Document:-
A/CN.4/SR.854

Summary record of the 854th meeting

Topic:
Law of Treaties

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

the defeated aggressor State, which had no choice but to accept it. With regard to treaties of that kind, it would certainly be useful to stress that the aggressor State could not challenge the validity of the treaty itself on the ground that it had been subjected to coercion. That aspect of the matter should obviously be dealt with in article 36 rather than in article 59.

83. In the other case—that in which the defeated aggressor State was not party to the treaty—the treaty might have been concluded between the finally victorious States during the period of hostilities. Such a treaty created mutual obligations and rights between the victorious States, and its object might be to specify the terms to be imposed on the defeated State and the sanctions to be applied to it. But even in such cases, as he had said in his first statement, the obligations imposed on the aggressor State did not derive from the treaty as such, and could not be represented as effects of the treaty for a third State. Consequently, a provision of the kind suggested had no place in that part of the draft.

84. On the other hand, he would have no objection to the insertion of a provision on the subject in article 59, provided that it was very clearly worded, that it did not give the impression that the obligations imposed on the aggressor State might derive from the treaty, and that it did not have the appearance of an exception to the rule that treaties had no effects on third States. Consideration might accordingly be given to a text of the kind suggested by Mr. Reuter or by the Chairman at the previous meeting.[8]

85. Mr. TUNKIN said he could not agree with the view put forward by Mr. Ago in his 1939 lectures at The Hague,[9] that a State on which sanctions were imposed was not under any obligation to comply with them. His own view was that if collective sanctions were agreed upon by treaty, they were binding on an aggressor State.

86. It had been pointed out by some members that the basis of the obligation of the aggressor State was the fundamental rule of international law governing the responsibility of aggressors for acts of aggression. The fact that the obligation thus had its foundation in a basic principle of international law should be no obstacle to the inclusion of the suggested proviso. The position was no different from that in regard to article 36, which proclaimed null and void any treaty concluded in violation of the prohibition of the threat or use of force. The basic principles of international law had their repercussions on all its branches; hence it was not possible to ignore them when formulating draft articles on the law of treaties.

87. The lack of a definition of aggression had been mentioned during the discussion. Apart from the fact that history showed that it was the potential aggressors who had prevented the acceptance of any definition of aggression, the lack of such a definition ought not to be allowed to stand in the way of the adoption of the proviso. The fact that there was no definition of the " threat or use of force " had not prevented the Commission from adopting article 36.

88. It had also been asked who would decide whether a State was an aggressor. He had little patience with that type of argument, which could be used with regard to any question of international law. In the absence of compulsory jurisdiction of the International Court and of a higher political authority than States to decide whether a violation of international law had been committed, it was possible to use the same argument with regard to any other matter, such as fraud or coercion. If that approach were adopted, the whole work of codification of international law would have to be abandoned and international law itself would be completely undermined.

The meeting rose at 1.5 p.m.

854th MEETING

Wednesday, 18 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.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 59 (Treaties providing for obligations for third States) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 59.

2. Mr. CASTRÉN said he still doubted the advisability of inserting in the draft a provision authorizing, in respect of a treaty imposed on an aggressor State, a derogation from the principles stated in articles 58 and 59; for if one exception were allowed, it would open the way for others and that would weaken the fundamental rule.

3. He did not deny that certain contractual provisions could be imposed on an aggressor, but everything depended on the content and scope of those provisions. A free hand to deal with the aggressor State could not be given to a State which was a victim of aggression, and still less—as Mr. Verdross had pointed out—to other States. It was therefore necessary to specify the obligations that could legitimately be imposed on an aggressor State; but that was an extremely complicated matter which required thorough study.

4. The wording proposed by the Special Rapporteur did not seem to be satisfactory and had already been

[8] Para. 87.

[9] R. Ago, "Le délit international", Académie de droit international, *Recueil des cours, 1939*, vol. II, p. 415.

[1] See 852nd meeting, preceding para. 53.

criticized by several members of the Commission. If the Commission wished to add anything to the 1964 text, the wording suggested by the Chairman at the 852nd meeting[2] would perhaps be preferable. He proposed that the Drafting Committee should reconsider the question both as to substance and as to form.

5. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion on article 59, said that the Commission appeared to be evenly divided on the question whether to transfer the last sentence in paragraph (3) of the commentary[3] to the text of the articles. A few members who had no great enthusiasm for the additional proviso would be prepared to contemplate its introduction as a separate paragraph or article in the section dealing with defective consent.

6. The text he himself had prepared had been designed to give effect to a suggestion made by four governments in their comments and to enable the Commission to discuss the point raised by those governments.

7. The discussion had revealed a general inclination to regard the obligation of an aggressor State to observe the provisions of the treaty as deriving from the law of State responsibility or from general international law. The proviso should accordingly be put in the form of a general reservation akin to estoppel, as pointed out by Mr. El-Erian. It was, however, somewhat paradoxical that, although all those in favour of including the reservation considered that the obligation of the aggressor State derived from State responsibility, none of them wished State responsibility to be mentioned in the text.

8. He himself supported the general idea which the Commission had accepted when it had underlined an exception in the case of an aggressor State in its commentaries on articles 36 and 59.

9. As far as the text of the articles was concerned, in article 36 the Commission had used the expression " in violation of the principles of the Charter of the United Nations " so as not to exclude the possibility that an obligation might arise for an aggressor from coerced consent. In article 59, a more specific exception was called for, since the article stated that an obligation could only arise with the consent of the third State. Moreover, there was a need for the same exception to be made also to the provisions of article 58.

10. Some members had put forward the view that the problem did not really arise under article 59 because, in the case envisaged, the aggressor State would sign the treaty and thus not be a " third State ". It was difficult to accept that view, because there undoubtedly existed the possibility of cases in which the provisions of the treaty would require to be binding on the aggressor, even without any expression of consent on its part. The aggressor State might disown its representatives who had signed the treaty. Another possible case, which had actually occurred in the Second World War, was that the defeated aggressor might have no government to represent it. Hence it was not possible to claim that the problem did not arise.

11. The problem arose under both article 59 and article 36. His own view was that the reference to the principles of the Charter in article 36 implied that the obligation was imposed on the authority of the international community. In the light of the discussion, he felt great concern that, if an unduly loose formula were used to express the reservation, it might open the way for a group of States to claim to be acting against an aggressor in order to assert the right to impose an obligation.

12. He would be opposed to any alteration of article 36 which might weaken its formulation; the almost unanimous adoption of that article by the Commission represented the recognition of a very important development in modern international law: the denial of the validity of treaties imposed by force. For those reasons, he would prefer the general reservation not to be introduced into article 36, but to be formulated in some other way, possibly, as suggested by Mr. Reuter, by placing at the end of the draft a proviso to the effect that nothing in the draft articles affected questions arising from the treatment of an aggressor.

13. As far as the wording of the reservation was concerned, the Drafting Committee would have to consider the suggested deletion of the reference to State responsibility—to which he himself would have no objection—and the proposal by Mr. Lachs that the term " imposed " be replaced by a more suitable expression. The Drafting Committee should also consider the useful suggestion that the commentary should include a reference to Article 107 of the Charter.

14. He suggested that article 59 be referred to the Drafting Committee in very general terms, without prejudging the Commission's views in any way.

15. Mr. AGO said he feared the question was not yet ripe for referring to the Drafting Committee, whether it was asked to go over the whole discussion again or simply to find suitable wording. The real problem was not so much to find a formula as to decide whether a provision on the point under discussion should be inserted in the draft, and, if so, where.

16. Mr. BRIGGS said that although the Commission was clearly divided on the question of the suggested proviso, it was technically possible for the Drafting Committee to consider the question on the basis of a new draft, or several alternative drafts, submitted to it by the Special Rapporteur, and then report to the Commission.

17. Mr. TUNKIN said he strongly supported the Special Rapporteur's suggestion that the matter be referred in very general terms to the Drafting Committee. It would not serve much purpose to prolong the discussion at that stage and consideration of the matter by the Drafting Committee would produce an alternative text, which might enable the Commission to resume the discussion more fruitfully.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that examination by the Drafting Committee would not prejudice the Commission's freedom of decision. The discussion had reached a deadlock largely as a result of drafting difficulties, though it was true that those difficulties had underlying points of substance. Examination of the matter by the Drafting Committee would make it possible to see how far the difficulties that

[2] Para. 87.

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

had arisen were connected with issues of substance and how far they could be solved by a change of presentation. It was not uncommon, when the Commission was split on a particular issue, for the division to seem worse than it was owing to the wording which had been placed before it and on which the discussion was based.

19. Mr. PESSOU said that the two conflicting ideas did not seem irreconcilable. Mr. Ago had not been radically opposed to including a provision on the point in dispute in article 36; nor had Mr. Tunkin apparently any objection to that suggestion, which seemed quite logical, since it was in article 36 that the problem first came up. It should be possible for the Drafting Committee to work on the formula suggested by Mr. Reuter.[4]

20. Mr. TSURUOKA said he had no objection to article 59 being referred to the Drafting Committee, provided the Commission remained entirely free to discuss it again.

21. The CHAIRMAN said that that was always the case; it was, of course, the Commission which took the decisions.

22. Mr. AGO said he was not categorically opposed to referring the article to the Drafting Committee; but Mr. Pessou was perhaps being over-optimistic in thinking that there were only two different views, between which a compromise was possible. In fact, there were several shades of opinion, and important questions of principle were at stake. Rather than instruct the Drafting Committee to seek a compromise, the Commission should ask it to re-examine the whole question.

23. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 59 to the Drafting Committee in general terms, as proposed by the Special Rapporteur.

It was so agreed.[5]

ARTICLE 60 (Treaties providing for rights for third States) [32]

[32]

Article 60

Treaties providing for rights for third States

1. A right may arise for a State from a provision of a treaty to which it is not a party if (*a*) the parties intend the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (*b*) the State expressly or impliedly assents thereto.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

24. The CHAIRMAN invited the Commission to consider article 60.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that government comments on article 60 (A/CN.4/186/Add.2) had not been very numerous. The Governments of the Netherlands and Turkey had proposed the deletion of the words " or impliedly " in paragraph 1 (*b*). He was unable to endorse that proposal because it would call into question the whole basis of the very delicate compromise reached in 1964. Moreover, he thought that those two Governments were mainly concerned with the problem of the possible restriction of the right of the parties subsequently to modify treaty rights, which was dealt with in article 61.

26. The United States Government had made a proposal designed to cover the case of two or more States which dedicated by treaty a right to all States in general, without that dedication being subject to the condition that each State wishing to exercise the right should have first assented thereto. He had considerable sympathy for that proposal, as he had explained in paragraph 4 of his observations (A/CN.4/186/Add.2), and he would like the Commission to consider it.

27. With regard to paragraph 2, the objection put forward by the Turkish Government appeared to be based on a misunderstanding of the intention of the paragraph; its interpretation of the paragraph did not correspond to the natural meaning of the words used.

28. He had given the fullest consideration to the government comments, but had not wished to make any formal proposal, in order to avoid the risk of upsetting the compromise achieved in 1964.

29. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion from paragraph 1 of the concluding words: " and (*b*) the State expressly or impliedly assents thereto ".

30. Circumstances had changed, and the Commission should therefore reconsider the 1964 compromise; it should adopt a text which reflected more accurately the legal situation in regard to stipulations in favour of third States and was better designed to serve the needs of the contemporary international community. Since 1964, the Commission had received such government comments as those of the Netherlands, the United States and Argentina, which favoured that type of stipulation. Another important development had been the deletion of the draft article prepared by the Special Rapporteur on objective legal régimes established by treaty;[6] as a result of that deletion article 60 would have a much more important role, for example, as the legal foundation of treaty stipulations in favour of all States providing for free navigation on inland waterways.

31. From the legal point of view, the fact that a third State was disposed to profit from a right granted to it in a treaty concluded between other States could never be deemed to constitute the consent or assent to a second, or collateral agreement. The assent referred to in article 60 was an act which merely confirmed pre-existing rights; it was not, like the consent referred to in articles 31-35, an act by virtue of which rights were acquired.

32. His view was supported by the Commission's recognition that the implied assent in paragraph 1 (*b*) could be revealed by conduct, since one of the commonest forms of assent by conduct was the fact of exercising the right in question. But it was legally untenable to assert that the exercise of the right by the beneficiary State constituted the acceptance of an offer, or consent to

[4] Previous meeting, para. 54.

[5] For resumption of discussion, see 867th meeting, paras. 24-28.

[6] *Yearbook of the International Law Commission, 1964*, vol. II, p. 26, article 63.

a second agreement, from which the very right that was being exercised was supposed to derive.

33. The example of the right of navigation on rivers clearly showed that the third State was exercising a pre-existing right. Under the treaties of San José de Flores of 1853 concluded by Argentina with the United Kingdom[7] and France,[8] the Uruguay and Paranâ rivers had been opened to free navigation for all States. It would be impossible to contend that, when a ship of Liberian flag used those rivers to proceed to the port of Rosario, there came into existence a collateral agreement between Liberia and Argentina. The captain of the Liberian ship could not be deemed to possess the authority to represent Liberia for the conclusion of a treaty under article 4 of the draft articles.

34. Another example was provided by Articles 32 and 35 of the United Nations Charter authorizing non-member States to participate in Security Council discussions. Whenever the Secretary-General received a request for such participation, he placed it before the Security Council, but it had never occurred to him that there came into existence collateral agreements which should be registered under the provisions of Article 102 of the Charter.

35. It was clear that the third State was not called upon to ratify or accede to the treaty, but merely to appropriate or renounce the rights stipulated in its favour, which it could do at any time. If it was desired to emphasize the fact that the beneficiary State was not compelled to exercise the right granted to it, that should not be done by referring to assent or consent, but by specifying that the stipulation became inoperative if the beneficiary disclaimed the benefit. But such a provision seemed hardly necessary, because it would merely state the obvious.

36. Apart from those doctrinal arguments against the collateral agreement theory, the Commission should bear in mind certain unfortunate results which that theory might have in practice, one of which was the rule embodied in article 61, which made the benefit irrevocable except with the consent of the beneficiary. As pointed out by a number of governments, that rule unduly favoured the third State at the expense of the contracting parties. He hoped that that defect would be remedied when the Commission examined article 61.

37. Another unfortunate result of the approach adopted in article 60 was that its provisions might provide a justification for States interested in creating obstacles to the present unimpeded use of various international waterways. For instance, the territorial State might stop a passing ship on the grounds that it had never received from the State of nationality of the ship a notification of its assent to the treaty granting the right of navigation. The territorial State might also claim, in the case of a ship flying the flag of a new State, that no assent was possible under article 60 because the State claiming the benefit had not been in existence at the time when the right was granted.

38. As the Special Rapporteur had pointed out, the mere fact that the parties had expressed an intention to confer a right on States in general justified the conclusion that the contracting States fully intended to dispense with the expression of assent by individual third States.

39. Adoption of article 60 as it stood would detract from the use of provisions in favour of third States which had become one of the most useful procedures for giving general scope to rules of international law that could only be put into effect through the agreement of a limited number of States. Even future States could, and did, derive rights from such stipulations, which had certain characteristics of acts of international legislation.

40. The Commission should not allow restrictive principles derived from the Roman law of contracts to check that progressive development of international law. As Judge Cardozo of the United States had said in connexion with third party stipulations, " rules derived by a process of logical deduction from pre-established conceptions of contract and obligation had gradually broken down before the slow and steady and erosive action of utility and justice ".

41. Mr. VERDROSS said that a legal distinction should be made between the creation of a right and the will to exercise that right. He had already expressed that view during the first reading of the draft in 1964[9] and he noted that one government's comment reflected it.

42. A treaty concluded between certain States could create a right for a third State; that had been the view taken by the Permanent Court of International Justice in the *Free Zones* case.[10] Paragraph 1 (*b*) of article 60 provided, however, that the express or implied assent of the third State was necessary for the creation of such a right. That was strange, to say the least, for the act of assent combined two acts which were quite different in character; participation in the creation of the right and the will to exercise the right. It was a pure fiction to maintain that, if a State exercised a right, it thereby participated in the creation of that right. Far from being a compromise, paragraph 1 (*b*) represented the opposite view to his own. He therefore proposed that it should be deleted.

43. On the other hand, he could accept paragraph 2, for if States wished to create a right in favour of a third State, they could certainly determine the conditions for its exercise.

44. Mr. CASTRÉN said he was in favour of retaining the text which had been adopted by a substantial majority after a long and difficult discussion in 1964; its wording reconciled the various schools of thought and also seemed satisfactory from the practical point of view.

45. The Commission should not accept the amendments proposed by certain governments—not even that proposed by the United States, for which the Special Rapporteur seemed to have some sympathy. Even if the parties to a treaty wished to confer a right on all third States in general, the assent—at least implied—of those States was necessary to make that right effective.

46. As had been pointed out several times during the 1964 discussions, the exercise of a right based on a treaty could be subject to special conditions, as was provided

[7] *British and Foreign State Papers*, vol. XLII, p. 3.

[8] *Op. cit.*, vol. XLIV, p. 1071.

[9] *Yearbook of the International Law Commission, 1964*, vol. I, p. 81, para. 7.

[10] *P.C.I.J.* (1932), Series A/B, No. 46, pp. 147-148.

for in paragraph 2 of article 60, and those conditions might constitute onerous obligations. That in itself was sufficient reason for denying that the assent of third States could be dispensed with. He regretted, therefore, that he could not accept the proposal made by Mr. Jiménez de Aréchaga, and supported by Mr. Verdross, that paragraph 1 (*b*) should be deleted.

47. He would propose only a minor drafting amendment, which consisted in replacing the words " may arise " at the beginning of paragraph 1 by the word " arises ". The Special Rapporteur had suggested that change in article 59, and the Commission appeared to have accepted it; the two cases were undoubtedly similar.

48. Mr. REUTER said he recognized that article 60 raised some theoretical problems and that the Commission should also bear in mind all the practical difficulties mentioned by Mr. Jiménez de Aréchaga. At the present stage of the work the only question he wished to raise was whether, without disturbing the delicate balance between articles 60 and 61, the Commission could still improve on the wording of the compromise which it had reached in 1964.

49. Without stating any definite opinion on the matter, he wondered whether the rule formulated in paragraph 1 (*b*) could not be expressed in negative form so as to state that the right was created for the third State unless that State expressly or impliedly rejected it. That wording would have the advantage of retaining the solution adopted in 1964, since it would cover both the conflicting theories. It would suggest that the third State was supposed to have accepted the right, but that if it refused it, the right was not created.

50. The Turkish Government had raised a minor problem, which also related to article 61. There was no doubt that, when a treaty established a right in favour of a third State—particularly if that right had a territorial application and applied, for instance, to a canal or a river—the parties to the treaty retained a power of regulation which was not mentioned in the draft. The Permanent Court of Arbitration had taken a very clear position on the point in the *North Atlantic Coast Fisheries* case,[11] and it was quite understandable that it should preoccupy governments.

51. Mr. de LUNA said that although, from the doctrinal point of view, he entirely agreed with Mr. Jiménez de Aréchaga, he would be prepared to accept article 60 in the interests of conciliation.

52. The cleavage of opinion in the Commission, which had led to the compromise text of article 60, had not been due to any political or philosophical differences, but simply to differences in legal training; those members who were imbued with the traditions of Roman law had taken a position completely different from those brought up on Germanic legal concepts. But even Roman law, in the last stages of its development, had made some allowance for stipulations in favour of third parties. In the traditional Roman law, the very formal *sponsio* required the physical presence of the two parties concerned and there was no room for a third party. By the time of Justinian's compilations, however, it had come to be recognized, in the interests of commercial transactions, that a right could be created for a third party if the contracting parties had an interest in creating that right. It was on the basis of that late Roman law of contract that Grotius and other early writers on international law had constructed the notion of a second collateral treaty. The Napoleonic Code of 1804 marked some progress by comparison with late Roman law, while in the common law system, the fact that agreements in favour of third parties were not recognized was offset by the possibility of achieving similar results by means of trusts.

53. In practice, the process envisaged in article 60 occurred in two stages. The first was the creation of the right: all States were free to create rights in favour of third parties. The second stage was the exercise by the third State of the right conferred upon it; so long as there was no compulsion to exercise the right, the sovereignty and independence of the third State were fully safeguarded.

54. He supported Mr. Reuter's suggestion that the concluding proviso in paragraph 1 (*b*) be expressed in negative terms. Personally, he would go even further and re-word article 61 in the same way. It would then provide that a provision which conferred a right on a third State could be revoked or amended by the contracting parties unless it appeared from the treaty that the provision was intended to be revocable only with the consent of the third State.

55. Subject to drafting improvements, he supported the United States Government's proposal (A/CN.4/186/Add.2), which could provide a useful compromise between the different views held in the Commission, since it made a distinction between treaties which established rights in favour of States in general, and treaties which required the beneficiary State's assent. That approach would cover the case of treaties which created objective régimes or embodied international settlements, such as those dealing with navigation on international rivers. Objective régimes and settlements could, however, also be justified on the basis of custom, under the provisions of article 62, which would make the United States proposal unnecessary.

56. The Commission should not overlook the difficulties resulting from irrevocability under the provisions of article 61.

57. Mr. TUNKIN said he fully endorsed the Special Rapporteur's conclusion that the application in practice of the two theses in the doctrinal controversy would produce different results only in very exceptional circumstances. The word " impliedly " had been used in the 1964 text in order to explain that, while express consent was not necessary for the creation of the rights in question, their exercise would be regarded as assent and, as it were, a final stage in the creation of the right.

58. Practical considerations had been advanced by Mr. Jiménez de Aréchaga in defence of his new standpoint, but the changes he proposed would not make much practical difference. It was undeniable that in the modern world rules of international law were founded on agreement between States and could have no other basis. Any attempt to derive them from some mysterious

[11] *United Nations Reports of International Arbitral Awards*, vol. XI, pp. 179 *et seq.*

natural law was bound to fail. That proposition was fully consonant with the principle of the sovereign equality of States. To argue that obligations imposed on third States required their consent, but that rights could be created in their favour without their consent, was contradictory.

59. To draw analogies with private law was usually dangerous, because the position of third States on the international plane was so different from the position of third parties in municipal contract law.

60. There might be cases in which a third State did not wish to be considered as having certain rights, and the exercise of those rights might be made subject to unacceptable conditions, so the argument that the interests of the third State were safeguarded in such cases was politically dangerous.

61. The Commission should adhere to the compromise reached at the sixteenth session.

62. Mr. AGO said he did not think that article 60 raised any serious doctrinal problems. All the members of the Commission agreed that a treaty was an agreement and that, by its very nature, an agreement could not by itself produce legal effects—obligations or rights—for any State not a party to it. There was, however, nothing to prevent a treaty between certain States from, as it were, proposing a right to a third State. For the right to come into being either the third State must give its assent, which was equivalent to the conclusion of an agreement between the parties and that State, or such an extension of a right to a third State must be authorized by a rule originating elsewhere than in the treaty.

63. In municipal law too it was not the contract itself that conferred rights on a third party; the right was created in certain cases because it was authorized by law. Hence the problem was to ascertain whether there was any rule of customary general international law under which a treaty could accord a right to a third State; the source of that right would not be the treaty, but the rule of general international law.

64. Although he recognized the force of the arguments advanced by Mr. Jiménez de Aréchaga, he doubted whether any such rule could at present be found in international law, governed as it was by the principle of the sovereignty of States. In contemporary international law, the rule seemed to be rather that a treaty could not create either an obligation or a right for a third State without that State's assent.

65. That rule also seemed preferable for another reason. If the " right " of the third State could be created without its express or implied assent, that State could not prevent the right from being created. It could not " refuse " the right; it would be obliged to " renounce " it after having nevertheless received it against its will and that appeared to be contrary to the conviction of States, which could not conceive of a right being imposed on a State that did not wish to receive it. It was of course, true, as Mr. Verdross had rightly pointed out, that it was sometimes a kind of fiction to maintain that an act performed in the exercise of a right was at the same time an act manifesting the will to assent. But it would also be a fiction to say that an act of opposition was an act of renunciation rather than a refusal. In any case, at some point it was necessary to consider certain acts that were open to different interpretations. Consequently, he would prefer to leave article 60 in the form in which it had been adopted by the Commission in 1964.

66. With regard to the United States proposal, he did not feel the need to accept so-called compromises between trends. The Commission should decide one way or the other : either a right could arise for third States—whether a single State, a group of States or all States—or it could never arise without their assent. He could not see any clear distinction between the case of a right offered to a single State and that of a right offered to a group of States or to all States, and it would be logical for the Commission to retain the former draft.

67. However, the French text of paragraph 1 (*b*), as well as the French translation of the United States proposal, needed amendment, since it referred only to " *cet Etat* ", whereas paragraph 1 (*a*) referred to " *cet Etat ou à un groupe d'Etats . . . soit à tous les Etats* ". It should be made clear that paragraph 1 (*b*) applied either to the State to which the right had been offered, or to the various States making up the group, or to all States individually. The English wording " the State " was more satisfactory.

68. Mr. BRIGGS said that at the 738th meeting[12] he had questioned the desirability of drafting an article on doctrinal lines and, in spite of what Mr. Ago had just said, there was a divergence of view as to whether a treaty could directly create a right for States not parties to the treaty or whether there was something in the nature of an offer by the parties which, if accepted, would constitute a collateral agreement. The doctrinal issue was unimportant; the Commission's task was to help solve a practical problem, not to adopt provisions that could hamper the progressive development of international law.

69. He entirely agreed with the revision of paragraph 1 proposed by the United States Government, not because it was perfect but because, in a sense, it reconciled the divergent views expressed in the Commission and provided a means of dealing with the problem without taking sides on the doctrinal question.

70. The 1964 text was based on the presumption that, normally, assent by the third State was required, but it did not make clear what was meant by implied assent. International waterways dedicated to international use could provide an example of the difficulty of interpreting what was meant by implied assent. A question might arise as to whether the consent of a third State to a treaty regulating navigation could be inferred from the use of the waterway in question by private vessels flying that State's flag, or whether it could only be inferred from such use by publicly-owned vessels. R. R. Baxter, in his *Law of International Waterways*, had argued that to require the express consent of a State wishing to benefit from the waterway would be retrograde.[13] It could even be contended that, once such a waterway had been used by the international community, the right conferred by the relevant treaty did not call for express consent on the part of any individual State. The text suggested by the United States attempted to convey the idea that some

[12] *Yearbook of the International Law Commission, 1964*, vol. I, p. 95, paras. 12 *et seq.*

[13] *Op. cit.*, 1964 edition, pp. 178-180.

indication of assent would be needed except where States intended a treaty provision to be the means of according a right " (*b*) to States generally ".

71. Mr. Jiménez de Aréchaga had asked whether the exercise of a right, as well as usage, should be regarded as assent, and that question was left open in the United States proposal. His criticism of the proposed new text for paragraph 1 (*b*) on the ground that it did not go far enough had been surprising. Perhaps it did not go as far as the Special Rapporteur's original proposal,[14] but it should certainly be retained.

72. Mr. ROSENNE said that, as he had explained at the sixteenth session, he had no strong personal views on the doctrinal controversy over article 60 and considered that there was merit in both points of view. His main concern was with the practical aspects of the problem.

73. He agreed with the implication in paragraph 2 of the Special Rapporteur's observations and proposals (A/CN.4/186/Add.2) that in 1964 the Commission had not altogether succeeded in maintaining a position of neutrality. The difficulty was essentially a drafting one; paragraph 2 of the 1964 text sufficed to cover the questions raised by the problem of the consent or assent of beneficiary States and protected the position of the parties to the main treaty.

74. Leaving doctrinal considerations aside, Mr. Jiménez de Aréchaga had just made out a convincing case for deleting paragraph 1 (*b*) on practical grounds. As a minimum, paragraph 1 ought to be re-worded on the lines suggested by the United States Government.

75. Paragraph 2 of the 1964 text should be retained for the reasons given by the Special Rapporteur.

76. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with Mr. Castrén, Mr. Tunkin and Mr. Ago. In 1964, he had upheld the theory of the collateral or supplementary agreement and he could see no essential difference between imposing an obligation and imposing a right. The important point was that the text the Commission had arrived at was a compromise which should be respected so far as possible at that stage, unless there were compelling reasons for doing otherwise, such as objections by a large number of States or a change in circumstances. As matters stood, he could see no reason for a change in attitude. As Mr. Ago had pointed out, if the *stipulation pour autrui* existed in municipal law, it was by virtue of a rule of law, such as article 1121 of the French Civil Code, whereas it was inherent in the nature of a treaty that its direct effects were restricted to the parties.

77. It would be argued that, since one of the Commission's functions was to promote the progressive development of international law, it would be useful to establish a rule dispensing with the third State's assent. He did not think so; the establishment of such a rule seemed to him to be incompatible with some of the principles which were the very foundation of international life, such as that of the sovereignty and sovereign equality of States.

78. It would also be argued that only a right was concerned. That was true; but in many cases a State would not accept a right conferred by some other State. Admittedly, a right could be created, but to assert that a right was conferred on a particular State was to interfere in its affairs, if the right was regarded as originating solely in an agreement between two States, neither of which was the beneficiary.

79. He was therefore in favour of respecting the compromise reached. He understood the reasons for the comments of the Turkish and Netherlands Governments and for the United States amendment, but to some extent the two ideas cancelled each other out, leaving the 1964 text intact.

80. The text required some minor drafting changes, such as the deletion of the word " may " at the beginning of paragraph 1 and the improvement of paragraph 1 (*b*). In the French text of paragraph 2 the words " en vertu " should be substituted for " *en application* ", to bring the French version into line with the English and Spanish versions.

81. He was sorry he could not accept Mr. Reuter's suggestion. To say that a right was created for the third State unless the latter either expressly or impliedly rejected it tipped the scales in favour of the thesis that a right could be created without the assent of the beneficiary State. Though prompted by a laudable desire to reach a still better-balanced formula, that proposal would be likely to impair the compromise reached in 1964.

82. Mr. EL-ERIAN said that the carefully balanced formula devised for article 60 in 1964 should be retained. A treaty could not of its own force create a right in favour of a third State. The juridical foundations of international law were not those of municipal law and it would be unwise to base the rule on an analogy drawn from rules of contract law concerning stipulations in favour of third parties. He interpreted Judge Huber's dictum[15] " . . . whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers " as also covering the case of rights stipulated for third States. But a treaty could confer a benefit in the form of an offer, which would only acquire the character of a right when accepted by means of a collateral treaty. At the sixteenth session, however, his suggestion[16] that the term " benefit " should be used had not been adopted.

83. If a right had existed before the conclusion of the treaty which simply gave it formal expression, the provisions of paragraph 2 would not apply.

84. Mr. REUTER said that Virgil's words " *Timeo Danaos et dona ferentes* " appeared to have been taken to heart by the majority of the Commission : international relations had come to a sorry pass if it had to be assumed that even gifts were dangerous.

85. Mr. AMADO said that in 1964 he too had used the analogy of the Trojan horse in that connexion, his views thus coinciding with those of Mr. Reuter.

86. He could accept the 1964 compromise, subject to certain drafting changes, although he found the text

[14] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 19-20, article 62.

[15] Island of Palmas case, *Reports of International Arbitral Awards*, vol. II, p. 842.

[16] *Yearbook of the International Law Commission, 1964*, vol. I, p. 92, para. 55.

unsatisfactory and disappointing. The Commission had been led into that situation by the influence of classical law, despite the antipathy of international law for such outdated but hallowed institutions. Account must, however, be taken of treaties which were not classical treaties, in other words law-making treaties, which were legislative instruments characteristic of the modern world. Such treaties provided food for thought; through the compromise solution and the law that *could* be, they gave a glimpse of the law that *should* be.

87. Mr. JIMÉNEZ de ARÉCHAGA said that the contention that the creation of rights for third States could be a violation of the principle of the sovereignty of States or a form of interference in their internal affairs was unfounded, because a third State could not be compelled to accept the right offered and need not exercise it. The provisions of Articles 32 and 35 of the Charter were clear examples of stipulations in favour of third States and had been designed to uphold the equality and independence of States. Mr. Tunkin had argued that conditions could be attached to a right rendering it unacceptable, and it was true that the right of a State to bring a matter before the Security Council would require acceptance of the obligations laid down in the Charter concerning the peaceful settlement of disputes, but a non-member State was not compelled to bring a matter before the Security Council.

88. Some members had questioned the existence of a general rule of international law authorizing States to agree in a treaty to confer a right on a third State; but he did not. During the hearing of the *Free Zones* case, Professor Basdevant had denied the existence of such a rule, but Professor Logoz, the agent of the Swiss Government, had affirmed that the rule derived from *pacta sunt servanda*, on the grounds that what had been agreed by the parties was the law.[17]

89. When he had proposed the deletion of paragraph 1 (*b*), he had been referring to the 1964 text.

90. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Ago that there was no rule establishing the stipulation on behalf of a third party. He was quite unimpressed by the argument advanced by the agent of the Swiss Government, for the *pacta sunt servanda* principle could not serve as the basis for establishing a special right for a particular State. The Commission was considering the important problem of the relativity of the effects of treaties, which clearly showed the scope of the *pacta sunt servanda* principle. It was self-evident that States could agree, by means of a treaty, to offer a right to a State, but they could not, by virtue of the *pacta sunt servanda* rule, create a right for a particular State which became part of its heritage.

91. Mr. BRIGGS said he had obviously misunderstood Mr. Jiménez de Aréchaga's suggestion about deleting paragraph 1 (*b*); he had thought it was directed at the proposed new paragraph 1 (*b*). He largely agreed with what Mr. Jiménez de Aréchaga had just said.

92. Mr. LACHS said that it was always tempting for lawyers to use analogies, and that had been the Commission's tendency in handling the issues covered in articles 58, 59 and 60. On a number of occasions he had spoken in the Commission of the dangers of drawing too close a parallel between international and municipal law.

93. He would refrain from repeating the arguments he had developed at the sixteenth session, and would only stress the importance of bearing in mind the essential differences between institutions of municipal and of international law. He continued to think that States could create new rights or confirm existing customary rights in favour of an individual State or group of States not parties to the treaty, or in favour of the international community as a whole. One example was the Declaration of Legal Principles governing the Activities of States in the Exploration and Use of Outer Space adopted by the General Assembly in 1963.[18] He held that that Declaration had some legal effects and confirmed some rights of all States, whether Members of the United Nations or non-Members. But if the Declaration had taken the form of an international convention, there could be no doubt that a whole complex of rights would have arisen for States not parties to it.

94. He was unable to agree with Mr. Jiménez de Aréchaga that the rule had its source in the *pacta sunt servanda* principle. It derived from the capacity of States acting unilaterally, or in concert, to dispose of rights within the sphere of their sovereign attributes. It thus had its source in the general principles of law and in the fundamental rights of States as its subjects. The third State or States could refuse to accept the right and, as Mr. Castrén had rightly argued, might regard it not as a right, but as an obligation. It was free to act as it wished.

95. It was important not to confuse three elements: the treaty provision stipulating a right, the use of that right, and the consequences of both. A right which a third State refused to accept might remain in existence, though a dead letter. A right of which it could not avail itself for a time, for lack of the necessary physical means, might be impliedly accepted and taken up later, the classical example being freedom of navigation on international waterways. Finally, a right established for all States, such as that accorded in Articles 32 and 35 of the Charter, might not have to be used for many years, but that did not mean that it lapsed. The formula to cover implied acceptance must therefore be flexible.

96. The 1964 compromise text should be maintained more or less as it stood, subject to drafting changes which could be left to the Drafting Committee.

97. Mr. CASTRÉN said he had not been convinced by Mr. Jiménez de Aréchaga's second statement either. He had quoted examples to support his argument, but it was easy to choose examples to fit a special case. For instance, to take another fairly extreme example, if several States concluded a treaty granting a third State the right of transit through their territory, but on condition that the third State accorded to others the right of free passage through its own territory, the treaty could come into force at once; thus without waiting for the third State to exercise its right, the other States could begin to exercise theirs.

98. Mr. AGO said that the argument advanced by the Swiss agent before the Permanent Court of International

[17] *P.C.I.J.* Series C, Nos. 17, 19 and 58.

[18] General Assembly resolution 1962 (XVIII).

Justice had not been valid and had added nothing to the case he had been pleading.

99. The *pacta sunt servanda* principle meant that the parties to a treaty had an obligation to observe it, but the principle had never been interpreted as conferring rights and obligations on a State which was not a party to the treaty.

100. Mr. Jiménez de Aréchaga had quoted other examples intended to prove the existence of a general rule of customary law according to which rights could be conferred on a third party. In particular, he had cited the peace treaties signed in 1947 under the terms of which the States bound by the treaties waived certain rights vis-à-vis third parties. He (Mr. Ago) was not convinced that that was an example of a treaty conferring a right; the third parties would perhaps gain advantages in fact, but not actually in law. Italy, like Finland, had assumed an obligation vis-à-vis the other parties to the treaty: the obligation not to claim a right vis-à-vis a third party; the third party had gained an advantage, but it could not be said to have acquired a right vis-à-vis Italy. Italy had an obligation to the other parties to the treaty, but not to third parties. Such examples might be quoted either way and proved little.

101. Some speakers had maintained that acceptance of the theory that a right could be conferred on a third State by a treaty meant that the third State was always safeguarded, because it could always refuse the right. But as he had pointed out before, according to that theory the third State could not refuse the right; it could renounce it, but it possessed it. For if the treaty could confer the right without the third State's assent, that State could not refuse it, because refusal meant refusal of assent, and according to the theory assent was not required. The third State must take note of the fact that it possessed the right and perform a unilateral act to divest itself—in other words renounce the right. That point was worth reflecting on.

102. He was convinced that there was no general rule of customary law to the effect that rights could be conferred on a third State. Of course the Commission could establish such a rule, but would that really be an advance? Much had been said of the progressive development of international law, but what progress would be made by adopting one system rather than the other—the system which permitted a right to be conferred without the assent of the third State rather than that which required its assent?

103. Mr. EL-ERIAN said that article 60 was not intended to cover rights arising out of constituent instruments of international organizations or general multilateral treaties of a law-making character which created general rules regulating the conduct of States and which, in the Commission's view, should be open to participation by all States. He did not mean, however, that a State acquiring independence and taking its place in the community of nations was not bound by customary law, even though it had not taken part in the formation of the custom.

104. Article 60 was concerned with rights for individual States or particular arrangements between groups of States. After a long discussion at the sixteenth session,[19] the Commission had decided not to include in its draft an article concerning objective régimes, since that would take it too far into a very complicated subject falling within other branches of international law besides the law of treaties.

The meeting rose at 1 p.m.

[19] *Yearbook of the International Law Commission, 1964*, vol. I, pp. 96-109.

855th MEETING

Friday, 20 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. 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 60 (Treaties providing for rights for third States) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 60.

2. Mr. TSURUOKA said that, at first sight, the two articles 59 and 60, as drafted in 1964,[2] appeared to deal, the first with obligations for third States and the second with rights for third States. He rather thought, however, that article 60 dealt with a mixture of rights and obligations, and that with regard to obligations it covered some of the same ground as article 59. But even if articles 59 and 60 did not follow quite the same pattern, that did not affect the substance in any way and generally speaking he could accept the ideas they stated.

3. He had a suggestion to make concerning the drafting, however, which was that the problem should be approached from a different angle. Would it not be possible to take as the point of departure the obligations and rights of States parties to a treaty vis-à-vis third States, in other words, to start out from the opposite end? With that idea in mind, and on the understanding that if the Commission accepted his proposal article 59 would be redrafted on the same lines, he proposed a new text for article 60 which read:

[1] See 854th meeting, preceding para. 24.

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