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Summary record of the 868th meeting

Topic:
Law of Treaties

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submission to the Commission, the text of a possible general article to deal separately with the problem of a treaty imposed on an aggressor State. That text would be submitted to the Commission shortly.[7]

28. The CHAIRMAN put to the vote the Drafting Committee's text for article 59.

Article 59 was adopted by 13 votes to none.

The meeting rose at 11.45 a.m.

[7] See 869th meeting, para. 3.

868th MEETING

Monday, 13 June 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. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the text of articles submitted by the Drafting Committee.

ARTICLE 60 (Treaties providing for rights for third States) [32][1]

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for article 60 reading:

> " 1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Unless after becoming aware of the provision it indicates the contrary, its assent shall be presumed.
>
> " 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. "

3. The first sentence in paragraph 1 more or less followed the 1964 text (A/CN.4/L.107) except for some changes of punctuation in the interests of clarity. The second sentence was new and replaced the former sub-paragraph (*b*) that dealt with express or implied assent; it had been revised by the Drafting Committee in the light of Mr. Ago's suggestion at the 855th meeting.[2] No change was proposed in paragraph 2.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's suggestion had been designed to bridge the division of opinion in the Commission and had been welcomed by some members.

5. The CHAIRMAN, speaking as a member of the Commission, said that he was not entirely satisfied with the second sentence of paragraph 1, whereby a third State was obliged to take immediate action as soon as it had become aware of the provision under which it was offered a right; no allowance was made for a reasonable interval. An obligation of that kind should not be imposed on third States and the sentence should therefore be recast.

6. Mr. PAREDES said that he agreed with Mr. Yasseen. The sentence should be drafted in the contrary sense. If a State which had been offered a right remained silent on the subject of that right, it should be assumed that it did not accept the right. At all events, a reasonable interval should be allowed for it to say whether it accepted or rejected it. He did not see how a right could be imposed on a State without its full knowledge and consent. It seemed to him essential that there should be an explicit statement regarding the right by the State to which it was offered, before the right could be regarded as having been acquired by that State and incorporated in its law.

7. Mr. JIMÉNEZ de ARÉCHAGA said that the second sentence in paragraph 1 was an improvement on the 1964 text and would not entail the dangers which the Chairman apprehended. It had been framed in the form of a presumption, and it would always be open to the third State not to exercise the right conferred upon it or expressly to refuse to accept it; it would in fact protect the position of a third State in cases when it might not wish to manifest its will in a formal way. The text could surely not be interpreted as imposing a right.

8. Mr. BARTOŠ said that he took the same view as Mr. Yasseen and Mr. Paredes. The new wording was an improvement on the old, but the second sentence of paragraph 1 was unsound, since it provided that, as soon as a State had become aware of the provision offering it a right, it was assumed that it had formally assented to it.

9. What in fact was the process by which a State became aware of a provision in a treaty and expressed its assent? In the ordinary course of events, those operations were performed by diplomatic agents of that State who might or might not be qualified to express the formal consent of the State to accept, not merely a right but an obligation arising under it. It was therefore very difficult to argue that, as soon as a State had knowledge of a communication indicating to it that there was a treaty under which it had acquired a right, it was presumed to have given its assent to accepting that

[1] For earlier discussion, see 854th meeting, paras. 24-103, and 855th meeting, paras. 1-30.

[2] Para. 20.

right. What did the presumption mean? Did it imply that the onus of proving the contrary rested with the State with regard to which the presumption was made? Could a State be obliged to reverse a presumption without saying that it had accepted the provision of a treaty concluded between other States under which a right had been created to its own advantage?

10. It was doubtful whether the wording succeeded in safeguarding the principle that the position of a State could not be changed without its consent. The intention had been to strengthen that principle by means of the presumption, but by stating categorically that the assent should be presumed, the article violated the principle whereby no one could be obliged to express his view at the request of another person. It seemed to him that the State for which it had been intended to create the right was placed in an unfavourable situation and he would therefore hesitate to vote for the second sentence of paragraph 1.

11. Mr. TABIBI said he endorsed the Chairman's views; the second sentence must be redrafted so as to state in clear language that the third State was entitled to accept or reject a right conferred upon it.

12. Sir Humphrey WALDOCK, Special Rapporteur, said that one of the difficulties of drafting the provision had been the objections that had been raised in the Commission to the various ways of expressing the idea of " a reasonable time ". On the point of principle, there seemed to be general agreement.

13. The text of the second sentence in paragraph 1 must be interpreted in good faith as meaning that the third State should be allowed a reasonable interval to take its decision. It was difficult to understand why the text should be misconstrued as imposing a right upon the third State when in fact its effect would be to protect the interests of that State. Paragraph 1 must be read as a whole and it must be remembered that the article was concerned with rights, not with obligations. The rule set out in the first sentence was fairly strict and, if interpreted in the manner in which the second sentence had been interpreted by the Chairman and others who had supported his view, could be taken to mean that, unless the third State had clearly given its assent to the conferment of the right, the right would be lost.

14. The important thing to ensure was that the third State had become aware of the existence of the right, and that was particularly vital in the case of treaties providing general rights in favour of third States.

15. Mr. REUTER said he thought that the difficulty arose, not from the time factor but from the idea of tacit consent. It was perhaps going too far to speak of a presumption; something more flexible was necessary. If the Commission could agree on the idea of tacit consent, all that was needed was to use the expression " expressly or impliedly ". On the other hand, if the Commission was against tacit consent, it should say so. But in any event, everything that there was to say on that very interesting question had already been said and the Commission should not reopen the discussion but take a vote on specific proposals.

16. Mr. TUNKIN said that the 1964 sub-paragraph (*b*) was sufficiently clear because it contained the phrase " expressly or impliedly assents thereto ", and there was no need to abandon it. If the first sentence in the Drafting Committee's text could be reworded to reintroduce that phrase, the new second sentence would then be unnecessary.

17. Mr. AGO said that he felt to some extent responsible for the wording proposed in the second sentence of paragraph 1. Its purpose was to secure the support of those members who were opposed to the very idea of the need for assent.

18. He could not see why all those who had been in favour of assent, whether express or implied, were now finding it necessary to show such concern about the wording. What in fact was the issue? A third State was offered a right and, in full accord with the theory of consent, was being given an opportunity to refuse it. Why were there so many misgivings at the idea that, once a State had become aware of the offer and so long as it had not expressed any opposition, its assent could be presumed?

19. He had no objection to the reintroduction of the idea of express or implied consent, but it seemed to him that it came to the same thing as the new wording and he could not understand the objections raised against the new draft.

20. Mr. BARTOŠ said that he could not support Mr. Ago's contentions.

21. In the first place, in the text now before the Commission, the question was not merely one of an acquired right but also of the duties and obligations arising from the exercise of that right.

22. In the second place, the obligations arising under such rights might entail very complicated procedures in the beneficiary State; so much so that there could be times when the State could not make use of a right except under conditions which might jeopardize its sovereignty. In such a case, it would be better for the State not to have the right than to submit to the obligations associated with it.

23. In the third place, the second sentence of paragraph1 introduced a legal inequality as between the States which had taken part in drawing up the treaty and third States. Those which had drawn up the treaty which created the right for third States were given time to express their views and to ratify it; but it was being suggested that, for those which had not taken part in drawing up the treaty, a mere notification, a diplomatic note regarding the contents of the treaty, would be sufficient to place them in such a position that their assent was to be presumed. If the underlying intention of the article was to make a gift to third States, then it should be remembered that gifts sometimes brought heavy liabilities for small States.

24. If the idea of express or implied consent were introduced, the position would be different, because it would then be a question of an act by which the State manifested its will. As it was, the article created a presumption based on the silence of the third State—and not even a prolonged silence at that, no period being

specified—that did not correspond to an already existing obligation to come to a decision.

25. Mr. JIMÉNEZ de ARÉCHAGA said that the 1964 text had been regarded as unsatisfactory both by several governments and by some members of the Commission, including the Special Rapporteur himself, because the condition in sub-paragraph (*b*) could be interpreted as meaning that some kind of formal assent must be given. That would jeopardize the rights of third States, particularly in respect of treaties establishing an objective régime on such matters as navigation. Mr. Ago's suggestion at the 855th meeting had been prompted by the need to take such practical considerations into account, and it appeared to have won support.

26. Possibly the Drafting Committee's formula for the second sentence of paragraph 1 was not a particularly happy one because it introduced the time factor and the idea that the third State must be aware of the provision conferring the right. A way out of the present difficulty might be found by dropping those two apparently controversial elements and referring the text back to the Drafting Committee to see whether an acceptable wording could be devised on some such lines as " Such assent shall be presumed, unless the third State rejects or refuses to exercise the right ".

27. Mr. VERDROSS said his impression was that the new wording, which had been evolved in a spirit of conciliation, was still influenced by the theory of consent. Surely it was not being contended that a State not a member of the United Nations which, under the Charter, had the right to bring a dispute before the Organization, could reject that right by stating that it did not accept it? In his view, that right existed, whether or not a State was a member of the United Nations and it could not be rejected.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with much of what had been said by Mr. Verdross but would refrain from reopening the discussion on the fundamental issue.

29. It was, however, important to explain that the drafting of the second sentence in paragraph 1, for which he was largely responsible, represented an honest attempt to take account of the point made by Mr. Bartoš during the discussion that the time factor should not be overlooked. But it was not easy to express. In the Drafting Committee he had suggested the phrase " unless after becoming aware of the provision ", to satisfy those members who had insisted on the right of the third State to accept or reject the right; obviously unless that State were aware of the existence of the provision in question, it could not be regarded as having impliedly assented. In his opinion the new text safeguarded that right.

30. In cases where onerous obligations were attached to the right, no doubt the provisions of article 59 as well as those of article 60 might apply. If the obligations were merely conditions governing the exercise of the right, then it would be reasonable to make them subject to the condition set out in article 60, paragraph 2.

31. The Drafting Committee, in the new text it was going to propose for article 61,[3] had sought to bring out the rather subtle distinction, as far as revocation or amendment was concerned, between obligations and rights. In paragraph 1 of that new text it was going to propose that an obligation that had arisen for a third State could only be revoked or modified with the mutual consent of the parties to the treaty and the third State concerned, but under paragraph 2 of the new text a right that had arisen for a third State could not be revoked or modified by the parties if the intention under the treaty had been to render it irrevocable or not subject to modification without the consent of the third State. That being so, the position of the beneficiary from the point of view of the freedom to accept or reject a conferred right was surely sufficiently covered in article 60. In any case, a beneficiary third State possessed a general right under international law to renounce a right conferred upon it under a treaty régime. He doubted whether any further protection was needed.

32. It was important to bear in mind, when considering treaties creating general rights in favour of third States, that when a third State had for a long time not taken up the right, the contrary inference might be drawn that it had no wish to do so and that, owing to lapse of time, the right was lost. Such an interpretation would be particularly unfortunate in the case of treaties concerned with, for instance, international navigation régimes.

33. Mr. AGO said that the proposal he had made at the 855th meeting was rather different from the Drafting Committee's proposal, since it was worded " (*b*) if the State assents thereto. Its assent shall be presumed in the absence of any indication to the contrary ". In other words, the State was given every opportunity to declare its opposition, although no time-limit for it to do so was laid down.

34. It might be possible to revert to that formula. It was perhaps unnecessary to speak of its " becoming aware of the provision ", for obviously the State could not give its assent until it had become aware of the provision.

35. Mr. AMADO said that jurists had always felt misgivings about presumptions. Both sides were right to some extent, but since perfection could never be attained, he personally was prepared to revert to the formula " expressly or impliedly ", which would make it possible to rely on precedents and under which third States would not be obliged to accept a gift which they did not want.

36. Mr. BARTOŠ said that, at the 855th meeting,[4] he had supported Mr. Ago's proposal in principle, while expressing the hope that the Drafting Committee would give some thought to the question of the time factor and ensure that the presumption was linked with some sort of time-limit which would allow the beneficiary State time for reflection. He was still in favour of Mr. Ago's proposal, subject to the addition he had suggested regarding the time factor.

37. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the Drafting Committee's text was an improvement on the 1964 text. As far as the point under discussion was concerned,

[3] See below, para. 53.

[4] Para. 22.

there was no difference in nature between rights and obligations, and that was also Mr. Ago's view.

38. It was now proposed that consent should be presumed. The acceptance of a presumption did not conflict with the theory that a State's consent was required in order to permit a right benefiting it to come into existence; but, in formulating a presumption, the first necessity was to build on a basis of reality. To contend that a State was presumed to have accepted a right immediately it had become aware of the provision under which it was offered was, however, a presumption which, in his view, did not have a basis of reality, because it took no account of the time factor and did not allow the State time to reflect.

39. Mr. Ago's proposal was certainly an improvement, but it was impossible to presume that a State had accepted, without giving it enough time to realize what kind of right was being proposed. If members of the Commission objected to the notion of " reasonable time ", they should also object to an arbitrary presumption which did not correspond to reality.

40. Mr. BRIGGS said that if the choice lay between the 1964 text of sub-paragraph (*b*) and a clause stipulating that in certain specified circumstances the assent of the third State should be presumed, he was in favour of the latter, for the reasons given by the Special Rapporteur. Like Mr. Tabibi, he was concerned as to where would lie the onus of proof that a State had become aware of a right conferred upon it.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that his personal preference had been for a formula of the kind just suggested by Mr. Ago, which was undoubtedly superior to that used in the 1964 text because it would safeguard the position of the third State, and on a strict interpretation of the first sentence of the Drafting Committee's new text, that position might be jeopardized by reason of a possible inference that could be drawn from failure to indicate assent.

42. Mr. TUNKIN said that the difficulty which had arisen over the Drafting Committee's new text was of no great importance. He would have been prepared to accept a second sentence in paragraph 1 on the lines of the formula proposed by Mr. Ago at the 855th meeting, while still preferring the 1964 version of paragraph 1, but if Mr. Ago's latest formula for the second sentence rallied more support, he would not oppose it.

43. Mr. de LUNA said he agreed with Mr. Verdross. Rights were created, even though the beneficiary State was not placed under an obligation to use them. From that point of view, he was satisfied neither with the 1964 text nor with the new one.

44. In conformity with his position on the origin of the right that was offered, he preferred Mr. Ago's proposal, which was closer to reality. The situation he was thinking of was that where States, without having signified their assent, took some action which, in his view, constituted the use of a right which they were free either to use or not to use, but in the view of others constituted the actual birth of the right.

45. He therefore supported Mr. Ago's proposal as originally formulated, in other words, without any reference to a State " becoming aware " of the provision.

46. Mr. TABIBI said that Mr. Ago's formula was more precise than the Drafting Committee's version, and was consequently acceptable. His main preoccupation had been about rights conferred upon third States which had not taken part in the drawing up of the treaty. Every right must be linked with an obligation and the obligation could be so onerous as to render the right an intolerable burden. A third State must be entitled to indicate whether it accepted or rejected the conferment of a right.

47. The CHAIRMAN, speaking as a member of the Commission, said that, although Mr. Ago's proposal was an improvement on the Drafting Committee's text, the time-factor was still lacking; the assent of the State was presumed immediately it became aware of the provision under which it was offered a right. Thus some time elapsed during which the State was presumed to have assented even though it had not had time to reflect.

48. The question, however, was not of great importance, more especially as there was the safeguard of good faith which governed the application and interpretation of treaties; he could therefore join the majority of the Commission in accepting Mr. Ago's text.

49. Mr. BARTOŠ said that he too could accept Mr. Ago's text, provided it was noted in the summary record that, in his view, the text also embodied the idea that the State was entitled to declare within a reasonable period of time that it did not accept the right " conferred " upon it.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that in English it might be better to render Mr. Ago's text to read: " The assent of the third State shall be presumed so long as it does not indicate the contrary. "

51. Mr. VERDROSS asked for paragraphs 1 and 2 to be put to the vote separately.

52. The CHAIRMAN put the Drafting Committee's text to the vote paragraph by paragraph, with the amendment proposed by Mr. Ago to the second sentence of paragraph 1.

Paragraph 1, as amended by Mr. Ago, was adopted by 16 votes to none, with 2 abstentions.

Paragraph 2 of the Drafting Committee's text was adopted by 17 votes to none, with 1 abstention.

Article 60, as a whole, as amended, was adopted by 16 votes to none, with 2 abstentions.

ARTICLE 61 (Revocation or modification of obligations or rights of third States) [33][5]

53. The CHAIRMAN invited the Commission to consider the new title and text for article 61 proposed by the Drafting Committee, which read:

" *Revocation or modification of obligations or rights of third States* "

" 1. When an obligation has arisen for a third State, the obligation may be revoked or modified

[5] For earlier discussion, see 855th meeting, paras. 31-83, and 856th meeting, paras. 1-59.

only with the mutual consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

" 2. When a right has arisen for a third State, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State. "

54. Mr. BRIGGS, Chairman of the Drafting Committee, said that the words " of provisions regarding " had been dropped from the title of the article. No distinction had been drawn in the 1964 text between obligations and rights, but that had now been done, so that paragraph 1 dealt with obligations and paragraph 2 with rights. The words " to which it is not a party " had been dropped because of the definition provisionally approved by the Commission of a " third State ".[6]

55. In the course of the discussion on article 60,[7] the Special Rapporteur had already explained the reasons for the changes introduced by the Drafting Committee in paragraphs 1 and 2 regarding the requirements that had to be met for a revocation or modification of obligations on the one side and of rights on the other.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that members would appreciate the important change of emphasis now being proposed in article 61. In the 1964 text (A/CN.4/L.107) and in the revision he had proposed in his sixth report (A/CN.4/186/Add.2), the problem of revoking or modifying an obligation for a third State had been handled from the point of view of the parties to the original treaty, but in reality attempts to modify an obligation were more likely to come from a third party rather than the parties themselves. Accordingly it seemed proper to stipulate that the obligation could only be revoked or modified by the mutual consent of the two sides.

57. That argument did not hold for the revocation or modification of rights, because the beneficiary third State was not compelled to exercise the right; it could even go further and categorically renounce it.

58. Mr. AGO said that there was one point which might seem self-evident but which he desired to emphasize; perhaps it would be sufficient to mention it in the commentary. It was clear that, in the same way as a right, an obligation which had come into existence for a third State could not be modified except with the consent of all the parties, on condition that the provision of the treaty containing the offer was valid and remained so. It might happen, however, that the treaty in which the right was offered ceased to exist as a result of a fundamental change of circumstances or of the emergence of a new rule of *jus cogens;* obviously in such a case the obligation imposed on the third State could not survive the disappearance of the treaty.

59. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Ago's suggestion with regard to the obligations of the parties, which were the counterpart of the rights of the third State. Such obligations could be terminated by the normal grounds of termination laid down in the draft articles. The explanation to be inserted in the commentary should also indicate that the procedures established for the termination of treaties were also applicable in that case.

60. The text of article 51 as it now stood was fairly strict and had been drafted in such a manner as only to take account of the position of the parties: it did not cover the possibility of a party to the original treaty putting forward vis-à-vis a third State a claim to terminate an obligation, but provided only for claims between the parties themselves. He had in mind the example that could be drawn from the *Free Zones* case,[8] when France had claimed vis-à-vis Switzerland that the French obligation to maintain the Free Zones was terminated because of a change of circumstances.

61. Mr. BARTOŠ said that he shared Mr. Ago's concern. In such a situation, there could be no question of the kind of modification for which article 61 provided, but only of a modification *ipso jure*, as a result of a change in international public order. It would be sufficient to mention that idea in the commentary and thus to indicate that the Commission was aware of the situation.

62. States which had concluded a treaty had not only the right but the duty to ensure that it ceased to be in force as soon as it was in conflict with *jus cogens*. In his opinion, such a situation was the consequence of the introduction of a new law of *jus cogens;* it was not an act introducing a right or a modification.

63. Mr. de LUNA said that he had no objection to the inclusion in the commentary of the passage proposed by Mr. Ago. It should, however, be made clear that there was a second, or collateral, agreement between the third State and the parties to the main treaty, a collateral agreement that was governed by all the rules applicable to treaties; that proposition was the only one consistent with the sovereignty of States.

64. The CHAIRMAN, speaking as a member of the Commission, proposed that the words " under article 59 " be inserted in paragraph 1 after the words " When an obligation has arisen for a third State " and the words " under article 60 " be inserted in paragraph 2 after the words " When a right has arisen for a third State ". Those additions would make the text clearer.

65. Mr. BRIGGS, Chairman of the Drafting Committee, said that the reference to articles 59 and 60 had been included in the 1964 text, but had been dropped by the Drafting Committee as unnecessary. As a member of the Commission, however, he now felt that the idea would be more clearly expressed if the reference were reintroduced.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that the main difficulty was a reluctance to use the French expression " *en vertu de* ". Perhaps the difficulty could be overcome by using the words " in conformity with article 59 "—in French " *conformément à l'article 59* "—after " arisen " in paragraph 1 and " in conformity with article 60 " after " arisen " in paragraph 2.

[6] See 867th meeting, para. 14.

[7] See above, para. 31.

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

67. Mr. ROSENNE said he was not in favour of introducing those references to articles 59 and 60. The whole group of articles 58 to 62 would now constitute a separate section, so that paragraphs 1 and 2 of article 61 would be quite clear without the additional words.

68. Mr. TUNKIN said he supported the Special Rapporteur's proposal, which would help to prevent any misinterpretation of article 61.

69. Mr. AGO said that the expression " *en vertu de* " was clearly wrong. He had no objection to " *conformément à* " but it might be dangerous, especially in paragraph 2, since it would give the impression that the right arose from article 60. The majority of members considered that the right arose, as a result of the consent of the third State, from an agreement between the parties to the treaty and the third State; care should be taken not to introduce a contrary theory in article 61.

70. The CHAIRMAN, speaking as a member of the Commission, said he was still convinced that something more was needed to make it clear that the obligation or the right arose from the processes described in articles 59 and 60 and not from some other source, such as custom or a general principle of international law.

71. Mr. BARTOŠ said that, while the point at issue might be of minor importance, the insertion of a reference to articles 59 and 60, though not absolutely necessary, would nevertheless be of value, since it would show that article 61 referred solely to rights and obligations arising in the conditions described in the two previous articles. Third states might have other rights and obligations arising, for instance, from general international law.

72. To avoid the drafting difficulty, it would perhaps be sufficient to insert a reference in brackets such as " (article 59) " in paragraph 1 and " (article 60) " in paragraph 2, and he accordingly proposed that that should be done.

73. Mr. PAREDES said that he could accept paragraph 1 after the explanations which had been given, but would have to vote against paragraph 2. He could not accept the proposition that a right established in favour of a third State could subsequently be modified by the parties. The consent of the third State should be required for the termination or modification of the right, since the third State could well have taken steps, or even performed concomitant obligations, to exercise the right.

74. Mr. REUTER suggested that the wording " in the circumstances envisaged in article . . . " might meet the difficulty mentioned by the Chairman and Mr. Bartoš.

75. He had abstained on article 60 and he would also abstain on articles 61 and 62, because it seemed to him that there should be some logic in the matter. If the Commission, in the name of State sovereignty, was opposed to the idea that a right for a State could arise from a treaty to which it was not a party, there was no reason why it should suddenly change its attitude and say that a right or obligation for a third State might very well arise by other processes. The discussion seemed to be dominated by an idea that rules could be imposed on a State without its consent, as a result, for instance, of general multilateral treaties or by virtue of *jus cogens* rules.

76. Mr. CASTRÉN suggested that the difficulty could be overcome by adopting the solution proposed by Mr. Rosenne in the Drafting Committee, which was to eliminate article 61 by incorporating its paragraph 1 in article 59 and its paragraph 2 in article 60.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had already considered that possibility. Personally, he considered that the best solution was to introduce in the first line, after the words " third State, " the words " in conformity with article 59" in paragraph 1 and " in conformity with article 60 " in paragraph 2; in French, " *conformément à l'article 59* ", and " *conformément à l'article 60* ".

78. Mr. VERDROSS asked for a separate vote to be taken on each paragraph.

79. The CHAIRMAN said that the two paragraphs as amended by the addition of the words just suggested by the Special Rapporteur, would be voted upon separately.

Paragraph 1, as thus amended, was adopted by 16 votes to none, with 2 abstentions.

Paragraph 2, as thus amended, was adopted by 15 votes to 1, with 2 abstentions.

Article 61, as a whole, as thus amended, was adopted by 15 votes to none, with 3 abstentions.

ARTICLE 62 (Rules in a treaty becoming binding through international custom)[34][9]

80. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 62:

" *Rules in a treaty becoming binding through international custom* "

" Nothing in the present articles precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law. "

81. There were a number of drafting changes from the text that the Commission had unanimously approved in 1964 (A/CN.4/L.107). The words " articles 58 to 60 " had been replaced by the words " the present articles ", the plural noun " rules " had been replaced by the singular noun " rule ", the expression " States not parties to that treaty " had been replaced by the expression " a third State ", the words " being binding " had been changed to " becoming binding " and the words " if they have become customary rules " had been replaced by the words " as a customary rule ".

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had on a number of occasions discussed the relationship between treaties and customary law. Article 62 was not designed to announce any large principles dealing with that relationship; it was merely intended to safeguard the possibility of a rule embodied

[9] For earlier discussion, see 856th meeting, paras. 60-106.

in a treaty becoming in fact binding on a third State in a manner quite different from that set forth in articles 59 and 60. The intention was to refer to the familiar phenomenon of a treaty rule developing into a rule of customary international law.

83. Mr. REUTER said he had had the impression, first in the Drafting Committee and then while listening to the explanations which the Special Rapporteur had just given, that the meaning of article 62 was fairly clear. It should be noted, however, that in that article the expression " third State " referred to third States in relation to the treaty and not to third States in relation to custom or in relation to the process of the formation of custom. The Commission was not deciding whether the customary rule could become binding on States which had not participated in its formation or whether it bound only States which had manifested their consent to its formation. The very fact that it was unwilling to decide that question—although it had not hesitated to take a decision when a right or an obligation based on a treaty had been involved—was in itself rather interesting.

84. Mr. VERDROSS said that he approved of the idea on which article 62 was based, but thought it was not clearly expressed. It was not correct to say that a rule could become binding " as a customary rule of international law ". What was meant was that that rule became binding if it changed into a customary rule of international law.

85. Mr. BARTOŠ said he had misgivings similar to those of the two previous speakers. Article 62 dealt with the case in which treaty rules were transformed into rules of customary law. It could, of course, be said that the treaty rule had been the source of the custom; for instance, the Nuremberg Tribunal had noted in its verdict that certain provisions of certain treaties were binding on all States, not as contractual rules but because they had passed into the universal custom of international law.

86. The principle stated in article 62 was correct, but it went beyond the scope of the draft; once the treaty rule had changed into a customary rule, the binding character of the rule was no longer governed by the law of treaties. The case dealt with in article 62 concerned neither the formation of treaties nor their effects—since the effect considered was that of custom—nor the termination of the treaty, since the treaty remained in force as such. What happened was merely that the rules of the treaty coincided with rules of a different kind. Treaty and custom then had parallel effect; the treaty was binding on States which were parties to it, and custom had binding force for all States, but its force did not derive from the fact that it had first been proclaimed as a treaty rule. The Commission was drafting a convention on the law of treaties, not on the sources of international law; if it wished to deal with custom, it should also study all the other sources mentioned in the Statute of the International Court of Justice.

87. In article 62, the Commission noted that the formation of custom might be based on treaty practice. The fact that the treaty rule had changed into a customary rule had given it binding force for all States, whether they were parties to the treaty or not. The States parties to the treaty were doubly bound, while the others were bound only by custom. But the position of the States parties to the treaty had also changed, since they could no longer terminate their obligation; even if they could terminate the treaty, they remained bound by the provisions which had become custom. The other States were bound only from the moment of the change and, after that moment, all States were bound in the same way.

88. If a rule of *jus cogens* emerged, with which a treaty was in conflict, that treaty must be amended or terminated, but that was a different case.

89. In the case referred to by article 62, once the transformation into custom had occurred, the treaty did not lose its effect, but that effect assumed another character. Article 62 dealt with a question of general public international law and, in his view, it should therefore be removed from a draft on the law of treaties.

90. Mr. TUNKIN said that there had been no intention on the part of the Commission in 1964, or of the Drafting Committee and the Commission at the present session, to go into the question of substance of the relationship between treaty law and customary law. Article 62 contained a useful safeguard; it stated that a rule embodied in a treaty could become binding on a third State by custom. The provisions of article 62 did not enter into the problem of the creation of customary rules of international law.

91. Many examples could be given of a treaty rule gradually extending its sphere of application by custom and becoming accepted as a customary rule by States not parties to the treaty. There was of course no suggestion that a rule embodied in a treaty adopted, say, by one-half of the States forming the international community, could automatically become a rule of customary international law. The intention was to refer to such rules as that which had outlawed aggressive war; that rule had been laid down in the Pact of Paris of 1928, the Briand-Kellogg Pact, but had gradually become a customary rule of international law for States not parties to that treaty and had been recognized as such by the Nuremberg Tribunal.

92. Mr. TSURUOKA said he understood the meaning of the article to be that the fact that a rule had been stated in a treaty did not prevent that rule from becoming a customary rule of international law. As Mr. Tunkin had noted, the term " customary rule of international law " covered all kinds of rules of customary international law. Perhaps that idea would be expressed more clearly if the words " upon a third State " were deleted; they seemed quite unnecessary, since the Commission was not trying to emphasize the distinction between customary rules and treaty rules.

93. Mr. TABIBI asked the Special Rapporteur whether there was any real need to include in the draft articles a provision on the lines of article 62.

94. Sir Humphrey WALDOCK, Special Rapporteur, replied that the Commission had considered that question in 1964[10] and had arrived at the conclusion

[10] See *Yearbook of the International Law Commission, 1964*, vol. I, 740th meeting, paras. 39-83, and 754th meeting, paras. 89-99.

that, bearing in mind the provisions of articles 58 to 61, a reserving clause on the lines of article 62 should be included. His own view was that such a clause was desirable in order to avoid any possibility of articles 58 and 59 being misconstrued as suggesting that a third State could dispute the binding character of a customary rule that had emerged from a treaty to which it was not a party.

95. Mr. ROSENNE said he shared the Special Rapporteur's view that article 62 served a useful purpose as a general negative reservation and should be retained. However, he was concerned at the risk of possible duplication with the provisions of article 30 (*bis*), which dealt with the possibility that an obligation embodied in a treaty which had been invalidated, denounced or terminated might be also binding under some other rule of international law. If a State ceased to be a party to a treaty under any of the provisions of part II of the draft articles, it would become a third State and the provisions of article 62 would be applicable. If articles 30 (*bis*) and 62 remained separate articles, it would be desirable to bring their wording into line.

96. The CHAIRMAN, speaking as a member of the Commission, said he thought article 62 stated a correct idea and contained a useful reservation. Nevertheless, as the specific reference to articles 58 to 60, which had been included in the text adopted in 1964, had been replaced by a broader reference to " the present articles "—that was to say all the articles in the draft—it might perhaps be well to widen the reservation by adopting Mr. Tsuruoka's suggestion. If a provision of a treaty became a customary rule, the treaty itself might disappear as an instrument, but the rule remained binding on all States, including the parties. In that way, article 62 would become even more useful.

97. Mr. JIMÉNEZ de ARÉCHAGA said he favoured the Drafting Committee's text, with its reference to a " third State ". Article 62 was a survival from the Special Rapporteur's proposal on objective régimes, as explained in paragraph (3) of the 1964 commentary.[11]

98. Mr. TUNKIN said he was not in favour of Mr. Tsuruoka's suggestion for the deletion of the reference to the " third State " since it would make the provisions of article 62 much too general.

99. Mr. de LUNA said that article 30 (*bis*) dealt only with the parties to the treaty and not with third States. Moreover, it referred to other rules of international law, and not merely to customary rules, and covered in addition the case of a treaty rule embodying a general principle of law.

100. Article 30 (*bis*) dealt with the case in which a treaty contained provisions which were declaratory of pre-existing customary international law, whereas article 62 dealt only with the case in which a treaty rule subsequently became a norm of customary international law. Since article 30 (*bis*) did not deal with the third State, it might be desirable to amend the provisions of article 62 so as to cover not only the case of a treaty clause which subsequently became a rule of customary international law, but also that of treaty clauses which were declaratory of pre-existing customary international law.

101. Mr. AMADO said he welcomed Mr. de Luna's statement. He himself had been uncertain whether, in using the expression " as a customary rule of international law " the article referred only to the case in which the rules of a treaty became customary rules or whether it also referred to the case in which pre-existing customary rules were embodied in a treaty. The present text was not clear on that point, but it was important that it should be, because of the different interpretations that might be placed on it. For example, mention had been made of objective régimes, and the Special Rapporteur had rejected the idea that the scope of article 62 might be extended to such régimes.

102. If the words " upon a third State " were deleted, the Commission would be stating a rule which was already applied in general international law and it would not be necessary to state it in the draft. The purpose of article 62 was to complete what was said in the preceding articles concerning the law of treaties in relation to third States.

103. Unless further explanations were given, he was willing to vote for the text as it stood, since he thought it referred both to a customary rule which had existed when the treaty was concluded, and to a customary rule which had derived from the treaty.

104. The CHAIRMAN, speaking as a member of the Commission, said it might be better to restore the specific reference to articles 58 to 60.

105. Sir Humphrey WALDOCK, Special Rapporteur, said he was opposed to Mr. Tsuruoka's suggestion, because it would be inconsistent with the Commission's decision not to enter into the general question of the relationship between treaty law and customary law. The Commission should confine the provisions of article 62 to a negative reservation. For that purpose, it could either revert to the 1964 text or adopt the text proposed by the Drafting Committee, replacing the opening words " Nothing in the present articles " by a reference to specific articles.

106. Mr. ROSENNE said that the appropriate reference in that case would be to articles 58 to 61.

107. Mr. TSURUOKA said that the purpose of his suggestion had been merely to have it stated in the text that a treaty rule which became a customary rule became binding on all States, both parties to the treaty and third States. The suggestion would lose its point if the reference to articles 58 to 61 were restored.

108. Mr. de LUNA said that his suggestion would fill a gap in the text of article 62, which did not deal with the case where a treaty contained clauses that were declaratory of customary international law and as such were binding on a third State.

109. Sir Humphrey WALDOCK, Special Rapporteur, said that, rather than adopt that suggestion, he would prefer to revert to the 1964 text which spoke of treaty rules " being binding " upon a third State " if they have become customary rules of international law ".

110. Mr. TUNKIN said that the Drafting Committee's text was more precise than the 1964 text and he therefore

[11] *Op. cit.*, vol. II, p. 185.

supported the Drafting Committee's text, subject to the replacement of the words " the present articles " by the words " articles 58 to 61 ".

111. Mr. REUTER suggested that the words " upon a third State " be replaced by the words " upon a State not a party ", an expression which would be more precise and would eliminate any doubt as to whether the reference was to third States in relation to the treaty or to third States in relation to custom.

112. Sir Humphrey WALDOCK, Special Rapporteur, said that, according to the definition of a third State which was to be inserted in article 1, that expression meant, precisely, a State not a party to the treaty.

113. The CHAIRMAN, speaking as a member of the Commission, said that he certainly understood the third State referred to in article 62 to be a third State in relation to the treaty.

114. As Chairman, he put to the vote the article 62 submitted by the Drafting Committee, as amended by the replacement of the words " the present articles " by the words " articles 58 to 61 ".

Article 62, as thus amended, was adopted by 13 votes to none, with 3 abstentions.

115. Mr. BARTOŠ said that, although he approved of the idea expressed in the article, he had abstained from voting because, in his opinion, in the case in question, a treaty rule which had become a customary rule also had effects for States parties to the treaty as a customary rule, and they had thus become doubly bound—by treaty and by custom.

The meeting rose at 6.5 p.m.

869th MEETING

Tuesday, 14 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later, Mr. Herbert W. BRIGGS

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

NEW ARTICLE: Case of an aggressor State [70][1]

1. The CHAIRMAN invited the Commission to consider the text of a new article proposed by the Drafting Committee on the case of an aggressor State.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that as he was not in favour of the inclusion of such a provision in the draft articles, he would prefer that the Special Rapporteur should introduce the text.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee wished to put forward for discussion a draft article to cover in a general way the case of an aggressor State. It read:

> " Nothing in the present articles may be invoked by an aggressor State as precluding it from being bound by a treaty or any provision in a treaty which in conformity with the Charter of the United Nations it has been required to accept in consequence of its aggression. "

4. The Governments of the Soviet Union, the United States and others had indicated in their observations on article 59 that the reservation in paragraph (3) of the 1964 commentary regarding the imposition of an obligation upon an aggressor State[2] was not enough. They considered that the matter should be covered in the text of the draft articles.

5. During the discussion of the problem at the present session, there had been a division of opinion. Some members had considered that the reference in article 36, on coercion of a State by the threat or use of force, to the principles of the United Nations Charter excluded by implication the case of an obligation imposed on an aggressor State. Others had considered that the matter should be dealt with explicitly in article 36 or in article 59, while yet others had been in favour of a separate article.

6. After some discussion, the Drafting Committee had finally decided to put forward a text in the form of a separate article which, if accepted, would need to be placed towards the end of the draft articles as a general exception to the provisions of articles 36, 59 and other articles such as article 44, on fundamental change of circumstances, dealing with the grounds most commonly invoked by an aggressor State for releasing itself from an obligation. The whole question raised problems of principle which the Drafting Committee had only begun to discuss and its members had reserved their position pending the general debate in the Commission itself.

Mr. Briggs, First Vice-Chairman, took the Chair

7. Mr. VERDROSS said that he approved the article in principle, but since it referred to the United Nations Charter, it should be made clear that, under Article 39 of the Charter, the Security Council alone was competent to determine the existence of an act of aggression and that its determination was binding on all Members under Article 25 of the Charter.

8. The situation was therefore a special one, since the organ empowered to determine whether or not an act of aggression existed had already been decided. Consequently, instead of saying merely " by an aggressor

[1] For earlier discussion, see 853rd meeting, paras. 3-88, 854th meeting, paras. 1-23 and 867th meeting, paras. 26-27.

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