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Summary record of the 740th meeting

Topic:
<multiple topics>

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740th MEETING

Monday, 8 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Welcome to Mr. Kanga

1. The CHAIRMAN welcomed Mr. Kanga, who was attending a meeting of the Commission for the first time.

2. Mr. KANGA thanked the Chairman and said he regretted that he had not been able to attend earlier; he appreciated the great importance of the Commission's work, and hoped to contribute to it.

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

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 63 (Treaties providing for objective regimes) *(continued)*

3. The CHAIRMAN invited the Commission to continue consideration of article 63 in the Special Rapporteur's third report (A/CN.4/167).

4. Mr. VERDROSS suggested that the Commission take up article 64 while continuing its discussion on article 63, since some members would probably accept, in article 64, the idea they rejected in article 63, namely, that a treaty between a few States could be transformed into a general rule.

5. Mr. TUNKIN said that although, when it came to discuss article 64, the Commission might touch on some problems dealt with in article 63, the fact remained that the subject-matter of the two articles was different and the wide field covered by article 63 could not be covered in article 64. He therefore urged that the discussion of the two articles be kept separate.

6. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that for the time being the discussion of the two articles should be kept separate. As at present conceived, article 64 was merely a reservation of the question of custom.

7. With regard to article 63, the discussion during the past week had shown that the majority of members recognized that the phenomenon considered in it existed, but that they were not prepared to include in the draft articles a provision embodying the concept of an objective regime generated by the treaty itself. If then, in deference to the wishes of the majority, it were decided not to include article 63, it would be necessary to adjust the formulation of article 62 so as to cover those treaties which constituted a means of creating a right for all States in general, and not merely for a particular category of States.

8. At the close of the previous meeting, he had mentioned the Chairman's interest in the question whether article 63 covered the case of a new-born State. He would like to hear from the Chairman, now that he was back, whether he thought that case came within the scope of the law of treaties and, if so, whether a special article was required to deal with it.

9. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion it was not quite correct to say that treaties could, of themselves, create an objective regime. Treaties merely laid down the conditions necessary to enable a situation to come into existence; objectively, that situation was created by the fact that the parties to the treaty acted in a certain way in fulfilling the obligations they had assumed under it. It could certainly be held that that problem went beyond the law of treaties proper, which was essentially concerned with the rights and obligations created for the parties to the treaty, not with the later consequences of the treaty's application.

10. During the discussion, however, the Commission had also considered the case in which two States reciprocally undertook to perform certain acts for the purpose of creating a new State, and made the birth of that new State subject to certain conditions. The Commission had recognized that a treaty could not create obligations for a third State without its consent. The question therefore arose whether the State about to be born was bound to observe a stipulation which was the very condition of its birth. The Commission could hardly disregard that special problem. If it did not think a special article could be devoted to the subject, it should be mentioned in article 62 or at least in the commentary on that article.

11. Mr. TUNKIN said that article 63 was intended to cover a variety of cases which differed greatly, both in factual background and in legal character.

12. One such case was the delimitation of a land frontier or of the territorial sea by two neighbouring States; so far as third States were concerned, that type of settlement constituted *res inter alios acta.*

13. Another case was that covered by the Montreux Convention on the regime of the Straits;[1] the material and legal bases of that settlement were completely different from those of the former example.

14. Another case was that of the 1948 Convention on the regime of the Danube[2] which provided for the right of free passage by merchant vessels of all nations, subject to the obligation to respect whatever rules might be established by the riparian States.

15. Yet another case of the type envisaged in article 63 was that covered by the Antarctic Treaty of 1959.[3]

[1] League of Nations *Treaty Series*, Vol. CLXXIII, p. 215.

[2] United Nations *Treaty Series*, Vol. 33, p. 197.

[3] United Nations *Treaty Series*, Vol. 402, p. 72.

Antarctica was of interest to all States ; some had made claims to territorial sovereignty, but a great many others did not recognize those claims. Speaking from his recollection as the Soviet Union representative at the Conference which had drafted the treaty, he would say that the intention had been to create a regime which could become universally accepted. But there had been no intention of imposing that regime ; any attempt to do so would have been illegal. Once again, the factual and legal situations in regard to that treaty differed from the other examples he had given.

16. To the extent that the problems considered in article 63 came within the scope of the law of treaties, they were covered by articles 62 and 64. If the language of those articles did not fully cover them, it could be amended to do so.

17. Mr. JIMÉNEZ de ARÉCHAGA said he would deal with two points that had arisen during the discussion : that of States *in statu nascendi*, and that of aggressor States.

18. With regard to States *in statu nascendi*, he wished to clear up a misunderstanding which appeared to have arisen in connexion with his statement earlier in the discussion. He had not said or intended to imply that it would be legitimate to make a State's right to independence, or the granting of independence, subject to certain conditions laid down in a treaty. History showed that the independence of a State was never granted graciously by another political community through a *stipulation pour autrui*, whether accompanied by conditions or not. Independence invariably resulted from the efforts of the subject people but, once thus earned, one of the juridical forms in which it could be acknowledged was a treaty to which the newly independent State was not technically a party. In mentioning that situation, he had intended to refer only to the legal superstructure and not to the sociological facts behind it.

19. It had been suggested by the Chairman that a special article should be devoted to the case of the State *in statu nascendi*, since it could not be covered by article 62, on the stipulation of rights in favour of third States ; the State concerned did not yet exist, so that it could not benefit from or accept the stipulation.

20. He was not of that opinion, however, because in cases of that kind, before the new State came into being, some recognition was granted to a belligerent community or *de facto* authority in favour of which the stipulation was made in the treaty. The community or authority in question, upon accepting the rights and obligations specified in the treaty, became a fully-fledged State. Examples of that situation were provided by Czechoslovakia with respect to the Treaty of Versailles in 1919, and Uruguay in 1828. But the Commission should abide by its earlier decision to deal only with treaties to which States were parties and leave aside agreements which might be entered into, or from which benefits might be derived, by other subjects of international law. If the Commission were to enter into the question of treaties that might benefit subjects of international law other than States, it would have to consider such questions as that of rights stipulated in favour of individuals, as in the human rights conventions.

21. Wtih regard to the question of aggressor States, to include a special article on the subject of treaties imposed on such States would raise more problems than it would solve.

22. The problem of the exercise of powers by a belligerent with binding effect on the territory of an aggressor State could not be divorced from other problems of international law, such as the law of *debellatio*, the responsibility of States, mentioned by Mr. Tunkin, and the difficult question of the limits of legitimate action against aggression, including both the application of sanctions by an international organization, and self-defence by the State attacked and by States supporting such legitimate defence. There would also be the serious difficulty that what had happened at the end of the Second World War, which had been legitimate then and continued to be legitimate by virtue of Article 107 of the Charter, might not be the appropriate action against future aggression under the existing law of the United Nations Charter.

23. He therefore suggested that the commentary should mention that certain members had wished to cover the subject of the aggressor State, but that others had thought it would lead the Commission into a discussion of matters alien to the law of treaties.

24. Mr. YASSEEN said that, from the technical standpoint, article 63 differed from article 62 only in regard to the machinery for determining the attitude of the third State towards the treaty. Under the terms of both articles, the extension of the rights and obligations provided for in a treaty could be based only on a collateral or complementary agreement establishing the acceptance of the third State. But article 63 sought to hasten acceptance by compelling the third State to decide within a certain time. On reflexion, he thought that the States directly concerned always gave a decision within a reasonable period ; as to States not directly concerned, there was no reason to lay down any special rule under which, after a certain period, their silence would be deemed to constitute consent. Article 63 was not really necessary ; all conceivable situations to which it might apply could be settled under article 62.

25. Mr. TABIBI said he agreed that articles 63 and 64 should be discussed separately, but decisions on them should be taken together.

26. Mr. LACHS said he agreed with Mr. Tunkin that article 63 attempted to cover, under the heading " objective regimes ", a number of cases which were different in nature, in objective character and in scope. It was certainly difficult to cover all those cases in article 63, but it was also true that article 62, as it had emerged from the discussion, did not cover all the problems that could arise with regard to third States.

27. In particular it did not cover situations which had an effect *erga omnes*, even if they did not constitute objective regimes. He would deal with only one such

situation, which he had already described as combining both rights and obligations: the neutralization of States — in peace, not in war. The nineteenth century conception of neutralization had been different from that which now prevailed, but the Treaty of London of 1839,[4] establishing the neutrality of Belgium, laid down that it should be observed *envers tous les autres Etats*. Consequently, at a time when States had still been considered to enjoy *jus ad bellum*, States which were not parties to the treaty had benefited by the neutral status of Belgium in that they could count on Belgium's not attacking them. But that benefit had been accompanied by certain obligations. The guarantors of the London Treaty had had a double obligation: to respect the neutrality of Belgium and to see that Belgium's neutrality was respected by other States.

28. Today, the status of neutrality had a different meaning, but it nevertheless had effect *erga omnes*. It could be created by a treaty or it could result from internal legislation, later confirmed by an international document. For example, Austria had adopted neutral status by an internal law of 26 October 1955 and its neutrality has been guaranteed by a number of States on 6 December 1955, by an exchange of notes.[5] That status gave States not signatories to the guarantee certain benefits resulting from the consequences of the neutrality thus established. The rights and obligations were thus linked with one another, and that contemporary conception of neutrality created a situation *erga omnes* which was not fully covered by the wording of article 62. The signatories to the treaty accepted the dual obligation to observe the status of the neutral State and to see that other States also respected it. Third States which acquiesced in that status, had only the duty to refrain from violating it.

29. The Commission should provide for that type of situation in its draft. It was, however, a matter of expediency whether it should do so in article 62 or in a separate article.

30. Another point which the Commission should bear in mind was the necessity of including a provision on the question of ex-aggressor States. Notwithstanding the difficulties to which Mr. Jiménez de Aréchaga had referred, the question could not be ignored. Since the Commission had included draft articles on the effects of treaties on third States, its silence on the question of ex-aggressor States might lead to an unwelcome interpretation of its attitude towards the treaties concluded after the Second World War; in the interests of the rule of law, it was essential that any doubts regarding the validity of those treaties should be dispelled.

31. Mr. ELIAS said he feared that the Commission was being drawn into entirely new fields. He had been the first to suggest the deletion of article 63 and he adhered to the view that much of its contents could be placed in article 62 or in article 64. That also applied to such subjects as neutralized and demilitarized zones, as indicated by the Special Rapporteur himself at the previous meeting. He therefore considered that the matter was ripe for decision and urged the Commission to drop article 63 altogether and proceed to consider article 64.

32. The CHAIRMAN said he noted that most members took the view that article 63 should not appear in the Commission's draft. But it remained to be decided whether some of the cases contemplated in article 63 should not be covered by other articles. The Commission could consider that question when it examined the redraft of article 62.

33. Sir Humphrey WALDOCK, Special Rapporteur, said he would regret the deletion of article 63, which, he believed, served a purpose and had a progressive element in its provisions. In so far as article 63 was intended to cover the granting of rights to third States, article 62 could, if redrafted, cover its subject-matter; it would, of course, be necessary to reformulate article 62 in such a way as to cover the case of provision for rights in favour of all States.

34. Like Mr. Lachs, he feared that article 62 could not cover the case of negative obligations, such as those arising from demilitarization. Such obligations were often concomitants of rights, but occasionally they were independent of the exercise of rights. For example, the Antarctic Treaty provided for freedom to use Antarctica for scientific purposes; but it also laid down an objective obligation in the form of the definite prohibition of all nuclear activities in Antarctica. If the Commission dropped article 63, that type of situation would have to be left to be covered by custom, which was necessarily a slower process. His intention in drafting article 63 had been to provide legal machinery for accelerating the process of recognition of such a regime as part of the established international legal order. In that type of situation, it could be said that tacit recognition ought to be regarded as being established quite quickly, as it had been in such cases as the Antarctic Treaty and the Austrian State Treaty.[6]

35. However, since many members were not prepared to accept the provisions of article 63, article 62 must be redrafted and the deletion of article 63 must be borne in mind by the Commission when it came to consider article 64. Some of the material relating to article 63 must be preserved in the commentaries on articles 62 and 64 in order to avoid misunderstanding.

36. With regard to the problem of the new-born State, he thought that the Commission must take a decision. The same applied to the problem of the aggressor State. He himself believed that the Commission would be entering on somewhat delicate ground if it tackled that problem, and that to do so would unduly complicate its draft on the law of treaties.

37. Mr. TUNKIN said that although the problem of the aggressor State in relation to the law of treaties was very complex, it was nonetheless one of crucial impor-

[4] *British and Foreign State Papers*, Vol. XXVII, p. 990.

[5] See, for example, *Command papers*, H.M. Stationery Office, London, 1955, Cmd. 9645.

[6] United Nations *Treaty Series*, Vol. 217, p. 225.

tance to contemporary international law, which took a firm stand against aggression. He suggested that members should reflect on the matter and that the Commission should reconsider it at a later stage.

It was so agreed.

38. The CHAIRMAN said that if there were no further comments he would consider that the Commission agreed to delete article 63 on the understanding that the problem of the new-born State could perhaps be covered in the redraft of article 62.

It was so agreed.

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

ARTICLE 64 (Principles of a treaty extended to third States by formation of international custom)

39. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 64, said that it had been drafted in negative form as a reservation in the light of the provisions contained in articles 61, 62 and 63. It was concerned with general law-making treaties and other treaties not initially framed as such, but which came to be recognized as embodying rules of general application. The article was not intended to cover the regimes he had sought to provide for in article 63.

40. In view of the Commission's decision on article 63, it might be thought desirable to re-cast article 64 in positive form and to include in it a reference to objective regimes the rules governing which developed into custom. Some members might consider that the subject-matter of article 64 required fuller treatment, but he believed that that would mean going beyond the scope of the law of treaties as such.

41. Although law-making treaties could, in certain cases, be regarded as formulating customary law, in most cases the treaties themselves were not binding on third States.

42. Mr. VERDROSS said he believed that article 64 would be very useful, and that it would be better to formulate it in positive terms. The Nuremberg Tribunal and other judicial authorities had taken the view that the Hague Conventions, for example, although not ratified by all States, had acquired binding force for the whole international community because they enunciated general norms of international law. That was also true of other conventions, and it might be that in the future the two Vienna Conventions, on Diplomatic Relations and Consular Relations, would have effects of the same kind.

43. He had spoken in support of article 63 and still thought that the fields of application of articles 63 and 64 did not entirely coincide. But if article 63 disappeared, article 64 would be all the more necessary, in order to make up, in part, for the provisions which the Special Rapporteur had embodied in article 63.

44. Mr. YASSEEN said that article 64 expressed an undeniable truth. A treaty could be the beginning of a *de facto* and *de jure* situation that could lead to the formation of a custom. That was so obvious that the article might not seem entirely necessary. Nevertheless, since it dealt with one aspect if the relationship between custom and conventional rules, the Commission should consider whether it might not be useful to examine other aspects of that delicate and controversial question, in particular the relationship between an existing custom and a new conventional rule. The object of codification was, precisely, to derive written rules from existing custom; but a conflict might later arise between the existing custom and the new written rules, especially if their effect was not the same.

45. At the Vienna Conference of 1961 it had been asked what would become of customs that were not codified, or not completely codified. The Commission would be well advised to try to resolve difficulties that would constantly arise by reason of the very fact of codification.

46. Mr. REUTER thought that article 64 was very important and useful, and should reassure those who regretted the deletion of article 63. To give it its full significance, it should be drafted so as to avoid doctrinal questions and to make its scope as wide as possible.

47. Fortunately — from the doctrinal point of view — the word "recognition" was not used in the article. But in connexion with the expression "principles of law" the Special Rapporteur had expressed his doubts about the distinction between law-making treaties and contractual treaties. He (Mr. Reuter) had never understood that distinction, and he thought it would be better to use the expression "rules of law".

48. There might be a treaty by which two States agreed to make an artificial island in the high seas for peaceful uses. Assuming that that was permissible, the case would not come within the scope of the article 63 as proposed; nevertheless, it could be admitted that the status of such an island might subsequently be recognized by other States. That example clearly showed that article 64 was wider in scope than article 63 and was indispensable.

49. Mr. JIMÉNEZ de ARÉCHAGA said he believed that article 64 should be retained; indeed, the Commission had decided to drop article 63 on the understanding that its omission would be partly offset by article 64.

50. Article 64 should be amplified to cover not only the formation of international custom on the basis of a treaty, but also the more frequent case of a treaty codifying or enunciating existing custom. In both cases the treaty reached States which had not ratified it, although it was always the rule of customary international law which bound non-parties, not the treaty as such. The failure to ratify a treaty codifying established rules could not, despite some *obiter dicta* pronounced in the *Asylum case*,[1] be considered as a repudiation of such rules if their existence could be proved by other means. The customary rules in question would also survive the extinction or termination of a codifying treaty.

[1] *I.C.J. Reports*, 1950, p. 266.

51. He hoped that, before taking up article 65, the Commission would discuss the question of most-favoured-nation clauses, which was of direct relevance to that of the effects of treaties on third States.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion the question of most-favoured-nation clauses did not belong to the section of his report under consideration, and constituted a special problem.

53. Mr. AMADO said that article 64 confirmed one of the more remarkable phenomena of international law: the fact that certain treaties could lead to the formation of an international custom. However, in view of his own understanding and experience of the conclusion of a treaty, which was the concrete result of a hard struggle, he found it rather surprising that a rule of law should require ratification by States.

54. There seemed to be some discrepancies between the French and English texts of article 64. In the first line of the French text the word "*interprété*" should not be used, because the Commission was to draft rules on interpretation, and because that word did not seem to be an accurate translation of the English word "understood". Again, instead of speaking of *principes de droit "énoncés"*, which did not seem to correspond exactly to the English expression "laid down", it would be better to say "*reconnus*", in other words, principles which had been made evident by practice and case-law.

55. Mr. LACHS said that article 64 should certainly be retained, as it constituted an important element in the law of treaties; but he would hesitate to extend its scope to treaties confirming existing principles or customary law, because the binding force of such principles or customary law would lie outside the treaties themselves, which would only be evidence of their existence. The article should be confined to treaties creating new principles or rules of customary law.

56. The article should be worded in more positive form and reference should be made to generally accepted principle of law. It should be remembered that the Nuremberg Tribunal had declared that the provision of the 1907 Hague Convention and of the 1929 Geneva Convention had been generally binding rules at the time when the crimes examined had been committed. The expression "international custom" was not sufficiently emphatic and should be replaced by the expression "customary rule".

57. Mr. ROSENNE said that article 64 was necessary and reflected existing law, but ought if possible to be re-drafted in a more affirmative manner, avoiding doctrinal issues. It was unnecessary to go into the actual source of the rule; it might indeed be impossible to establish which had come first, the customary or the conventional rule.

58. The Commission had already accepted the principle of article 64 in article 53, paragraph 4,[8] which dealt with the legal consequences of the termination of a treaty, but it was now given a more independent status.

59. Perhaps, instead of referring to articles 61 to 63, it would be preferable to refer to the articles in general, since some of the provisions in Part I of the draft might also be relevant. He was not sure that article 64 should be placed with those dealing with the effects of treaties on third States. As it embodied a fundamental rule, perhaps it should be given a more independent position.

60. Mr. TUNKIN said he agreed with Mr. Rosenne that article 64 did not belong to the group concerned with the effects of treaties on third States, since it dealt with the separate issue of the relationship between conventional and customary norms of international law. Perhaps it ought to be transferred to a different part of the draft.

61. He approved of the way the article had been formulated by the Special Rapporteur and would deprecate its being broadened to refer to all rules of international law. Such a general formula might render the article virtually meaningless.

62. Although principles of international law were not merely concepts but, as in the case of those mentioned in the United Nations Charter, involved rights and obligations and possessed a normative character, in the context of article 64 perhaps the word "rules" would be more appropriate.

63. As the word "custom" was ambiguous both in English and in Russian, it would be better to substitute the expression "customary norm".

64. The CHAIRMAN,* speaking as a member of the Commission, said he was in favour of retaining article 64. The Drafting Committee could consider the question of transferring it to another part of the draft.

65. He agreed with Mr. Rosenne that the provision should refer to the articles of the draft in general and not specifically to articles 61 to 63. It would also be preferable to refer to customary rules of international law rather than to an international custom, and to rules rather than to principles of law.

66. Mr. CASTRÉN said that article 64 was useful and necessary; on the whole he was prepared to accept the text submitted by the Special Rapporteur, but he agreed with Mr. Rosenne that it should not refer to articles 61 to 63 only.

67. Mr. PAL said that, in his opinion, the purpose of article 64 was to mitigate the effects of the immediately preceding articles; it should therefore remain where it was, otherwise its force would be greatly diminished. Another such article of general application could be inserted elsewhere if the Commission so desired.

68. Mr. ELIAS said that article 64 should be retained, but the drafting would require considerable

[8] *Official Records of the General Assembly, Eighteenth Session Supplement No. 9*, p. 28.

* Mr. Briggs.

amendment. The Special Rapporteur had adopted the right approach to the matter and it would be unwise to extend the scope of the provision.

69. Mr. de LUNA said he fully agreed with the Special Rapporteur's statement in his commentary on article 64 that it was not appropriate to deal with the extension of the effects of treaties through the growth of custom as a true case of the legal effects of treaties on third States. As several members had already stressed, it was a particular case of the more general subject of the relationship between customary international law and conventional international law — of parallel norms whose content might be the same, but which had an entirely independent existence. He too was in favour of leaving aside doctrinal problems concerning the nature of the sources of positive international law. It was quite evident that the inclusion of a rule of international law in a treaty did not deprive the pre-existing customary rule of its validity. Moreover, it should be made clear in the text that the article referred to customary international law, for the expression used could have several meanings.

70. A problem arose because, in customary international law, a distinction could be drawn between two kinds of international legal custom: that which created ordinary international law because it satisfied a need of the international community, and that which formed a special or regional customary law. In both cases a rule laid down in a treaty might subsequently be approved by States other than the parties — not as third States, but because the rule reflected the *convictio juris* of the international community. It might happen, however, that the customary rule and the conventional rule did not coincide exactly. Hence a rule laid down in a treaty should not be too closely linked with the corresponding rule of customary law. That did not mean that the Commission should not deal with the matter; he approved of the principle on which article 64 was based, but doubted whether the rule was in its proper place in the section of the draft relating to the effects of treaties on third States.

71. Mr. TUNKIN suggested that the words "international custom" should be replaced by the words "customary rules of international law": that expression would have the additional merit of stressing the unity of international law.

72. Mr. RUDA said he fully endorsed what had been said by Mr. Yasseen; the principle laid down in article 64 was incontestable and generally accepted. Treaties forming international custom acquired binding force for States not parties to them and were a source of rules of law.

73. He agreed with Mr. Reuter that the word "rules" should be substituted for the word "principles" and also welcomed the drafting suggestion made by Mr. Tunkin. He hoped Mr. Lachs had not intended to suggest the insertion of a reference to generally accepted principles of international law; that would detract from the force of the article.

74. Mr. TSURUOKA said that, broadly speaking, he agreed with the previous speakers. Like Mr. de Luna, he thought it might be dangerous to establish too close a connexion between the provisions of a treaty and the formation of a custom in the manner provided for in the draft. Although it was self-evident, it might nevertheless be useful to draw attention in the commentary to the fact that such a custom should be regarded as derived from the treaty only in so far as it coincided with the provisions of the treaty. With regard to Mr. Yasseen's observations on the partial coincidence of a new written rule with existing custom, it might be advisable to mention in the commentary that such a conventional rule did not affect the custom.

75. He could accept the position chosen for the article by the Special Rapporteur, because the section in which it was placed dealt with the effects of treaties not only in relation to the parties, but also to non-party States, and because what was stressed was not the formation of the custom, but the effects of a treaty on the formation of the custom.

76. Mr. LIU said he agreed with Mr. Pal that article 64 supplemented the three preceding articles and belonged to that group. He hoped its present scope would not be enlarged.

77. Mr. BARTOŠ said that, although he might be opposed to article 64 on theoretical grounds, he could approve it from the practical point of view.

78. The first problem that arose was one of definition: were the rules in question really general and, consequently, binding rules? Although some international tribunals had adopted a positive attitude towards certain rules in their judgments, there were dissenting opinions of equal weight. In his view, the rules in question were certainly rules of positive law; but it was also necessary to know whether the parties to the treaty had intended to state a rule that would really be binding on other States, and whether a sufficient number of third States had agreed to abide by that intention, thus establishing quasi-unanimity of the international community.

79. The controversies that arose at most international conferences when it came to deciding whether the content of a rule laid down should be regarded as a general principle of international law, showed what a delicate question that was. It was thus rather dangerous, in international law, to confuse the source of rules with the effects of treaties; if the content of a rule was in dispute, could the existence of the rule be proved by the text of a law-making treaty or treaty of general interest ratified by a large number of States? That was a debatable point. He feared there might be some confusion between two different questions: the question whether general principles were binding, irrespective of whether they were laid down in treaties or not, and the question whether the use of certain formulas in treaties was conclusive proof of the existence of general rules?

80. Consequently, while he supported the Special Rapporteur's proposal, he did so subject to certain

reservations, because he was not absolutely sure whether such rules were always rules of pre-existing positive international law, or whether they were created by the treaty itself. Moreover, it was very doubtful whether certain rules laid down in treaties could be regarded as binding. There was, as yet, no international legislation that could be relied on to determine which rules were really binding. The rule enunciated in the article was accordingly in the nature of international quasi-legislation, which was certainly useful, but still exceptional.

81. Mr. YASSEEN said that, as he saw it, article 64 regulated only one aspect of the general problem of the relationship between custom and written rules, namely, the effects of a treaty on third States. It might be useful to consider whether the problem should not be treated as a whole in a general study which would include the question of the codification of law.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that most members seemed to view article 64 as a corrective to the preceding provisions and only a few wished to deal with the matter in a broader way. Perhaps he might be allowed to postpone his summing-up of the discussion until the following meeting.

83. In the meantime he would suggest that, after concluding the discussion on article 64, the Commission should take up article 66; it could then discuss article 65 together with the articles on revision, with which it was closely connected.

It was so agreed.

The meeting rose at 6 p.m.

741st MEETING

Tuesday, 9 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

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

[Item 3 of the agenda]

ARTICLE 64 (Principles of a treaty extended to third States by formation of international custom *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 64 in the Special Rapporteur's third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the most important suggestion made during the discussion of article 64 was that its provisions should deal more generally with the relationship between international custom and treaties. Like the majority of the Commission, he thought it would be inadvisable to broaden the scope of the article in that way; the relationship between international custom and treaties depended to a large extent on the nature of the particular custom involved and on the provisions of the treaty. The subject would be considered later in connexion with interpretation, and he had in mind to include in that section of the draft a provision which would touch on the subject-matter of the former article 56. He therefore proposed that article 64 be confined, as at present, to the application of the rules of a treaty to a non-party State by reason of an international custom.

3. It had been suggested by some members that article 64 should be made to deal specially with the case of general multilateral treaties — the so-called "law-making treaties". It was characteristic of those treaties that although ratifications proceeded very slowly, the international community tended to act on them comparatively quickly. In other words, sooner or later the treaty began to be considered as the most authentic statement of the customary international law on the matter with which it dealt. He was not, however, in favour of extending article 64 to deal specially with general multilateral treaties. The chief difference in their case was that the great majority of States were not altogether strangers to the treaty; they had signed it, even though through inertia or otherwise they might not have become parties. But the treaty was not binding on them as such; it was still a case of the principles embodied in the treaty coming to be recognized as customary law and being binding on them for that reason. As he had envisaged it, article 64 was intended simply as a corrective to the fundamental rule laid down in article 61, *pacta tertiis nec nocent nec prosunt.*

4. Mr. Jiménez de Aréchaga and some other members had suggested that article 64 should be made to cover the fairly common case of a treaty which wholly or in part embodied rules of customary international law from the outset. That situation was somewhat different from the one envisaged in article 64, in that the other States were already bound by the rules of customary international law codified by the treaty. It must be recognized, however, that codification conventions contained a mixture of rules of customary international law and elements of progressive development intended to settle controversial points. Nevertheless, the Drafting Committee could attempt to cover the point in article 64 without abandoning the article's main purpose, which was to operate as a corrective to article 61.

5. The Drafting Committee could also consider the suggestion made by some members that article 64 should be couched in positive rather than negative terms. At the same time, certain points of drafting could be dealt with, such as the suggestion that the word "principles" be replaced by "rules". He had no objection to that change, but had hesitated to use the word "rules" from a desire not to appear to be introducing a suggestion of international legislation.