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Summary record of the 735th meeting

Topic:
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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

operate as an impenetrable blind closing out all perception of the circumstances of a case.

6. Admittedly, certain types of multilateral treaty might impose standards of conduct on third States, as in the case of Article 2, paragraph 6, of the United Nations Charter, but such obligations were not created by Member States as parties to a treaty: they resulted from a generally accepted principle of international law being incorporated in the Charter and thus by their nature were unlike the kind of obligation contemplated in article 62. The principle laid down in article 2, paragraph 6, of the Charter could not be relied on to justify the rule proposed. It would be a wrong projection of that principle if, as in the proposed article, any two States could impose obligations on a third State, even to the limited extent contemplated in the article. Article 62 was not in any way limited in scope to multilateral treaties or to a situation in which the obligation could be said to be of the same character as that imposed by article 2 of the Charter. Even bilateral treaties such as those modifying territorial boundaries, effecting the unification of States or incorporating a State into the political system of another State or group of States, might create situations which third States would be compelled to reckon with; those too might eventually lead to some kind of obligation coming into existence, but again, not of the kind covered by article 62. The special position of newly independent States mentioned by some speakers would not justify the inclusion of the proposed rule.

7. One serious objection to the rule was that it might open the way to interference in the affairs of third States. States invited to participate in drawing up a multilateral treaty, but which were not represented at the Conference, or for some reason failed to sign the treaty or avoided signing it, could participate later, through accession, acceptance or approval, under the provisions already adopted by the Commission. If they were unable to take such action, that was no reason for enabling other States to do so on their behalf without being asked. It was true that international treaties taken together created a complex system of interdependence between, perhaps, all the States of the international community; but that was a matter outside the framework of article 62.

8. He agreed that the requirement of express consent would render the provision fairly innocuous. But that was not the pertinent consideration. The question was whether there was any real demand for that novel principle in the existing circumstances of international life. The rule, with all its qualifying limitations, would still not breathe any healthy new life into the international legal order. He was unable to accept paragraph 1 and thought that for its acceptance some sort of willing suspension of disbelief would be needed.

9. Mr. TABIBI said that, although the fundamental rule was that a treaty could neither impose obligations nor confer rights on third States, exceptions had occurred in practice. They were, of course, becoming rarer because the trend towards more general participation in multilateral treaties was gaining momentum; more and more States were taking a direct part in the conclusion of treaties and defending their own interests. He accordingly suggested that paragraph 1 (*b*) be amended to read:

"(*b*) that State has expressly consented to the provision of the treaty and was kept fully informed during its negotiation and conclusion."

10. A provision allowing implied consent was not acceptable, for the reasons he had given during the discussion on reservations at the fourteenth session.[1]

11. The analogy with Article 2, paragraph 6, of the Charter was not relevant, because that provision was concerned with the maintenance of peace and security, which would benefit the whole international community and not merely one group of States. The same argument held good for the provisions contained in Articles 32 and 35 of the Charter, which were also applicable to non-Member States.

12. In considering article 62, the Commission must take into account the primary rule of international law that the parties to a treaty were not entitled either to impose an obligation on, or to modify the legal rights of, a third State, since that would be violating its independence and sovereignty. There had certainly been instances of that practice in the past, notably by European countries in the conclusion of treaties between themselves which affected third States without their consent. Examples were the agreements between the United Kingdom and Czarist Russia establishing the frontiers of Afghanistan, and the arrangements by the United Kingdom Government in 1840 transferring a large section of Afghan territory to the Punjab.

13. If the provision in paragraph 1 was not to violate the principle of the equality of States, it was essential to ensure that the third State was informed of the content of the treaty being drawn up, as had been the case with Article 435 of the Treaty of Versailles, the text of which had been submitted to Switzerland. Another essential requirement was that consent to the obligation must be given expressly.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that there was probably no great disagreement between himself and Mr. Tabibi on paragraph 1. Some of the difficulties to which it had given rise might be due to the fact that it had been drafted in the form of an exception to the rule *pacta tertiis nec nocent nec prosunt*. That had seemed a convenient method, but as he had explained in the commentary, he did not regard the provision as a real exception to the rule, because there could be no question of the treaty itself imposing an obligation on third States. There were cases, though they were not common, of a treaty being instrumental in establishing a relationship between the parties and a third State or States, but no obligation came into existence for the latter until consent had been clearly manifested. The *Free Zones* case[2] was a good example because, although Switzerland might have

[1] *Yearbook of the International Law Commission, 1962*, Vol. I, p. 144.

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

been regarded in a sense as being in an inferior position to the Great Powers which were drawing up the Treaty of Versailles, nothing had been imposed on it. Indeed, its assent to certain arrangements had only been given subject to various conditions, as a result of which France had not been able to win its case before the Permanent Court of International Justice.

15. What in fact happened in the situation which article 62 was intended to cover was that a collateral agreement came into existence as the result of the acceptance by a third State or States of certain obligations provided for in the treaty.

16. Mr. EL-ERIAN said that if the subject-matter of article 62 was to be placed in its right context, it must be dissociated from obsolete analogies and practice. As the Special Rapporteur had said in paragraph 1 of his commentary, caution seemed necessary in applying to treaties principles taken from national systems of contract law. Undeniably there was a historic relationship between private and international law; the founding fathers of the latter had relied to a considerable extent on the former in framing certain rules and concepts — those pertaining to sovereignty and the territory of States, for example — and during the formative period the authorities had drawn many analogies between private law and international law. But during the second half of the nineteenth century a new development had begun to appear: international legislation which, along with international custom, had helped to create an independent science of international law — independent not only as to methodology, but also as to its subjects and subject-matter. One of the special features of international law was that its subjects were at the same time law-makers.

17. On the question of analogy, the Special Rapporteur had pertinently pointed out in paragraph (1) of his commentary on article 61 that in international law the justification for the rule *pacta tertiis nec nocent nec prosunt* did not rest simply on a general concept of the law of contract, but on the sovereignty and independence of States, and that treaties had special characteristics which distinguished them in important respects from civil law agreements.

18. With regard to the need to dissociate article 62 from obsolete practices and view it in the context of modern international life, it seemed that instances of States not participating in the conclusion of treaties affecting them would become much rarer; with the principle of equality established and the disappearance of guardianship by some States over others, whether to their advantage or their detriment, the rule in the article must be regarded as an exception to the normal and regular procedures of treaty-making.

19. Some reference had been made to differing interpretations of the United Nations Charter, but that was an issue which should be left aside; the Commission ought not to enter into the philosophical realm of the basis of the legal force of certain rules of customary law. Article 62 should be viewed as a provision extending the application of a treaty with the free consent of a third State, for as the Special Rapporteur had pointed out in his commentary, the requirement of that consent was one of the bulwarks of the independence and equality of States. The Chairman had rightly emphasized that consent must be real. If, for drafting reasons, it proved difficult to qualify the reference to consent in paragraph 3, the nature of the consent required should be mentioned in the commentary.

20. He shared the doubts expressed with regard to the precise meaning of the expression " class of States " and suggested that some examples should be included in the commentary to make its meaning clear.

21. He supported Mr. Elias's suggestion that sub-paragraphs (*a*) and (*b*) of paragraph 1 should be combined.[3]

22. Mr. ROSENNE said that the provision proposed in paragraph 1 caused him no serious difficulties. The Special Rapporteur's introductory remarks had confirmed that there was no question of an obligation being imposed and that the free consent of the third State must be given in appropriate form. The validity and duration of that consent would be governed by the provisions already approved by the Commission, more especially in Part II of the draft. That being so, paragraph 1 of article 62 did not really constitute, in the proper sense of the term, an exception to the major statement of principle in article 61. There would be some advantage in framing the provision in rather more permissive form, for example, by modifying the opening words to read " A state would become bound " and by making it clear that it would be bound *vis-à-vis* the original parties. The words " is bound " by themselves were not free from ambiguity and might give rise to misunderstanding.

23. The meaning of consent was clear and it would probably be better to omit the qualification of its being given expressly or impliedly.

24. He agreed with Mr. Lachs that all interested States should, as a matter of principle, be given the opportunity of participating in negotiations on matters of interest to them, but even if that desirable state of affairs were achieved, a provision of the kind set out in paragraph 1 would still be needed because, without wishing to become parties to an instrument, States might nonetheless wish to assume certain obligations in regard to it.

25. As to the scope of the article, it would normally apply to the ordinary bilateral or multilateral treaty, but there might be some difficulty in determining its bearing on three particular classes of treaty. First, general multilateral treaties in the sense defined by the Commission; second, the constituent instruments of international organizations, in particular the United Nations Charter; and third, treaties providing for the devolution of international agreements in the event of new States coming into being — examples of the latter class could be found in the Secretariat's memorandum on succession of States (A/CN.4/150).

26. With regard to the second class, he was not convinced that the constituent instruments of international

[3] Previous meeting, para. 70.

organizations, and more particularly the United Nations Charter, were necessarily treaties from the standpoint of the general law of treaties; with special reference to the Charter, he considered that particular provisions of that instrument should not be singled out for mention lest that prejudice the interpretation or application of the Charter as a whole. Since the same might apply to the Covenant of the League of Nations, he had some misgivings about the prominence given to the *Pablo Najera* arbitration [4] in paragraph (5) of the commentary on article 61.

27. As to the third class of treaties he had mentioned, perhaps the general reservation concerning State succession in the introduction to the Special Rapporteur's third report [5] would not suffice and some specific mention of that topic would be needed in the commentary.

28. As the Commission had decided to drop the reference to article 62 in article 55, it was important to state in the commentary on article 62 that the rule *pacta sunt servanda* applied to third States coming within the scope of the provision in article 62, paragraph 1.

29. He reserved his position on the non-applicability of paragraphs 3 and 4 of article 62 to the obligations of third States. Of course, the decision to discuss obligations separately from rights had been dictated by the requirements of systematic debate, but they were not always clearly distinguished in practice and it was therefore essential that the formulation adopted in article 62 should not preclude third party stipulations of an interlocking character.

30. One point which had been omitted from the commentary and ought perhaps to be mentioned was dealt with by the previous Special Rapporteur, Sir Gerald Fitzmaurice, in articles 6 and 7 of his fifth report,[6] namely, that in the event of the third State not taking advantage of the rights or obligations conferred upon it, the rights *inter se* of the principal parties remained as provided by the terms of the treaty.

31. It should also be stressed that if a third State consented to accept obligations, it was fully entitled to all the rights specified in the provisions of Part II, more particularly those relating to termination.

32. Mr. TSURUOKA said he had always had the impression that paragraph 1 was less important for practical purposes than it was for the balance of the article. In the first place, actual cases to which the provision would apply were rather rare, and they would be still rarer if treaties providing for objective regimes — which came under article 63 — were excluded from the scope of the paragraph. Secondly, as the Special Rapporteur had explained, the paragraph should be interpreted as referring to a special case of the circumstances contemplated in article 61, rather than as an exception to the rule stated in that article. If, for example, it was said that a third State was bound by an obligation deriving from a treaty concluded between States A and B to which it was not a party, it was not bound by virtue of the provisions of the treaty, but by virtue of its freely given consent. That being so, the source of the obligation was always consent, whether it was given in the form of an international commitment — the normal case of the operation of a treaty — or in the form of a unilateral declaration which could be recognized in international law — perhaps a rather exceptional case, but one which should not cause any difficulty. He hesitated to propose the deletion of paragraph 1, however, as it could serve as an introduction and thus help to systematize the articles on the effects of treaties as a whole. All that was needed was a very simple formulation bringing out more clearly that the situation was a rather rare one, which came within the general case dealt with in article 61.

33. Some members of the Commission had raised the question of the formulation of rules of *jus cogens* in a general multilateral treaty. That was a very delicate question, and some rather difficult situations would have to be taken into account. For instance, a conference of 110 countries might be convened to prepare a draft treaty establishing a new rule of *jus cogens*, the treaty to come into force on being ratified by at least twenty-five States. Once that condition had been fulfilled, the treaty would come into force, and with it the new rule of *jus cogens*; but there would still be some 85 countries which had not ratified the treaty and it would not be known whether they would eventually do so. That was a problem which the Commission might consider later when it reverted to article 37 on second reading.

34. He agreed with those members who thought that the words "or impliedly" in paragraph 1 should be deleted; they were of no practical value, since the obligation of the third State derived from its consent and was not an immediate effect of the treaty concluded between the other two States. Moreover, they might create uncertainty and thus be a cause of disputes as to the consent of the third State.

35. Mr. BARTOŠ said he had already expressed this opinion, which was that all such questions should be settled in accordance with the fundamental principles of the United Nations Charter, namely, the sovereign equality and independence of States, which required that the free consent of the third State should be expressed in every case. He was inclined to take a less rigid position, however, having regard to the principle of the interdependence of States, which had become a real factor in international relations.

36. With regard to the point raised by Mr. Yasseen,[7] he was prepared to accept the text proposed by the Special Rapporteur if it was intended to refer to a form of open contract. As to the deletion of the words "or impliedly", he was inclined to agree with Mr. Pal that it would further reduce the possibility of clearly establishing the consent of the third State.

[4] United Nations *Reports of International Arbitral Awards*, Vol. V, p. 466.

[5] Para. 6.

[6] *Yearbook of the International Law Commission, 1960*, Vol. II, p. 77.

[7] Previous meeting, para. 33.

37. His main object in speaking was to explain his position regarding two new ideas which had been put forward during the debate. As to the first — the obligations created for new States coming into being — he was not sure that contractual obligations could be imposed on new States in the treaty granting them independence. If States were entitled to independence, they should be granted it without any such conditions. It was another matter, of course, if a rule of *jus cogens* was involved, for in that event the new members of the international community would have to submit to the rules already accepted by the community. But that question was not covered by paragraph 1, and a separate rule should be drafted on it, so that the Commission could study means of legally binding new States at the time when they were created by a treaty.

38. With regard to the Commission's idea that general multilateral treaties could introduce new rules of *jus cogens* into international law, he inclined to the view that States were interdependent, not absolutely independent in that respect. He recognized that law-making treaties could exist if they were ratified by virtually the whole of the international community, and that it was even possible to impose certain obligations or confer certain rights on third States; but paragraph 1, as it stood, did not cover the case of a rule of *jus cogens* which States must respect and by which they were not even called upon to give their consent. That was an entirely different matter from the case contemplated in paragraph 1, and it should not be confused with the subject-matter of article 62.

39. He would give his views later on the question of newly created States, which he thought should be dealt with in a separate article, since it was more closely related to State succession than to the law of treaties. As to the question of *jus cogens* rules, it would be better to amend the articles proposed by the Special Rapporteur than those on the validity of treaties drafted and adopted at the previous session, But in any case those two questions were not adequately dealt with in article 62.

40. The CHAIRMAN, speaking as a member of the Commission, agreed that the two questions mentioned by Mr. Bartoš were not dealt with in article 62. But with regard to the problem of new States, a clear distinction should be drawn between the case of a treaty concluded between an already existing country and a country coming into being — the normal case of a treaty between two parties, with which the Commission was not concerned at that point — and the case in which the creation of a new State was provided for in a treaty concluded between two other States which agreed, for example, to surrender part of their respective territories in order to create the new independent State, as might occur in the settlement of some former dispute between them. The special feature of that case was that the third State, for which rights and obligations were being established, had not yet come into existence when the treaty was being negotiated. That situation, as the Special Rapporteur had observed, was related to the case contemplated in article 63. The Commission would decide whether it should be dealt with in article 63 or whether a special rule should be drafted on it as Mr. Bartoš had suggested.

41. The Commission seemed to be paying rather too much attention to rules of *jus cogens*. It should not be thought that every general multilateral treaty created rules of *jus cogens* from which the parties to a bilateral or even a multilateral treaty could not derogate. Besides, at its previous session the Commission had stated that a rule of *jus cogens* was a rule of general international law.[8] Such a rule might appear in a treaty, but the treaty itself was not its source, even though it might help to define the rule more clearly. The force of the rule was due to its generality. He therefore agreed with Mr. Bartoš that the Commission need not concern itself with that issue in connexion with article 62.

42. Sir Humphrey WALDOCK, Special Rapporteur, said he had already dealt with two important points raised during the discussion: first, the principle that there should be no imposition of any obligation on the third State, and second, the question whether article 62 constituted an exception to the rule *pacta tertiis nec nocent nec prosunt*.

43. He now wished to comment on the point raised by Mr. Lachs, that all States interested in the subject-matter of a treaty should, in principle, be consulted. It would be generally agreed that such consultation was the normal practice, but he doubted whether any specific reference to the matter should be included in article 62 itself, as there could be some doubt as to the stage at which consultation should take place. The question of consultation was specially relevant to such matters as the revision of treaties and he was considering it in connexion with the articles on revision which he would submit to the Commission in due course.

44. He agreed that the reference to implied consent in paragraph 1 (*b*) need not be retained; and he would prefer to drop the words "expressly or impliedly" altogether. The provision would then state the firm principle that the consent of the third State was required; it would be explained in the commentary that the consent must be genuine. He confessed that he had been somewhat surprised at the anxiety expressed by some members concerning implied consent. The difficulty in practice generally was that States attempted to avoid compliance with the terms of treaties to which they had given their consent. It was decidedly unusual for any difficulties to arise because of an attempt to hold a State bound by a provision in a treaty to which it was not a party and to which it had not given its consent.

45. The problem of a treaty imposed upon an aggressor State had also been raised. The question arose whether such a treaty should be dealt with as an exception to the *pacta tertiis* rule. In any event the problem of the aggressor State might arise in other connexions and it might be preferable to reserve it for separate consideration.

[8] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, pp. 11-12.

46. Reference had been made to the distinction between general multilateral treaties and other treaties. It was very difficult to define general multilateral treaties — the so-called "law-making treaties"; indeed, the Commission's attempts in that direction had met with criticism from governments, and the subject seemed to be connected with article 64, rather than article 62. In any case, the problem seemed more theoretical than practical, since it was unlikely that the parties to a general multilateral treaty would resort to devices of the kind envisaged in article 62.

47. Another problem which was more appropriate to article 64 than article 62 was that of rules of *jus cogens*. There were certainly cases in which a treaty constituted the primary source of such a rule; the nuclear test ban, for example, was fast acquiring *jus cogens* force. But such cases appeared to be cases of a customary rule whose development had its genesis in a particular treaty.

48. The other points raised could be dealt with by the Drafting Committee, assuming that members as a whole agreed that the draft articles should include a provision along the lines of article 62, paragraph 1, although it dealt with a situation which might not arise very frequently. The majority of cases of *stipulation pour autrui* concerned the acceptance of a right, rather than an obligation, and were covered by paragraphs 2, 3 and 4. There were instances of obligations for a third party, however, and one example was to be found in the *Free Zones* case. It was therefore appropriate to include paragraph 1, on the understanding that it would be subject to the safeguards laid down in the articles dealing with such matters as coercion and nullity, to which Mr. Rosenne and Mr. Jiménez de Aréchaga had referred.

49. Reference had also been made during the discussion to the rather complex problem of the creation of a new State and to the obligations that might be imposed on that State by treaty or by a multilateral act — for example a General Assembly resolution — setting up the new State. The matter was a very important one, because, questions such as those of minorities had been covered in such treaties or acts. However, it seemed hardly possible to deal with that problem in article 62, unless the new State were to be regarded as a third State within the meaning of that article. The provisions of article 62 would be inadequate if the obligations imposed on the new State were incorporated in its constitution and were not afterwards assented to by it in some way. The subject fell more within the scope of article 63.

50. The CHAIRMAN, speaking as a member of the Commission, said that the question of new States was indeed an important one which the Commission could not neglect and which was not entirely covered by the provisions of article 62. For example, if several States decided to establish an independent city having neutral status, could that city, once it was established, refuse to accept the rights and obligations entailed by neutrality on the ground that it had not consented to that status? That was a different situation from the one provided for in article 62, and it seemed that it would be dangerous, and contrary to international practice, to ask for the consent of the new State subsequently.

51. Mr. AMADO observed that the discussion had broadened considerably since he had first spoken on article 62. He had already rejected the idea that there was any relationship between the United Nations Charter — in particular, Article 2 — and the case dealt with in article 62.

52. With regard to the expression "expressly or impliedly", he had described implied acceptance by the third State as "mute consent", as compared with the express and real will of the States which were actually parties to the treaty. He had been rather surprised at the expression "collateral agreement", used by the Special Rapporteur in his commentary on article 62. As Mr. Tunkin had pointed out, if the third State had given its consent, that was a declaration of its will, and it was unnecessary to say "expressly or impliedly". The expression "collateral agreement" did not satisfactorily define the form of acceptance by the third State. Was it to be supposed that a third State, whether large or small, or a new State, allowed its fate to depend on the good will of the parties and gave a kind of tacit consent? If the collateral agreement was in the nature of a treaty, it must be assumed that there were two treaties, one subordinate to the other. He therefore considered that the question of the form of acceptance by the third State was not satisfactorily settled in the text proposed.

53. Mr. de LUNA endorsed Mr. Amado's comments. If there was a collateral agreement, there was no longer any third State, and the obligation derived not from the first treaty, but from the second, or from the declaration by which the State had given its consent. The principle of paragraph 1 was correct, but the Commission would be creating confusion if it stated the rule there.

54. He doubted whether the legal existence of a new State could rest on a treaty in the conclusion of which that State had not been able to participate because it did not yet exist. The new State came into existence by virtue not of the treaty, but of the principle of effectiveness, according to which a power that was able to maintain the order it had established must be regarded as the legitimate authority of a people settled in a particular territory. That order was valid by virtue of a rule of international law different from the rule engendered by the treaty. It was valid for the territory in which it was effective, and once it had begun to be effective in the international community it could be expected to be so in the future.

55. The Commission could leave aside the rather different case of a treaty whereby States which had previously been direct subjects of international law, became members of a federal State. But it could consider the case of a treaty establishing a free city, as the Treaty of Versailles had established the Free City of Danzig. Supposing that in such a case the treaty, which had even outlined the new State's constitution, had not dealt with its capacity to conclude treaties; what would be the legal position if the new State refused to fulfil

the obligations laid down in the treaty because it had not been able to approve them constitutionally? He doubted whether there was any rule of international law which would oblige the new State, once it possessed a constitutional procedure for manifesting its will, to assume the obligations its founders had wished to impose on it.

56. Mr. YASSEEN said that Mr. Amado's remarks prompted him to raise the question of the form the third State's consent should take. A collateral agreement was not a treaty, because an agreement could be in unwritten form. Instead of "collateral" or "additional" agreement, he would prefer to use the expression "complementary agreement", in order to make it clear that the first treaty was only the beginning and that the obligation did not exist until the complementary agreement had been made. For the sake of certainty in international transactions, it would be advisable for article 62 to specify the form in which the consent of the third State must be given.

57. Sir Humphrey WALDOCK, Special Rapporteur, sait that where rights were stipulated in favour of a third party, the problem of consent did not present itself in the same light; the consent became manifest as soon as the third party exercised or claimed the right in question. The problem of consent arose very clearly when an obligation was being created for a third party. In the *Free Zones* case, an attempt had been made to cover the question of Switzerland's consent to the abrogation of the *Free Zones* by incorporating a statement of it in the relevant article of the Treaty of Versailles.[9] Undoubtedly, in most cases the consent of the third State would be embodied in some diplomatic document. He wondered what form of consent Mr. Yasseen had in mind.

58. Mr. YASSEEN replied that for the time being he had in mind only a written note to the governments concerned. An oral declaration was not enough; it might be withdrawn, and that would give rise to controversy. In the case contemplated in paragraph 1, the State which was presumed to have accepted the obligation was in the position of defendant, whereas in the case of a *stipulation pour autrui* the State presumed to have accepted a right was in the position of plaintiff. The third State could argue that the mere fact of claiming the right was equivalent to an acceptance. It would be advisable to lay down different rules for the two cases, which were not identical.

59. Mr. LACHS said he noted that the Special Rapporteur had agreed to take account of his suggestion that some reference should be made to the need for consultation of all interested parties in the negotiation of a treaty. One solution of the problem, but by no means the only one, would be to incorporate the consent of the third State in the treaty itself. There would then be no need for a supplementary or collateral agreement.

60. The problem of the status of an aggressor State certainly ought to be mentioned in article 62, since it was indirectly connected with the subject-matter of the article.

61. Mr. TUNKIN said he thought paragraph 1 could now be safely referred to the Drafting Committee, which could very well deal with the problem of the form of consent of the third State, though personally he doubted whether it was necessary to go into too much detail on that point in article 62.

62. A paragraph should be included in the article specifying that its provisions did not apply to peace treaties imposed on aggressor States; the Commentary would explain that the problem of the aggressor State would be dealt with under the topic of State responsibility. The Commission would thus avoid creating the impression that the provisions of article 62 were so general that, even in the case of State responsibility arising from aggression, a different principle could not be applied.

63. The CHAIRMAN, speaking as a member of the Commission, said he was prepared to agree that the Drafting Committee should consider the question of the form in which the third State must give its consent. He pointed out, however, that it was solely for reasons of convenience that the Commission was discussing paragraphs 1 and 2 of article 62 separately; in reality, the rights and obligations of the third State were often stipulated together, and the Commission would be creating difficulties if it laid down different procedures for them.

64. As to the problem referred to by Mr. Lachs and Mr. Tunkin, he did not see how the Commission could deal with it in article 62. A treaty imposed on an aggressor State was a treaty concluded with that State; it was not a third State. No doubt the consent of the aggressor State was given under pressure, and possibly the terms of the treaty had been negotiated in advance by the other parties; but the fact remained that the treaty had been concluded with the aggressor State. State responsibility had been mentioned in that connexion; but that was a different question, and the Commission would be wrong to prejudge it, even in the commentary.

65. Mr. TUNKIN said that he had been referring to the agreements concluded by the Allied Powers during the Second World War. Germany had not been a party to those agreements, and yet the agreements had concerned and had been applicable to Germany; they had not been peace treaties. In his view, cases of that kind should be mentioned, at least in the commentary.

66. The CHAIRMAN, speaking as a member of the Commission, said he thought that in those agreements the parties had decided among themselves what treatment to apply to Germany, but that the agreements imposed no legal obligation on Germany.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that in general the position was as described by the Chairman; the matter was covered by article 36[10]

[9] Article 435.

[10] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 10.

which provided for the nullity of any treaty " procured by the threat or use of force in violation of the principles of the Charter of the United Nations ". A treaty imposed upon an aggressor State would not constitute such a violation. There had, of course, been cases in which an aggressor had been asked to recognize the validity of certain acts performed by the States which had overcome the aggression, but the matter was usually covered by a clause in the treaty of peace.

68. The case of Germany was a special one because no treaty of peace had been signed.

69. Mr. BRIGGS said that the Commission was ready to refer paragraph 1 to the Drafting Committee, but a formal decision on that point could be postponed until it had dealt with paragraphs 2, 3 and 4.

70. Mr. LACHS said he regretted to find himself in disagreement with the Chairman. He had not been referring to a peace treaty imposed upon an aggressor, but to an instrument to which an aggressor State had not been invited to become a party for some reason. Other examples than the recent case of Germany could be cited. Article 62 would not be complete without some reference to the exceptional rule that applied in cases of lawlessness or aggression.

71. Mr. REUTER said that the Commission was discussing the law of treaties, not custom or *jus cogens*. *Jus cogens* was a very serious matter, and he could not regard as a rule of *jus cogens* one from which States had reserved the right to derogate for political reasons.

72. Mr. JIMÉNEZ de ARÉCHAGA said that although the Commission had concluded its discussion on the provisions of paragraph 1, two new problems had been raised, that of new States, and that of aggressor States. Those problems seemed to be more closely connected with article 63 than with article 62. He therefore suggested that the Commission should consider its discussion on paragraph 1 concluded, and agree to take up the two problems he had mentioned when it came to discuss article 63 or later.

73. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted that suggestion.

It was so agreed.

The meeting rose at 5.50 p.m.

736th MEETING

Tuesday, 2 June 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) *(continued)*

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

Paragraph 2

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the subject of rights created in favour of third States, which was dealt with in paragraph 2, was complicated and controversial. The leading case on the subject was the *Free Zones* case,[1] but it was not easy to discern the precise implications of the opinion delivered by the Permanent Court. He had explained in the commentary in some detail the considerations that had led him to the conclusion, expressed in paragraph 2, that a treaty might of its own force create a right in favour of a third State, which that State might or might not take up. There was, of course, no question of the right being imposed. His view was supported by the previous special rapporteurs on the law of treaties and by Mr. Jiménez de Aréchaga in his article in the American Journal of International Law (1956), to which reference was made in the commentary, though certain other authorities, including McNair and Rousseau, were not of the same opinion. Their interpretation of the *Free Zones* case, however, was one to which he could not subscribe.

3. If the view were taken that a treaty could establish only a means of creating a right, but not a right itself without some form of specific acceptance on the part of the third State, that would mean that the right arose not from the treaty, but from a further collateral agreement between the original parties and the third State. In that event, if there were any question of revision or termination of the treaty, the ordinary rules would apply and the consent of the third State would be needed. But if the treaty were regarded as having established an actual right in favour of the other State, it could be argued that the original parties, as the unilateral creators of the right, were free to take such action as they wished in regard to revision or termination, without reference to the third State. That was, perhaps, the crucial point of difference between the two views.

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