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Summary record of the 687th meeting

Topic:

Law of Treaties

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70. Sir Humphrey Waldock, with the very wide experience he had gained during two years as Special Rapporteur, had said that the instructions given to the special rapporteur on State responsibility should not impose induly strict limitations on his work. A plan of work, which was what the Sub-Committee had drawn up, could include fairly detailed suggestions; but the Special Rapporteur would inevitably find some gaps when he came to the heart of the matter, and would have to make some adjustments. Even though the Commission and the Sub-Commission were in full agreement on the main lines of the programme, it must be possible to depart from it when going into the subject more thoroughly.

71. It had also been asked whether the main emphasis should be on codification or on progressive development. There again, just as he did not believe it possible to draw a clear dividing line between those two activities, he did not think it possible, either, to foresee whether one of them should take precedence over the other. A final conclusion on the matter could not be reached until the substance of the problems had been examined. Neither the Commission, nor the General Assembly or the Sixth Committee, could decide beforehand which points should be codified and which were suitable for progressive development. The Special Rapporteur would first have to submit rules on each point in the light of experience, of reality and of the case-law, which was fairly abundant on certain aspects.

72. Another question was what work the Commission might ask the Secretariat to carry out. A kind of index of everything done or said by the various organs of the United Nations about State responsibility would be very useful to the Special Rapporteur. The work of the 1930 Codification Conference was certainly quite well known and the memorandum which the Secretary had mentioned might be very useful. The documentation on the subject was sufficient, but what would be especially useful would be a collection of the leading cases. It would suffice if the Secretariat prepared a full and accurate index, showing the sources.

73. Provisional work and discussion would probably be of little use, and would duplicate the Sub-Committee's work. The connexion between a principal provision and secondary provisions would only become apparent when the subject was studied as a whole. Thus there was some danger of doing work which would have to be entirely revised the following year. For that reason, and because the Commission would first need to have all the documentary material the Secretariat could provide, and because a great deal of research would be needed before a report could be written, he thought the item should not be placed on the agenda for the 1964 session; a preliminary report should not be scheduled until 1965. Besides, it would be a pity to take up valuable time which might be spent completing the work on the most important subject of the law of treaties.

74. The first report need not necessarily cover the whole subject; it could be confined to the first point, leaving the second till later. That division would be practical, and consistent with the method adopted for the law of treaties. But those were merely suggestions; the Commission could take the necessary decisions as its work proceeded.

75. The CHAIRMAN, after thanking Mr. Ago for his able summary of the discussion, said that, if there were no objections, he would consider that the Commission agreed to approve the report of the Sub-Committee on the understanding that the outline programme of work it contained was without prejudice to the position of any member regarding the substance of any of the questions mentioned in the programme. It was also understood that the outline would serve as a guide to the Special Rapporteur without, however, obliging him to follow it in detail.

It was so agreed.

76. The CHAIRMAN said that other points, such as the time for submission of the report, would be taken up at the end of the present session. There remained, however, the important question of the appointment of a special rapporteur for the topic of state responsibility. Mr. Ago, Chairman of the Sub-Committee on State Responsibility, had already been mentioned several times as the member best qualified to undertake the task. He therefore invited the Commission to indicate its approval of Mr. Ago's nomination.

Mr. Ago was appointed Special Rapporteur for state responsibility by acclamation.

The meeting rose at 1 p.m.

687th MEETING

Monday, 27 May 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(*resumed from the 685th meeting*)

1. The CHAIRMAN invited the Commission to resume consideration of article 14 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 14 (CONFLICT WITH A PRIOR TREATY) (*continued*)

2. Mr. LACHS, stressing the importance of article 14, commended the Special Rapporteur for his approach and particularly for his commentary. The article raised certain issues of principle and his doubts had not been dispelled by the discussion. In view of the increasing number of treaties and of the danger of incompatibility of their provisions, the Commission must lay down rules for the guidance of States. Its primary concern should be the security of international transactions and the protection of the interests of parties to a treaty who

wished to rely on its provisions. The parties could not be left helpless when certain signatories entered into a new treaty that conflicted with obligations under the former treaty.

3. Paragraph 4 was the most important provision and should be placed first. Treaties which confirmed general principles of law or gave greater precision to binding rules of law could not be altered, since they confirmed what had been termed *jus cogens*. The source of the obligation lay outside the treaty itself and article 13 applied. Any conflict that might arise in such a case concerned not the treaty, but the very existence of *jus cogens*, of which the treaty only constituted evidence.

4. The second provision in order of importance was that embodied in paragraph 3 (*b*), which reproduced the terms of article 103 of the United Nations Charter. The Charter occupied a special place among instruments of contemporary international law and it was therefore appropriate that paragraph 3 (*b*) should be placed immediately after paragraph 4, which should be placed first. Article 103 of the Charter had wider implications, in particular in point of time, than, for example, article 20 of the Covenant of the League of Nations. Provisions similar to article 103 were to be found in the Paris Peace Treaties of 1947: in article 44 of the Treaty with Italy, article 10 of the Treaty with Rumania, article 8 of the Treaty with Bulgaria, article 10 of the Treaty with Hungary and article 12 of the Treaty w.th Finland.[1]

5. An interesting illustration of the practice under Article 103 of the Charter was furnished by the Agreement of 1 July 1948 between the Universal Postal Union and the United Nations, article VI of which specified that " no provision in the Universal Postal Convention or related arrangements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations." [2]

6. The Special Rapporteur's paragraphs 1 and 2 dealt with cases in which the freedom of action of States was not limited by a higher law. It would of course be desirable in those cases for States concluding a new agreement to define its relationship to agreements already in existence — as was done in the case of the relationship between the Geneva Protocol of 1924 and the Covenant of the League by article 19 of that Protocol [3] — or to provide for the termination of the old treaty as soon as the new one came into force. An instance of that kind was to be found in International Labour Convention No. 28 of 1929, article 23 of which provided that: " Should the Conference adopt a new Convention revising this Convention in whole or in part, the ratification by a Member of the new revising Convention shall *ipso jure* involve denunciation of this Convention without any requirement of delay. . . ." [4]

7. A somewhat different approach had been adopted in the Universal Copyright Convention,[5] concluded under the auspices of UNESCO in 1952, to which a declaration [6] had been attached containing a set of principles to prevent any conflict which might result from the coexistence of that convention and the earlier Berne Convention.

8. Unfortunately, States often failed to include specific clauses on the subject in their treaties and it was necessary to deal with that contingency. It might be advisable also to include principles covering cases in which such stipulations did exist, bearing in mind that article 15 dealt with such situations in relation to the termination of treaties.

9. With regard to the serious problem raised by the case contemplated in paragraph 1 (*a*), he thought it would be desirable to place at the very outset of that provision a confirmation of the principle of unanimity — a principle to which the Special Rapporteur subscribed. The provisions on the various cases to which the rule applied, and the various exceptions to the rule, should follow.

10. However, the main problem was that of the cases contemplated in paragraph 2. The Special Rapporteur had perhaps attached too much importance to the two cases cited in paragraph 15 of the commentary, which had been decided by the Permanent Court of International Justice; he seemed to rely not so much on what the Court had said, but on what it had not said.

11. The principle of unanimity could not be questioned. In another case, that of the Act of Algeciras of 1906,[7] concerning Tangiers, which had not reached the Court, some of the parties to an older instrument had proceeded to revise it without the consent of the others; the parties which had revised the Act had tried to remedy the situation by communicating their decision to the absent parties with a view to obtaining their consent. Similar action had been taken for the revision of the Treaty of 1839 establishing the neutrality of Belgium.[8]

12. Article 14 did not deal with those treaties which specifically prohibited the conclusion by the parties of special agreements on the same subject, either between themselves or with third States, as was the case with the Berne Convention of 1886,[9] the General Act of Berlin of 1885 [10] and the Declaration of Brussels of 1890.[11] The conclusion might be drawn that such stipulations had no legal effect. It was true that treaties containing provisions of that type were few in number, but it was essential to uphold the principle of unanimity and to take the existence of those provisions into account. As Judge Anzilotti had said in his separate opinion in the *Lighthouses Case*, "... it is a fundamental rule in

[1] United Nations, *Treaty Series*, vols. 41, 42, 48 and 49.

[2] *Agreements between the United Nations and the specialized agencies* (United Nations publication, Sales No.: 1951.X.I), p. 99.

[3] *League of Nations Official Journal*, Geneva, 1924, *Special Supplement No. 23*, p. 502.

[4] *Conventions and Recommendations*, 1919-1949, Geneva, 1949, International Labour Office, p. 165.

[5] United Nations, *Treaty Series*, Vol. 216, pp. 134 ff.

[6] *Ibid.*, pp. 150 ff.

[7] *British and Foreign State Papers*, Vol. 99, pp. 141 ff.

[8] *Op. cit.*, Vol. 27, pp. 990 ff.

[9] *Op. cit.*, Vol. 77, pp. 22 ff.

[10] *Op. cit.*, Vol. 76, pp. 4 ff.

[11] *Op. cit.*, Vol. 82, pp. 55 ff.

interpreting legal texts that one should not lightly admit that they contain superfluous words. . . ." [12]

13. Another question he wished to raise was that of treaties which had an effect on States that were not parties to them. Some treaties had played a decisive part in the formation of new States or had guaranteed the vital rights of States that were not parties. Such third-party beneficiaries should not be left helpless in the face of attempts to revise the treaties or to conclude new instruments which conflicted with the earlier ones.

14. He proposed that the provisions of article 14 should be rearranged, paragraph 4 being placed first and paragraph 3 second. On the points of substance he had raised, he would make no concrete proposals at that stage, but would await the explanations of the Special Rapporteur.

15. Mr. YASSEEN said that a conflict with an earlier treaty having the same substantive force would raise no difficulties if there were a single international community with a single legislative body. As in municipal law, if the judicature and the legislature were part of the same system it would be merely a matter of interpretation, since in the last resort the solution would depend on the will of the legislature.

16. But the situation was quite different in the sphere governed by international law, and especially by conventional law, since there were a large number of communities and legislative bodies. No problem arose where completely different international communities existed side by side, for every rule would then remain in force within its own sphere; but where conventional rules came into force successively in international communities which differed from each other only in part, that overlapping complicated matters.

17. Two principles had then to be borne in mind. First, respect for acquired rights: a later treaty should not impair the interests of the States parties to an earlier treaty. As a general rule, however, it would be wrong to go so far as to invalidate the later treaty. Secondly, the interests of States, which were parties to the later, but not to the earlier, treaty should be safeguarded. The contractual principle should be ignored, since the Commission was drafting rules *de lege ferenda*, and the development of international law should not be impeded merely for the sake of some States which might not be willing to bow to modern requirements.

18. The line taken by the Special Rapporteur was therefore both moderate and justifiable; it did not impair the rights of the States parties to an earlier treaty, since that treaty was held to prevail. At the same time there was no bar to the treaty's amendment. The later treaty was not invalidated, but could be carried into effect provided that the States signatories to the later treaty fulfilled their obligations to the States parties to the earlier treaty.

19. The Special Rapporteur had not laid down any absolute rule, but had provided for justified exceptions. The proviso regarding the constituent instruments of international organizations seemed perfectly reasonable in view of the importance of such instruments and the need to provide international organizations with certain guarantees. The other exception, relating to *jus cogens* rules, was also essential. Moreover, the solutions adopted in article 14 could be more easily accepted in view of the approval of article 13.

20. Further exceptions might be conceivable, especially for conventions of great political importance based on a balanced compromise achieved with great difficulty, particularly those prohibiting derogation from their provisions by means of later conventions. They might be regarded as somewhat analogous to *jus cogens* rules.

21. The principles on which article 14 was based and the solutions put forward in it were acceptable as a whole, subject to the reservations he had mentioned.

22. Mr. TUNKIN said it was important to avoid the temptation to adopt an approach borrowed from municipal law; in article 14, it would be inappropriate to take a position based on the concept of civil liability. The situation in international relations was very different from that obtaining under municipal law; international treaties were of greater importance than contracts concluded under municipal law, for world peace could depend on the fulfilment of treaty obligations. Consequently, the provisions of article 14 were of vital importance.

23. The problems of principle involved had some bearing on the *pacta sunt servanda* rule. A State which was a party to a treaty would violate that rule if it entered into a later treaty which conflicted with its obligations under the earlier treaty. The question then arose what the legal consequences would be with regard to the validity of the later treaty; he would leave aside, for the time being, the problem of responsibility, which would be dealt with by Mr. Ago as Special Rapporteur for that topic.

24. The principle stated in paragraph 2 was correct, but the problem arose of whether that principle could be applied to every situation. Some speakers had quoted instances in which exceptions might have to be made. Personally, he thought there could be international treaties of which it was not sufficient to say that "the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty." One example was the recent agreement on the neutrality of Laos,[13] which prohibited the establishment of foreign military bases on Laotian territory. It a treaty were concluded in violation of that provision, it would clearly not be sufficient merely to say that the provisions of the earlier treaty would prevail; such a statement might cover most of the practical points involved, but it would also be necessary to state that the second treaty was void.

25. Paragraph 1 dealt with the case where all the parties to the later treaty were also parties to the earlier treaty. In that case, the principle to be applied was that the parties could always change the provisions of the earlier

[12] *P.C.I.J.*, Series A/B, No. 62, p. 31.

[13] Command Papers, H.M. Stationery Office, London. Cmd. 9239, pp. 18 ff.

treaty by subsequent agreement. The problem of validity did not arise and paragraph 1 did not properly belong to the subject matter of article 14; he suggested that it should be removed from the article.

26. Mr. de LUNA said he was glad to see that the Special Rapporteur had departed from the approach adopted by his two predecessors, Sir Hersch Lauterpacht, who had held that a treaty should be void " if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties ",[14] and Sir Gerald Fitzmaurice, who had drawn a distinction between cases in which a previous treaty imposed reciprocal obligations and those in which the obligations imposed were of the " interdependent " or " integral " type.[15]

27. The Special Rapporteur had adopted a more correct approach, which had, moreover, the support both of judgements of the Permanent Court of International Justice and of the principle that conflicts between treaties should be resolved on the basis of the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty.

28. The most useful idea in the arguments of the two previous Special Rapporteurs, the idea that a treaty conflicting with a *jus cogens* rule was invalid, had been retained; any other solution would needlessly impair the stability of conventional law. Wherever *jus cogens* rules did not apply, the principles to be respected were the autonomy of the will of the parties, the principle that so far as third States were concerned treaties were *res inter alios acta* and the principle *pacta tertiis nec nocent nec prosunt.* Where a party to an earlier treaty assumed a subsequent obligation, it would be sufficient to follow the general principles governing the interpretation and application of treaties, their amendment and termination. Where a State was unable to fulfil one or other of its successive obligations, the principle of responsibility would apply, with its consequence: compensation.

29. In many instances States in a particular region which were parties to multilateral treaties had concluded among themselves regional agreements containing provisions that differed from those of the earlier treaties. For such States it was the regional agreements which had effect, by virtue of the principle *tractatus specialis derogat generali.* Many cases similar to those quoted by the Special Rapporteur and by Mr. Lachs existed in general international law; for example, not all the States parties to the Hague Convention of 1899 had become parties to the Hague Convention of 1907, but both conventions had operated simultaneoulsy by virtue of a special clause in the latter.[16]

30. Mr. ROSENNE said the discussion had strengthened his opinion that article 14 dealt with the interpretation and application of treaties rather than with their validity.

31. In most cases, subject to the overriding rules of *jus cogens,* the real problem was that of determining which set of obligations was to prevail in the event of conflict between an earlier treaty and a later one. As pointed out by the eminent French internationalist Rousseau, that could give rise to delicate situations in which legal considerations were not always predominant.

32. He believed that the guiding principles should be expressed in terms of a residual rule. Indeed, the Special Rapporteur had begun his formulation on that basis, but his approach should be more emphatic. The residual rule would apply where both treaties were completely silent on the question of other treaties and where there had been no real negotiations to try to bridge the gap between them. It was quite common for a clause to be included in a treaty dealing with its relationship with past treaties, with future treaties, or with both. It was essential that that practice should be encouraged and that the efficacy of that type of clause should not be impaired by the adoption of too general a rule. All United Nations conventions codifying international law concluded since 1958 contained a clause on the subject. On the other hand experience showed that provisions for resolving that type of conflict did not always appear on the face of the treaty, but could be agreed in the antecedent negotiations. Accordingly, the residual rule would have to be carefully formulated.

33. Paragraph 9 of the commentary referred to the effect of knowledge of the conflict between the earlier and the later treaty; he wondered whether compliance with the provisions on the registration of treaties might affect that question of knowledge.

34. With regard to paragraph 3 (*a*) of the article, he found it difficult to accept the proposition that the Charter of the United Nations or the constitution of a specialized agency limited the treaty-making powers of member States or raised questions of capacity. What article 108 of the United Nations Charter and similar provisions did was to lay down modalities for the conduct of negotiations, a matter which was covered by article 5 of Part I of the draft.

35. Finally, paragraph 3 (*b*) seemed unnecessary, because the matters it dealt with were already covered by other provisions of the draft.

36. Mr. ELIAS said he found the provisions of article 14 acceptable, except that they omitted to deal with one situation which merited attention. They dealt with the case in which the parties to the later treaty were the same as those to the earlier treaty, the case in which the later treaty had a larger number of parties and the case in which the later treaty had fewer parties; there was, however, a fourth case, admittedly a somewhat rare one: the case in which the later treaty was concluded by parties entirely different from the parties to the earlier one.

37. The provisions proposed by the Special Rapporteur were based on the attitude adopted by the Permanent Court of International Justice in the *Oscar Chinn* [17] and

[14] *Yearbook of the International Law Commission, 1954,* Vol. II (United Nations publication, Sales No. 59.V.7, Vol. II), p. 133, article 16.

[15] *Op. cit.,* 1958, Vol. II (Sales No.: 58.V.1, Vol. II), pp. 27-28, articles 18 and 19.

[16] Scott, J. B., *Hague Conventions and Declarations of 1899 and 1907,* 3rd edition, New York, 1918, Oxford University Press.

[17] *P.C.I.J.,* Series A/B, No. 63.

European Commission of the Danube[18] cases. The situation which he had in mind, and which had been the subject of attention at a conference held at Niamey, in the Republic of the Niger in February 1963, on the subject of the River Niger, went beyond those cases.

38. The Act of Berlin of 1885 had established an international regime for the Congo and the Niger. That regime had been confirmed and slightly modified by the Convention of St. Germain of 1919.[19] As far as the Niger was concerned, France and the United Kingdom had been the riparian signatories of those treaties at the time. The territories which had then been colonies of France and the United Kingdom had, of course, since become independent. Nine independent riparian States had thus met at the Niamey Conference to consider arrangements for the development of the Niger and its utilization, in particular for the generation of hydroelectric power and the exploitation of the river's resources. The question which had arisen was whether, and if so to what extent, those nine States could seek to provide, in a treaty establishing a River Niger Commission, for the abrogation of the General Act of Berlin of 1885 and the Convention of St. Germain of 1919, in so far as those States were concerned.

39. That question could be considered from several different angles, one of which was that of State succession. Since the nine independent States had taken over the rights and duties of the former colonial Powers under the two treaties in question, they had also taken over the right to abrogate the treaties and substitute for them arrangements more acceptable from the point of view of their development schemes. The doctrine of *rebus sic stantibus* had also been invoked and, more broadly, the problem of the obsolescence of treaties. The conclusion reached by almost all the members of the prospective River Niger Commission was that the Act of Berlin, the Convention of St. Germain and the intervening Declaration of Brussels of 1890 must be deemed inapplicable to the new situation in which the riparian States found themselves.

40. The States attending the Niamey Conference had reached agreement on a Convention and on a Statute for the River Niger Commission. Those instruments had been communicated to the United Nations and circulated to France and the United Kingdom, the Powers formerly responsible for the Niger Basin, and there appeared to be general agreement that the course adopted had been unexceptionable. In any event, the nine riparian States had reaffirmed the main principles which the Act of Berlin had sought to protect: equality of treatment for the nationals of all States, and freedom of navigation for vessels of all flags.

41. He accordingly suggested that the Special Rapporteur should deal with the case of a treaty concluded between parties entirely different from the parties to an earlier treaty and with the subrogation of new States to the rights and duties of the former colonial Powers.

[18] *P.C.I.J.*, Series B, No. 14.

[19] League of Nations, *Treaty Series*, Vol. 8, pp. 27 ff.

42. Mr. TSURUOKA said it seemed to him that the essential point in article 14 was not the substantial validity of a later treaty, since under the Special Rapporteur's draft such a treaty was not invalidated by the fact that some or all of its provisions were in conflict with those of an earlier treaty, but rather the position under conventional law of a State which had concluded two treaties and thereby assumed two mutually conflicting treaty obligations. It would be better to consider that point in connexion with the question of the application and effects of treaties. Any other problems that might arise in connexion with article 14 were relevant either to the revision of treaties or to *jus cogens* rules.

43. Accordingly, the questions dealt with in article 14 might be gone into in the commentary on article 2 or article 13, or even in connexion with the succession of States and governments.

44. Mr. TABIBI said that the length of the commentary on article 14 testified to the complexity of the subject. It was one which ought not to be approached exclusively with a view to codification, as had been done by the two previous special rapporteurs on the law of treaties, but also with a view to progressive development.

45. He agreed with the views expressed by the present Special Rapporteur, in paragraphs 3 and 4 of his commentary, as to the kind of cases in which a question of essential validity might arise, and with his statement in paragraph 18 that international jurisprudence was not perhaps entirely conclusive on the question whether and, if so, in what circumstances, a treaty might be rendered void by reason of its conflict with an earlier treaty. That was probably the main reason why Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice had been chary of admitting that such conflicts ever led to nullity.

46. Although he was in general agreement with the fundamental purpose of the article, he feared that it might lead to difficulties in application, especially if the points raised by Mr. Lachs were not elucidated, and might detract from the force of the other articles on essential validity. It also appeared from the general trend of the discussion that the article in its present form would not prove acceptable. It might be preferable for the Special Rapporteur to reconsider the subject and submit a new text to the Commission.

47. Mr. AGO said that his doubts regarding the need for article 14 — which had been strengthened by the critical examination made by the Special Rapporteur himself — had not been dispelled by the discussion.

48. Paragraph 1 of the article, concerning the case in which the parties to two treaties were the same, stated an obvious truth which no one would think of disputing and which it was therefore unnecessary to reaffirm in the draft.

49. Paragraph 2 dealt with the problem of conflict between two successive treaties to which only some of the parties were the same and the effects of the conflict on the validity of the second treaty. The Commission was not concerned at that point with the problem of revision, which it would consider later. Nor could it,

of course, hold that the earlier treaty ceased to be valid with respect to States not parties to the later one; for manifestly, if some of the parties to a treaty concluded another treaty *inter se* which conflicted with the earlier one, the second instrument was valid as between those parties; but equally obviously, as between those parties and the other parties to the earlier treaty, the validity of the earlier treaty remained intact. If the second instrument made it impossible to carry out some of the obligations deriving from the first, the question which would arise would not be one of validity, but one of international responsibility. Of the two solutions proposed in paragraph 2 (*b*), the first was obvious and the second seemed to deal with a purely theoretical situation, for a State which had participated in the conclusion of the second treaty could hardly contest its effectiveness.

50. Paragraph 3 dealt first, in sub-paragraph (*a*), with the case of a special treaty concluded between States members of an international organization, some provisions of which conflicted with provisions of the constitution of that organization. There could be no doubt that problems of that kind could only be solved by interpretation and application of the constitution concerned. Sub-paragraph (*b*) was not necessary, as it merely reproduced article 103 of the Charter.

51. Paragraph 4 merely repeated what had already been said in article 13.

52. There remained the case mentioned by Mr. Tunkin and Mr. Lachs: that of a State which, having first concluded with other States a treaty placing certain obligations on all of them, subsequently concluded with some of its partners or with other States, a treaty some of whose provisions conflicted with the first treaty. There would appear to be two possibilities: either the first treaty expressly limited the capacity of the parties to conclude other treaties conflicting with its provisions, in which case the second treaty was void; or else the first treaty prescribed no such limitation, in which case the second treaty was valid as between the States which had concluded it, but the State or States which were parties to both treaties had failed to fulfil their obligations under the first treaty and thereby incurred international responsibility, one of the consequences of which was that they were under a duty to eliminate the conflict between the two instruments by terminating or amending the second.

53. To sum up, article 14 contained only provisions which, if not unnecessary, merely reproduced clauses already embodied elsewhere in the draft articles or dealt with problems which the Commission would take up later. He therefore suggested that the Commission should suspend consideration of the article and pass on to the following articles, reverting to article 14 later, if necessary, to see whether any part of it need be retained or not.

54. Mr. VERDROSS said he shared the view of Mr. Tunkin and Mr. Ago that paragraph 1 of article 14 did not apply to the case of a conflict between two treaties, and should therefore be deleted.

55. According to the prevailing doctrine, if a State party to a treaty concluded with another partner a second treaty conflicting with the first, then that State was undoubtedly bound to do everything it could to annul the second. Admittedly, it was reasonable to ask whether the Commission, one of whose tasks was to develop international law, should not go further than that doctrine; he would prefer not to give a categorical answer to that question.

56. If the Commission wished to take a decision concerning a possible conflict between the Charter of the United Nations and the provisions of another international agreement, then it should be a clear decision. It was unnecessary to reproduce Article 103 of the Charter, which had been intentionally drafted in rather vague terms so that it could also apply to a treaty concluded by a Member State with a State which was not a Member; according to Article 103, the Charter obligations prevailed in such a case, but the treaty conflicting with the Charter was not declared void.

57. Mr. PAL said that, after listening to the observations of other members and examining some of the literature on the subject, he had come to the conclusion that there was authority for the view that conflict with a prior treaty at some points touched upon the issue of validity. For instance, according to Oppenheim, a treaty conflicting with a prior treaty was illegal, a view clearly stated in the following passage:

> "Treaties, whether general or particular, lay down rules of conduct binding upon States. As such they form part of international law. They are, in the first instance, binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker." [20]

58. Article 14 should remain in section II among the articles dealing with essential validity, but should be amplified to cover both the important case raised by Mr. Elias and the case in which the earlier treaty contained clauses restricting or purporting to restrict the capacity of the parties to enter into the later treaty. The latter point needed general treatment, whereas the provision in paragraph 3 (*a*) was limited to the constituent instruments of international organizations.

59. Mr. GROS said it had been his understanding at the previous meeting that most members approved of the Special Rapporteur's approach in proceeding from the assumption that article 14 was concerned less with the validity of treaties than with the conflict between two treaties. However, the conflict between successive rules of law raised problems concerning the revision and the termination of treaties and the interpretation of the constitutions of international organizations; he therefore supported Mr. Ago's suggestion that consideration of article 14 should be deferred.

60. With regard to the substance, he particularly endorsed paragraph 20 of the commentary, for he did not think

[20] *International Law*, 8th edition, 1955, Vol. I, p. 894.

it was by applying a theory of the nullity of treaties that certain breaches of international law could be effectively penalized. The rule of estoppel was much more practical, as the Permanent Court of International Justice had indicated in its advisory opinion on the European Commission of the Danube, when it had stated the governments "cannot, as between themselves, contend that some of its [the Statute's] provisions are void as being outside the mandate given to the Danube Conference..."[21]

61. Mr. AMADO said that from the length of the commentary it was evident that the Special Rapporteur had had serious doubts about article 14. Indeed, the article did not stand up to searching scrutiny. It was inconceivable that States would behave in a manner that would make such rules necessary. The Commission's task was to give form, not to the doubts of scholars, but to scientific certainties and to the rules accepted by States. He did not think that any of the provisions of the article should be retained, since the whole of its substance was already embodied in articles 2 and 19 and whatever few points were not settled by those two articles would be covered by the provisions governing the interpretation, revision and deposit of treaties.

62. Sir Humphrey WALDOCK, Special Rapporteur, summarizing the discussion, said that although a few members of the Commission were hesitant about removing article 14 from section II, the majority seemed to agree with him that the article did not really raise any issues of essential validity. He had explained, when introducing the article, that it had been inserted in that section because the two preceding Special Rapporteurs had treated its subject-matter in that context, having found that some of the problems arising from conflict with a prior treaty touched upon validity. Until the Commission had expressed its view on the question whether any matters of validity were raised by article 14, he had thought it better to present the article in the context of validity in section II of the report.

63. As he had already suggested, the substance of the article might need to be discussed in connexion with article 19 which raised questions of implied termination of a treaty brought about by concluding a subsequent treaty. But generally speaking, if the Commission did not think the article raised any question of essential validity, it ought to be taken up at the sixteenth session when he would be presenting his draft articles on the application of treaties. It would be easier to deal with the matter of conflict after the Commission had discussed the question of the effects of treaties on third parties.

64. Some members had touched upon the question of revision. That certainly had links with the question of conflict between treaties, but had no relevance to article 14 if it were dealt with in its present context as an article on essential validity.

65. Commenting on some of the detailed observations put forward during the discussion, he said that Mr. Lachs' suggestions about rearranging the order of the clauses had some justification, though perhaps he would differ as to emphasis. But those suggestions called for consideration only if the article were left in section II.

66. Mr. Lachs had drawn attention to treaties containing provisions dealing with the problem of incompatible obligations, or expressly prohibiting the parties from assuming incompatible obligations under some other instrument or giving the treaty priority over other treaties; but the question of validity was usually not touched upon by those provisions. A number of treaties, including the Charter, contained such provisions, and he also knew instances of two treaties containing inconsistent provisions and both claiming priority for their own provisions. But the mere introduction of such clauses did not, in his opinion, transform a conflict into an issue over validity. It was noteworthy that in the *European Commission of the Danube* case the Permanent Court had attached no special significance to the existence of an express prohibition in the Treaty of Versailles against inconsistent agreements, although the point had been stressed in the opinions of the dissenting judges. If the Commission as a whole accepted the general conclusion set out in article 14, that would certainly not mean that it sanctioned entry into inconsistent obligations; such action would be a violation of a previous treaty and would raise a question of responsibility. The injured State could always bring the matter before the United Nations and rely upon such procedural remedies as existed.

67. He would be encroaching on the territory of the Special Rapporteur to be appointed on State succession, if he were to comment on the special case brought up by Mr. Elias of an agreement to which none of the parties were the same as those to the previous treaty. He had not dealt with the matter in the article or in the commentary, because such a situation did not raise a question of validity. The question might have to be taken up in another context. The particular example of the régime of the river Congo mentioned by Mr. Elias was of the greatest legal interest. But it seemed to raise other issues than those of validity — issues of State succession and of *rebus sic stantibus*.

68. Mr. Tunkin had raised the very difficult problem of the possible existence of special cases in which conflict between two treaties might involve validity even if the general thesis propounded in article 14 were accepted, but he would have thought that the example of Laos raised a problem of capacity, and in particular the difficult problem of when diminution of capacity took place as a result of a treaty. The matter had been touched upon during the previous session, but the Commission had shown itself reluctant to press it to any conclusion. In any event, he did not regard such a case as constituting an exception to the general rule he had sought to lay down in article 14 and which appeared to have gained general support. The case seemed, as he had indicated, rather to raise a possible question of capacity and certainly a question of responsibility. In such an instance, the State regarding itself as the injured party could raise the matter in the United Nations and also seek application of the various remedies open to it under general international law.

[21] *P.C.I.J.*, Series B, No. 14, p. 23.

69. Mr. TUNKIN said that the question at issue was not what was the proper place for article 14 but what should be its substance, and the discussion had not sufficiently clarified that. Few members had put forward really definite opinions and, with all respect to the Special Rapporteur, he himself was not convinced that treaties in violation of a previous agreement only raised problems of responsibility and not of validity.

70. As for the action to be taken by the Commission, he supported Mr. Ago's suggestion that the discussion on article 14 should be suspended, so that it could be decided later where the article should be placed and in what form.

71. Sir Humphrey WALDOCK, Special Rapporteur, said he would like to make it plain that he too favoured the course suggested by Mr. Ago.

72. The CHAIRMAN said that article 14 might be left aside until the Commission was in a position to determine whether it should be included in some part of the draft, or whether the question of conflict with a prior treaty ought to be dealt with under the topic of state responsibility or of state succession.

73. Mr. TUNKIN said it should be understood that the Commission would resume the discussion of article 14 at the present session.

74. Mr. ELIAS agreed with Mr. Tunkin: the argument that some of the issues raised by conflict with a prior treaty did not involve essential validity had not convinced him. The matter should not be held over until the following session.

75. The CHAIRMAN proposed that the decision on article 14 be deferred and that the article be taken up again at a later stage in the session.

It was so agreed.

The meeting rose at 5.55 p.m.

688th MEETING

Tuesday, 28 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider section III of the Special Rapporteur's second report (A/CN.4/156/Add.1), which began with article 15.

SECTION III (THE DURATION, TERMINATION AND OBSOLESCENCE OF TREATIES)

ARTICLE 15 (TREATIES CONTAINING PROVISIONS REGARDING THEIR DURATION OR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 15, 16 and 17 were clearly linked together and could be regarded as a unity. Article 15 dealt with the case in which the treaty contained provisions intended to regulate either its duration or its termination. Article 16 was, strictly speaking, of the same kind; it dealt with the case in which the treaty, on its face, appeared to contemplate an indefinite duration, making no provision of any kind for denunciation or for termination by other means; its chief relevance was its link with article 17. Article 17 dealt with the case in which the treaty contained no provisions regarding either its duration or its termination.

3. In article 15 he had stated possible rules, in case the Commission wished or thought it right to state in terms the methods by which the duration or termination of a treaty could be determined, in accordance with the various types of clause which a treaty could contain for that purpose. He fully realized that, as already appeared from one or two of the proposals for amendment, the article could be dealt with quite differently; indeed, it could be said simply that " a treaty shall endure, or terminate, in accordance with its terms, where the treaty itself makes provision for that purpose "; if that method of approach were adopted, it would be possible to shorten article 15 very considerably.

4. There were very few points in article 15 on which the matter did not really follow directly from the treaty. Perhaps the main point was in paragraph 4 (*c*), where there was a little problem to which he had suggested an answer, but which he did not think could be said to be settled by the treaty itself. There were quite a number of treaties which contained a clause preventing the treaty from coming into force until a certain number of ratifications had been obtained; the problem was what was to happen if denunciations should reduce the number of parties below the number originally specified. He had dealt with that point in the commentary, and proposed a rule.

5. Apart from that problem, the provisions set out in the article really followed from the particular provisions of the treaty itself, so that if the Commission wished to adopt a different method it would be quite possible to dispense with some of the paragraphs. It was simply a question of whether, in a codification of that kind, it was useful or not useful to try to state explicitly the rules which would, in fact, be applied under the various forms of treaty clauses.

6. A point which might possibly be raised in connexion with paragraph 5 was that two possible methods of termination were sometimes provided for in the same treaty. Even then, it followed from the treaty itself how the two clauses would operate in conjunction, but it might be argued that it was worth noting that particular point, as he had done in paragraph 5 (*a*).

7. Article 17 dealt with quite a complicated question on which there might be different views. If the Commission were to take a widely different view from the Special Rapporteur as to the extent to which implied rights of denunciation were to be understood in treaties, then the provisions of article 17 could be greatly shortened.