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Summary record of the 741st meeting

Topic:
Law of Treaties

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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.

6. It had also been suggested that the expression "international custom" should be replaced by "customary international law". He had no objection to that change either. He had borrowed the term "international custom" from Article 38, paragraph 1.b of the Statute of the International Court of Justice, where it was followed by the words "as evidence of a general practice accepted as law". In drafting article 64, he had thought that the words "becoming applicable to States..." covered that same notion of a binding custom, as opposed to a mere usage.

7. The CHAIRMAN, speaking as a member of the Commission, said he approved of the conclusions reached by the Commission. If the article were left in the position suggested by the Special Rapporteur, it would be better for it to remain restricted in scope — simply stating that a customary rule identical in content with the conventional rule might be formed subsequently — and negative in form, appearing as a corrective to the preceding articles. If, on the other hand, the Commission preferred to use a positive formula and to deal with cases in which a treaty provision reproduced an existing customary rule, it would be better to place the article elsewhere in the draft. The Drafting Committee should be able to settle that question quite easily.

8. Mr. JIMÉNEZ de ARÉCHAGA suggested that it might be advisable to include in the draft articles a few provisions sanctioning the practice of the most-favoured-nation clause and dealing with its modalities and mode of termination. It was true, as the Special Rapporteur had pointed out, that the mechanism of operation and the effects of that clause were simple and easy to understand, but he did not think the subject should on that account be excluded from draft articles, which already contained a number of self-evident provisions.

9. The most-favoured-nation clause was acquiring increasing importance in international law and international relations; it provided a suitable mechanism for enlarging the traditional contractual framework of treaty-making and for allowing States not parties to a treaty to benefit from its provisions. As a result of the operation of the clause, treaties could assume a quasi-legislative function; and another useful service it performed was to permit the continuous adjustment of commercial and other economic agreements to new circumstances, since it was generally the most recent treaty which came to be applied through its operation. It was significant that the whole of the GATT system was based on the most-favoured-nation clause.

10. It could not be said that no difficulties of a general legal nature arose in connexion with the most-favoured-nation clause. In practice, such difficulties did arise and, in a recent case, the International Court of Justice had examined the problem of the manner in which most-favoured-nation treatment might terminate. The judgment of the Court in the *Morocco* case could provide a useful rule of law for incorporation in the draft articles on the law of treaties.¹

11. The problem was thus of both theoretical and practical importance and should find a place in the draft — perhaps between articles 62 and 64. He therefore suggested that provisions should be included in the draft articles sanctioning the practice of the clause and dealing with its modalities and the specific forms of termination of the treatment it afforded.

12. Sir Humphrey WALDOCK, Special Rapporteur, said that his decision not to include any provisions on the most-favoured-nation clause had not been due to any feeling that the clause was unduly simple; in fact, although the idea behind it was simple enough, its application could be extremely difficult. Nor had it been due to any idea that the subject was unimportant, since the clause played an important part in treaty practice. But it did not appear to add much to the general rules of treaty-making. The effect of the clause was to incorporate in a treaty, by agreement, the provisions of another treaty. Perhaps some mention of the practice could be included, either in the draft articles or in the commentary, though he saw no need for the Commission to go out of its way to give its sanction to a practice which was well established and was based on the sovereignty of States and their freedom to make agreements at will. Any serious consideration of the problem of the most-favoured-nation clause would deserve, and require, a special study.

13. Mr. BRIGGS said he was not inclined to favour the inclusion in the draft articles of provisions on the most-favoured-nation clause; he thought a reference in the commentary should suffice. Generally speaking, he found the draft articles too long already; they should deal only with general principles and not go into excessive detail.

14. Mr. REUTER agreed with the Special Rapporteur that there was no reason to refer to the most-favoured-nation clause in a general draft on the law of treaties. The subject was not only broad and complex, but also highly specialized. The effect of the clause differed, according to whether it appeared in an economic treaty or, for instance, in the form of a national treatment clause in an establishment treaty. Technically, the most-favoured-nation clause was a *renvoi* to another treaty, whereas the national treatment clause was a *renvoi* to municipal law. The Commission would therefore have to deal with the whole question of *renvois* to another rule, whether conventional or not, and also with the whole question of reciprocity, since the clause was very often only applicable subject to reciprocity. In addition, very complicated economic problems were involved, which the Commission could not tackle without the help of economic experts.

15. The CHAIRMAN said that the Commission was at present dealing with the effects of treaties on third States. But the most-favoured-nation clause only appeared to provide for the treaty to produce an effect on third States; in reality it was rather a rule left blank, which filled itself in of its own force when other more favourable treaties were concluded. If the Commission wished to refer to that clause it could only do so in a very simple and general provision, which would per-

¹ *I.C.J. Reports*, 1952, pp. 192-196 and 204.

haps be more appropriate in Part II of the draft. The Commission could therefore keep the question in mind and take it up when it reconsidered the draft as a whole.

16. Mr. JIMÉNEZ de ARÉCHAGA said he had not been convinced by the arguments he had heard. In the first place, other articles dealt with matters just as common and obvious as the most-favoured-nation clause, and secondly, the Commission would not have to deal with the substance from the economic point of view, but could confine itself to the formal and legal aspects. He would not press for an immediate decision, however; the matter could be mentioned in the commentary and taken up again when the draft was re-examined as a whole.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that on the whole he agreed with Mr. Reuter and did not consider it advisable to deal with the question of the most-favoured-nation clause. However, the Commission should not be influenced by the fact that the subject had been raised in connexion with articles 61 to 64. Except for article 61 itself, those articles did not really deal with the effects of a treaty on third parties, but rather with the acceptance of particular treaty provisions by a third State. Thus the question of the most-favoured-nation clause was not so remote from their subject. There was, however, a difference between that clause and the acceptance given to certain provisions of a treaty by a third State which thereby became a party to those provisions. The effect of the most-favoured-nation clause was that, by concluding another treaty, a State bought, as it were, rights in a treaty already concluded or to be concluded by another State.

18. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to refer article 64 to the Drafting Committee on the understanding that the question of the most-favoured-nation clause would only be mentioned in the commentary; it would be discussed again by the Commission during the second reading of the draft articles.

It was so agreed.

ARTICLE 66 (Application of treaties to individuals)

19. The CHAIRMAN invited the Special Rapporteur to introduce article 66 in his third report (AC/N.4/167).

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of article 66 were intended to reflect the existing situation in regard to the application of treaties to individuals. In drafting those provisions, he had endeavoured to avoid any pronouncement in the theoretical issues involved. If the Commission agreed on the usefulness of including an article on the lines of article 66, it would be necessary to expand the commentary.

21. Mr. VERDROSS said that, in his opinion, article 66 dealt with two quite different cases. The first was that

of a treaty under which a State was bound to confer certain rights or impose certain obligations on individuals. That was the normal case of a treaty concluded between States and to be executed by them; there was no need to draft a rule on it.

22. The second case was that of a treaty which directly created rights or obligations for individuals. States were perfectly free to make such a treaty. A treaty could directly confer on individuals the right to lodge a complaint against a State before an international body, which was equivalent to creating international rights for individuals. Many cases of that kind had occurred in practice. For example, the second Hague Conference had adopted a treaty — not subsequently ratified — establishing an international prize court and giving individuals whose cargo had been seized the right to bring a claim against a State before that court.² The Upper Silesian Arbitral Tribunal and the many other mixed arbitral tribunals established after the First World War had also been bodies before which individuals could proceed against States.

23. Such treaties were therefore possible. Whether the Commission should devote an article to cases of that kind was another question.

24. Mr. CASTRÉN said he entirely agreed with Mr. Verdross. The Special Rapporteur himself did not seem to be sure that the article was necessary; he (Mr. Castrén) thought it should not be included in the draft. Sub-paragraph (a) stated a well-known and almost universally accepted general rule. Sub-paragraph (b) confirmed the obvious fact that States were free to concert special procedures for applying the treaties in question.

25. If the Commission nevertheless decided to retain the article, it should be drafted differently. First, it should be made clear that the procedure referred to in sub-paragraph (a) was the normal course, and that sub-paragraph (b) provided for an exception. Secondly, the opening words of the article were rather strange; strictly speaking, it was the State itself, as a party to the treaty, which, in most cases at least, was the subject of the treaty. Consequently, it would be better to begin the article with a more neutral and general expression, such as "Where a treaty concerns individuals".

26. Mr. YASSEEN said that article 66 was very controversial, because it raised two problems: that of the individual as a subject of international law and that of the monistic or dualistic nature of the legal order. But doctrinal controversies apart, and without taking any general position on either of those problems, he thought the Commission should include in its draft an article in which it recognized that, to a certain extent and in certain circumstances, a treaty could be invoked directly for or against individuals. For a treaty could provide for obligations imposed directly on individuals as well as rights conferred directly on individuals. That view was consistent with the recent trend in the development of international law and was supported by case-law.

² Scott J. B. *The Hague Conventions and Declarations of 1899 and 1907*, New York, 1915, p. 188.

27. International case-law tended to recognize the direct application of treaties to individuals, especially where the treaty itself contained provisions in that sense. As early as 1910, in the *North Atlantic Fisheries* case, the Permanent Court of Arbitration had intimated that it was a question of interpretation of the treaty, when it had said: "But considering that the treaty does not intend to grant to individual persons or to a class of persons the liberty to take fish. . .".³ In its advisory opinion on the *Jurisdiction of the Courts of Danzig*, the Permanent Court of International Justice had stated that "... it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations enforceable by the national courts."⁴ That tendency was evident in the case-law of certain countries. He agreed with Mr. Verdross that there was nothing to prevent States from stipulating in a treaty that the treaty was directly applicable to individuals. The parties were free to fix the scope of the treaty and to decide the details of its application.

28. The Commission should certainly propose a solution in its draft, but the article should be differently drafted; it should stress the tendency, supported by international case-law, to consider the treaty itself as the basis of the solution.

29. Mr. PAREDES said that in his commentary on article 66 the Special Rapporteur had very wisely drawn attention to the disadvantages of discussing the controversial question of whether an individual could be a subject of public international law, which he thought would lead the Commission very far afield. He (Mr. Paredes) believed that that was so, but at the same time he found it difficult to reach a decision on the content of article 66 without taking some position on the question.

30. In his opinion, when two or more States agreed to guarantee certain rights for individuals, those individuals were not given the capacity to plead before an international court, but duties were agreed between the contracting parties, of which the individuals were the beneficiaries. The obligation was established between the States and it was for them to ensure that it was fulfilled and to demand its fulfilment in case of default. In the case of an agreement on human rights, for instance, if one of the parties violated the agreement on its own territory and with respect to its own nationals, they could not bring an action before an international court, but could only act through one of the contracting parties, which would assume the role of protector of the individuals concerned and demand fulfilment of the obligation in its own name.

31. He thought it would be extremely dangerous to attack the jurisdiction of the State on the pretext of providing international protection for the individual citizen, by creating yet another court in addition to those already established under the municipal law of

every country. In Ecuador, for example, litigants were protected by three courts (even four, if actions for damages were taken into account); would it be advisable to prolong litigation by introducing yet another — international — court? He did not think so. Consequently, he was not sure that it was advisable to retain article 66.

32. Mr. ROSENNE said that his first reaction to article 66 had been to doubt its relevance to the subject of treaties between States. On further reflection, however, he had arrived at the conclusion that a provision on the question dealt with in article 66 was necessary, if only because of the definition of a "treaty" adopted by the Commission.⁵ However, he was not certain that the article, as drafted, was adequate.

33. He agreed with the Special Rapporteur that it was not necessary for the Commission to become involved in the controversy regarding the precise legal status of the individual in international law. Doctrinal controversies could be avoided if the treaty itself were taken as the real starting point. The question might be easier to deal with if obligations and rights were treated separately, since they raised different problems.

34. The Commission should omit any reference to the very special problem of international criminal law, on which much more could be said than appeared in the commentary; there was, for instance, the Commission's own work on the subject and that of the two special committees set up in 1951 and 1953 by the General Assembly to study the question of international criminal jurisdiction.

35. From the point of view of the general law of treaties, the question of obligations on individuals presented a very real problem, which was illustrated by the recent "pirate" radio broadcasts in Europe. Those broadcasts seemed to involve breaches of the international agreements on the allocation of radio frequencies and of a number of other treaties, such as those dealing with copyright. The position in such cases was that a State was not entitled to escape its obligations under a treaty on the plea that the breaches were being committed by individuals. The principle *pacta sunt servanda*, meant that a State was under an international duty to take the necessary steps to ensure that a treaty was not violated by individuals under its jurisdiction — not only persons in its territory, but also its nationals who were not within the territorial jurisdiction of another State. The provisions on the subject of obligations should express the idea that a State committed a breach of a treaty if it did not take all the necessary steps to ensure that individuals under its jurisdiction respected the provisions of the treaty. The matter was directly connected with State responsibility, and would have been covered if paragraph 4 of article 55 had been retained.

36. The problem of obligations was more serious than that of rights. A State could, in its relations with

³ United Nations *Reports of International Arbitral Awards*, Vol. XI, p. 192.

⁴ *P.C.I.J.*, 1928, Series B. No. 15, pp. 17-18.

⁵ *Yearbook of the International Law Commission*, 1962, Vol. II, p. 161.

other States, subscribe certain undertakings as a result of which rights appeared to be granted to individuals. In fact the individuals concerned benefited from the consequences of the rights conferred on States. Examples of that situation were provided not only by the treaties on the protection of minorities, but also by the copyright conventions and many agreements relating to matters of private law. The position in those cases was that the State was under an international duty to give effect to the treaty in its municipal law. Any statement to the effect that a treaty could be invoked by individuals would lead the Commission on to controversial ground. Personally, he preferred the approach adopted by the previous Special Rapporteur, Sir Gerald Fitzmaurice, in his fourth report.⁶

37. He noted that in sub-paragraph (a) the expression "national systems of law" was used, and he would like to know whether there was any reason for departing from the expression "internal law of the State" used in articles 1 and 31.

38. Mr. AMADO said that his position was similar to that of Mr. Verdross, Mr. Castrén and Mr. Yasseen. The article was simplicity itself. The German positivist doctrine had failed to gain acceptance, and case-law had long since swept away the complications that might have attached to the problem of the rights of individuals in international law. The one thing that was essential and fundamental in international law was the will of the parties. States could not be prevented from agreeing on stipulations concerning individuals.

39. Mr. Verdross's comment on sub-paragraph (a) was quite justified, however; it was unnecessary to say that treaties could act on individuals through the State, because that was the normal process.

40. Mr. de LUNA said he agreed with Mr. Amado and considered, like Mr. Paredes, that the subject called for the most careful formulation. His own opinion was that if the parties so wished a treaty could confer rights or impose obligations on individuals; but the Commission should not pronounce on that point of doctrine. Many pertinent examples could, of course, be given, such as the treatment of minority rights by the League of Nations or the option clauses in treaties for the transfer of territory; but some writers, particularly Anzilotti, denied that treaties created actual rights in favour of individuals. It was certain that States could create such rights and were free to do so, but he doubted that they had ever done so or that any treaty had ever created a subjective right for individuals. In a system of law, one must not confuse the owner of a subjective right and the beneficiary or object of a legal rule or norm. Individuals belonging to a minority, for example, might have the right to petition and inform a body such as the Council of the League of Nations; but in so doing they merely provided the datum on the basis of which the right would be exercised.

41. Hence it was important to draft the article with great caution and to choose the examples in the commentary very carefully. He had no theoretical objection to the wording proposed, but he feared that, especially in sub-paragraph (a), it took a definite doctrinal position and that the examples given in the commentary were not conclusive.

42. Mr. BARTOS said he did not intend to discuss the doctrinal question which arose in connexion with article 66, but it must inevitably be asked whether individuals could be regarded as relative — or indirect — subjects of international law, in other words, as the potential beneficiaries of rights deriving from the treaty, or whether, on the contrary, they could be granted actual rights enabling them to act directly.

43. Article 66 had the merit of reflecting an idea that was gradually gaining ground in international law; the idea that, in the international public order, individuals could be direct subjects *vis-à-vis* all States, including that of which they were nationals. The question had arisen in connexion with the draft covenants on human rights, which were under discussion in other United Nations organs, and the same trend was discernible to a certain extent in conventions of general interest. Without taking sides in that controversy the Commission could, therefore, by adopting a very cautious formulation for article 66, simply recognize that States could confer certain direct rights on individuals by a special treaty. That might be a reasonable first step in introducing the idea as an institution of positive international law.

44. It was very difficult to say that the examples given really justified the assertion that such direct rights existed. The United Nations Charter spoke of nations and peoples, not of individuals. It did, however, provide for the possibility of bringing certain international machinery into operation for the benefit of individuals. The Convention for the Protection of Human Rights and Fundamental Freedoms,⁷ gave individuals who considered themselves injured in that respect the right to apply direct to the European Commission of Human Rights. Similarly, it seemed that certain labour conventions drawn up by the International Labour Organisation, sought to give individuals a direct right to remedies. But in any event, in a draft convention prepared with a view to the progressive development of international law, it was the Commission's moral and intellectual duty to recognize that rights could be directly conferred and obligations directly imposed on individuals, juristic persons, or groups of individuals, especially as nothing was said in the present article about the measures to be taken by States for the effective application of the treaty to individuals.

54. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had tried to draft the article without taking any definite position on one of the most controversial theoretical problems of internationalist doctrine. If he had not succeeded, it

⁶ *Op. cit.*, 1959, Vol. II, p. 49, articles 32 and 33.

⁷ United Nations *Treaty Series*, Vol. 213, p. 222.

was because any such undertaking was doomed to failure from the start.

46. He (Mr. Ago) recognized that the ultimate object of nearly all international rules in treaties was to create rights and obligations for individuals. That was true, for instance, of all rules relating to the status of aliens ; but in that case the rights and obligations would only be created by the State through internal legislation enacted to implement the treaty. The Commission was not required to consider that problem at present for it must not be forgotten that the preceding articles dealt with the effects of treaties on third parties that were subjects of international law, not on third parties governed solely by municipal law.

47. As several speakers had said, it was open to question whether rights and obligations deriving from a treaty really existed for individuals. The examples given in the literature and by the Special Rapporteur himself showed that different interpretations were possible in support of either thesis. None of them settled the questions whether subjective international rights and international obligations of individuals really existed, whether such rights and obligations were really international or rather internal in character, whether they derived from the treaty itself or from action taken by States or by other bodies in pursuance of the rights and obligations created by the treaty, or whether those bodies themselves were international or national in character. One of the most important examples mentioned was that of mixed arbitral tribunals ; but, there again, there was only controversy and most of the authorities were inclined to consider that they were ordinary courts of internal law.

48. The case referred to by Mr. Rosenne was very interesting, but it was hard to say whether the international obligation was an obligation on the individual or an international obligation of the State not to permit an individual to perform a certain act.

49. It was therefore essential for the Commission to avoid taking any definite position on such a controversial question as whether an individual could be a subject of international law. The Commission was bound to be divided on that point, and the law of treaties would gain nothing from any majority decision for or against. But if the Commission acknowledged that an international treaty had effects on third parties, and if, when speaking of third parties, it referred to individuals, it would be implicitly admitting that individuals could possess international rights or obligations and were consequently subjects of international law.

50. He therefore thought it preferable to delete article 66. He could not subscribe to an article that took a positive view on the international personality of the individual at that stage in the development of international law.

51. Mr. ELIAS said that article 66 should be deleted or at least left aside until the observations of governments had been received and the Commission took up the whole draft on second reading. Some of the problems the article set out to solve were so complex that

even with the most ingenious drafting, he feared it would be impossible to devise an acceptable text. In all probability the Special Rapporteur had inserted the article mainly for the sake of logical completeness.

52. Mr. BRIGGS said he was unable to see what purpose article 66 was intended to fulfil. Presumably the sense in which it talked of rights being applicable to individuals was through the contracting parties by their systems of law. As to the obligations, it was presumably the duty of States to see that they were performed by individuals. Neither of those two provisions appeared to be necessary, since they were self-evident. The article could be dropped.

53. Mr. JIMÉNEZ de ARÉCHAGA said that, although the Special Rapporteur was to be commended on his effort to by-pass the doctrinal issues, the drafting of the article raised difficulties, as it adopted an Anglo-Saxon common law approach identifying rights with remedies. The way in which it had been formulated would not be appropriate for continental systems of law, under which rights were regarded as coming into existence before remedies. Under those systems it could not be stated, as proposed, that a right was "applicable to the individuals through... international organs and procedures". The provision would have to stipulate that an individual could derive rights direct from a treaty, and that the remedies provided for in the treaty could be invoked by him without recourse to the State of his nationality. But such a formulation would certainly not be considered a neutral formula by the Chairman. In view of the drafting difficulties, he agreed with some other members of the Commission that the article should be deleted.

54. Mr. LIU said that article 66 had its place in the Commission's draft, because it laid down the important principle that only contracting States could enforce rights and obligations of individuals under a treaty. It was important to recognize that as a result of recent developments some kind of international machinery and procedures did exist, which placed States under some pressure to ensure that certain treaty rights were respected. The article was compatible with modern trends and its inclusion could be regarded as a progressive step.

55. Mr. TUNKIN said that the Special Rapporteur had submitted article 66 for discussion without committing himself on the principle. After studying the article, he (Mr. Tunkin), had come to the conclusion that it was not indispensable and should be dropped — a point on which he largely shared the views put forward by the Chairman.

56. The main purpose of the article was to ensure the observance of treaty obligations affecting individuals ; but the Commission had already approved an article embodying the principle *pacta sunt servanda*⁸ under which States were bound to observe treaty obligations, the manner in which that was to be done being left to them. The statement made in sub-paragraph (a)

⁸ Article 55.

added nothing to the provisions already adopted and there hardly seemed to be any need for the provision in sub-paragraph (b) even if the existence of such exceptions were admitted — a matter about which he had serious doubts.

57. Mr. EL-ERIAN said that although he was in favour of the principle underlying the article and its basic idea, he subscribed to what had been said by most members, and in particular by the Chairman, concerning the technical difficulties to which its formulation gave rise. Like Mr. Briggs, he was not altogether clear about the purpose of the article. As it was essentially concerned with internal processes and machinery for ensuring the observance of treaty obligations, it had no real place in the draft.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that he had tried to avoid doctrinal issues by not specifying, in article 66, what the rights and obligations were and whether they were possessed by individuals, but he agreed with Mr. Briggs's criticism of the drafting of sub-paragraph (a). The purpose of the sub-paragraph was only to state that there was an obligation on States to ensure respect for the provisions of a treaty by their own nationals. That provision was made necessary by the one contained in sub-paragraph (b); otherwise the article would not have been properly balanced.

59. He would prefer to withdraw the article altogether than to adopt the solution advocated by Mr. Rosenne, which was to deal with the important issue of compliance by individuals with obligations arising under treaties by converting the article into a statement of the obligations on States with respect to the actions of individuals. The Commission had already rejected an article concerned with the duty of States to take the necessary steps in their national law to ensure the due performance of their treaty obligations, largely on the grounds that it was a matter falling within the topic of State responsibility.

60. As the general feeling seemed to be against including article 66, he wished to put on record his view that sub-paragraph (b) dealt with a phenomenon which already existed in international law and the extent and importance of which had perhaps not been sufficiently recognized during the discussion. For example, he could hardly conceive of the European Commission of Human Rights as a municipal tribunal, and it applied a Convention through international machinery; he believed the view expressed by the Chairman on that point to be in contradiction with the existing practice.

61. There were other examples of the transfer to the international plane of matters concerning individuals; for example, the right of petition in the United Nations trusteeship system was expressly accorded to individuals by the Trusteeship Agreements. Some members who had been opposed to article 66 had on various occasions referred to the right of self-determination; he would like to know what kind of right that was and whether it belonged to individuals and groups of indi-

viduals or only to embryonic States and whether they considered that it existed on the international plane. In general, he would much regret the deletion of sub-paragraph (b) since it would not accord with the high importance attached by the Charter and by modern international law generally to human rights and freedoms.

62. The CHAIRMAN said that that concluded the Commission's discussion of Article 66 which was now withdrawn.

63. Mr. BARTOŠ said that he supported the idea expressed in article 66 and regretted its withdrawal from the draft.

64. Mr. YASSEEN said that he, too, regretted that the draft convention would not contain an article on a practical problem mentioned by most of the writers, when case-law and international practice seemed to be tending towards a certain solution. He did not intend to discuss the main problem underlying the article — namely, whether an individual could be a subject of international law — but wished to emphasize that, especially in the case of treaties intended to confer rights and impose obligations on individuals, the national courts should ensure that individuals would have direct enjoyment of those rights and would assume those obligations. He thought it would have been useful to deal with the question in the draft articles and regretted that the majority of the Commission had decided otherwise.

65. Mr. TSURUOKA said that he agreed with the minority view and regretted that the question had not been considered more thoroughly.

66. Mr. RUDA said he very much regretted the Commission's decision to drop article 66 as he fully subscribed to its main purpose. The article did not touch upon the controversial issue of whether or not an individual could be a subject of international law, but it did deal with something which had become a fact in the modern world. As Mr. Rosenne had pointed out, it was both useful and necessary, because it recognized the legality of States entering into treaties having as their object the creation of international machinery or procedures to enable individuals to exercise rights of an international character, as well as to discharge the obligations laid down in such treaties.

67. The CHAIRMAN, speaking as a member of the Commission, observed that the decision not to retain the article did not mean that the majority of the members of the Commission considered it illegal for States to set up international bodies to which individuals were entitled to submit claims, petitions or other requests of that kind.

68. Mr. REUTER said he agreed with Mr. Bartoš. He could not accept any interpretation which cast doubt on the fact that the principles laid down in the Charter were intended to benefit individuals.

69. Mr. LACHS said he agreed with the Chairman that article 66 could be dropped without prejudice to

the question it covered or to progressive development. As drafted, the provision did not correspond to existing law and sub-paragraph (b) would give rise to serious objections.

70. Since the Special Rapporteur had mentioned the question of self-determination, it was necessary to point out that that right was certainly something wider and more important than an individual right. Some of the examples mentioned in the commentary evoked painful memories, particularly for his own country, inasmuch as the institutions and procedures established during the inter-war period had been used to overthrow the State and to pave the way for the Second World War. That was particularly true of the German-Polish Convention of 1922 on Upper Silesia.⁹ Undoubtedly there were cases of rights being guaranteed — for example, the right of petition under the trusteeship system — but that was a step in the direction of full self-determination.

71. The CHAIRMAN said he thought that if it continued the discussion, the Commission would only move further and further from the subject-matter of the article itself, until it became increasingly obvious that it would have to take a definite position on the doctrinal issue. His purpose in suggesting the deletion of article 66 had been, precisely, to avoid doing so. But, of course, the decision to withdraw the article was entirely without prejudice to the Commission's opinion on the matter.

72. Mr. ROSENNE said that a paragraph explaining the meaning of the Commission's decision to drop article 66 should be inserted in its report.

The meeting rose at 12.35 p.m.

742nd MEETING

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

Chairman: Mr. Herbert W. BRIGGS

Later: Mr. Roberto AGO

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

[Item 3 of the agenda]

ARTICLE 65 (Priority of conflicting treaty provisions)

1. The CHAIRMAN invited the Commission to consider article 65 in the Special Rapporteur's third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 65, said that the subject of conflicts

between treaty provisions had already been discussed by the Commission at its previous session¹ when it had decided to re-examine the issue in the context of application. He had explained at some length in the commentary the reasons underlying the new draft he was now presenting in article 65. During the earlier discussion it had become clear that the majority of the Commission viewed the matter essentially as one of priority rather than invalidity.

3. In accordance with the trend of that discussion, he had moved the general reservation of article 103 of the Charter, which gave supremacy to its provisions, to the top of the article. But he had not attempted to state its effects on a non-Member State. The Commission had previously taken the view that it should leave the interpretation of provisions of the Charter to the competent organs called upon to apply them.

4. Paragraph 2 was concerned with cases in which an express clause was inserted in the treaty stipulating in one form or another that its provisions were to be subject to, and give way to, those of another treaty. That form of clause, unlike some others regulating conflicts between treaties, affected the normal rules governing the priority of treaty obligations, and it was therefore necessary to mention it as an exception.

5. The principal provisions of article 65 were in paragraphs 3 and 4. Paragraph 3 dealt with cases in which all the parties to the earlier treaty were also parties to the later one. If the intention of the parties was that the later treaty should supersede the earlier one, the provisions of article 41² would come into play automatically, but if that were not so, the second treaty must necessarily prevail as a later expression of intention.

6. As he had explained in paragraph (20) of the commentary, after further reflection he had come to the conclusion that partial supersession should be dealt with in article 65; that would necessitate some modification of article 41.

7. Paragraph 4 dealt with cases in which some of the parties to the earlier treaty were not parties to the later one — cases which raised the problem of conflicting treaty obligations. At the previous session the Commission seemed to have taken the view that no reservation should be made of a special class of treaty with regard to which a conflict could raise the question of the invalidity of the later treaty and that that question should only be considered to arise when a subsequent treaty contained rules of *jus cogens*.

8. Mr. CASTRÉN said he thought the Special Rapporteur had satisfactorily overcome the difficulties he had already had to face at the previous session concerning the question dealt with in article 65. The commentary on the article was convincing in every respect and the chosen point of departure appropriate. A conflict between treaties, or the existence of conflicting provisions in different treaties, did not raise a question of

¹ *Yearbook of the International Law Commission, 1963*, Vol. I, 685th, 687th and 703rd meetings.

² *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 16.

⁹ See Kaeckenbeek, G., *The International Experiment of Upper Silesia*, London, 1942, Oxford University Press, p. 572.