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Summary record of the 736th meeting

Topic:
Law of Treaties

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which provided for the nullity of any treaty " procured by the threat or use of force in violation of the principles of the Charter of the United Nations ". A treaty imposed upon an aggressor State would not constitute such a violation. There had, of course, been cases in which an aggressor had been asked to recognize the validity of certain acts performed by the States which had overcome the aggression, but the matter was usually covered by a clause in the treaty of peace.

68. The case of Germany was a special one because no treaty of peace had been signed.

69. Mr. BRIGGS said that the Commission was ready to refer paragraph 1 to the Drafting Committee, but a formal decision on that point could be postponed until it had dealt with paragraphs 2, 3 and 4.

70. Mr. LACHS said he regretted to find himself in disagreement with the Chairman. He had not been referring to a peace treaty imposed upon an aggressor, but to an instrument to which an aggressor State had not been invited to become a party for some reason. Other examples than the recent case of Germany could be cited. Article 62 would not be complete without some reference to the exceptional rule that applied in cases of lawlessness or aggression.

71. Mr. REUTER said that the Commission was discussing the law of treaties, not custom or *jus cogens*. *Jus cogens* was a very serious matter, and he could not regard as a rule of *jus cogens* one from which States had reserved the right to derogate for political reasons.

72. Mr. JIMÉNEZ de ARÉCHAGA said that although the Commission had concluded its discussion on the provisions of paragraph 1, two new problems had been raised, that of new States, and that of aggressor States. Those problems seemed to be more closely connected with article 63 than with article 62. He therefore suggested that the Commission should consider its discussion on paragraph 1 concluded, and agree to take up the two problems he had mentioned when it came to discuss article 63 or later.

73. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted that suggestion.

It was so agreed.

The meeting rose at 5.50 p.m.

736th MEETING

Tuesday, 2 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

Paragraph 2

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the subject of rights created in favour of third States, which was dealt with in paragraph 2, was complicated and controversial. The leading case on the subject was the *Free Zones* case,[1] but it was not easy to discern the precise implications of the opinion delivered by the Permanent Court. He had explained in the commentary in some detail the considerations that had led him to the conclusion, expressed in paragraph 2, that a treaty might of its own force create a right in favour of a third State, which that State might or might not take up. There was, of course, no question of the right being imposed. His view was supported by the previous special rapporteurs on the law of treaties and by Mr. Jiménez de Aréchaga in his article in the American Journal of International Law (1956), to which reference was made in the commentary, though certain other authorities, including McNair and Rousseau, were not of the same opinion. Their interpretation of the *Free Zones* case, however, was one to which he could not subscribe.

3. If the view were taken that a treaty could establish only a means of creating a right, but not a right itself without some form of specific acceptance on the part of the third State, that would mean that the right arose not from the treaty, but from a further collateral agreement between the original parties and the third State. In that event, if there were any question of revision or termination of the treaty, the ordinary rules would apply and the consent of the third State would be needed. But if the treaty were regarded as having established an actual right in favour of the other State, it could be argued that the original parties, as the unilateral creators of the right, were free to take such action as they wished in regard to revision or termination, without reference to the third State. That was, perhaps, the crucial point of difference between the two views.

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[1] *P.C.I.J.*, 1929, Series A, No. 22; *P.C.I.J.*, 1932, Series A/B, No. 46.

4. There was a real link and perhaps some overlapping between articles 62 and 63 and no doubt members might wish to reserve their final positions until the Commission had expressed its opinion on the subject of objective regimes.

5. During the discussion on paragraph 1, Mr. Elias had criticized the use of the word " class ", which also appeared in paragraph 2. It was a normal term in legal usage as far as the English language was concerned, but could be replaced by either " group " or " category "; the purpose was simply to denote cases in which beneficiary States were indicated by some general description. So far as paragraph 1 was concerned there was little likelihood of there being many instances in which obligations were designed to come into existence for a class of third States. But in the case of rights the likelihood was much greater ; he need only mention the examples of the Mandate in the *South-West Africa* case,[2] the Trusteeship Agreement in the *Northern Cameroons* case [3] and the reparations clauses of peace treaties, which not infrequently extended to allied countries that were not at war with a particular belligerent, and consequently were not parties to its peace treaty.

6. Mr. VERDROSS said that, under paragraph 2, the creation of a right for a third State under a treaty concluded between two other States was subject to the fulfilment of two conditions. The first condition was positive — that the parties to the treaty must have intended to create such a right ; the second condition was negative — that the right must not have been rejected, either expressly or impliedly, by the third State.

7. A distinction should be made between the existence of a right created in favour of a third State by a treaty concluded between two other States, and the exercise by the third State of the right thus conferred on it. The right existed from the moment when the treaty came into force, but its exercise depended on the will of the third State. Thus paragraph 2 (*b*) did not seem to be in accordance with the true legal position, even if it was construed to mean that the third State could renounce the right conferred upon it by other States ; but in that case the sub-paragraph would be unnecessary, for a right could always be renounced.

8. In his view, only one condition was necessary for the creation of a right in favour of a third State : the parties to the treaty must have manifested the will to create the right. The case was quite different from that contemplated in paragraph 1 of the article ; although an obligation could not be imposed on a third State, there was no reason why it should not be granted a right, without having expressed either acceptance or rejection.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that in essence he did not dissent from the view expressed by Mr. Verdross, but he wished to explain that, according to paragraph 2, for a State to be entitled to invoke a right two conditions must be fulfilled : the stipulation creating the right must exist and the State in question must not have renounced it. The paragraph formulated the rule in terms of the conditions necessary for the right to be invoked at any given time.

10. Mr. CASTRÉN said that paragraph 2 confronted the Commission with a very difficult and controversial problem. As could be seen from the commentary, a number of writers, including Rousseau and McNair, maintained that, apart from treaties of an " objective " character, a treaty could not of its own force create an actual right in favour of a third State. On the other hand, the three previous special rapporteurs on the law of treaties, as well as Mr. Jiménez de Aréchaga and other writers, took the opposite view, in which the Special Rapporteur himself concurred.

11. With regard to the Special Rapporteur's reasoning, it did not seem possible to cite in support of his thesis the provisions of certain treaties, most of them recent, or the opinions of certain courts, since they did not constitute a sufficiently clear and general body of practice. The final judgment of the Permanent Court of International Justice in the *Free Zones* case, quoted by the Special Rapporteur in paragraph (15) of his commentary, had not settled either the question whether actual rights could be created in favour of third States without their acceptance or the question of the revocability of a right deriving from a *stipulation pour autrui*. In the article cited by the Special Rapporteur, Mr. Jiménez de Aréchaga had recognized that, although it was possible to create a right in favour of a third State without its consent, that State could not be compelled to exercise the right.

12. With regard to State practice, especially the peace treaties concluded after the Second World War, the Special Rapporteur had examined at some length the Peace Treaty with Finland [4] and the negotiations conducted by Finland with the United States to obtain compensation for the Finnish owners of ships requisitioned in United States ports during the War. In his (Mr. Castrén's) opinion, the statements and actions of the State Department were at variance with the thesis of the Special Rapporteur, who pointed out in paragraph (19) of the commentary that the State Department had replied that " since the United States was not a party to the treaty of peace with Finland, it had no legal right to benefit therefrom unless it performed some affirmative act indicating acceptance of the benefit." In the end, the question of the Finnish ships had been settled by legislative action, without any final conclusion being reached on the legal effect of stipulations in favour of third parties.

13. Nevertheless, although he did not agree with the Special Rapporteur's interpretation of the case-law and State practice, he accepted, in principle, the new ideas underlying the rules proposed. But a few changes in the text seemed to be needed.

14. Paragraph 2 (*b*) provided that a third State was entitled to invoke a right provided for in a treaty to

[2] *I.C.J. Reports*, 1950, p. 128.

[3] *I.C.J. Reports*, 1963, p. 15.

[4] United Nations *Treaty Series*, Vol. 48, p. 228.

which it was not a party, on condition that the right had not been rejected in some way or other. For the reasons he had already given, he proposed a different, positive criterion, namely, clear acceptance, whether implied or not, which could be manifested, for example, by the exercise of the right conferred. Such an act of acceptance did not necessarily constitute a collateral agreement between the third State and the parties to the main treaty, so that the parties would not be able to modify or abrogate the right in question — though the right could in fact have been granted subject to unilateral revocation. Again, although acceptance could be express or implied acceptance, what was meant by implied rejection? If it meant that the third State refrained from exercising the right conferred on it, how much time would have to elapse before the right was finally lost? It was difficult to set a time-limit either for rejection or for acceptance.

15. In paragraph 3 (*a*), instead of speaking of a specific agreement between the parties to the treaty and the third State entitled to the right, it would be better to say that the parties to the treaty had declared that the right of the third State was irrevocable, or that they would not exercise their right to amend or revoke the provision in question for a specified or unlimited period. Some writers maintained that such a declaration could be revoked by a fresh treaty concluded between the partes to the first treaty without the consent of the third State, but he found it difficult to accept that view without reservations. If the third State had already exercised its right and in doing so had incurred heavy expenses, for example, it would be unfair to deprive it of its right unilaterally. Provision should therefore be made for that contingency in a sub-paragraph (*c*) to be added to paragraph 3. In any case, if the parties to the treaty amended or annulled it in such circumstances, they would be responsible to the third State and would be required to indemnify it.

16. With regard to the question of treaties intended to have objective effects, referred to in paragraph (20) of the commentary, treaties creating objective regimes which came within the scope of article 63 should be dealt with in a separate article. But if some other class of treaties was referred to, the provisions of article 62 would have to be made applicable to them in order to avoid undue complexity. The Commission would be able to decide that point more easily after discussing article 63.

17. Mr. PAREDES said that the Special Rapporteur had done well to state in separate paragraphs the conditions under which a treaty could create obligations for third States and those under which rights could be conferred on them; but it would have been better to devote separate articles to those two questions.

18. With regard to paragraph 1, he had already expressed his objection to the idea of " implied consent " being binding on third States. Nor did he believe that there was a collateral agreement, for when the third State accepted the consequences of the treaty it had already been concluded, and the act by the third State was much closer to an accession, even if it was not in accordance with the provisions of articles 8, 9 and 13.

19. An obligation could certainly not be imposed on a third State without its express consent, but it would not be satisfactory to delete the words " expressly or impliedly "; only the words " or impliedly " should be deleted, for if the word " expressly " was dropped, the question whether both forms of consent were valid would remain in doubt. It had been said that there were cases of oral agreement in which implied consent must be recognized. His own view was that express consent was always necessary, though it might be given either in writing or orally.

20. The position was different in the case of paragraph 2, since it referred to rights conferred by the contracting parties on third States, which could manifest their will by exercising or not exercising those rights. But the will to accept must be clear; not even rights should be conferred on States against their will.

21. Once a right had been granted or an obligation expressly accepted, the original parties to the treaty should not be able to revoke or modify it by themselves without the consent of the State which had accepted it. A kind of contractual relationship existed between the States making the offer and the State accepting it. It was all the more necessary for the latter to be consulted because its acceptance of the offer might have led to considerable expenditure on preparations for exercising the rights conferred. For example, if two States agreed to grant an outlet to the sea to a land-locked third State, and in order to make use of the promised waterway that State invested large sums in ships, could the right to use the waterway be revoked without consulting it? It must be emphasized, however, that all those considerations applied to the individual interests of peoples, not to the recognized universal interests which were part of the juridical heritage of the world.

22. With regard to paragraph 3, it was important to make a distinction between the rights promised and mere benefits granted. If two or more States entered into an agreement to provide technical assistance or some other form of help to developing countries, those countries should not regard it as irrevocable; the countries providing the assistance were always free to discontinue it.

23. Both the obligations referred to in paragraph 1 and the rights referred to in paragraph 2 constituted exceptions to the rule stated in article 61 that treaties created neither obligations nor rights for third States. So there was no reason to speak of a collateral agreement as their source; what happened was that the third State acceded to the treaty — whether to a part or to the whole of it. Once that accession had taken place, the acceding State had the same rights as the other parties, and the treaty could not be terminated without its consent.

24. Paragraph 4 was acceptable, and its wording showed that there must be an agreement of wills between the parties to the original treaty and those to whom it was subsequently applied, since they were " bound to comply with any conditions laid down in that provision or elsewhere in the treaty for the exercise of the right ". The transaction comprised an offer and

an acceptance, which gave it the legal character of a contract.

25. Mr. LACHS said that on the whole he agreed with the Special Rapporteur's approach to the issue of stipulations in favour of third States. It was, of course, important that the Commission should be guided by the trend which had begun with the Treaty of Paris of 1856[5] — on which Turkey, while not being a party, had relied to claim certain rights — and had continued to the *Free Zones* case and up to the present day. There was no theoretical or practical reason for limiting the freedom of parties to a treaty to include such stipulations if they wished and that, as he saw it, was the existing rule.

26. A telling example of a stipulation in favour of third States, coupled with the establishment of effective machinery for its application, was the most-favoured-nation clauses in the Peace treaties of 1947[6] which were to apply to all Members of the United Nations, irrespective of whether they were parties to the treaties, for eighteen months after their entry into force. The Conciliation Commissions set up to ensure that the provisions were implemented had included Member States that were not parties. There had also been the decision in 1925 by the United States-German Mixed Commission recognizing certain rights accruing to the United States from the Treaty of Versailles,[7] to which it had not been a party. For such stipulations to be effective it must be made clear that a right had been created and in whose favour, although, as the Special Rapporteur had rightly concluded, the beneficiary need not be designated by name.

27. He had some difficulty in accepting the wording of paragraph 2 (*b*), because it might leave too much room for the third State to play for time and then reject or accept the right when it was convenient. In law there was already a wide area of uncertainty between acceptance and non-rejection which left a great deal of room for manœuvre. The wording would need to be reconsidered and he was inclined to agree with Mr. Verdross that the right existed from the moment of its establishment under the treaty, so that the beneficiary third State must, at the first possible opportunity, indicate whether it would avail itself of the right or renounce it. That requirement ought to be plainly laid down in the provision. A presumption of acceptance was admissible in the case of rights, though not in the case of obligations, the structure of the two provisions being entirely different.

28. In practice, events would not necessarily fit into the provisions devised by the Commission, and it might well be that the duties and rights of third States would be interwoven, in which case the criteria applying to obligations must prevail.

29. Treaties establishing objective regimes and obligations *erga omnes* should be dealt with separately from article 62, paragraph 2.

30. He would not, at that stage, comment on the question of the revision or termination of treaties providing for obligations or rights of third States, because that was a matter affecting the whole issue.

31. Mr. REUTER thought that the presentation adopted by the Special Rapporteur was too complicated; a simpler and shorter text would be preferable.

32. In considering the problem dealt with in article 62, the essential question to be settled was that of the legal source of the rights of third States. Moreover, that question was suggested by various uncertainties in the wording of article 62, in particular the differences between the French and the English texts. Paragraph 3 of the French text referred to an "*accord*", whereas the English text spoke of a "specific agreement", which had different connotations.

33. Could it be said, as the Special Rapporteur had done, that the right of the third State derived from a collateral agreement, which was a true international agreement, or was some other explanation possible? His own view was that article 62, which dealt with the problem as a whole, should keep to the general principles which the Commission had recognized so far, namely, that States were sovereign, but that as sovereign States they could not conclude any agreement binding on a third State. Once that principle was acknowledged, it followed that States could not only bind themselves with respect to one another, but could also offer an option to a third State; otherwise accession clauses in bilateral treaties would not be possible.

34. But there was a third possibility: two States that laid down a rule might take steps which later, through the establishment of a custom, created rights in favour of third States. That was a case which the Commission should leave aside, but which should be borne in mind.

35. In the case contemplated in article 62, it was clear that the third State could accept the offer made by the States parties to the treaty in any way whatever, provided that its acceptance was real. Paragraphs 1 and 2 should therefore be symmetrical, for a third State was committed, even by a right conferred on it, and there was no more justification for binding that State by a right offered to it than by an obligation.

36. If a collateral agreement existed, it could be made subject to conditions or limits from the legal point of view. According to circumstances, the parties to the main treaty, who were also parties to the collateral agreement, could make the term of that agreement depend on the continuance in force of the main treaty or of one of its clauses. The principle raised no difficulty, but very complicated situations could arise in practice. The case contemplated was not that of accession. Certain new States had thought fit to send to the Secretary-General of the United Nations a declaration that they considered themselves bound by various general treaties which contained accession clauses. They had not become parties to the treaties by virtue of that

[5] *British and Foreign State Papers*, Vol. XLVI, p. 8.

[6] United Nations *Treaty Series*, Vol. 41, pp. 78-80, article 29 and p. 204, article 33; Vol. 42, p. 66, article 31; Vol. 49, p. 166, article 82.

[7] *Mixed Claims Commission, United States and Germany, Administrative Decisions and Opinions*, Washington, 1925, pp. 308 *et seq.*

declaration, but there was a special legal relationship between them and the parties to the treaties. The Secretary-General had therefore been asked to notify those new States that they were entitled to accede to the treaties in question and thus to acquire more extensive rights by becoming parties. That was a special case with which the Commission was not concerned at present.

37. Once the general principles underlying article 62 were accepted, it should be possible to draft a much simpler article, for all that was needed was to restate certain consequences of general principles relating to the law of treaties. That would make it possible to dispense with some elements of the present wording that might suggest, for example, that the article covered the question of the effects of the most-favoured-nation clause, which was not the Special Rapporteur's intention.

38. The CHAIRMAN, speaking as a member of the Commission, said that most of the comments he had intended to make had been made by Mr. Reuter. The Commission could not evade the fundamental theoretical question: what was the source of the right? Everything else depended on the answer to that question.

39. It had been said that the right derived from the treaty itself, but he did not see how the Commission could content itself with such a reply. A treaty concluded between two States could confer rights and impose obligations on those two States, but it could not create rights or obligations for a third State. For the third State, a right could derive only from a general rule of customary law or from an agreement to which it was a party. He strongly doubted whether there was any general rule of customary law by which some States, by agreement among themselves, could confer a right on a third State. Such a rule would seem contrary to the spirit of international law, according to which the action of a group of States could not modify the legal position of a third State without its consent. No matter whether an obligation or a right was concerned, the consent of the third State was always necessary.

40. The only difference between the cases contemplated in paragraphs 1 and 2 was that mentioned by Mr. Lachs. If two States agreed to offer a right to a third State — for it seemed certain that the parties to the initial treaty could not confer a right on a third State, but only offer it — there was a presumption that the right would be accepted. No doubt that was why the Special Rapporteur had drafted a rule under which the third State was deemed to have accepted the right so long as it had not rejected it. If, on the other hand, the parties proposed an obligation, the presumption was the contrary, and a clear manifestation of acceptance by the third State was necessary.

41. The most difficult case was probably that in which the parties offered both a right and an obligation. Mr. Lachs had been right in saying that it was then more important to consider what happened in regard to the obligation than what happened in regard to the right.

42. He hoped the Commission would be able to express its views in simple terms. If it recognized that the basis of the third State's right was mutual consent between the parties and the third State, that consent would also be necessary for modifying or terminating the right.

43. Mr. ELIAS said that, unlike paragraph 2 (*a*), paragraphs 2 (*b*) and 3 created difficulties, mainly because of the confusion caused by the use of the word "right". An examination of paragraph 3 and of the views of previous Special Rapporteurs on the law of treaties, who had considered that parties to a treaty conferring rights on a third State could subsequently alter its provisions without seeking the consent of the beneficiary, or even informing it, showed that the right referred to in article 62 was not something that could be enforced in a court of law. Hohfeld had analysed the word "right" and found that it had sixty-four different meanings;[8] that showed the kind of misunderstanding that could result from misuse of the word. In reality, paragraph 2 was concerned with conferring a benefit in favour of a third State.

44. Despite the arguments put forwards by the Special Rapporteur in the commentary, in which he had cited certain authorities in support of the view that the creation of stipulations in favour of third States was an accepted concept, he (Mr. Elias) had come to the conclusion that the thesis developed by McNair and Rousseau was the sounder one. He also considered that the passage quoted in paragraph (12) of the commentary, from the advisory opinion of the Committee of Jurists in the *Aaland Islands* case, in fact rebutted the Special Rapporteur's contention, by rejecting the possibility of Sweden having any direct rights under the provisions of the Convention of 1856.

45. Paragraphs 2 and 3 would have to be simplified and some time-limit imposed on the third State for acquiescence in the right created on its behalf.

46. Some safeguard would also need to be introduced against the parties to the treaty unilaterally modifying rights in the exercise of which the third State had incurred expenses; otherwise its position could be changed for the worse without its having any say in the matter.

47. Mr. ROSENNE said that, in principle, paragraph 2 was satisfactory. He understood the word "right" as used in that paragraph to mean a right that was legally enforceable by whatever means were available in international law or international relations. The expression "actual right", used in sub-paragraph (*a*) appeared unusual and it probably originated from the registry of the Permanent Court of International Justice, which had used it as a translation of the words "*véritable droit*", which appeared in the French authentic text of the judgment in the *Free Zones* case. That translation was not altogether appropriate because it was clear that what the Court had meant by "*véritable droit*" was a legally enforceable right.

[8] Hohfeld, W. N., *Fundamental Legal Conceptions*, Yale University Press, 1923.

48. Like some other speakers, he was not altogether satisfied with the negative formulation of sub-paragraph (*b*). He would prefer to see the concept of implied rejection replaced by the idea contained in paragraph (1) of the commentary on article 47,[9] which spoke of " the principle that a party is not permitted to benefit from its own inconsistencies ".

49. A number of suggestions had been made for simplifying the wording and for introducing an element of symmetry into paragraphs 1 and 2, but he did not think that complete symmetry was possible; it must be remembered that two States could agree that one of them, and only one of them, would grant a right to a third State.

50. He wished to reserve his position regarding paragraph 3 although he could say that he was in broad agreement with some of the views already expressed by the Chairman.

51. Mr. VERDROSS, referring to a comment by the Chairman, said that there was indeed a customary rule that States could create a right in favour of a third State; that was proved by the generally accepted rule concerning accession clauses. The effect of those clauses was to create, for certain other States or for all other States, a right to become parties to the treaty by a mere declaration; States wishing to avail themselves of that right were not required to accept it in advance.

52. Everything really turned on what was meant by a " right ". As he saw it, a right was the faculty conferred by a rule of law to require certain behaviour on the part of another person. It might be possible to overcome the difficulty by replacing the word " right " by " faculty ", since no one would deny that two or more States could, by means of an agreement, grant a certain faculty to a third State. The use of that word might also satisfy those members who had a different opinion on the theoretical aspect of the problem.

53. Mr. YASSEEN thought that the crux of the problem was whether the right of the third State derived from the original treaty or from that State's acceptance of the right. The theory of the *stipulation pour autrui* was accepted in the municipal law of most countries to meet needs which had been felt in the internal legal order; it was an exception to the *pacta tertiis* rule. But neither the precedents nor case-law demonstrated convincingly that that theory was part of positive international law, in which, incidentally, it was not necessary. The Commission should not depart from the general principle that agreements could not be invoked against third parties. The method of the collateral or complementary agreement — or whatever it might be called — was sufficient for all the needs of the international order.

54. When a right was said to be created for a third State, it was in fact not an abstract right, but a concrete right, of which a State that was, or could be, determined was the subject. Some speakers had suggested that the word " right " was used to mean an advantage or a favour; but it was for the third State itself to judge whether the alleged advantage really was an advantage. A cession of territory, for example, might not always be regarded as an advantage. It was necessary to be sure that the third State consented to the proposed change in its legal position.

55. Consequently, he could not accept the idea of paragraph 2, which was based on the theory of the *stipulation pour autrui*. States could not create obligations or advantages for a third State: they could only offer them, and the third State remained free to accept or reject them. The right offered did not come into being until it was accepted by the third State.

56. Mr. TUNKIN said that, while he recognized the usefulness of studying the decisions of international courts, he was rather alarmed at the undue emphasis being placed on the judgments of the International Court of Justice and the Permanent Court of International Justice at the expense of State practice. In fact, an analysis of that practice was essential, because it was States which created the rules of international law; their practice therefore meant more than judicial opinions of the views of prominent internationalists. Of course, he did not accept the view put forward by Kelsen that State practice as such could be taken as international law,[10] since Article 38 of the Statute of the International Court of Justice referred to " practice accepted as law ", not merely to practice as such. But more prominence should be given, in the Commission's work, to the study of State practice, which alone would enable it to formulate acceptable rules of international law.

57. Paragraphs 2 and 3 should be examined in the light of the basic principles of international law, the first of which was the equality of States. By virtue of that principle, no State or group of States could create rules of international law binding upon other States. The Commission had already accepted that principle in article 61 and should adopt the same approach in article 62.

58. If a State had a legitimate interest in the subject-matter of a treaty it should be invited to the Conference formulating the treaty or at least be consulted during its formulation; that should be clearly stated in the commentary. But in article 62, the question arose what constituted the real source of the rights and obligations of the " third State ". He agreed with those members who considered that the source was the additional or " collateral " agreement to which the third State was a party. As he had already pointed out, strictly speaking it was not correct to speak of a "third State ", since no treaty could create rights or obligations for a third State; the rights and obligations derived from the consent of the third State and the agreement entered into with the original parties to the treaty.

59. There had been some discussion on the subject of implied consent. Just as when dealing with obligations (paragraph 1), so too, when dealing with rights (paragraph 2), real consent was necessary. The con-

[9] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 24.

[10] Kelsen, H., *Principles of International Law*, New York, 1962, pp. 307 *et seq.*

ferment of a right often carried with it certain consequences, some of which might well not be acceptable to the State on which the right was being conferred. Paragraph 2 should be redrafted to take those points into account.

60. With regard to paragraph 3, he inclined to the view put forward by the Chairman that the consent of the third State was necessary to modify or revoke a right conferred on it. That view, which was shared by several other members of the Commission, was based both on considerations of principle and on practical grounds.

61. Mr. LIU said that the rights dealt with in paragraph 2 often derived from existing circumstances which were acquiesced in, or acknowledged by, the parties to the treaty. In those cases it was not so much a matter of the creation of a right in favour of a third State, as of the acceptance of an obligation in respect of a third State by the parties to the treaty. He found it difficult to accept either the idea that that right had to be expressly accepted before it came into existence, or the idea that the right could be modified or revoked without the consent of the State entitled to it.

62. Mr. AMADO thought Mr. Tunkin had been right in saying that, in the case being considered, there was no third State. There were only States which could enjoy certain advantages provided by the treaty; but even so those advantages must not be like the Trojan horse.

63. He had been the first to express doubts about the "collateral agreement", which was really only a more or less audible murmur of consent. The Commission was now seeking the legal source of the right in question, and was moving towards a formula carefully adapted to a subject that carried within it the seeds of its own destruction.

64. Sir Humphrey WALDOCK, Special Rapporteur, said he did not believe that the question whether the third State possessed an actual right was so important in practice, although he did agree that it might assume importance if the parties contemplated revoking the right.

65. Personally, he had no difficulty in accepting the thesis that a treaty created a right for a third State. There were well-known examples of a number of States agreeing, often in connexion with a peace settlement, on a provision intended to confer a specific benefit upon a third State. In his mind there was no doubt that such an agreement would create an actual right if the parties so intended. The treaty had a quasi-legislative effect. It established a situation in which the third State could at any moment avail itself of the provision and enjoy the benefit which it offered. None of the parties to the treaty could individually refuse to accord the benefit to the third State or revoke the provision. The position of the third State therefore seemed to be that of a beneficiary of a right. The right existed under the treaty and would not disappear until terminated by the States which had created it by common agreement. Thus, unless the benefit provided for in the treaty was rejected by the third State, the right existed under, and was established by, the treaty.

66. Paragraph 3 was inspired by the view expressed in the *Free Zones* case by Judges Altamira and Hurst in their dissenting opinion, to which he had referred in paragraph (16) of the commentary. It allowed the parties to revoke the *stipulation pour autrui* except where it had been created by agreement with the third State or had been intended to be irrevocable. Some members of the Commission considered that it should always be irrevocable once the third State had manifested its acceptance. He had preferred the view of Judges Hurst and Altamira, because it seemed more likely to encourage the creation of rights in favour of third States.

67. Mention had been made of the possibility that the third State might incur considerable expense in preparing to exercise the right conferred upon it; in such a case, it would clearly be unfair for the third State to be placed in a position where the right might be amended or revoked without its consent. But in cases of that type, the parties to the treaty would almost certainly have entered into a specific agreement with the third State, and the case would be covered by the exception stated in paragraph 3 (*a*), which had been formulated in order to cover cases such as that of the *Free Zones*. In that case, Switzerland had succeeded in establishing that there existed a contractual relationship with the other States, even though the real origin of the Free Zones was in another instrument of the 1815 peace settlement to which Switzerland had not been a party.

68. Paragraph 3 could, he thought, be reformulated in such a manner as to give satisfaction to the various views which had been expressed, by indicating that, where the third State had accepted the right conferred on it, that right would be irrevocable without its consent. A formulation of that type would avoid placing too much stress on the issue of principle, on which admittedly views were divided. Unlike some members, he held the view that a treaty could create rights for a third party, but disagreement on a matter of principle should not prevent the formulation of a provision which would be satisfactory to all.

69. It had been suggested that more prominence should be given to State practice. As shown by his commentary, he had made every effort to use the information available regarding the State practice. The obstacle was the inadequate publicity, which made it difficult to obtain information on State practice; he would always be grateful if members of the Commission would supply him with any additional information in their possession. He must emphasize, however, that he was quite unable to accept the view that the decisions of international tribunals were not evidence of State practice. Not only were the statements of the contesting States evidence of practice, but the decisions of the tribunals themselves were based on what they regarded as the general practice accepted as law. Moreover, the decisions of tribunals had particular value as being objective appreciations of the practice of States on the points which they were called upon to deal with.

70. The question of the link between rights and obligations had been raised by Mr. Lachs and it was not

always easy to determine in a particular instance which of the two was the uppermost element; in case of doubt, it would be appropriate to place the emphasis on the obligation and to insist on consent being given specifically by the third State. Where the right was the more prominent element, the evidence of consent need not be so clear-cut.

71. He would try to prepare for the Drafting Committee a new text of paragraphs 2 and 3 which would place rights conferred upon third parties more on the basis of agreement, although not such formal agreement as in the case of obligations.

72. Mr. TUNKIN said that his remarks regarding the judgments of the International Court had merely been intended to show that he disagreed with the opinion of the late Sir Hersch Lauterpacht that pronouncements by the International Court of Justice constituted the law.[11] Proof that that view was not generally held was provided by the fact that only some forty States had accepted the compulsory jurisdiction of the Court. But even if it were accepted that the decisions of the Court took State practice into account, there was a broad field of practice that had never come to the notice of the Court. In any case, the Commission should pay special attention to recent State practice.

The meeting rose at 12.30 p.m.

737th MEETING

Wednesday, 3 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Law of Treaties
(A/CN.4/167)
(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. JIMÉNEZ de ARÉCHAGA said that several speakers had emphasized the need to establish the source of the right of the third State. In common with Mr. Verdross, Mr. Lachs and the Special Rapporteur, he took the view that the right of the third State derived directly from the treaty as such and was available to that State as soon as the treaty entered into force. As he understood them, the Chairman, Mr. Reuter, Mr. Yasseen and Mr. Elias took the view that the right of the third State was based on a second or additional agreement entered into between the original parties to the treaty and the third State. Notwithstanding that cleavage of opinion on the theoretical aspect of the problem, he believed that it was possible to draft a rule which would be generally acceptable and would at the same time reflect the practice of States.

3. The rule should incorporate one element on which all were agreed, namely, the principle that the consent of the third State was essential. The third State was the sole judge of whether or not it should exercise the proffered right. No one had suggested that a right could be imposed on a State against its will, for not only would that be contrary to the principle of the equality of sovereign States, but it would not be feasible. No State could be compelled to exercise a right against its will: that would, in fact, constitute the imposition of an obligation and as such would fall under the general rule contained in article 61 and in article 62, paragraph 1. As the Latin maxim had it, *invito beneficium non datur*. That element was clearly brought out in the opening sentence of paragraph 2: "...a State is entitled to invoke a right...". The provision was thus based on the assumption that the favoured State would perform an act of will by invoking or claiming the proffered right.

4. There was also general agreement on a second element, namely, that the consent of the third State need not take the form of a second or collateral agreement, but could be expressed in any form in which the real consent of States was manifested in international practice. What was essential was the existence of real consent, and practice showed that such consent could be revealed by conduct, the commonest form being the very act of claiming or invoking the right. It would be carrying a fiction too far to claim that the exercise of a right by a third State constituted the consent to a second or collateral agreement from which that very right originated; the second agreement could hardly come into being at the same moment as the right was exercised.

5. The Permanent Court of International Justice had held, in the *Free Zones* case, that the acceptance could result from the fact that the provision of the Treaty of Versailles on the Free Zones had been requested by Switzerland before that treaty was concluded.[1] It seemed impossible to contend that consent to a second or collateral agreement could result from a request that a certain provision be included in the first agreement in which the original offer was supposed to have been made. Nor did he believe that a collateral agreement was entered into by the Member States of the United Nations with a non-Member State every time such a non-Member State availed itself of the rights conferred upon it by Article 35 (2) or Article 32 of the Charter.

[11] Lauterpacht, H., *The Development of International Law by the International Court of Justice*, London, 1958, pp. 20-22.

[1] *P.C.I.J.*, 1929, Series A, No. 22, pp. 17-18; *P.C.I.J.*, 1932, Series A/B, No. 46, p. 141.