Document:-

A/CN.4/SR.856

Summary record of the 856th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1966, vol. I(2)

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 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 61 (Revocation or amendment of provisions regarding obligations or rights of third States) *(continued)*[1]

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

2. Mr. TUNKIN said that the Special Rapporteur's redraft[2] 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-

[1] See 855th meeting, preceding para. 31.

[2] *Ibid.*, para. 31.

national law as that of the sovereign equality of States. At the same time, he agreed with Mr. Ago that the 1964 text was unduly rigid and that the Drafting Committee should try to improve on it.

6. Mr. ROSENNE said that he doubted if either the 1964 text or the Special Rapporteur's redraft provided a solution to the difficult problems involved in article 61, which, as governments had observed, required further study. In principle, he agreed with Mr. Ago that no essential difference should be made in the article between the rights and the obligations of third parties.

7. He had been struck by the fact that hardly any mention had been made of the only relevant judicial authority in the matter, the 1952 judgment of the International Court of Justice in the *Case concerning Rights of Nationals of the United States of America in Morocco*.[3] Admittedly it dealt with a matter arising from a most-favoured-nation clause, but it offered an extreme example of a problem similar to that dealt with in article 61. The International Court had said nothing about the consent of the beneficiary of the most-favoured-nation clause: when the treaty specifying the rights enjoyed through the most-favoured-nation clause fell, the treaty containing the most-favoured-nation clause also fell to that extent. In its judgment, the Court had laid particular emphasis on the intention of parties. If that was the position when the third State was acting by virtue of an express clause in a treaty, he saw no reason why the position should be any different in the case envisaged in article 61.

8. The position he was advocating was fairly close to the views expressed by Sir Gerald Fitzmaurice in his second[4] and fifth[5] reports and by the present Special Rapporteur in his commentary to article 62.[6] The Commission had made a mistake when it had reversed that trend in 1964 and had omitted to take into account the only judicial precedent which existed in the matter.

9. In his sixth report, the Special Rapporteur had attempted to draw a fine distinction between the termination or modification of the treaty provision itself and that of the rights or obligations of the third State. But if the third State had assented in writing to the creation of those rights or obligations, the result would be a treaty within the definition adopted by the Commission, and the problem would then be one of compatibility between that ancillary treaty and the main treaty. In those circumstances, article 63 would be relevant. The conclusion would probably be the same if the consent were not given in writing, by virtue of the general reservation contained in article 2.

10. He was concerned at the Special Rapporteur's explanation that the omission of the words " from the treaty " after the words " unless it appears " in paragraph 2 (*a*) was accidental. He himself had supposed that it was deliberate, so as to cover not only the original treaty but also the ancillary agreement, or assent of the third State. With the narrower interpretation which followed from the Special Rapporteur's explanation, the article might prove somewhat unbalanced.

11. The 1964 text had been criticized by governments as giving excessive rights to third States, but the Special Rapporteur's redraft hardly provided an answer to those criticisms. Both texts seemed to allow the third State to terminate unilaterally and at will any right or obligation it might have assumed under articles 58 to 61 without even informing the principal parties. Such a solution could not be right. Stability and reciprocity must be maintained between the principal parties and the third State. The only answer to the problem was to make it clear that both the principal agreement, as between its parties, and the ancillary agreement, as between its parties, could be terminated or modified only in accordance with the various provisions of the draft articles with all the consequences and all the safeguards therein specified. The United Kingdom Government's observations gave an indication of the direction in which an adjustment of article 61 should be sought.

12. Mr. CASTRÉN said that the comments of governments gave the impression that the text adopted by the Commission in 1964 was too favourable to the State for which an obligation or a right had arisen from a provision of a treaty to which it was not a party and thus unduly restricted the freedom of action of the parties. That text probably also had the defect of being too concise; it would be more satisfactory to deal separately with rights and obligations and with their respective modification and termination. Moreover, according to the text adopted in 1964, it would be the " provision " of the treaty which would be revoked or amended, whereas in fact, as the Netherlands Government had pointed out, it was only the obligations or rights arising from that provision which would be revoked or amended. Unlike Mr. Rosenne, he considered the distinction justified.

13. The new draft proposed by the Special Rapporteur was much more carefully worked out, more detailed and better balanced. He was prepared to accept it as a basis for discussion, but would like to suggest a few amendments.

14. First, for the reason he had already given, the words " provisions regarding " should be deleted from the heading of the article. Secondly, for the sake of conformity with other articles, particularly article 59, as well as for other reasons, the word " consent " in paragraph 1 (*b*) and paragraph 2 (*a*) should be replaced by the word " agreement ". And lastly, the proviso at the end of paragraph 2 (*b*) should refer only to article 60, since article 59 related solely to obligations.

15. It was possible, as Mr. Jiménez de Aréchaga had said, that paragraph 1, and probably also paragraph 2 (*b*), were unnecessary; the deletion of those two provisions would avoid the doctrinal difficulties which had been mentioned by Mr. Verdross, among others. Everything depended, however, on the final form given to articles 59 and 60.

16. Mr. TSURUOKA said that there were two possible solutions to the problem dealt with in article 61. The

[3] *I.C.J. Reports*, 1952, p. 176.

[4] *Yearbook of the International Law Commission, 1957*, vol. II, document A/CN.4/107, para. 211.

[5] *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/130, para. 89.

[6] *Yearbook of the International Law Commission, 1964*, vol. II, p. 20, para. (3).

right or obligation of the third State might be held to be based on a collateral agreement between the parties to the treaty and the third State. In that case, the amendment or revocation of the right or obligation did not present any special problem: they were governed by the relevant articles applicable to treaties in general. If the Commission took that view, it would be logical to delete article 61.

17. If, on the contrary, it decided in favour of the alternative solution, which was to lay down special rules in the matter, he would prefer the new wording proposed by the Special Rapporteur to the formula adopted in 1964. He would merely propose that the words " X months' " be inserted between the words " giving " and " notice " in paragraph 1 (*a*), so that notice would be required for termination of an obligation just as it would be required for termination of a right in accordance with paragraph 2 (*a*). It was necessary to safeguard the stability of international relations, and, under rules of that kind, the obligation affected not only the parties to the treaty and the third State, but sometimes other States as well. For example, say States A and B had created an obligation, by means of a treaty, for State C; then State D, which was in the same situation as State C vis-à-vis States A and B, might find itself in a privileged position because of the fact that it had not been asked to assume the same obligation as C. In such a case, it was desirable that the change of rule should be smooth and orderly and a few months' notice would enable State D to prepare itself for the change.

18. Mr. PAREDES said that he adhered firmly to the principle that both obligations and rights could only arise from the agreement of the parties, and that principle should be applied in the case dealt with in article 61. If a right was conferred upon, or an obligation laid down for, a third State, that right or obligation could not be terminated without the consent of the third State. The same process which had been used for creating an obligation or a right must be used for modifying or extinguishing it. The consent of the parties was the decisive element both for the main treaty and for the collateral agreement between the third State and the original parties.

19. Considerations of justice and fairness supported that view; where a third State accepted an obligation, it did so because it thereby gained some benefit or acquired some right. For example, a third State might have agreed to sell its surplus oil production to the member States of a common market treaty; if, in consequence of that agreement, the third State made investments to increase its production, it would then be unfair to face it suddenly with a decision by the original parties to terminate the agreement and stop buying its oil.

20. He did not believe that rights could be imposed upon a third State, because they invariably involved corresponding obligations. The third State concerned was therefore alone entitled to accept or reject the rights. If it decided to accept and exercise the rights, it often carried out acts which affected its whole existence. It was therefore unfair to permit the original contracting States to terminate the rights.

21. There was a discrepancy between the provisions of articles 59 and 60 on the one hand and the Special Rapporteur's article 61 on the other. The latter specified that notice was required for the termination of an obligation, whereas articles 59 and 60 contained no such provision. A situation could thus arise in which a third State might not be aware of the creation for it of certain rights or obligations, and some action by that third State might be construed by the original parties as acceptance, whereas nothing of the kind was intended. The rights of small countries must be safeguarded and, for that reason, he could not accept the Special Rapporteur's redraft.

22. As had been pointed out during the discussion, there was a difference between the creation of rights or obligations for a particular State and the laying down by the contracting States of a certain programme for the benefit of other States which fulfilled certain conditions. The latter type of situation was similar to an offer of freight rates by shipping companies; if the offer was accepted, a contract was brought into existence; there was no question of any obligation being imposed on a third party. The situation was different in articles 59 and 60, where obligations or rights were imposed on the third State. He could not accept the idea that rights could be imposed upon a third State, or that once created they could be abrogated without the consent of that State, since there was then a collateral agreement between that State and the original parties.

23. Mr. AGO said he wished to draw the attention of the Drafting Committee to the point which had been raised by Mr. Rosenne. At the previous meeting, the Special Rapporteur had said that the words " from the treaty " had been omitted unintentionally after the words " unless it appears " in paragraph 2 (*a*) of the English text, but he personally considered the omission felicitous. The Commission had already on several occasions questioned the accuracy of the expression " it appears from the treaty ", since texts other than the treaty might be taken into account. In the case under consideration reference might be made, *inter alia*, to the correspondence between the parties to the treaty and the third State.

24. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Ago that it would serve a useful purpose to drop the words " from the treaty " after " unless it appears ".

25. Mr. AGO said that it might perhaps be desirable to replace the expression " unless it appears " by some expression which was slightly more precise, such as, in French, " *s'il est établi* ".

26. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that it was perhaps arguable that paragraph 1 of article 61, dealing with obligations, could be dispensed with on the ground that it was covered by the general principles set forth in the other articles. Paragraph 2, dealing with rights, was, however, essential.

27. As far as a third State's obligations were concerned, there was undoubtedly a need in international relations for consultation and perhaps assent for revocation or amendment. Nevertheless, it would be inadmissible

in law to hold that those who had a right to enforce an obligation could not renounce that right; for certain classes of obligations, therefore, consent would obviously not be necessary. However, for certain other obligations of an objective character, or which formed part of a settlement, termination by the original States would not be a simple matter.

28. In paragraph 1, particularly in sub-paragraph (*a*), he had had in mind the case of renunciation and it might perhaps be better to use the verb " renounce " instead of " terminate ". With regard to Mr. Tunkin's remarks on the difference between sub-paragraphs (*a*) and (*b*) of paragraph 1, the use in sub-paragraph (*b*) of the words " in any other respect " was intended to make it clear that the modification envisaged would have an effect other than that of terminating the obligation in whole or in part.

29. On the question of rights, dealt with in paragraph 2, the Commission was obviously divided on his suggestion to reverse the presumption. It was not as yet clear to him how many members favoured that reversal and how many opposed it.

30. The question had been raised by Mr. Rosenne of the distinction between the modification or termination of provisions regarding the third State's obligations or rights and the modification or termination of those obligations or rights themselves. His own view was that article 61 was essentially concerned with the relationship between the original contracting parties and the third State. The question of that relationship could not be ignored; it was undoubtedly a separate one from that of the relationship between the original contracting States themselves, and that point was in fact illustrated by the case mentioned by Mr. Rosenne.

31. He suggested that article 61 should be referred to the Drafting Committee with the comments made during the discussion and that the Drafting Committee be asked to attempt a redraft.

32. Mr. ROSENNE said that he did not dispute the fact that there were two different processes at work; there were indeed two sets of relationships, but they were very closely linked. His earlier remark had simply been to the effect that the distinction between the revocation or amendment of the provision and the revocation or amendment of the right or obligation was too fine to form the basis of an article in an international convention.

33. Mr. AGO said he would like to help to remove the Special Rapporteur's uncertainty as to the preferences of members of the Commission with respect to the reversal of the presumption in paragraph 2 (*a*) of his new text. The crux of the problem lay in the difference of opinion as to the source of the right possessed by the third State. A majority of members considered that source to be the assent of the third State. If that were the case, then the inescapable conclusion was that the termination of such a right should be neither easier nor more difficult than the termination of the other rights which arose from an act of assent. For that reason, he was on the whole opposed to the presumption of revocability; he could not support a formula by which the right of the third State could be abolished merely by giving notice unless the third State could prove that the right was irrevocable.

34. Mr. JIMÉNEZ de ARÉCHAGA said that the fact that the assent of the third State was necessary was not necessarily a decisive factor on the question of revocability. For example, the original parties could offer a conditional or revocable right.

35. Mr. VERDROSS said he entirely agreed with Mr. Ago, provided articles 59 and 60 were retained, since obviously if the Commission decided to modify those two articles as he (Mr. Verdross) had proposed, it would have to modify article 61 as well.

36. Mr. EL-ERIAN said that he had not taken part in the discussion on article 61 because in 1964 he had adopted a negative attitude towards the whole question of the effects of treaties on third States. He had therefore not wished to discuss the amplification of that system.

37. The discussion on article 61 had shown that it was difficult to combine provisions on rights and obligations of third States when the basis on which rights and obligations rested was not the same. Where rights were concerned, the doctrinal differences between members sprang from the two different conceptions in the matter: the conception of offered rights and that of conferred rights.

38. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Jiménez de Aréchaga that the offer of a right could be subject to certain conditions and could be accepted on those conditions. But he was still convinced that the presumption should be based on the general rule, not on an exception; and the general rule was that a right was offered unconditionally. The presumption should therefore be that the right offered was irrevocable.

39. Mr. BRIGGS said that, as he had already pointed out at the previous meeting, the question was not so much one of juristic logic as one of policy, and as he had then indicated, he favoured the reversal of the presumption.

40. Mr. TUNKIN asked what Mr. Briggs meant by the term " policy ".

41. Mr. BRIGGS replied that what he meant was that course which best served the community interests of States.

42. Mr. TUNKIN said that the Commission should seek to embody in the draft articles the norms best suited to international relations and most likely to promote peace.

43. Mr. AGO said that, even from the point of view of legislative expediency, there was no reason why it should be possible for a right given to a third State to be revoked *ad libitum* by the parties to the treaty unless it could be proved that the parties had intended conferring the right irrevocably. It seemed, rather, that the opposite should be the case.

44. Mr. de LUNA said that he was in favour of the reversal of the presumption in paragraph 2, although he did not deny the logic of the argument that the modification or termination of the collateral agreement required the consent of the third State.

45. The Commission should adopt as neutral a formulation as possible, taking into account the fact that the majority of governments in their comments had stated that they considered the rights granted to the third State excessive. As he had said at the previous meeting, States were more often selfish than altruistic and, if they made provision for rights for third States, it was usually in order to avoid making the treaty open to accession.

46. The case cited by Mr. Rosenne did not deal with a question of rights granted to a third State. The rights invoked in that case did not arise from a collateral agreement but from the most-favoured-nation clause.

47. Mr. JIMÉNEZ de ARÉCHAGA said that presumptions were usually based on two elements: facts, and considerations of convenience or policy. As far as the facts were concerned, a rebuttable presumption generally followed the line of the majority of cases. In the problem under discussion, the normal situation was that where the parties to a treaty wished to make some provision in favour of third States; their intention was usually to grant a benefit which could be utilized while it was kept in force by the original parties to the treaty; there was usually no intention to grant a right and to bind themselves to the third State. That was the meaning of the statement by the Permanent Court in 1932 in the *Free Zones* case, which he had quoted at the previous meeting,[7] that it could not be " lightly presumed " that stipulations favourable to a third State had been adopted with the object of creating a right and of binding the parties toward that third State.

48. The presumption should therefore be in favour of revocability and considerations of convenience or policy supported that conclusion. It was desirable to promote third party stipulations; if a rule were to be laid down that the parties were irrevocably caught by the stipulation, contracting States would not be inclined to include such provisions in their treaties.

49. Mr. TUNKIN said that although the members of the Commission were divided on doctrinal issues, they were united as far as their practical objectives were concerned; it was undoubtedly those practical objectives which Mr. Briggs had had in mind when he had referred to policy considerations. In the circumstances, the article could safely be referred to the Drafting Committee, which would endeavour to formulate a text that would obviate the doctrinal difficulties.

50. Mr. AGO said that, as Mr. Jiménez de Aréchaga had urged, he would consider what happened in practice. In practice, if the parties to a treaty wished to give a third State a right which they intended should last only as long as they wished, they would normally take the precaution of saying so in the treaty. If they did not include any specific provision to that effect in the treaty, the third State was entitled to consider that the right had been offered to it irrevocably. That was why he considered the presumption of revocability to be just as unacceptable as the idea that the third State should be placed in a position where its rights came and went without its having any say in the matter at all.

51. Mr. AMADO said he agreed with Mr. Ago and especially because the right conferred on the third State was not just nominal but might lead to a whole series of actions by the State. Except from the doctrinal standpoint, his views coincided with those of Mr. El-Erian. But he feared that the article was going to give the Drafting Committee a lot of trouble.

52. The CHAIRMAN, speaking as a member of the Commission, said that the presumption of irrevocability was not prejudicial to the States which offered the right, because it was they who were taking the initiative and they were consequently able to take their precautions, lay down conditions which limited the right, offer it for a specific period, or make it revocable. If no such provisions were contained in the treaty, the right of the third State should be regarded as irrevocable.

53. Mr. CASTRÉN said that since the Special Rapporteur had asked for more definite guidance, he would inform him that he shared the view expressed by Mr. de Luna. For practical reasons, and leaving pure logic and theoretical considerations aside, he was in favour of including the presumption suggested by the Special Rapporteur.

54. Mr. TSURUOKA said that he too would support the Special Rapporteur's proposal, though he regretted he could not follow Mr. Ago. In practice, owing to the mentality of States and their conduct in international relations, it often happened that treaties intended to be permanent were very soon amended, and that temporary arrangements were liable to last for a very long time. A delicate balance was therefore needed and he was sure that the Drafting Committee would manage to find one.

55. Sir Humphrey WALDOCK, Special Rapporteur, said it was clear that the Commission was fairly evenly divided on the doctrinal question. The Drafting Committee would have to devise a practical formula likely to attract general support.

56. It was a fact that the few governments which had commented on article 61 had found that its provisions went too far in protecting the third State. Those comments should be taken into account, even if it were assumed that many of the States which had not sent any comments were prepared to accept the 1964 text.

57. The main point which had arisen was partly one of legal policy. It was undoubtedly highly desirable that, when a right was created in favour of third parties, especially in such matters as navigation on international waterways, that right should be as firm and as solid as possible. There was also considerable force in the argument that, if the contracting States wished to make the third party's rights revocable, they could specify as much in the treaty.

58. He would repeat his proposal that the article be referred to the Drafting Committee with instructions to prepare a new text in the light of the discussion.

59. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's proposal.

It was so agreed.[8]

[7] Para. 49.

[8] For resumption of discussion, see 868th meeting, paras. 53-79.

ARTICLE 62 (Rules in a treaty becoming generally binding through international custom) [34]

[34]

Article 62

Rules in a treaty becoming generally binding through international custom

Nothing in articles 58 to 60 precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law.

60. The CHAIRMAN invited the Commission to consider article 62, for which the Special Rapporteur had no new proposal.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that article 62 seemed to have been misunderstood by some governments. The Commission had intended it to constitute a general reservation to the provisions in articles 58 to 60. Some members had attached special importance to the article because of the decision not to include in the draft an article on objective régimes on the ground that the time was not ripe to attempt codification on that subject, although the problems involved had been fairly thoroughly discussed.

62. Members had admitted the existence of the phenomenon whereby treaty provisions acquired the force of customary rules of international law through being recognized as authoritative statements of existing law and the Commission had been anxious to ensure that the provisions of articles 58 to 60 should not be misconstrued as a denial of such a proposition.

63. In his report he had analysed the objections by governments and delegations to the article and had reached the conclusion that it ought to be maintained more or less on the lines approved in 1964.

64. Mr. VERDROSS said that he too was in favour of leaving article 62 as it was. He would merely suggest inserting the word " general " before the words " international law " at the end of the article, in order to draw a clear distinction between customary rules of general international law, which were what the Commission was referring to in the article, and customary rules of regional international law or local customary rules.

65. In the *Case concerning Right of Passage over Indian Territory*,[9] the International Court of Justice had recognized the existence of a local custom. But the problem of local custom was dealt with in article 65, which implied that a treaty could be amended even by an unwritten agreement.

66. The existence of a regional custom, on the other hand, was very difficult to prove. In the *Asylum* case, for instance, the International Court had found against the existence in Latin America of a regional custom concerning the right of diplomatic asylum[10], because a State in that region had not ratified a convention on the subject.

67. Mr. CASTRÉN said that although three governments, including that of Finland, had suggested that article 62 should be deleted, he personally, after considering the observations of the Special Rapporteur, had no objection to its being retained. It did not seem to be essential, but at least it could do no harm. He would therefore accept it, subject to certain drafting changes.

68. Mr. TUNKIN said that there was no difference in the Commission over the substance of article 62, but the text lacked clarity. There were rules generally binding through international custom on the one hand and customary rules of a regional or local character on the other. The Commission's intention had not been to exclude the latter and if the amendment proposed by Mr. Verdross were adopted, the consequence would be restrictive. The scope of application of rules embodied in a treaty might become extended in the course of time. He therefore suggested that the final words of article 62 be amended to read " if they have become binding through international custom ".

69. Mr. AGO said that he was in favour of the underlying idea of the article, but the drafting could be improved. The Commission did not intend to say that the rule in the treaty, as such, would become binding on a third State, but that, should a customary rule emerge that was identical in content with the rule in the treaty, the customary rule would be binding on the third State.

70. He was not sure that the Commission had really covered all possible cases in using, in the French text, the word " *deviennent* ". A treaty might contain a rule which merely reproduced an already established customary rule, as was true of some examples recently cited in connexion with *jus cogens*, and it was hard to tell whether the rule in the treaty had preceded or followed the customary rule. The drafting might therefore be improved.

71. Like Mr. Verdross, he was rather sceptical about local custom; it was frequently mentioned, but no really convincing example had been quoted so far. He saw no need to speak of " general " custom, because customs were either all general, in which case any reference to customs meant general customs, or else there were local customs also, in which case there was no reason to exclude them. Assuming that there were customs peculiar to the American continent, a treaty made between American States might embody rules that were binding on American States not parties to the treaty because of the existence of an American custom.

72. Too narrow a definition should therefore be avoided, and it would be preferable to adopt a text on the lines suggested by Mr. Tunkin, referring to custom but not specifying whether the custom was general or local.

73. The CHAIRMAN, speaking as a member of the Commission, said that the article might be regarded as useful. In 1964 he had pointed out that it covered only one aspect of the general problem of the relationship between custom and written rules, and had suggested that the problem should be treated as a whole in a general study.[11]

74. He saw no objection, however, to retaining the article in the draft. Custom could, of course, be general,

[9] *I.C.J. Reports*, 1960, p. 6.

[10] *I.C.J. Reports*, 1950, p. 277.

[11] *Yearbook of the International Law Commission, 1964*, vol. I, 740th meeting, para. 81.

but although the existence of local customs was contested, he himself believed that such customs existed and that there was nothing to prevent their formation; therefore he saw no reason for excluding that possibility.

75. Most of the difficulties raised by governments did not detract from the value of the article. He agreed in principle with the Syrian delegation on the need for including in the text the element of recognition in connexion with custom. Recognition of a custom by a State was an essential element in the formation of that custom, so far as that State was concerned, but that was not the right place to deal with the matter, which formed part of another topic, that of the technique of the formation of custom as a source of international law.

76. In his view, the article could be accepted, with some drafting changes.

77. Mr. JIMÉNEZ de ARÉCHAGA said that, while he was in favour of maintaining the 1964 text, subject to drafting improvements, he considered that it should be regarded as covering regional or local rules of customary law. In the *Asylum* case, the International Court had not rejected the possibility of a customary regional law existing but had denied on the basis of the evidence the existence of a particular rule of customary law, which one of the parties had sought to deduce from the existence of a regional custom, namely the right to define unilaterally the political crimes which authorized the grant of asylum. One factor taken into account by the Court had been the refusal of one party to the dispute to ratify a treaty providing for such unilateral definition, on which the other party had relied.

78. Mr. de LUNA said it might be worth considering a text reading:

> " Nothing in articles 58 to 60 precludes the rules set forth in a treaty from being equally binding upon States not parties to that treaty if they are binding because they are rules of customary international law. "

Mr. Tunkin's suggestions could be taken into account by referring at the end to the binding character of the rules. It should be remembered that at other periods of international law customary general rules had had features which were now excluded by the sovereignty and independence of States.

79. Mr. ROSENNE said that he agreed with the Special Rapporteur's conclusions and with what had been said by Mr. Tunkin and Mr. Ago. Strictly speaking, even a rule of regional or local customary law ultimately obtained its validity from general international law, and as far as that point was concerned, the wording of article 62 should be left unchanged.

80. He was more concerned about the Commission's decision to insert a new article 30 *(bis)* (A/CN.4/L.115) on the obligations of parties under other rules of international law which had been approved during the second part of the seventeenth session.[12] That article and article 62 dealt with two aspects of the same problem, and the possibility of their being amalgamated should be considered when the Commission examined the whole question of the arrangement of the articles in the draft.

81. Mr. REUTER said that the English text was certainly more satisfactory than the French and Spanish. The expression " *devenir obligatoire pour des Etats tiers* " struck him as very poor drafting. What the text should say was " *pour des Etats non parties au traité* ", because the States which would be affected if the rules became binding had not remained third parties, so far as the formation of custom was concerned. That point must be made clear.

82. He was not sure whether the Commission wished to refer to " custom " or to " customary rule "; a distinction was sometimes made between the two but he would support whatever was the Commission's usual practice.

83. Mr. BRIGGS said that he had no difficulty in accepting the principle enunciated in article 62, but the drafting must be improved. He favoured the suggestion by the Israel Government to revise the opening words to read " Nothing in these articles precludes . . . ".

84. The Special Rapporteur was right in his view that the article should be kept in its present position because of its close connexion with articles 58 to 60.

85. The reason why he was critical of the text was that it failed to make clear whether the customary rules of international law referred to had existed before the treaty was concluded or whether they derived from the treaty itself and became rules of customary law subsequently. There were numerous historical examples of treaty provisions becoming accepted as rules of customary law after a long process of appearing in a great number of treaties.

86. The article should certainly not exclude rules of international custom which had not yet become general.

87. Mr. EL-ERIAN said that article 62 must be maintained because the decision not to include an article concerning objective régimes had been accepted by some members on the understanding that article 62 would at least partially fill the gap. It was a useful provision because it dealt with something in the nature of a combination of treaty and customary law. The phrase " international custom " which was used in Article 38(1)(b) of the Statute of the International Court was the right one, because it comprised both general and local customary rules of international law.

88. Mr. de LUNA said that regional or local custom should obviously not be excluded. But in his opinion, the repetition of a rule in many treaties, or in all treaties of a similar kind, was not evidence of the formation of a custom. Such clauses were often repeated precisely because States were aware that the rule they were stating would not be binding unless it was embodied in the treaty. It was therefore a little venturesome to conclude from the presence of a rule in one or more treaties that States had the legal conviction that that rule was binding: its inclusion in a treaty was often evidence to the contrary. It should be noted that the customary rule was in many cases neither precedent nor subsequent to the treaty, but the act by which given

[12] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 842nd meeting, paras. 71-78.

States embodied it in a treaty as a legal provision was sufficient to establish it as a customary rule.

89. Mr. AGO said he thought that the Commission should avoid using a form of words such as " Nothing in articles 58 to 60 precludes ". What the Commission was proposing to state in the article was an absolute truth, which it could not impugn by the draft it was preparing on the law of treaties. Whatever the Commission included in the article, it could not prevent the formation of customary rules nor hinder them from governing certain matters and according rights and obligations. In any case, the rule might be stated much more simply in the following terms: " Rules stated in a treaty may be or may become binding upon States which are not parties to the treaty if they are at the time or if they become customary rules of international law ".

90. Mr. TUNKIN said that the formula put forward by Mr. Ago would cover a much wider field than what the Commission had originally intended to cover in article 62, which was cases of rules deriving from a treaty acquiring the force of customary rules for certain States, since it would also cover rules which had already become customary rules before the conclusion of the treaty.

91. Mr. BRIGGS said he supported Mr. Ago's suggestion. Many provisions in the Vienna Convention on Diplomatic Relations had been customary rules of international law long before the Convention had been drawn up, but a saving clause concerning customary law had been included in the preamble. A text on the lines suggested by Mr. Ago would also overcome the drafting difficulty he had mentioned earlier.

92. The CHAIRMAN, speaking as a member of the Commission, said that the new proposal that had just been made showed the justice of his observation that the article dealt with only one aspect of a general problem, that of the relationship between custom and written law, more particularly in the light of the existing trend of codification.

93. Mr. TUNKIN said that the Drafting Committee must scrutinize Mr. Ago's text with great care. He still thought its effect would be too broad. It must be remembered that the provisions of a treaty might alter rules of customary law for the parties.

94. Mr. AGO said it was certainly possible that a treaty might alter an existing custom, but that situation did not fall within the scope of article 62, which was exclusively concerned with the case in which the customary rule and the rule in the treaty were identical in content. It would therefore be rather dangerous to consider only the case where a rule in the treaty subsequently became a customary rule, without providing for the case where the customary rule either already existed or came into existence simultaneously with the rule in the treaty.

95. Mr. TUNKIN said he recognized the existence of the difficulty mentioned by Mr. Ago, but it should not be discussed in the present context. The purpose of article 62 was to deal with the effect of rules in a treaty becoming generally binding through international custom upon States not parties to the treaty. The problem of the relationship between customary and treaty rules was an entirely different one, which the Commission was hardly in a position to tackle at that juncture.

96. Mr. AMADO said that, in his view, if the rules set forth in a treaty were already law or became law, that law was binding. That was the whole point: if such rules were law, they produced the effects of law and were binding. A customary rule arose and in due course became the law. A treaty between two or more States could not possibly conflict with the law which was in effect in the form of custom.

97. Mr. EL-ERIAN said that he shared Mr. Tunkin's misgivings. The Commission should not go beyond the limited objective it had had in mind when drafting article 62 at its sixteenth session. The article dealt with rules which had their origin in a treaty and not in international custom.

98. Mr. REUTER said that the main question now before the Commission was whether to retain an extremely restricted article or to adopt a rather longer one. Mr. Rosenne had already pointed out that there was perhaps a connexion between article 62 and an earlier article. The Commission should also bear in mind that paragraph (*c*) of article 68 dealt with the relationship between a treaty and a subsequent custom conflicting with it.

99. So without wishing to be specific about it, he thought that, at least in the commentary, the Commission would have to touch on a problem it had raised in such general terms. To the best of his knowledge, the existence of a custom had never been established before any international court or in any exchange of diplomatic correspondence merely by referring to a body of precedents drawn from the conclusion of earlier treaties.

100. Thus, if the article was interpreted in a restricted sense, he was not opposed to its retention, though it had no great practical importance. On the other hand, the question whether the customary rule continued to exist on the conclusion of a codification treaty, though perhaps a difficult problem, was also a very practical one, on which there was a good deal of case-law. Anyone who examined the provisions of The Hague Conventions on the laws of war, instruments that had had the character of customary law, then had given rise to treaties from which—according to the Nuremberg Tribunal—a general custom had again been derived, would almost be prepared to justify the existence of a special article defining the limits of codification. In other words, codification did not affect the existence of a prior autonomous customary rule, a point of some consequence in relation to a draft convention on the law of treaties, which the Commission could not be sure would be accepted and ratified by all States. That was why the question seemed difficult and deserved more attention.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem to which article 62 gave rise was not a new one and had been discussed at the sixteenth session, when the Commission had deliberately decided to frame an article of a restricted character.[13] As Mr. Tunkin had pointed out, the suggestion to amplify its

[13] See *Yearbook of the International Law Commission, 1964*, vol. I, 740th, 741st and 754th meetings.

scope would entirely change the basis of the agreement reached in 1964.

102. It might be argued that the article, which had been inserted to obviate any possible misunderstanding about the implications of articles 58 to 60, was unnecessary because any competent lawyer would be aware that the latter could affect the fundamental principle concerning the force of customary law. The Commission's desire to include article 62 had been reinforced by the compromise reached over article 60 and the reluctance of some members to drop an article dealing with objective régimes.

103. Both the Commission and the Drafting Committee had discussed the relationship between customary and treaty law, but had decided, possibly out of timidity but nevertheless wisely, not to go too far into the subject. The codification of the relation between customary law and other sources of law should be left to others. The problems it posed had come up during the consideration of the Commission's draft articles on the law of the sea and on diplomatic and consular privileges and immunities. They were not peculiar to the codification upon which it was at present engaged.

104. The amendment put forward by Mr. Ago had brought out into the open a slight discrepancy between the English and French texts. In the former, the word "being" had been chosen deliberately, to meet the point of view of those who wished the article to be wide enough to cover the case of a treaty which embodied already existing customary law. But the article had originated in one of his own proposals—article 64—to cover the case of treaties giving rise to rules of customary law through the formation of custom as a kind of incrustation on the treaty.[14]

105. The problem of the concordance of the text in the three languages would certainly have to be examined in the Drafting Committee in the light of the suggestions made during the discussion. But at the present stage the Commission could hardly embark upon a general study of the relationship between treaty and customary law.

106. The CHAIRMAN said that it seemed to be the general view that the article could be referred to the Drafting Committee.

It was so agreed.[15]

Co-operation with Other Bodies

(resumed from the 853rd meeting)

[Item 5 of the agenda]

107. The CHAIRMAN invited the Deputy Secretary to the Commission to report on the receipt of communications from other bodies.

108. Mr WATTLES, Deputy Secretary to the Commission, said that the Secretariat had just received copies of three papers prepared by a study group of the American Society of International Law, which had been examining the Commission's draft articles on the law of treaties. The Secretariat, which was simply acting as a channel for transmission of the papers, would be glad to make them available to any member.

109. A letter had also been received from the Secretary of the Asian-African Legal Consultative Committee, informing the Commission that the Committee's eighth session was to be held at Bangkok from 1 to 10 August 1966. A copy of the provisional agenda had been enclosed with the letter. Among the items to be discussed was the consideration of the Commission's report on the work of its seventeenth session and the law of treaties. It would be remembered that the Commission had a standing invitation to be represented by an observer at the Committee's sessions.

110. Mr. de LUNA proposed that the Commission should be represented at the Asian-African Legal Consultative Committee's session by its Chairman, Mr. Yasseen.

111. Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. AGO, Mr. TSURUOKA, Mr. BRIGGS, Mr. ROSENNE and Mr. REUTER supported that proposal.

112. The CHAIRMAN thanked the Commission for his nomination, which he accepted in principle, on the understanding that, if he found it quite impossible to travel to Bangkok, he could delegate the duty to any other member of the Commission who was willing to undertake it.

The meeting rose at 6 p.m.

857th MEETING

Tuesday, 24 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. 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)

(resumed from the previous meeting)

(Item 1 of the agenda)

ARTICLE 63 (Application of treaties having incompatible provisions) [26]

[26]

Article 63

Application of treaties having incompatible provisions

1. Subject to Article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

[14] *Op. cit.*, vol. II, p. 34.

[15] For resumption of discussion, see 868th meeting, paras. 80-115.