Document:-
A/CN.4/SR.852

Summary record of the 852nd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(2)

had drawn attention to the connexion between its provisions and those of article 36. Article 58 made provision for a treaty being used as a means of binding a third party with the consent of that party; if that consent was obtained by coercion, it was clearly invalid under article 36. That question had been raised when article 36 had been discussed at the previous session,[10] and the general feeling had been that, although the Commission might consider introducing a provision to deal with it into article 58, it was perhaps already covered by the general language of article 36 as adopted at that session.

77. He had proposed a change in the title of the article in order to meet the point raised by the Netherlands Government, as explained in paragraph 2 of his observations.

78. Mr. ROSENNE said that he was in general agreement with the conclusions reached by the Special Rapporteur.

79. With regard to the connexion between article 58 and article 36, he recalled that at the previous session he had accepted the general view on article 36 largely because of the stress laid by Mr. Ago on the need for a lapidary text. He had done so, however, subject to the question being dealt with in the commentary and his position was the same with regard to article 58 and its commentary. The question was one to which governments would have to give some attention at the conference of plenipotentiaries.

80. The Drafting Committee would have to examine the wording of article 58 carefully; in its terms, it applied only to the question of imposing obligations or conferring rights upon States not parties to a treaty. Paragraph (2) of the commentary adopted in 1964,[11] however, introduced another element, which was not covered by the text of article 58 itself; the question of the modification of legal rights and obligations, and perhaps even of their extinction. From the legal point of view, the modification of rights was not the same as the imposition of obligations. Article 61 dealt with the revocation or amendment of provisions regarding obligations or rights of third States, and the question arose whether article 58 was fully consistent with the remainder of the group of five articles.

81. Moreover, for the same reasons, he had some doubts about the Special Rapporteur's proposed new title for article 58.

82. Mr. BARTOŠ said he was quite convinced that articles 58 to 62 were inseparable as to substance. Nevertheless, in his capacity as a member of the Commission, he did not agree with the view expressed by the Yugoslav Government that the first three of those five articles could be combined in one article; he was more inclined to take the Czechoslovak Government's view that article 58 stated a general principle which should be stressed as such. Moreover, the Yugoslav Government was not at all opposed to that principle.

83. With regard to the comment by the Netherlands Government, he did not agree that the transfer of a piece of territory constituted an exception to the principle stated in article 58. In his opinion, the transfer of a piece of territory did not entail the transfer of the contractual situation resulting from prior treaties, for in that case the frontiers represented legal facts the contractual nature of which had already been consummated. The State to which the territory was transferred was not obliged to accept that territory, but if it did so it could not accept more than was transferred to it.

84. There was no reason to make any change in the rule stated in article 58, as formulated in 1964. The rule was a simple one, as the Greek delegation had observed, but it was of great importance and almost a part of the international public order. The Commission should therefore bear it in mind in reviewing the articles that followed.

85. Mr. AGO said that the more he thought about it, the more convinced he became that article 58 should be left as it stood. The comments which had been made about the title seemed to him to have little legal justification. In that context, the term " effects " could only denote legal effects, not factual consequences. Although he was not absolutely opposed to changing the title, he thought, like Mr. Rosenne, that it would be preferable not to do so.

86. If reference were made to article 36, it would also have to be made to all the other articles concerning invalidation of consent, such as those on error and fraud, for there was no justification for restricting the reference to invalidation by the threat or use of force. Consent to be bound by obligations or to acquire rights under article 58 created an agreement and therefore came within the scope of the rules relating to treaties. The Commission could mention in the commentary that the rules relating to invalidation of consent must be taken into account in applying article 58, but it would be dangerous to mention only one ground for invalidation.

The meeting rose at 12.55 p.m.

852nd MEETING

Monday, 16 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 58 (General rule limiting the effects of treaties to the parties, *(continued)*[1]

[10] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 826th-827th meetings and 840th meeting, paras. 84 *et seq.*

[11] *Yearbook of the International Law Commission, 1964*, vol. II, p. 180.

[1] See 851st meeting, preceding para. 74.

1. The CHAIRMAN invited the Commission to continue consideration of article 58.

2. Mr. de LUNA said that the Special Rapporteur was to be congratulated on the sound legal sense reflected in his observations and on the impartiality with which he had respected the division of opinion in the Commission, even at the cost of his personal convictions. At the second reading, the Commission should not concern itself with the doctrinal differences which had divided it into two almost equal groups in 1964; in all good faith and setting theoretical considerations aside, it must arrive at specific results which were satisfactory to all.

3. His own view, which he had expressed in 1964, that a treaty could create subjective rights[2] was based on the case-law of the Permanent Court of International Justice in the German Interests in Polish Upper Silesia case[3] and above all in the Free Zones (1932) case;[4] it was also supported by State practice, as further exemplified in various articles of the peace treaties concluded in 1947: article 29 of the treaty with Finland,[5] article 76 of the treaty with Italy,[6] article 28 of the treaty with Bulgaria[7] and article 32 of the treaty with Hungary.[8] It was quite obvious, however, that the important practical problem was that of the revocability or irrevocability of the right conferred on a third party.

4. It was, indeed, immaterial whether the third party expressly agreed to accept the right conferred on it by a treaty or remained silent until it became convenient to decide to exercise that right; as a matter of doctrine, the mere exercise of the right could always be interpreted by those who did not share his own opinion as acceptance *rebus ipsis et factis*, by conclusive acts, and it was at that point that the "collateral agreement" was introduced, which he himself regarded as a fiction, but which others considered to be necessary.

5. In any event, what mattered was that, in order to achieve a practical result, the members of the Commission should agree on the consequences of the rights created either by the treaty itself or by the subsequent consent of the third party. It was universally accepted that, without its prior consent, no State could be bound to anything whatever by a treaty to which it was not a party; the opposite view would be contrary to the principle of the sovereign equality of States. Since a State could not be bound without its consent, it could not be obliged to exercise a right conferred upon it by a treaty to which it was not a party; but the act of conferring a right upon it by a unilateral or bilateral act did not infringe the equality or the independence of States. Similarly, every State was free to confer upon another State, by a unilateral legal act, a right which might be irrevocable by virtue of the principle that no State could disavow its own acts without violating the good faith essential to international relations, and the beneficiary State was free to exercise that right or not to do so.

6. Naturally, he was not very satisfied with the wording of article 58, which was contrary to the facts of international life, but in a spirit of compromise he would accept that imperfect solution.

7. Turning to the comments by the Algerian delegation and the Government of Cyprus, he observed that both were rightly concerned to ensure that it could not be inferred from the article that an obligation could be imposed on a State by extorting a consent vitiated by coercion. He saw no need for continual restatement of the principle already laid down by the Commission concerning invalidation of consent as a ground for nullity or voidability; the *pacta sunt servanda* rule in itself implied an authentic treaty which was not vitiated. Consequently, there was no reason to recast the article, as desired by Algeria and Cyprus. If absolutely necessary, that obvious principle could be further stressed in the commentary.

8. The Netherlands Government claimed that, in exceptional cases, a treaty could impose obligations upon a third party. In his opinion, that view was wrong, for never, without any exception, could a treaty impose an obligation upon a third party without its consent. That did not mean that contractual provisions agreed between two or more States did not have repercussions on third States, but those were indirect repercussions and effects deriving not from the treaty, but from other rules of international law. The Netherlands Government was confusing them with obligations and rights directly created by a treaty. Among other examples was the most-favoured-nation clause, where there was no creation of rights for the third party by the treaty; the third party, which was a party to the first treaty, was merely supplementing a certain rule with elements contained in subsequent treaties.

9. The Netherlands Government's suggestion should therefore be rejected. On the other hand, he approved of the proposed change in the title and the other minor amendments suggested by the Special Rapporteur.

10. Mr. VERDROSS said that, as the article had been adopted by an overwhelming majority on the first reading, he would not oppose it, but he was still convinced that half of it was not correct. He recognized that there were no treaties which imposed obligations on a third party, but he could not agree that there were no treaties which imposed rights on a third party.

11. Mr. REUTER said that article 58 was one of those whose merit lay in their brevity. From that point of view, the Special Rapporteur's observations merited approval and the Commission should retain the article as it stood.

12. It might perhaps be well to point out that there were a number of special situations which constituted exceptions to the first phrase: "A treaty applies only between the parties"; for example, a treaty setting up an international organization certainly applied as between that organization and the parties. It would be enough simply to mention one case of that kind.

13. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment on two points that had been raised in connexion with article 58. Unlike the Netherlands Government, which challenged the principle itself, he did not think the article was open

[2] *Yearbook of the International Law Commission, 1964*, vol. I, p. 90, paras. 29 *et seq.*

[3] *P.C.I.J.* 1926, Series A, No. 7.

[4] *P.C.I.J.* 1932, Series A/B, No. 46.

[5] United Nations, *Treaty Series*, vol. 48, p. 248.

[6] *Op. cit.*, vol. 49, p. 158.

[7] *Op. cit.*, vol. 41, p. 76.

[8] *Ibid.*, p. 202.

to question. That was only a matter of a misunderstanding, or rather of the need to view the article from a different angle. Treaties, like agreements in municipal law, produced effects only between the contracting parties; that was a recognized principle. But, like those agreements, treaties created certain legal situations which could and should be recognized. That was a different question, however, namely, that of the extent to which the legal situations created by the treaty could be invoked against third parties; in other words, the question of the indirect effects of the treaty, which was governed, not by the treaty itself, but by other sources of international public order. The wording adopted by the Commission was therefore correct, though the words " A treaty applies only between the parties " might be replaced by the words " A treaty produces effects only between the parties ".

14. The Algerian delegation and the Government of Cyprus wished to add to the article a provision stipulating the nullity of obligations imposed on a third State, in other words, consent obtained by coercion. He could see no need for that; the case was covered by the draft as a whole. True, the members of the Commission had not been in agreement on the rights arising from a treaty; some had maintained that a treaty itself could directly create rights for third parties, whereas others had supported the theory of the collateral agreement. With regard to obligations, on the other hand, the Commission had unanimously recognized that the basis of any obligation which the parties to a treaty wished to impose on a third State was consent, or more precisely, a collateral or supplementary agreement grafted on to the original treaty. That new agreement must be subject to the general rules governing treaty-making and could be void if there were grounds for nullity. From that point of view too, it would therefore be better to retain the existing wording.

15. Mr. CASTRÉN said he accepted the new title for article 58 proposed by the Special Rapporteur, which was an improvement. The present title could lead to confusion, as the comments of the Netherlands Government showed. That change was all that was needed and the Commission could accept the text of the article as it stood.

16. Mr. BRIGGS said that the new title for article 58 suggested by the Special Rapporteur, which was designed to correct a defect in the drafting, would create another difficulty inasmuch as rights and obligations could be provided for in a treaty for individuals, if the parties so intended. Given the definition of a party in article 1 (*f*) (A/CN.4/L.115), such a change in article 58 might prove restrictive. The difficulty was due to the words " applies only between the parties ". An illustration was provided by Article 3 in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War[9] and Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[10] which conferred rights on " parties to the conflict ", though the conflict did not necessarily have to be of an international character and the entities did not have to be States parties to the two treaties or even States at all.

17. The final words of the article " without its consent " had been discussed at length and he would not reopen the issue except to point out that they destroyed the balance supporting the Commission's claim in the 1964 commentary[11] that it had tried to take a neutral stand in the doctrinal controversy. The inclusion of those three words produced an article which was somewhat biased; they could safely be omitted without involving the Commission in a theoretical argument about the general principle stated in article 58, which he endorsed. His criticism was directed only at the wording. In his opinion, the article could be redrafted to read: " A treaty neither imposes any obligations nor confers any rights upon a State not a party to it ".

18. Mr. LACHS said he shared the Special Rapporteur's view that the comment by the Netherlands Government was mainly due to a misunderstanding and was not very relevant. The effects of treaties could be direct or they could be indirect and far-reaching, and leaving aside treaties defining frontiers or demarcating the continental shelf, it could even be argued that a trade agreement between two non-adjacent States could indirectly affect a third State across the territory of which their goods had to be transported. That argument could be pushed too far.

19. He had had doubts about the title of the article, particularly the word " limiting ", and they persisted with regard to the new title suggested by the Special Rapporteur. The issue was not a semantic one, but involved the essence of a treaty commitment. The proposition that a treaty could be limited as to its substance was not sustainable, because only the parties could impose obligations on themselves or create rights arising out of the treaty itself. That constituted the very essence of a treaty and was not a limitation. It should be brought out more clearly in article 58.

20. There was obviously a risk of the article being examined by governments and lawyers as a separate entity and not in the context of the three articles, 58-60, taken together. In order to obviate any misunderstanding, those articles should be given a common title or heading.

21. Mr. EL-ERIAN said that the rules set out in articles 59 and 60 had been formulated as exceptions to the general rule in article 58, which the United States Government rightly regarded as a fundamental one governing the effects of treaties on States not parties to them. The principle involved was a crucial element in the theory of the sovereign equality of States in modern international law.

22. The general structure of article 58 was satisfactory and it should be maintained in its present succinct form. Although he agreed with the Chairman that the points put forward by the Government of Cyprus and the Algerian delegation were well taken, there was no need to elaborate the article.

23. During the final reading of the whole draft, the points raised in connexion with article 36 could be considered. The comment of the Netherlands Government prompted him to emphasize the importance of distinguishing between the legal effects and the factual

[9] United Nations, *Treaty Series*, vol. 75, p. 136.

[10] *Ibid.*, p. 288.

[11] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 180-181.

consequences of a treaty, both direct and indirect. Even in municipal law a distinction was drawn between responsibility for the direct consequences of an act and indirect consequences that might not be attributable to the act giving rise to the responsibility.

24. Although he appreciated the Special Rapporteur's scrupulous concern to dispel the doubts of governments by changing the title of the article, he was not convinced that that was absolutely necessary; perhaps the same purpose could be achieved by clarifying the commentary. Evidently some of the comments had failed to take into account that articles 58, 59 and 60 formed a group that should be considered together; their inter-relationship would need to be given greater emphasis.

25. Mr. TUNKIN said that the article had been discussed at length at the sixteenth session and as it had not drawn many comments from governments or delegations, it could be assumed that the 1964 draft was generally regarded as acceptable. He fully agreed with the views of the Special Rapporteur and Mr. de Luna on the comment by the Netherlands Government—that issue had been frequently raised from different stand-points, mostly as a result of misconceptions of the purport of the article.

26. The Algerian delegation's point was a valid one, but if an obligation were imposed upon a third State without its consent, that would be contrary to the rule in article 59, so that nothing need be added to article 58.

27. The Government of Cyprus had really raised an issue of interpretation, but its point was in fact already covered, though perhaps not expressly, because the whole draft was based on the assumption that situations of the kind envisaged by that Government had no legal effect. The Drafting Committee should give the matter some attention; at that stage he was unable to express a firm opinion on whether it called for more explicit treatment.

28. The 1964 text, though a compromise, was logical and should be retained. The Commission had agreed that, for obligations on third States to be valid, their consent was absolutely indispensable, but where rights were concerned, there were two schools of thought. He was among those who held that the principle of the sovereign equality of States must apply and that, there being no international legislature, no group of States could create rights for third States without their consent. To put it in a different way, an offer could be made to create such rights for third States, which they could accept or reject; if they accepted that would constitute a kind of additional agreement.

29. Mr. PAREDES observed that the governments which had commented on articles 58 to 60 had really discussed problems entirely different from that dealt with in article 58. For example, they had referred to article 36 which dealt with a treaty that had had no legal effect because there had been use of force and consequently no free consent. But articles 58 to 60 referred to a genuine treaty, valid between several States which had intended not only to settle problems existing between them, but also to create obligations for, or confer rights on, third States.

30. As Mr. de Luna had clearly shown, there were natural effects or consequences of treaties which arose from the very fact of the treaty and existed in themselves, independently of the will of the authors. But there were other acts by which the authors intended to establish rights and obligations for States which had not taken part in the conclusion of the treaty. In such cases, given the right of every State to equality and sovereignty, it was impossible for a State to accept the consequences of obligations created or even of rights conferred by other States. It was absolutely essential that there should be consent by the third State. In reality, there was a form of accession or a collateral treaty between the States which made the original treaty and the State on which specific obligations had been imposed. Only the express will of that State could give validity to the obligations created and the rights offered by the States which had concluded the first treaty.

31. Although the drafting of article 58 was excellent, the Commission might perhaps be even more specific and dispel the doubts felt in some quarters by inserting the words " express and free " before the word " consent ".

32. The change in the title suggested by the Special Rapporteur seemed to him to be logical.

33. Some Governments had mentioned the obligations arising from a treaty imposed on an aggressor. In his opinion, that was a case of responsibility, of a penalty incurred for unlawful behaviour, which was out of place in the law of treaties.

34. Mr. JIMÉNEZ de ARÉCHAGA said that the comments by Mr. Briggs and Mr. Reuter about the way in which the word " applies " might be interpreted were important, since the text could be read to mean that rights and obligations created by treaties concluded in accordance with the draft articles could not apply to individuals or to international organizations. That point must be examined by the Drafting Committee; a possible solution might be to drop the words " applies only between the parties and ".

35. Some changes must also be made in the title so as to make it clear that the rule was concerned not with the repercussions of a treaty, but with the rights and obligations created between the parties; it was important to avoid the kind of misunderstanding exemplified by the Netherlands Government's comment. Mr. Lachs's suggestion that a general title be inserted to cover articles 58, 59 and 60 was a good one, because in their present form they were slightly contradictory.

36. The words " without its consent " should be dropped; that would not mean going back on the compromise reached at the sixteenth session, because without them the rule would be even more categorical, particularly since under article 59 the agreement of the third State would be required and under article 60 its assent.

37. The provisions on what invalidated consent, set out in articles 31 to 37, were applicable to both the acts of agreement and assent required under articles 59 and 60, and the application of the provisions of articles 32 to 35 would cause no difficulties.

38. There seemed to be no loop-hole in article 58 as far as the application of articles 36 and 37 was concerned.

He agreed with Mr. Ago's argument at the previous meeting[12] that the Commission must make clear in its commentary that, as far as obligations were concerned, the case which article 58 was intended to cover would imply a collateral agreement or a second treaty, to which the provisions of articles 36 and 37 would be applicable.

39. But that would not be true in regard to rights, because in the opinion of many members of the Commission no collateral agreement or second treaty would result; that view was reinforced by the fact that the Commission had decided not to include an article on objective régimes dealing with treaties that had come to depend on stipulations in favour of third States, such as treaties regulating navigation on canals. Where rights were concerned, the theory of a collateral agreement was not consistent with reality.

40. However, the provisions of article 36 would be applicable, because every time a right was created in favour of a third State there must be a corresponding obligation deriving from the treaty. If a treaty containing stipulations in favour of a third State became void because it had been procured by coercion, fraud or any other form of invalid consent or because it was contrary to a *jus cogens*, not only the treaty, but every right and obligation deriving from it must fall to the ground, both for the parties themselves and for third States. All the grounds of invalidity set out in part II, section II, of the draft would vitiate the consent required in article 58.

41. Mr. PESSOU said that article 58 had given rise to long discussions in 1964, during which the Commission had heard the same proposals as it was hearing at present. The comments by governments were more relevant to article 60. The Commission was really discussing two rules; while stating that a treaty produced effects only for the parties, it had come upon the contrary principle. He drew attention to the text proposed by Mr. Briggs, as Chairman of the Drafting Committee in 1964.[13] The idea of combining articles 58 to 60 might be considered, but he thought the text proposed by the Special Rapporteur was worth retaining.

42. The Commission should be grateful to the Netherlands Government for seeking to regulate by international law the questions relating to the continental shelf which were of such vital concern to it, but the solution it proposed went too far and could not be adopted.

43. Mr. BRIGGS said that if the titles of articles 58, 59 and 60 were not combined, the first might be given the title " Treaties and third States: general rule ", so as to emphasize that the articles dealt with rights and obligations for States only.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that most of the difficulties that had arisen over article 58 were of a drafting character and the Drafting Committee would examine all the suggestions put forward. Clearly articles 58, 59 and 60 would have to be dealt with together, so as to make their structure as consistent as possible.

45. Whatever the merit of the point made by the Government of Cyprus and the Algerian delegation concerning the applicability of article 36, no change was called for in article 58 and the matter could be considered when article 36 was reviewed.

46. The point made by Mr. Rosenne at the previous meeting, namely, that article 58 failed to cover cases of a treaty seeking to modify or extinguish the rights of third States, had not been taken up by other speakers and he presumed that the Commission did not wish it pursued. The point had been referred to in his original proposal[14] and when it had been discussed he had drawn the Commission's attention[15] to the fact that that aspect of the problem had been considered in the *Island of Palmas* arbitration.[16] But the Commission had regarded the treaties in question as examples of a particular form of treaty imposing obligations on third States and purporting to deprive them of rights. He had inferred from the discussion then that the Commission did not wish to complicate the drafting of article 58 by covering the point, though it was a valid one.

47. There was general agreement that the title was not very satisfactory and the one suggested by Mr. Briggs certainly was more attractive, but the Commission had been chary of using the expression " third States " although it was common in legal usage and had in fact appeared in his original proposal. The suggestion made by Mr. Lachs should certainly also be considered by the Drafting Committee.

48. However general the expression of the rule in article 58, there was the risk that the words " applies only between the parties " might be interpreted as excluding the possibility of rights and obligations arising out of a treaty for individuals or international organizations, and that difficulty would not be overcome by the introductory article which the Commission intended to insert, limiting the scope of the draft articles to treaties concluded between States (A/CN.4/L.115).

49. Although it was natural in English to use the word " applies " or " application ", the term was not free from ambiguity and it was difficult to find an alternative that would convey with precision the idea the Commission wished to express: that a treaty was binding only between the parties. The word " valid " would also not be appropriate. Mr. Briggs's suggestion that the words " applies only between the parties and " should be deleted, because the rest of article 58 would suffice to cover the two aspects of the rule, should be considered by the Drafting Committee.

50. The phrase " without its consent " had been inserted at a fairly late stage in the discussion at the sixteenth session, primarily at the instigation of Mr. Ruda,[17] in order to link up articles 58, 59 and 60. It had been argued that without that phrase article 58 would appear to contradict the provisions of articles 59 and 60. Perhaps Mr. Lachs's suggestion of a general title covering the three articles—a device contemplated at the

[12] Para. 86.

[13] *Yearbook of the International Law Commission, 1964*, vol. I, p. 173, para. 62.

[14] *Op. cit.*, vol. II, p. 17 (article 61).

[15] *Op. cit.*, vol. I, p. 66, para. 71.

[16] *United Nations Reports of International Arbitral Awards*, vol. II, p. 829.

[17] *Yearbook of the International Law Commission, 1964*, vol. I, p. 175, para. 97.

sixteenth session—would help, but some contradictions would still remain. His own proposal of the words " except as provided in articles 59 and 60 " had raised strong objections from those members of the Commission who did not admit the possibility of treaties creating rights of their own force. Various other devices for providing some kind of explanation of the relationship between articles 58, 59 and 60 had been considered, and the wording approved had been carefully chosen to cover tacit forms of agreement or assent as well as express agreement. The compromise reached was a delicate balance, but it had secured majority support as finally approved in 1964.

51. Clearly a further effort should be made to remove any appearance of contradiction between the three articles. He would not commit himself to supporting the words " without its consent " as the means for doing so, being one of those who considered that a treaty could create rights in favour of a third State without any agreement on its part. On the other hand, he recognized that ultimately the assent of the beneficiary to the right was necessary, because no State could be compelled to accept a right.

52. He suggested that the article be referred to the Drafting Committee for examination in the light of the discussion.

It was so agreed.[18]

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

[31]

Article 59

Treaties providing for obligations for third States

An obligation may arise for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.

53. The CHAIRMAN invited the Commission to consider article 59. The Special Rapporteur had suggested that the English text be modified to read:

" An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend that the provision may be a means of establishing the obligation and the State in question expressly agrees to be bound by that obligation. "

54. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been few government comments on article 59. The Government of Cyprus had referred to its comment on the subject of duress, made in connexion with article 58. Since the Commission had already decided to leave that question for further consideration, he would not dwell on it.

55. In redrafting the provision, he had replaced the opening words " An obligation may arise " by the words " An obligation arises ". He had thought that the permissive language used in the 1964 text was not very logical; once the State in question had expressly agreed to be bound, the obligation would in fact arise for it.

56. In paragraph 3 of his observations (A/CN.4/186/Add.2), he had dealt with the suggestion by the Government of Israel that the French text might express the substance of the rule better than the English. On one particular point he did not agree with the suggestion, but with regard to other points, he thought it should be considered by the Drafting Committee.

57. The main issue raised in the government comments was the suggestion by the Governments of Hungary, the Union of Soviet Socialist Republics, the United States and the Ukraine, that the reservation in paragraph (3) of the Commission's commentary[19] regarding the imposition of an obligation upon an aggressor should be incorporated in the text of the article itself. He had commented on that suggestion in paragraph 4 of his observations, and in case the Commission thought an express reservation of that type desirable, had drafted an appropriate proviso in the form of an additional paragraph which read:

" Nothing in the present article or in article 58 precludes a provision in a treaty from being binding on an aggressor State, not a party to the treaty, without its consent if such provision is imposed on it in accordance with the law of State responsibility and with the principles of the Charter of the United Nations. "

58. A case of that kind would, of course, represent a derogation from an extremely important principle and it was therefore essential to make the language of the proviso very strict, in order to confine its application to cases in which the imposition of obligations upon an aggressor State was effected in conformity with the Charter.

59. Mr. de LUNA pointed out that in 1964 the Commission had been unanimous on the meaning of article 59; he hoped that it would adhere to the formula it had then adopted. If, as four governments had suggested, the Commission introduced a reference to the case of obligations imposed on an aggressor State, it would be dealing with a question of responsibility, which was not within the scope of the draft. From both the doctrinal and the legal point of view, the obligation in question and the penalty applicable if it was not fulfilled, derived not from the treaty itself but from other norms of international law, such as the United Nations Charter or the *pax est servanda* principle, which was a rule of *jus cogens*.

60. From the practical point of view, he had no objection to the exception to the rule in article 59 being mentioned in the commentary, as it had been in 1964.

61. He fully approved of the drafting change proposed by the Special Rapporteur, whereby the too imprecise expression " may arise " would be replaced by the word " arises ".

62. Mr. CASTRÉN said he agreed that the expression " An obligation arises " would make the rule more categorical. He also accepted the other drafting changes proposed by the Special Rapporteur for the English text of the article.

[18] For resumption of discussion, see 867th meeting, paras. 20-23.

[19] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 181-182.

63. There were some arguments in favour of adding a second paragraph to article 59 stating a reservation concerning obligations imposed on an aggressor State which was not a party to the treaty; as the Special Rapporteur had pointed out in his observations, however, the obligations thus imposed on an aggressor did not stem from the law of treaties, but from the law of State responsibility, which the Commission had decided not to prejudge in its draft. It would therefore be better to retain the text adopted in 1964 and to deal with the question of the obligations imposed on an aggressor State in the commentary, as the Commission had then done.

64. All the members of the Commission agreed that an act of aggression should be condemned; but the question of the legal consequences of aggression was extremely complicated and raised difficult problems, particularly as to the extent of the penalties to be imposed on the aggressor State. Grotius had pointed out in his time that a State which had won a just war should treat its adversary with moderation, and that view was shared by several modern writers. Usually, political matters were settled between the aggressor State and the other States in treaties which were also ratified by the former, and then the question dealt with in the new paragraph proposed by the Special Rapporteur did not arise.

65. The new paragraph was cautiously worded, but as a result was rather vague and subject to interpretation. For instance, it accepted the principle of State responsibility, but the rules governing the application of that principle were not yet well defined. Again, there was still much uncertainty about the principles of the United Nations Charter, as had become evident during the long discussions on the subject in the General Assembly and in its special committees which had met in 1964 and the spring of 1966.

66. Mr. BRIGGS said he noted that the additional paragraph put forward by the Special Rapporteur did not represent a formal proposal on his part. He agreed with Mr. de Luna and Mr. Castrén regarding that paragraph, which he found both unnecessary and irrelevant. If a group of States agreed between themselves by treaty to impose a particular policy on a State which they regarded as an aggressor, it was not the treaty provisions as such which were imposed or became binding on the aggressor State, but the policy of the other States. For that reason he considered that the final sentence of paragraph (3) of the 1964 commentary was ambiguous and should be deleted.

67. With regard to the article itself he had no difficulty in principle, but he wished to reserve his position on the Special Rapporteur's rewording.

68. Mr. TUNKIN said that when the question of treaties imposed on an aggressor State had been raised in 1964, no member of the Commission had disputed the principle; all had agreed that treaties of that type existed and should be considered as valid.

69. He agreed with Mr. de Luna that the sanctions imposed upon an aggressor State had their source not in the law of treaties, but in the law of State responsibility. In the case in point, however, the law of State responsibility had a direct bearing on the law of treaties and called for an exception to the rule stated in article 59. It was true that in 1964, the Commission had introduced a safeguard in the commentary but, as was well known, the commentaries would not endure beyond the conference of plenipotentiaries. After the commentary had disappeared, the concluding words of article 59 would remain: " and the State in question has expressly agreed to be so bound ". Those words could be used by an aggressor State to repudiate its obligations, claiming that they referred to *res inter alios acta*. Contemporary practice provided an example: not only writers in Western Germany, but even the Government were now contending that the treaties concluded by the Allied Powers at the end of the Second World War were without effect with respect to Germany, which was not a party to them and could therefore disregard them.

70. For those reasons, he urged the acceptance of the additional paragraph put forward by the Special Rapporteur. A paragraph of that type would not enter into the substance of the matter, namely, what sanctions should be applied to the aggressor; that was a question of State responsibility.

71. Mr. LACHS said he supported the improved wording proposed by the Special Rapporteur; it did not change the substance, but made the provisions of the article clearer and brought them into line with the language adopted in other articles.

72. The additional paragraph drafted by the Special Rapporteur was a sound suggestion and should be adopted. There were three types of international agreement dealing with the situation after a state of war. The first was an agreement under which the victorious powers acted in a dual capacity: as victors, and in the exercise of supreme authority over the territory of the aggressor State in the absence of a government in that State. An example of that type of instrument was provided by the Potsdam Agreement of 2 August 1945.[20] The second type was an instrument concluded by the victorious Powers, to which the defeated aggressor was not a party, such as the London Agreement of 8 August 1945 concerning the punishment of war criminals.[21] The third type was an instrument in the preparation of which the defeated aggressor State participated, which it signed and ratified, but the entry into force of which was independent of its will. The Paris Peace Treaties of 1947[22] provided examples of that type of instrument. All three types were valid international agreements and all were, and continued to be, binding on the former aggressor State.

73. It was true that the source of the obligations of the aggressor State lay both in the rules on State responsibility and in the law of treaties, but the effects were felt mainly in the law of treaties. In the Commission's draft articles, it was not usual to enter into the motives behind the conclusion of treaties; the draft articles were intended to provide a framework for the treaty-making activities of States, irrespective of the motives for their conclusion or whether they were of a political, economic, military or other character. It was essential to draw a

[20] *British and Foreign State Papers*, vol. 145, p. 852.

[21] United Nations *Treaty Series*, vol. 82, p. 280.

[22] *Op. cit.*, vols. 41, 42, 48 and 49.

distinction between the motives and the consequences of the action of States in regard to treaties.

74. The Commission should not legislate for future aggressors, but should draw up provisions which would restrain aggression in the future. He therefore strongly supported the proposed additional paragraph, which would serve the interests of peace by not offering the same protection of the mantle of law to the law-abiding and the law-breaking State.

75. Mr. VERDROSS said that in his view, responsibility for aggression and the obligation to make reparation derived directly from a rule of general international law, whereas a treaty concluded between victorious Powers was an agreement on the way in which reparation was to be made.

76. After the Second World War, treaties had been imposed on Italy, Bulgaria, Hungary and Romania, in which it was stipulated that the treaties would enter into force upon ratification by the victorious States; the States on which the treaties were imposed could also ratify them, but their ratification was not a necessary condition for entry into force. So far as he knew, that was the first time in the history of peace treaties that the requirement of consent had been dispensed with. He would be interested to know whether the Special Rapporteur regarded that fact as a manifestation of new law or as an exception to general international law.

77. The additional paragraph suggested by the Special Rapporteur was unacceptable as it stood, because its wording implied that a treaty imposing obligations on an aggressor State could be concluded between any States whatsoever; it was necessary to specify that the treaty must be concluded between the States which had been attacked in violation of international law.

78. Mr. ROSENNE said that in his analysis of government comments, the Special Rapporteur had observed that the Government of Israel gave no reasons for its suggestion that the order of articles 59 and 60 should be reversed. That suggestion had been made merely in the interests of presentation, since it had been thought more elegant for the provisions on rights to precede those on obligations.

79. With regard to paragraph 1 of the Special Rapporteur's observations, it would be sufficient to point out in the commentary that the agreement of the third State was naturally subject to the provisions of articles 31-36, and, if made in writing, to those of articles 4 to 29.

80. Expressing general agreement with paragraphs 2 and 3 of the Special Rapporter's observations, he explained that the inter-ministerial committee which had prepared the comments of the Government of Israel had worked on the three texts in the Commission's working languages, with the assistance of his Ministry's translation services. That was how it had come to make its comments on the apparent lack of concordance between the three versions.

81. With regard to the additional proviso, he suggested the deletion of the words " with the law of State responsibility and ". That would make the proviso refer to a treaty provision imposed on an aggressor State in accordance with the principles of the Charter of the United Nations, thus using the same language as article 36. He was not satisfied, without further study, that the imposition of a treaty on an aggressor State necessarily fell within the scope of the law of State responsibility. Inclusion of a reference to State responsibility might therefore prejudge the Commission's consideration of the whole question of State responsibility. If his suggestion were adopted, the additional proviso would be consistent with the last sentence of paragraph (3) of the commentary on article 59 adopted by the Commission in 1964.

82. The Drafting Committee should carefully consider the concluding words " agreed to be so bound " with a view to co-ordinating the language used with that of other articles of the draft, where the expression " consent to be bound " was used.

83. The CHAIRMAN, speaking as a member of the Commission, said he supported the Special Rapporteur's proposal to replace the words " may arise " by the word " arises ", which was more correct.

84. He agreed that the English text did not reproduce the exact meaning of the French phrase " *un moyen d'aboutir à la création de l'obligation* ", which the Drafting Committee had taken as a basis in 1964. But that was a point which could be settled by the Drafting Committee.

85. Article 59 involved an essential problem of substance which had been raised by several governments and the Special Rapporteur had made a praiseworthy effort to solve it. He (Mr. Yasseen) shared the view that the case of a treaty imposing an obligation on an aggressor State was not an exception to the rule stated in article 59, since the source of that obligation was not the treaty itself. Nevertheless, that question should not be disregarded, and a number of governments had rightly pointed out that the article adopted by the Commission in 1964 did not reflect what was said in paragraph (3) of the commentary.

86. Apart from a few exceptional cases, the Commission had generally refrained from including in its draft articles any reservations concerning other rules of law. But aggression was one of the most serious problems of international life, and the United Nations, whose tasks included the maintenance of international security, should spare no effort to prevent acts of aggression. Those were reasons enough why the Commission should relax the rule it had adopted and add a proviso on the subject to article 59.

87. The new paragraph proposed by the Special Rapporteur might serve as a basis for discussion in the Drafting Committee, but he himself would prefer the reservation to be worded less specifically. There was no reason to mention the law of State responsibility, since it was only part of international law. It would be better to say " . . . if such provision is imposed on it in accordance with international law ".

88. Mr. REUTER said he agreed with the Special Rapporteur and with several previous speakers on the few minor drafting problems raised by article 59, including that of the words " may arise ".

89. The most important question, that of a treaty imposed on an aggressor State, certainly raised a prob-

lem of principle and a problem of form, both of which called for further consideration by the Commission. If the Commission endorsed the idea that the draft should cover the case of aggression, it would not be enough to deal with the case in which the aggressor State was not party to the treaty concluded between the victorious Powers; it would also be necessary to provide for the simpler case in which a defeated aggressor State had become a party to the treaty, but later claimed that it had not acted freely.

90. International law had not so far provided any very convincing reason why a treaty imposed on a defeated State should be binding on that State. One of the less inadequate reasons advanced was that of the *de facto* international government established by the victors. But would not a provision on that subject be better placed among the provisions relating to invalidity of consent? In drafting those provisions, the Commission had shown that it was not very optimistic, since it had found it necessary to state as a rule that a treaty imposed by a victorious aggressor was void. It might perhaps add, in the same article, that a defeated aggressor could not evade the obligations imposed on it by a peace treaty by invoking either the fact that it had been forced to become a party, or the fact that it was not a party to the treaty. In that way, the whole problem would be dealt with at once.

91. As to referring to State responsibility, he agreed with the Chairman that it would be going beyond the scope of the law of treaties. It was also open to question whether the article should mention only " the principles " of the Charter, or the " principles and rules " of the Charter—a broader formula which would include the machinery for determining the existence of aggression.

92. Mr. BARTOŠ said he wished to express his opinion on the question of substance. It was true, as a number of delegations and several members of the Commission had pointed out, that history provided examples of cases in which a treaty had imposed obligations on a State without its express consent. But even if, in the cases mentioned, the solution had been dictated by considerations of equity, he did not think that a rule on the subject came within the scope of the law of treaties as the Commission had conceived it. The United Nations Charter itself (Article 107) authorized the nations which had united in the fight against fascism during the Second World War to take certain measures incompatible with the principles of the Charter, in order to ensure that those principles would be better applied in the future. But that derogation was valid only for the past. Any future derogation from the principle of free determination by States as subjects of international law could only be for the purpose of safeguarding international public order. The object of any measures taken by the international community—in the Security Council, for instance—would be to put an end to aggression and to force the aggressor to make reparation. They would not constitute a treaty and would not impose contractual obligations, since the latter always required an expression of the free will of the State concerned.

93. After the Second World War, under the authority conferred by the Charter on the Allied Powers, treaties had been imposed on certain States regarded either as direct aggressors or as having collaborated with the aggressors. Those of the victorious Powers which had ratified the treaties had been authorized to enforce them, but those which had not ratified the treaties could not invoke them. The ex-enemy States had in fact ratified the treaties, which had consequently assumed the aspect of genuine treaties, but had they not done so, the treaties would have been executed as treaties between the allies. That example clearly showed that the treaties in question had not created contractual obligations for the ex-enemy States, but had constituted executory decisions of the Allied Powers. The Charter regarded them not as treaties but as " action . . . taken or authorized ".

94. He would not express any opinion on the Special Rapporteur's suggested additional paragraph for the moment, but would merely point out that, if it refrained from adding the proposed rule, the Commission would leave unimpaired the principle embodied in the Charter from which it followed that obligations could be imposed on a State, not on a contractual basis, but by virtue of the international law concerning responsibility.

The meeting rose at 6 p.m.

853rd MEETING

Tuesday, 17 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Co-operation with Other Bodies

(resumed from the 849th meeting)

[Item 5 of the agenda]

1. The CHAIRMAN welcomed the observer for the Inter-American Juridical Committee.

2. Mr. CAICEDO-CASTILLA (Observer for the Inter-American Juridical Committee) said that he hoped later to give the Commission an account of the progress made in revising the Charter of the Organization of American States. During the preparatory work at Panama in March 1966, agreement had been reached on a number of points, but there were still differences of opinion between the United States and the Latin American countries on the economic clauses. The Juridical Committee had met at Rio de Janeiro in April and had adopted resolutions on three subjects: a Brazilian proposal for an inter-American peace council; a draft submitted by Ecuador on the peaceful settlement of disputes; and a statute for political refugees.