

Document:-  
**A/CN.4/SR.855**

**Summary record of the 855th meeting**

Topic:  
**Law of Treaties**

Extract from the Yearbook of the International Law Commission:-  
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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,<sup>19</sup> 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.

<sup>19</sup> *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)<sup>1</sup>

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,<sup>2</sup> 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:

<sup>1</sup> See 854th meeting, preceding para. 24.

<sup>2</sup> *Yearbook of the International Law Commission, 1964*, vol. II, pp. 181-182.

“ The States parties to a treaty shall respect the right of a State which is not a party to the treaty to enjoy the advantage stipulated (a) if the parties to the treaty intend by a provision of the treaty to accord that advantage either to the State in question or to a group of States to which it belongs or to all States, (b) and if the State complies with the conditions laid down in the treaty or established in conformity with the treaty for the enjoyment of that advantage.”

4. Mr. PAREDES said that a treaty was, by definition, an agreement between two or more States on one or more matters, but such agreement did not and could not exist on the question of imposing obligations or rights on a third State. In both cases, the consent of the parties, which was the reason or basis for the treaty, was lacking.

5. The obligations imposed by a State or group of States on an aggressor might be necessary, proper and just. They were necessary inasmuch as the paramount rule governing co-operation between States in the modern world was peace among the nations, and peace was one of the essential purposes of the United Nations. It was obvious that in that sense the imposition of sanctions on an aggressor was an absolute necessity. That necessity did not, however, derive from a contract between the victim of aggression and the aggressor, even if a treaty was concluded between them, as might well be the case, for it was self-evident that an aggressor might at some point accept as a lesser evil the obligations it had negotiated with the victim of aggression. But that could never in any circumstances be regarded as an agreement, for it was inconceivable that an aggressor would accept its status as an aggressor and conclude a treaty establishing the obligations devolving on it as a result of its aggression. There could undoubtedly be a valid and lawful treaty between the victorious victims of aggression and the defeated State, but there could be no treaty relationship between the victims of aggression and the aggressor.

6. The same could be said of rights. In view of the principle of the sovereign equality of States, it was impossible to impose a right on a third State. The right must be accepted by that State, which was the sole judge of whether the right was to its advantage or disadvantage. It was only when a third State voluntarily accepted rights conferred on it that those rights produced their effects. Otherwise, even if it was maintained that the third State retained the capacity to accept or reject the right, relations between the States could be vitiated by a number of circumstances.

7. For instance, a right created by a treaty between two or more States in favour of a third State might not have been brought to the notice of that State and be known only to the parties to the treaty. The third State, being unaware of the right conferred on it, might in certain circumstances perform acts which seemed to signify a tacit acceptance, whereas that was not in fact the case. A right might thus become prejudicial to the State on which the original parties had believed they were conferring a benefit. The third State was the only one that knew whether, having regard to the circumstances and the relations arising from the right, that right was to its advantage. It was therefore essential that the third State should recognize and accept the right before

exercising it. For that reason, he was satisfied with the wording adopted in 1964, although he would like the words “ expressly or impliedly ” to be deleted.

8. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said there was general agreement that the rule in article 60 should be stated in a more positive way in preference to the present permissive language. The discussion during the past two meetings had been on a high level, but not much fresh ground had been broken, and the general attitude of members was much the same as it had been at the sixteenth session. Some found it impossible to accept the idea of a right arising directly from a treaty and interpreted article 60 in the sense that the rights provided for by a treaty would require the express consent or assent of the third State. Other members, for whose thesis Mr. Jiménez de Aréchaga had been the principal spokesman, took the opposite view and in 1964 had, as it were, allowed the text to go through because they regarded it as the greatest measure of agreement the Commission could achieve, rather than as a correct statement of the law.

9. It was evident from the present discussion that the Commission would have to adhere more or less to the 1964 text, but the Drafting Committee should consider the extent to which the various points raised could be met.

10. As a member of the Commission, his point of departure was the same as that of Mr. Jiménez de Aréchaga. In his opinion, under the existing rules of international law, the objection to the proposition that a treaty could create of its own force a right in favour of a third State could not be sustained. He remained unconvinced by the argument that the proposition was contrary to the principle of the equality of States, because there was no obligation on the third State to take up the right, even if no conditions were attached to its exercise.

11. On the question of the source of the right, the rule *pacta sunt servanda*, though an element, did not provide the whole answer because it did not explain why the right was binding vis-à-vis the third State. Nor must the source of the right necessarily be found in a *pactum*. Even a unilateral declaration by one State might in particular circumstances create a legal relationship with another. In the case of a treaty purporting to create rights for third States there was a double relationship because, as between the parties, any refusal to accord the right to a third State would be a violation of the treaty with respect to the parties to the treaty as well as a violation of the right of the third State.

12. He had set out the reasons for the conclusion that the right was recognized as a rule of customary law by international jurisprudence in his third report,<sup>3</sup> and no argument advanced since that time had shaken his own appreciation of the light thrown on the matter by international jurisprudence. It had been surprising to hear Judge Huber invoked in defence of the opposite thesis, because Judge Huber, who had been one of the members of the Committee of Jurists in the *Aaland Islands* case,<sup>4</sup>

<sup>3</sup> *Yearbook of the International Law Commission, 1964*, vol. II, pp. 21-26.

<sup>4</sup> League of Nations, *Official Journal*, October 1920, Special Supplement No. 3.

had clearly been a proponent of the position taken by Mr. Jiménez de Aréchaga.

13. Leaving aside the purely legal issue, about which there was a difference of opinion in the Commission, it was important not to include in the draft articles anything that might be open to an interpretation which could weaken the position of third States.

14. He understood the consensus of opinion to be that an application by a third State to use the right was in itself a form of assent that could create a legal nexus between the parties to the treaty and that State. If that were so, the substantive difference of opinion in the Commission was not as great as it appeared. There might be special cases in which a third State could only secure the enjoyment of the right provided for in the treaty through one of the parties, but that need not call for any fundamental change in the text of article 60.

15. Mention had been made during the discussion of the special problems raised by objective régimes or by new States entering the international community, but even there the position of the third State under the provisions of article 60 was not necessarily weak, particularly if it were borne in mind that customary law developed parallel to the régime established by the treaty.

16. The Drafting Committee would certainly need to consider the proposal made by Mr. Tsuruoka to invert the whole structure of articles 59 and 60 and state the law in terms of the legal position of the parties to the treaty. But what the Commission was trying to do in those articles was to state what should be the position of third States. Clearly, as between the parties, *pacta sunt servanda* would apply. It was their legal position vis-à-vis third States and vice versa which the Commission was seeking to formulate.

17. For the sake of brevity he would not comment on many of the other points made during the discussion, interesting though that would be.

18. Mr. AGO said that, convinced though he was of the principle that the consent of the third State was necessary in order to establish a right in its favour and that it was impossible for a right to arise for any subject of law whatever against its will and without its consent, he nevertheless appreciated the underlying reason for certain misgivings expressed by Mr. Jiménez de Aréchaga and by the Special Rapporteur. He wondered whether there was not some way of preserving the principle while at the same time taking account of those misgivings.

19. As he had already said, if it were assumed that a right arose from the treaty itself without the assent of the third State, the absurd result would be that the third State could not even reject the right: it would have to recognize that the right had arisen and then renounce it. He found that idea unacceptable. Leaving the principle aside and viewing the matter from the standpoint of practical consequences, he wondered whether some objections did not arise from the expression "expressly or impliedly". He had been struck by Mr. Jiménez de Aréchaga's observation that there were sometimes manifestations, such as the exercise of a right, in which it was hard to discern a manifestation of implied assent. In such cases the implied assent had probably been given previously, but in some other way.

20. He himself would be inclined to think that what really happened was something entirely different. When the parties to a treaty wished to confer a right on a third State, the assent of the third State was either expressed, or was presumed to have been given unless there was evidence to the contrary. In fact, instead of using the word "impliedly", the Drafting Committee should consider the possibility of replacing sub-paragraph (b) by the wording: "if the State assents thereto. Its assent shall be presumed in the absence of any indication to the contrary".

21. That wording would make it possible to preserve the principle of assent, which was essential, while at the same time taking account of the misgivings of those who wished to clarify the concept of implied assent. It would thus go some way to meet the objections that had been raised and would gain a wider measure of support.

22. Mr. BARTOŠ said that, in principle, he supported the amendment proposed by Mr. Ago, provided that the Drafting Committee considered the question of the time within which the third State would have to give an "indication to the contrary", for after a certain lapse of time, it might be dangerous to reserve the presumption that assent had been given.

23. The CHAIRMAN, speaking as a member of the Commission, said he appreciated that in theory the form of words proposed by Mr. Ago did not impair the principle on which the article was based. But Mr. Bartoš had brought up an important practical point: after how long could the silence of the third State be regarded as signifying assent, and what time-limit did a State have to rebut the presumption that it had assented?

24. Mr. AGO said that, under his proposal, a third State could reject the right at any time.

25. Mr. de LUNA said that, where the parties to a treaty assumed an obligation *inter se* to accord a right to a third State, that obligation between the parties was complete, irrespective of the will of the third State, by virtue of the *pacta sunt servanda* rule. That did not mean that the right conferred on the third State arose from that rule, but that by virtue of the principle that whatever was not prohibited was permitted, all States could assume obligations vis-à-vis each other by means of a treaty, provided that it did not infringe any rule of international law. Regardless of the importance which members of the Commission, who were divided on that point, attributed to the *Free Zones* case,<sup>5</sup> to the practice reflected in peace treaties or to the example of accession clauses quoted by Mr. Verdross in 1964,<sup>6</sup> he knew of no principle of international law that prohibited States parties to a treaty from assuming an obligation among themselves to accord a right to a third State.

26. Whether they considered that a right was effectively created for a third State or that there was an offer which only gave rise to a right when it was expressly or impliedly accepted by the third State, all the members of the Commission were obviously agreed that by virtue of the principle of good faith, whatever the parties had promised *animo obligandi* they were bound to perform. It would

<sup>5</sup> P.C.I.J. (1932) Series A/B, No. 46.

<sup>6</sup> *Yearbook of the International Law Commission, 1964*, vol. I, 736th meeting, para. 51.

obviously be contradictory to maintain that the right was created solely by the *pacta sunt servanda* rule, which bound only the parties.

27. Mr. El-Erian had mentioned estoppel, but that was a different aspect of the same idea.

28. In any event, Mr. Ago's proposal did not affect the principle on which the Commission was divided into two camps; but on the other hand it did solve a number of practical problems which would be greatly complicated by the concept of implied assent. The presumption of assent which it enunciated was satisfactory to those who considered that the assent was given for the purpose of exercising a right, to those who considered that it was assent to the creation of a right, to all the members of the Commission who had difficulty with the legal interpretation of the concept of implied assent, and lastly, in regard to the practice of States, which would be relieved of their uncertainty; for the concept of implied consent was not conducive to the security and stability of international relations.

29. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's proposal was close to what he had originally put forward in his third report<sup>7</sup> in an attempt to meet both points of view in the doctrinal controversy. If the proposal were found generally acceptable and secured wide support in the Commission, he would be very much in favour of a change on those lines. His personal preference would be to make no reference in article 60 to express or implied assent, because of the difficulties of interpretation it might cause.

30. The CHAIRMAN suggested that article 60 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

ARTICLE 61 (Revocation or amendment of provisions regarding obligations or rights of third States) [33]

[33]

*Article 61*

*Revocation or amendment of provisions regarding obligations or rights of third States*

When an obligation or a right has arisen under article 59 or 60 for a State from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable.

31. The CHAIRMAN invited the Commission to consider article 61, for which the Special Rapporteur had proposed a new text as a basis for discussion, reading:

" 1. When an obligation had arisen for a State not a party to a treaty under article 59, the parties afterwards may:

(a) terminate the obligation in whole or in part on giving notice to such State;

(b) modify the obligation in any other respect only with the consent of such State.

" 2. When a right has arisen for a State not a party to a treaty under article 60, the parties afterwards may:

(a) terminate the right in whole or in part, after giving X months' notice to such State, unless it appears that the right was intended to be irrevocable except with its consent;

(b) modify the right in any other respect only under the rules laid down in articles 59 and 60."

32. Sir Humphrey WALDOCK, Special Rapporteur, said that article 61 was closely linked with article 59 and, more particularly, article 60 (A/CN.4/L.107). Some interesting comments had been made by governments which he had analysed in his report (A/CN.4/186/Add.2), possibly at greater length than might at first sight appear necessary, because they raised points of principle that would make it necessary for the Commission to take a closer look at the article.

33. More than one government considered that the article should be deleted, but he found that view unacceptable because the rules set out in the two preceding articles called for a provision on the position of the parties regarding the revocation or amendment of provisions in a treaty concerning the obligations or rights of third States. The issue had caused difficulties in a case before the Permanent Court of International Justice. The Commission would remember the statement in the joint dissenting opinion of Judges Altamira and Hurst in the *Free Zones* case.<sup>9</sup>

34. There was force in the Netherlands Government's argument that the provisions of articles 59 and 60 ought to apply to transactions revoking or amending provisions regarding obligations or rights of third States, but the question was whether the Commission should endorse the logic of that contention or treat the relationship between the parties to a treaty and a third State on which the treaty had conferred an obligation or a right as a special case, owing to the manner in which the obligation or right had arisen. The Commission had in fact adopted the latter standpoint, which as Special Rapporteur he regarded as correct, but the position between the parties and the third States ought to be indicated more clearly. After examining the observations by governments and delegations he had come to the conclusion that article 61 was more intricate than appeared on the surface and would need further discussion.

35. It might be desirable to deal separately with obligations and with rights, as had been done in the preceding articles, because there was force in the criticisms that the Commission had gone too far in protecting the position of third States in regard to rights, and that it was not appropriate to require the consent of third States to the termination of an obligation. For those reasons he had prepared a new text for discussion.

36. Mr. VERDROSS said that, if the Commission retained articles 59 and 60, and even if the latter were amended as proposed by Mr. Ago, the text of article 61 adopted by the Commission at the first reading was preferable to the new text suggested by the Special Rapporteur. Articles 59 and 60 were based on the idea that there could be no obligation or right for a third

<sup>7</sup> *Op. cit.*, vol. II, document A/CN.4/167, article 62.

<sup>8</sup> For resumption of discussion, see 868th meeting, paras. 2-52.

<sup>9</sup> *P.C.I.J.* (1932), Series A/B, No. 46, p. 185.

State without its consent; it followed logically that such an obligation or right could not be modified without the consent of the third State unless it appeared from the treaty that the provision establishing the obligation or right was revocable.

37. Even if the Commission wished to follow the Special Rapporteur, it did not seem possible to say that an obligation thus created by a treaty could be modified merely by giving notice to the third State. The treaty would first have to be amended, and it was that amendment which would be notified to the third State.

38. If, as seemed unlikely, the Commission wished to revert to the Special Rapporteur's original idea, which had been supported by Mr. Jiménez de Aréchaga, Mr. de Luna and himself, he saw no need to specify that if the States parties to the treaty had created a right in favour of a third State, they could not modify the treaty in that respect unless the third State had not exercised that right.

39. Mr. BRIGGS said that he was inclined to favour the Special Rapporteur's suggestion that the revocability of obligations and of rights of third States should be dealt with separately, but wondered whether the emphasis in the article should be placed on revocability or on the other aspect, namely, that of the right of the parties to amend a treaty provision, thus making the obligation or right inoperable for non-parties.

40. The question was what were the rights of the non-party and of the parties in the matter, and whether an obligation acquired or a right accepted by a non-party could be revoked or amended without its consent. The answer given to that question in the 1964 text was in the negative, but some governments had criticized it for being too rigid.

41. The Special Rapporteur's new text for paragraph 1 (a) was probably a correct statement of the rule, but how should the new paragraph 1 (b) be construed? Did it mean that an obligation acquired under a treaty provision could not be amended for purposes of giving it greater precision without the consent of a non-party? The question was a real one and had arisen in connexion with Article 2 of the Charter when, in the Final Act of the London nine-Power Conference of 1954, the Federal Republic of Germany had declared that it "accepts the obligations set forth in Article 2 of the Charter".<sup>10</sup> Could not the Charter nevertheless be amended without the consent of the Federal Republic of Germany? The consequence of a contrary interpretation would be to confer upon a non-party an absolute veto over the modification of treaty provisions, and that would be inadmissible. If, as he supposed, the Special Rapporteur's intention in paragraph 1 (b) was to indicate that a State not party to the treaty should be allowed to participate in the process of revision and that it could not be bound by the obligation in the revised provision without its consent, that should be made clearer. He doubted whether the Commission could go further.

42. With regard to the new paragraph 2, it was preferable to express the rule in terms of the termination or amendment of a treaty provision and then to set out the

consequences for the third State. The problem was not merely one of juristic logic, depending upon whatever theoretical views were held in regard to articles 59 or 60, but was one of policy. The purpose of the Special Rapporteur's new text in paragraph 2 was acceptable in so far as the parties had the right to terminate or modify the provisions of a treaty after giving due notice.

43. The difficulty to which that paragraph gave rise concerned the alleged irrevocability of a right flowing from a treaty provision and the power of veto a non-party might have over modifying such a provision. The revocability of a particular treaty provision or of a right accepted by a third State might vary considerably with the treaty. To take as an example the case of a treaty providing freedom of passage for merchant vessels of all States through a canal, could the parties to the treaty terminate one of its provisions simply by giving notice? Could they amend a provision by stipulating, without the consent of the users of the canal not parties to the treaty, that the freedom of passage would be limited to non-nuclear merchant vessels? The second hypothesis would be less a revocation of a right than a limitation upon it. Was the essence of the right of a non-party a right of user under the original conditions laid down in the treaty, or did it include the right to participate in the modification of that right even to the extent of preventing any such modification? A State not party to the treaty might only be interested in one of its provisions, and in that eventuality the rights of such a State in respect to termination or modification of the provision in question might be regarded as less important than the rights of the parties in regard to the treaty as a whole. Finally, would the same argument hold good of a right deriving from a bilateral treaty governing navigation through a canal that might be used by some hundred States not parties to the treaty?

44. Questions of that kind were easier to raise than to answer and on balance his conclusion was that, while the question of objective régimes in international law should be completely reserved, for the purposes of article 61 the presumption on which the 1964 text had been based ought to be reversed, as suggested by the Special Rapporteur in the new paragraph 2. Subject to drafting changes, something on those lines might provide a solution.

45. Mr. JIMÉNEZ de ARÉCHAGA said that he would comment on the Special Rapporteur's text. He thought the Netherlands Government was right in suggesting that there was no need for a provision on the lines of paragraph 1 dealing with the revocation or amendment of obligations. For either such a provision eliminated the obligation of the third State, or made it less onerous, so that in fact it conferred a right on the third State, which would be governed by article 60; or it made the obligation more onerous, and thus imposed an obligation on the third State, which would be governed by article 59.

46. If paragraph 1 were deleted, that would also take account of the Hungarian Government's comment that there was a certain lack of concordance between article 61 and the two preceding articles.

47. Paragraph 2, on the other hand, provided the answer to a very real problem which had arisen in inter-

<sup>10</sup> *British and Foreign State Papers*, vol. 161, p. 405.

national practice. He fully supported the Special Rapporteur's suggestion to reverse the rule laid down in 1964 as to the irrevocability of rights. The formula now proposed would thus conform fully with the decision of the Permanent Court of International Justice in the *Free Zones* case on the question whether a right conferred on a third State could or could not be abolished by the contracting parties without the consent of the beneficiary.

48. The issue before the Court, as it concerned the Free Zone of Gex, was of particular interest. That zone had been created in 1815 by the Treaties of Vienna and Paris, which provided that France should grant the benefit of the zone to Geneva. In 1919, France had secured from all the parties to the Treaty of Vienna the inclusion in the Treaty of Versailles of article 435, which stated that the stipulations of 1815 concerning the Free Zones were no longer consistent with present conditions. France had then proceeded to contend before the Court that she had in consequence been relieved of her obligations, since the third State, Switzerland, which was not a party to the 1815 and 1919 treaties, had no right to claim that the abrogation of the treaty depended on its consent.

49. Switzerland had replied that the intention of all the parties in 1815 had been to grant to it an irrevocable right and that it therefore possessed a vested right which could not be abolished without its consent. The Court had found in favour of Switzerland, stating: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such".<sup>11</sup>

50. The Court's reference to "the will of sovereign States" which were parties to the treaty as having the "object and effect" of creating a right for the third State, meant that it had accepted the Swiss argument that the *pacta sunt servanda* rule constituted the legal foundation of the rights in favour of the third State. The Court did not base its conclusion on the theory of the offer and collateral agreement, which had only been invoked in a separate opinion by Judge Negulesco.

51. In the Court's language, "actual right" meant one which could not be abolished without the beneficiary's consent. Since, however, the Court had stated that the intention of granting an irrevocable right could not be "lightly presumed", it was appropriate to formulate the rule as the Special Rapporteur now suggested in his proposed paragraph 2 (a).

52. An example of an intention to grant an irrevocable right was provided by the treaties opening the rivers Uruguay and Paraná to the free navigation of all flags. Those treaties were the outcome of a long conflict between the Province of Buenos Aires, which had wanted

to close the rivers and thus have the monopoly of international trade, and the other provinces higher up the River Plate, which wanted international shipping to have free access to their ports.

53. Articles 32 and 35 of the United Nations Charter, which provided for the right of non-member States to appear before United Nations organs in certain cases, were an example of treaty provisions granting to third States rights which could be modified or abolished without the beneficiary's consent, by amendment under Articles 108 or 109 of the Charter. He was not convinced, however, of the wisdom of requiring a notification in such cases. To take the example of a possible amendment of Article 32 or Article 35 of the Charter, it was difficult to see what States would have to be notified under the provisions of the Special Rapporteur's paragraph 2 (a).

54. He saw no necessity for the provision embodied in the Special Rapporteur's paragraph 2 (b), because the modifications would already be covered by articles 59 and 60. Paragraph 2 (b) would to some extent conflict with paragraph 2 of article 60, which allowed for the establishment of new conditions for the exercise of a right, and laid down that that modification could be effected "in conformity with the treaty" and not necessarily by means of a treaty.

55. The point raised by Mr. Briggs on the right of passage would be covered by paragraph 2 of article 60, relating to the conditions for the exercise of the right; article 61 dealt with the revocation of the right.

56. Mr. AGO said he agreed with Mr. Verdross that the Commission should be consistent and should bear in mind the position it had taken in the preceding articles. If, as he believed, the third State's right or obligation was based on an agreement between the parties to the treaty and the third State, obviously that right or obligation could not be modified or revoked without its consent. From that point of view, article 61 as adopted by the Commission in 1964 was certainly preferable, despite a slight drafting error, for it was not the "provision" of the treaty which could not be revoked or amended without the consent of the third State, but the third State's obligation or right.

57. However, the rule stated in the 1964 text was perhaps too rigid and went too far in the direction of safeguarding the right or obligation of the third State. Since an agreement had been formed between the parties to the treaty and the third State, that agreement should be governed by all the rules relating to agreements in general; it would be absurd for that particular agreement to receive better protection than was normal. To state that the obligation or right could not be revoked or amended without the third State's consent unless it appeared from the treaty that the provision was intended to be revocable was to make the right or obligation virtually inviolable. No provision had been made for the case in which the treaty constituting the basis of that right or obligation became void as a result of a fundamental change of circumstances or the emergence of a new rule of *jus cogens*. But in such a case, the offer contained in the treaty obviously became void and the obligation or right of the third State could not continue to exist although the treaty from which it derived was void.

<sup>11</sup> P.C.I.J. (1932), Series A/B, No. 46, pp. 147-148.

58. Moreover, though he was grateful to the Special Rapporteur for having tried to find a more flexible wording for the article, he was afraid that his suggested text went too far in that direction, since it virtually eliminated the idea of the third State's consent.

59. He was not sure, either, that a separate system need be established for rights and for obligations. A State might be reluctant to accept a right offered to it by other States and equally reluctant to lose an obligation which it had previously accepted. International life was such that an obligation might be an essential safeguard for a State, and that State might be placed in a very awkward position if it were deprived of that safeguard by a unilateral act of the parties to the treaty. A third State might have had good reasons for accepting the obligation and it might also have good reasons for wishing to retain it.

60. The Special Rapporteur's text was perhaps also rather imprecise with respect to rights; it might be difficult to prove that it "appears from the treaty that the right was intended to be irrevocable".

61. Like the 1964 text, it also failed to cover the two cases he had mentioned, those where a treaty became void owing to a fundamental change of circumstances or as a result of the emergence of a new rule of *jus cogens*.

62. There was one other point that should perhaps be taken into account in article 61, or at least in the commentary, namely, that all the defects of consent were applicable to the agreement between the parties to the treaty and the third State which had given rise to the right or obligation of the third State.

63. The Commission should reconsider the article carefully and try to arrive at a more satisfactory drafting.

64. Mr. ROSENNE said he would be grateful if the Special Rapporteur would clarify a number of points with regard to the new text he had put forward. The first was what meaning was intended to be attached to the word "terminate"? In the Commission's discussions, two possible meanings had been suggested: one, that the draft articles did not cover all cases of termination, with special reference to such matters as obsolescence; the other, that it only referred to termination in accordance with one of the substantive provisions of part II of the draft articles. It was precisely in order to avoid that difficulty that in 1964 the Commission had decided not to use the word "terminate" but to use instead the word "revoke".<sup>12</sup>

65. Secondly, what was the meaning of the expression "in whole or in part", used in paragraphs 1 (a) and 2 (a), and was that expression intended to establish a connexion between the provisions of article 61 and those of article 46 on separability?

66. Thirdly, did the term "modify", which was used in paragraphs 1 (b) and 2 (b), have the same meaning as that given to it in the group of articles on modification?<sup>13</sup>

67. Fourthly, what were the Special Rapporteur's reasons for replacing the expression "unless it appears from the treaty" by "unless it appears"?

68. He questioned whether article 61 was necessary at all, since its real content was, or should be, covered by

an adequate formulation of articles 59 and 60, to which it in fact referred on the crucial question of rights.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the changes of phraseology noted by Mr. Rosenne were largely due to the fact that the revised text referred to the modification of the obligation or right of the third State, and not to the modification of the treaty provision establishing the obligation or right. In particular, the reference to the termination of an obligation was intended to cover renunciation by the parties of their right to enforce the obligation undertaken by the third State. The use in the 1964 text of the verb "to revoke" was due to the fact that the article had been drafted in terms of the modification of the treaty provision. The amendment of a treaty provision was a matter for the parties to the treaty; in the new approach, the emphasis was on the relation between the parties and the third State.

70. The question of renunciation in part might prove extremely complicated because it might involve a change in the rights of the third State. Perhaps it would be better to deal with the matter as one of modification under paragraph 1 (b).

71. In paragraph 2 (a), after the words "unless it appears", the words "from the treaty" had been omitted unintentionally and should be restored.

72. The question of the need to retain article 61 should be dealt with when the Commission had fully discussed the provisions of the article.

73. The CHAIRMAN, speaking as a member of the Commission, said the new version of article 61 put forward by the Special Rapporteur was a laudable effort and he could accept the change in the method of formulation whereby it was the third State's obligation or right, and not the provision of the treaty, that might be modified.

74. The new version, however, went rather further than was desirable, since it was essential that there should be some correspondence between the rule on the creation of a right or obligation for a third State and the rule on the modification or termination of that right or obligation. The Commission had required the express consent of the third State in the case of an obligation and had conceded that such consent need only be implied in the case of a right. Mr. Ago had helped to bring conflicting doctrinal views still closer together by proposing that article 60 should contain a presumption in favour of acceptance of the right by the third State. That being so, it would be logical to provide that an obligation might be modified or terminated with the implied consent of the third State, but, for practical reasons which had been ably stated by Mr. Ago, it would be going too far to say that an obligation could be terminated merely by giving notice. It was not possible, from the theoretical point of view either, to terminate by mere unilateral notification an obligation which had been created by the effect of a collateral agreement between the parties to a treaty and a third State.

75. In 1964, he had supported the presumption in favour of the irrevocability of the right of a third State, and he hoped that that presumption would be maintained. An intention to accord a right was assumed to mean a desire for the permanent existence of the right,

<sup>12</sup> *Yearbook of the International Law Commission, 1964*, vol. I, 751st meeting, paras. 71-95.

<sup>13</sup> Articles 65-68.

in the absence of an explicit statement that it was revocable.

76. He shared Mr. Ago's concern about the fate of a third State's obligation or right, should the treaty from which that obligation or right had arisen be voided as a result of the emergence of a new rule of *jus cogens*.

77. Mr. BARTOŠ said that he had little to add to the views which had just been expressed by Mr. Ago and Mr. Yasseen and with which he was in complete agreement. At the first reading, he had upheld the thesis that there was a presumption in favour of the irrevocability of established situations. The great principles of freedom and self-determination argued in favour of giving a third State the possibility of divesting itself of an obligation, even if that obligation had the appearance of an international obligation. For the reasons put forward by Mr. Ago and Mr. Yasseen, he adhered to the position he had taken at first reading, namely, that revocability was not presumed and that the consent of the State affected by revocability must be expressed.

78. Mr. de LUNA said that he was inclined to favour a reversal of the presumption, as was done in the Special Rapporteur's new text, since selfishness was more common than generosity in international relations.

79. It was essential to bear in mind the need to safeguard the security of legal transactions. At the same time, the protection extended to the third State should not go beyond what was afforded to the parties themselves and he commended the Special Rapporteur for his efforts to prepare a text which took that aspect into account.

80. At the same time, the Commission must be consistent. It had based the rules embodied in articles 58 to 60 on the consent of the third State, and consequently on a collateral agreement. The logical consequence of that system was that no rights or obligations could be established for the third State without its consent and the same approach should prevail in article 61.

81. A new point had been raised by Mr. Ago when he had referred to the possibility of the nullity of the treaty which had established the right or obligation for the third party. The question would then arise whether the collateral agreement with the third party could continue to exist independently of the main treaty. That problem involved the difficult issue of conflicting treaty obligations.

82. The Special Rapporteur's new formulation was much closer to his own doctrinal position, and he himself would have favoured even greater flexibility. It should be recognized, however, that the governments had not asked for that and had in fact expressed considerable anxiety at the possible consequences of the presumption embodied in the article.

83. Finally, the rule in article 61 should not place the third State in a better position than it would have enjoyed had it been a party to the treaty. In the discussions which had led to the Hay-Pauncefote Treaty of 1901 on free navigation in the Panama Canal, the United Kingdom had advocated making the treaty open to accession by all States, but the United States had not agreed and had preferred to make provision in the treaty for the rights of free navigation for all flags. The position

given in cases of that type to a third State under article 61 should not therefore be better than that which would result from accession.

The meeting rose at 12.45 p.m.

## 856th MEETING

Monday, 23 May 1966, at 3 p.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. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock.

### Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 61 (Revocation or amendment of provisions regarding obligations or rights of third States)  
(continued)<sup>1</sup>

1. The CHAIRMAN invited the Commission to continue its consideration of article 61.

2. Mr. TUNKIN said that the Special Rapporteur's redraft<sup>2</sup> of article 61 was hardly an improvement on the 1964 text. In the first place, there was a logical contradiction between paragraphs 1 (a) and 1 (b); modification could come close to termination and it was difficult to see why mere notice should suffice for the termination but consent should be required for the modification of an obligation.

3. A more important point, however, was that raised by Mr. Ago at the previous meeting. There was no basis for assuming that an obligation invariably represented a burden from which the third State would be glad to be released. In fact, it was not uncommon for the third State to have some interest, or to derive some advantage, from the obligation which it had agreed to perform.

4. The obligations of the third State arose from a collateral agreement between that State and the original contracting parties. That collateral agreement could only be terminated with the consent both of the original parties and of the third State, unless it had been otherwise agreed.

5. Paragraph 2 dealt with the rights of the third State and the same principles should apply. He saw no justification for reversing the presumption embodied in the 1964 text, which was consistent with articles 59 and 60 and also with such basic principles of inter-

<sup>1</sup> See 855th meeting, preceding para. 31.

<sup>2</sup> *Ibid.*, para. 31.