

Document:-
A/CN.4/SR.703

Summary record of the 703rd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1963, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

83. Mr. TUNKIN said that if article 2 were not omitted, the only course open to the Commission would be to state the principle *pacta sunt servanda*, in which case article 2 might read: "Every treaty entered into and brought into force in accordance with the provisions of Part I is valid and binding upon the parties unless etc." The title would also have to be amended to read: "The binding force of treaties."

84. Sir Humphrey WALDOCK, Special Rapporteur, said that article 2 was not concerned with the principle *pacta sunt servanda*, according to which the parties were bound to execute the treaty. There were various grounds on which a valid treaty that was in force need not be executed. Such cases would come within the compass of his next report.

85. Mr. AMADO thought article 2 amounted to stating that the international law of treaties was governed by the rule *pacta sunt servanda*. But why state a self-evident principle? He proposed that if article 2 were not deleted, because some members wished to retain it, the decision on the matter should at least be deferred until the next session.

86. Mr. TUNKIN said he would be able to accept article 2 if it were re-drafted to state that a treaty which was valid and in force was binding and must be observed by the parties.

87. Mr. TSURUOKA supported Mr. de Luna's proposal; he thought it was mainly a matter of drafting.

88. The CHAIRMAN suggested that article 2 be referred to the Drafting Committee for re-drafting. The Commission could then finally decide, on the basis of a new text, whether the article should be retained or not.

It was so agreed.

The meeting rose at 12.40 p.m.

703rd MEETING

Wednesday, 19 June 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 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) *(resumed from the 687th meeting)*

2. Sir Humphrey WALDOCK, Special Rapporteur, said it appeared from the earlier discussion of article 14 that the Commission was disposed to accept the view that a conflict with a prior treaty raised questions of

priority rather than of nullity. Some members had considered that article 14 belonged in Part III of his report because it was concerned with the interpretation of the two treaties, and that it should be considered at the next session.

3. He appreciated the reason why Mr. Tunkin had said that article 14 did not go far enough to cover treaties of a special type, some provisions of which might be of a nature similar to *jus cogens*, and had quoted the recent agreement on the neutrality of Laos¹ as an example. That type of treaty had been touched on in the commentary but, as he had pointed out, it did not raise the question of nullity so much as the question whether the parties intended to impose some limitation on their future capacity to conclude agreements on a particular matter, such as the neutralization of a territory or part of a territory.

4. After the Commission had postponed consideration of article 14, Mr. Pal and the Chairman had jointly proposed an amendment to paragraph 2 (a), adding the following sentence:

"Provided, however, that if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty, of such a kind as to frustrate the object and purpose of the earlier treaty, then any party to it whose interests are seriously affected shall be entitled to invoke the nullity of the second treaty."

5. That was a substantial amendment, which would considerably change article 14 by introducing the possibility of the second treaty being nullified; and its application was not limited to a special kind of treaty. Such a general exception to the provision in paragraph 2 (a) seemed dangerously wide and would embrace, for example, ordinary commercial treaties. Attractive as the idea might seem that certain conflicts could entail nullity, he questioned whether it could be accepted at the present stage of development. It seemed fair to say that the amendment went beyond the provisions of the Charter, which provided only for the primacy of the Charter over other treaties, not for other treaties being nullified in the event of a conflict with the Charter.

6. The question on which the Commission must try to reach a conclusion was whether a case of conflict between two treaties should be regarded as essentially raising an issue of priority. If it was so regarded, and the later treaty did essentially violate obligations assumed under the earlier one, that would raise a question of responsibility, but the later treaty would not be nullified, as between the parties to it, so long as it was not contrary to *jus cogens*. Under article 14 in its present form, the parties to the later treaty remained under the obligation to execute the earlier one in respect of any of the parties to it which had not become parties to the later treaty.

7. Mr. PAL explained that the purpose of the amendment, which had been couched in cautious language, was to deal with cases in which the later treaty not only

¹ *Command papers*, H.M. Stationery Office, London, Cmd. 9239, pp. 18 ff.

conflicted with the earlier one, but its performance would result in a direct breach of the obligations assumed under the earlier one. In those cases the later treaty must be regarded as illegal and indicative of bad faith. During the earlier discussion of the article, he had quoted a passage from Oppenheim which substantiated that view (687th meeting, para. 57).

8. The amendment should meet the point made by some members during the previous discussion that in some instances conflict with an earlier treaty might raise the problem of the legality of the later instrument. If it were accepted, article 14 could remain in section II.

9. The CHAIRMAN, speaking as a member of the Commission, said that the authors of the joint amendment thought that the Special Rapporteur was right in proposing as a general rule that *inter se* agreements should be regarded as valid. The only purpose of the amendment was to provide for the exceptional case in which there had been a deliberate conspiracy to conclude a new treaty in breach of the earlier one. It had been inspired by provisions contained in the reports of the two previous special rapporteurs, but unlike them had been framed in the form, not of a rule, but of an exception, and was accordingly of restricted application; it was further qualified by the provision that the nullity of the second treaty could only be invoked if the party's interests were "seriously affected".

10. He had not been convinced by the Special Rapporteur's objection that the amendment went beyond the provisions of the Charter, because Article 103 of the Charter was concerned not so much with the question of conflicting obligations as with the difficulty of applying certain provisions of the Charter, for example, those calling for economic measures, if they conflicted with the terms of ordinary, perfectly valid agreements like commercial treaties. A similar problem had arisen during the period of the League of Nations, over the application of economic sanctions to Italy in 1936.

11. The fact that, in the event of a conflict between obligations, those of the Charter prevailed was not an argument for rejecting the principle that a treaty deliberately designed to call for action in direct breach of obligations assumed under an earlier treaty must be a nullity.

12. Mr. CADIEUX said that in principle he approved of the text proposed by the Special Rapporteur. His formulation of article 14 constituted an important contribution to the progressive development of international law in a field in which the rules of international law had to be reconciled with contemporary practice and needs. As Sir Gerald Fitzmaurice had said in his 1958 report, the right of some of the parties to a treaty to modify or supersede it by another treaty in their relations *inter se* was an instrument which States increasingly employed for changing a treaty situation in a desirable and perhaps necessary manner, in circumstances in which it would not be possible, or would be very difficult, to obtain the consent of all the States concerned.²

13. The Special Rapporteur had adopted his predecessor's idea and expressed it in a form which seemed not only to have received the approval of most of the Commission's members, but also to conform with the decisions of the Permanent Court of International Justice in the *Oscar Chinn*³ case and the *European Commission of the Danube* case.⁴

14. The rule proposed by the Special Rapporteur was a reasonable compromise between the need to safeguard the position of the parties to an earlier treaty and the desire to recognize the legitimate interests of the parties to a subsequent treaty, between respect for the principle *pacta sunt servanda* and the principle *res inter alios acta* and between respect for obligations contracted and freedom to contract other obligations.

15. With regard to the individual provisions of the article, like some other members of the Commission, he considered that paragraphs 1(a) and (b) were not essential and that paragraph 2(b)(ii) was of doubtful value, for as Mr. Ago had pointed out, a State party to the second treaty could hardly contest its validity by pleading conflict with a prior treaty. For the reasons given by earlier speakers, paragraph 3 could also be deleted.

16. He did not, however, take the view that article 14 as a whole was unnecessary. Such an article would be more appropriate in the section on the application of treaties, but for the moment the essential issue was not so much the placing of the article as the usefulness of the rule it stated, and its content.

17. He did not quite follow the argument that the parties to the first treaty would in certain cases be free to claim that the second was void, as seemed to be implied in the amendment proposed by Mr. Pal and the Chairman. The rule in paragraph 2 of the Special Rapporteur's draft protected the interests of the parties to the first treaty sufficiently; it recognized the priority of the first treaty and did not exclude the possibility that, in certain cases, the second treaty could be voided by a court in accordance with the provisions of paragraph 2(b)(i), because it conflicted with an overriding principle of international law or with a rule of *jus cogens* under article 13.

18. However, that particular problem might be dealt with in the commentary, without any need to amend the general terms used by the Special Rapporteur.

19. Mr. TUNKIN said that the earlier discussion on article 14 had usefully cleared the ground, but some points still needed to be elucidated. The amendment was concerned with a special case of conflict with a prior treaty, which should be dealt with separately. If a later treaty clearly violated an earlier one, that constituted a breach of the principle *pacta sunt servanda*, which was a rule of *jus cogens*, and it must therefore be regarded as void. The Special Rapporteur's draft was highly adequate to cover conflicts in general when the earlier obligation would take precedence, but it would not suffice to cover the special case he had mentioned; international in-

² *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 43, para. 89 (b).

³ *P.C.I.J., Series A/B, No. 63.*

⁴ *P.C.I.J., Series B/14.*

struments could not be treated in the same way as private contracts. Both cases must be covered in the article.

20. Paragraph 3 (a) of the Special Rapporteur's text would presumably be omitted, as a special provision was to be prepared concerning the constituent instruments of international organization. Paragraph 3 (b) should be dropped because it served no useful purpose. Paragraph 4, on the other hand, was important and should be retained.

21. Mr. CASTREN said he had some difficulty in accepting the amendment proposed by Mr. Pal and the Chairman, while the Special Rapporteur's arguments had convinced him of the soundness of his views on several points.

22. Mr. Pal and Mr. Tunkin had distinguished between certain cases of conflict between the earlier treaty and the later treaty, and the amendment dealt with the case in which the interests of a party to the earlier treaty were seriously affected. All those distinctions were very subtle and relative and could accordingly give rise to subjective interpretations. For the time being he preferred the text proposed by the Special Rapporteur, which seemed to him clearer and more homogeneous.

23. Mr. TSURUOKA thought that the right context for article 14 would be the section dealing with the application of treaties or with their legal effects vis-à-vis third parties.

24. A problem arose when the later treaty was a multi-lateral treaty and some of the parties to the earlier treaty did not accept the later treaty, some of whose provisions completely changed the earlier one. Could those parties claim that the later treaty was void? For the time being it seemed to him wiser to follow existing practice and to apply, for the purpose of settling such disputes, the recognized principles of state responsibility.

25. Mr. ROSENNE said that Mr. Tunkin had helped to clarify the issues by pointing out that the problems which article 14 was intended to cover related to two entirely different situations. As far as the first was concerned, namely, a simple conflict between the obligations imposed by two different treaties, the consenses of opinion seemed to be moving towards the Special Rapporteur's proposal. With regard to the second situation, in which the implementation of the later treaty could constitute a real violation of the earlier treaty, not all the parties to which were parties to the later one, he presumed that Mr. Tunkin had in mind violations of a very definite and serious kind, similar to those which had been contemplated by Sir Hersch Lauterpacht. In his own opinion the two cases should be dealt with quite separately.

26. He also wished to reiterate with even greater emphasis the view he had expressed during the earlier discussion of the article (685th meeting, para. 59, and 687th meeting, para. 30), that problems of conflict which did not raise serious issues connected with the violation of a prior treaty should be discussed in connexion with an entirely separate part of the draft, namely,

that to be devoted to the application of treaties in the Special Rapporteur's third report. The Special Rapporteur should therefore be asked to reconsider that problem in the light of the present discussion and to present his revised conclusions at the sixteenth session.

27. The provisions concerning breach of a treaty already discussed by the Commission had been approached from a standpoint rather different from that adopted by the authors of the joint amendment and by Mr. Tunkin. The Commission had regarded a breach as giving rise to a right of the injured party to suspend or denounce the treaty, but, according to the example of the Laos agreement, what was desired in the present context was a right of quite a different character — namely, the right to insist on continued performance of the earlier treaty, even to the extent of requiring that the later treaty be regarded as void. Other examples should be considered, however, such as the Danube convention of 1948,⁵ which would also come within the scope of the Special Rapporteur's proposals for article 14.

28. One criticism that could be made of the amendment was that it failed to indicate how, or before what tribunal, the injured State could claim that its interests had been seriously affected by the later treaty. Since the hypothesis of the amendment was that the parties to the earlier treaty were not all parties to the later treaty, the provisions of article 25 could not apply. Sir Hersch Lauterpacht had proposed that the International Court should have compulsory jurisdiction over any dispute of that kind, but that was a solution which the Commission could not adopt. Nevertheless, means did exist — United Nations machinery and diplomatic procedures — for settling the kind of issues which might arise.

29. A provision covering the point dealt with in the amendment and discussed by Mr. Tunkin would, of course, have to be brought into line with the provisions already discussed concerning the substantive and procedural aspects of breach. Article 25 might require considerable modification if it was to be made applicable to such a provision.

30. The CHAIRMAN said that the joint amendment would need only some small changes to bring it within the scope of article 25.

31. Mr. ROSENNE maintained that to achieve that result, article 25 itself would require substantial amendment.

32. Mr. de LUNA said it was merely a question of whether the right to claim the nullity of a later treaty should be recognized or not. It seemed that, in order to avoid the danger of international anarchy, the Commission was inclined not to accept the idea of the automatic invalidation of a treaty by the unilateral decision of one of the parties. But several speakers had shown that in certain cases the validity of treaties could be contested. He found the amendment submitted by Mr. Pal and the Chairman in every way preferable to the Special Rapporteur's text.

⁵ United Nations, *Treaty Series*, Vol. 33, pp. 197 ff.

33. But why not leave the parties to the earlier treaty free to choose either not to accede to the later treaty, or to conclude another treaty conflicting with the earlier treaty obligations, accepting, of course, all the possible consequences as to liability for damages to the other parties? States should not be granted less freedom than the parties to a contract in municipal law. It would therefore be better to deal with the matter in the part of the draft dealing with the application and interpretation of treaties, for even if certain cases of invalidity might be recognized, each case should be treated on its merits.

34. If the majority disagreed with that view, he would support the amendment, since it offered a simpler solution than the Special Rapporteur's text.

35. Mr. ELIAS said that during the earlier discussion he had pointed out that the article dealt with three cases, but not with the fourth, an admittedly rare case, in which the later treaty was concluded by parties entirely different from the parties to the earlier one (687th meeting, para. 36). As an example he had mentioned the conference held at Niamey in the Republic of the Niger, to consider arrangements for the development of the river Niger and the exploitation of its resources. The nine riparian States attending that conference had been former dependencies of France and the United Kingdom and the question had arisen whether, in a treaty establishing a River Niger Commission, they could provide for the abrogation, as far as they were concerned, of the 1885 and 1919 treaties which had established an international regime for the Niger. His remarks appeared to have been misconstrued as a request for advice, whereas his intention had been to draw attention to a case which merited consideration and to suggest that the Special Rapporteur should deal with it.

36. The Niamey Conference had been attended not only by the nine riparian States, but also by France and the United Kingdom, and by representatives of the International Bank, which would be providing financial assistance for the development schemes, and of the Office of Legal Affairs of the United Nations Secretariat. The Office of Legal Affairs had concurred in the view of the nine riparian States that the new treaty must be regarded as valid, even though it expressly abrogated an earlier treaty between other States.

37. The problem in that case was undoubtedly one of validity, and it deserved consideration because similar problems might arise later in connexion with the Congo or with rivers in South-East Asia.

38. Mr. YASSEEN said that on the whole he was inclined to accept the principle underlying article 14, namely, the priority of a certain obligation; but that did not mean that the sanction attached to it might not, if necessary, be modified.

39. The Special Rapporteur himself had contemplated the nullity of a treaty in certain exceptional cases. Should the sanction of nullity be applicable to the treaties to which the amendment proposed by Mr. Pal and the Chairman referred? Mr. Castrén thought it difficult

to distinguish departures from the terms of a treaty from an actual breach. A breach was, in fact, no more than a departure from the terms of a treaty, but a departure so great as to involve a change which could be regarded as a difference in kind.

40. However difficult that distinction might be, it should not be impossible to differentiate between certain departures and a breach, especially one so specific as that contemplated in the amendment, namely, a breach that would frustrate the object and purpose of the earlier treaty. Mr. Castrén's objection did not seem justified. However, he (Mr. Yasseen) was not prepared to accept the amendment as it stood; there was one consideration that made him reluctant to accept it in the form in which it had been submitted: it might perhaps impede the development of international law, for its terms might equally well apply to general multilateral treaties, and that would be dangerous. If, for example, ten States had concluded an earlier treaty and six of them joined with eighty other States in concluding a general multilateral treaty which frustrated the object and purpose of the earlier treaty concluded by the ten States, could one of the four States which had not acceded to the later treaty be permitted to claim that the general multilateral treaty was invalid?

41. He was prepared to accept the proposed amendment, provided that it would not hinder the development of international law, of which general multilateral treaties were one of the principal elements.

42. Mr. BRIGGS said he had already pointed out during the earlier debate on article 14 that the Special Rapporteur's illuminating commentary convincingly demonstrated that conflict with a prior treaty did not raise any major issues of validity (685th meeting, para. 58). Hence there appeared to be no justification for leaving the content of article 14 in the section where it had been placed. The question of conflicting obligations under two treaties could best be dealt with in connexion with the application of treaties, which the Commission would consider at its next session.

43. There remained the problem dealt with in the joint amendment, which was peripheral and in any case was not necessarily one of nullity. In his view, the law of state responsibility would suffice for the intended purposes.

44. The whole question of article 14 should be postponed until the following session, and the Special Rapporteur should be asked to draft a new article relating to the application of treaties.

45. Mr. AGO said that during the first discussion he had expressed serious doubts about the need for article 14, which contained only provisions that were either superfluous or already embodied elsewhere in the draft (687th meeting, paras. 47-53). He would briefly recapitulate certain points.

46. It seemed particularly strange that paragraph 1 should state that, where the parties to a treaty were the same as the parties to an earlier treaty, the later treaty was not invalidated by a conflict between the two treaties. He did not see how such a problem could

even be raised. There was a specific rule on the subject: *lex posterior derogat priori*. Questions might arise as to the chronological sequence of the legal rules, or there might be problems of adjustment — and in that event it would be correct to say that the general rules of interpretation were applicable — but there was no need to mention them in the article, for what was quite certain was that no problem of validity arose in regard to the second treaty by reason of the existence of the first.

47. The case considered in paragraph 2 was more serious, but there again it seemed doubtful whether the provision was necessary. In paragraph 2 (b), the Special Rapporteur had envisaged two cases. Sub-paragraph (ii) dealt with the case in which, although the parties to successive treaties were not the same, the validity of the second treaty was nevertheless contested by a State which was a party to both treaties. That situation was practically the same as the case contemplated in paragraph 1, and the fact that the second treaty must take precedence was too obvious to need stating.

48. Paragraph 2 (b) (i) dealt with the contrary case, in which, according to the Special Rapporteur's text, the earlier treaty prevailed. But that was also obvious because, from the point of view of the State which was a party to the first treaty and not to the second, there was only one treaty.

49. In the case contemplated in paragraph 2, what was the status of the second treaty? He could not agree that the question of nullity arose in that case. If the second treaty contained provisions constituting an obvious breach of the first — which, according to the amendment proposed by the Chairman and Mr. Pal, must be a particularly serious breach — then its implementation could involve States which were parties to both treaties in international responsibility towards those which were parties only to the first treaty. There was then an international unlawful act. Another State, not a party to the first treaty, could invoke that responsibility and all its consequences, and could even claim that the second treaty should cease to exist; but it could not claim that the second treaty was void.

50. One case suggested by way of example was that in which some of the States parties to the first treaty had concluded the second treaty with other States not parties to the first. Why should the second treaty be void for those other States? For them, the question of responsibility did not even arise; it arose only for the States parties to the first treaty, which had violated it by concluding the second. There was only one case in which the question of nullity could arise: that in which the first treaty had effected the capacity of one of the States. Such a consequence was possible in the case of certain neutralization treaties, where the neutralized State would be deemed no longer to possess the capacity to conclude certain treaties, such as treaties of military alliance. But apart from those exceptional cases, the second treaty could not be considered void merely because, in concluding it, some of the parties had violated the provisions of a former treaty.

51. In saying that, he was not being any less severe in regard to the second treaty than other members of the Commission, since he was admitting not only the possibility of demanding its termination, but also other consequences following from the responsibility incurred in concluding it.

52. He did not think it possible to go so far as Mr. Tun-kin and assert that the nullity of the second treaty followed from the principle *pacta sunt servanda* because that was a principle of *jus cogens*; if that were so, then all rules of treaty law would become rules of *jus cogens*.

53. For all those reasons, he thought that paragraph 2 was out of place in section II. It was not necessary to deal with the problem referred to in paragraph 3 either, because everything concerning international organizations should come under a separate rule.

54. Thus there remained only the provision in paragraph 4, which really did concern validity and nullity. It was, indeed, certain that if the first treaty contained a rule of *jus cogens*, then the conclusion of another treaty departing from that rule constituted a ground for nullity. But should the rule be stated in the present context or elsewhere? It had been proposed, for example, that it should be placed after article 13, which concerned *jus cogens*. At all events, it was the only provision of the article which really did relate to the validity of the treaty.

55. Mr. BARTOŠ said he wished to make it clear at once that he was in favour of dropping the article for reasons lucidly explained by Mr. Ago. What was involved was a matter both of discipline — members of the international community were expected to fulfil their contractual obligations — and of freedom of action.

56. In the case of successive treaties concluded between the same parties there was no problem; so long as they did not derogate from *jus cogens* the parties were free to amend the treaty provisions. But where it was a question of changing the situation governed by a treaty, it was hardly possible to impose strict rules producing effects *erga omnes*, as in civil law. Like Mr. Ago, he thought that conduct conflicting with a prior obligation governed by the *pacta sunt servanda* rule was unlawful and raised a problem of international responsibility, which could have various consequences.

57. A party might, however, claim that the conclusion of a later treaty conflicting with prior obligations had been due to a change of circumstances. That was the main argument against a strict rule. There had been cases in which States had been compelled, sometimes to the detriment of prior obligations to certain parties, to change their position by reason of later treaties. During the liberation movement, for example, the development and progress of the liberated nations would have been impossible without new treaties which, strictly speaking, conflicted with preemptory norms.

58. On that point an analogy could be drawn with personal freedom. Individuals assumed obligations which conflicted with their earlier obligations, and could be held answerable for their conduct, together with any

accessories, if they had acted in bad faith. The *pacta sunt servanda* rule imposed an obligation to perform the contract faithfully, but it did not involve renouncing freedom of action.

59. He did not agree with Mr. Ago's view concerning the example of neutrality. If neutrality was imposed by a peremptory rule of international law or by a treaty of general interest, it was *jus cogens*, and the State concerned then lacked capacity to conclude another treaty conflicting with that almost absolute régime.

60. But the incapacity of a State to conclude treaties, established by treaty, was a very debatable matter. It might be recalled that Monaco and France had concluded a treaty under which the Principality of Monaco would be incorporated with France if the Grimaldi dynasty ceased to reign; and under a treaty between Haiti and the United States of America, Haiti could not become a protectorate of any country other than the United States. Those treaties had become obsolete by reason of the principles of the Charter—in particular, the independence of States and non-interference in the affairs of other States—and the only possible case to be considered was that of a strictly international régime. Thus, if the Free Territory of Trieste had become a State, it would have had to respect its territorial statute concerning neutralization, demilitarization, etc., for it would have been a buffer State established to avert disputes in a particular region. Such a situation should be disregarded, except in the case of a territorial régime forming an integral part of the general international régime, which had the force of *jus cogens*. In that case he would subscribe to Mr. Ago's view.

61. Mr. AGO explained that he had been speaking of neutralization, not of neutrality.

62. Mr. BARTOŠ thought that in that case, he and Mr. Ago were in agreement. In any event, the *pacta sunt servanda* rule could hardly be given the effect contemplated in the Special Rapporteur's text or in the amendment. The article should therefore be dropped, though the problem might be reconsidered in 1964.

63. Mr. TABIBI said he could support the provisions of paragraphs 1, 3 and 4 of article 14, but had serious doubts regarding paragraph 2. The question raised in paragraph 2 was closely connected with state responsibility, succession of States, validity and many other matters. The adoption of a strict rule might well lead to the anarchy it was hoped to prevent.

64. It was necessary to bear in mind the situation at the present time. Since the establishment of the United Nations, and particularly since the adoption of the General Assembly resolutions on the emancipation of peoples, it had become appropriate to regard a recent treaty as superseding an earlier treaty. Many old treaties belonged to the colonial era and should not be given precedence over more recent ones. Judging from the experience of his own country, he could safely say that provisions of the kind contained in paragraph 2 would create more problems than they solved. For those reasons, paragraph 2 should be deleted.

65. Mr. TUNKIN said that, after listening to the discussion, he had reached the conclusion that it would be preferable to postpone consideration of article 14; the Commission was not yet ready to adopt a suitable provision meeting the requirements of contemporary international law, and it would in any case have to revert to the matter during the second reading of the draft.

66. Mr. Ago had pointed out that the question of conflict with a prior treaty involved the responsibility of States. That was true, but conflict with a prior treaty could also involve questions of validity; state responsibility did not exclude nullity. For example, the breach of a treaty normally involved state responsibility, sometimes of a very grave kind warranting reference of the matter to the Security Council. Nevertheless, the Commission had considered that the breach of a treaty could have certain consequences affecting its validity.

67. The *pacta sunt servanda* rule had been mentioned, but he did not think it could be properly discussed in connexion with article 14. Like other members, he attached the greatest importance to the progress of international law and was opposed to anything that might hinder it. But the examples given in that connexion were not convincing and would be covered by other parts of the law of treaties.

68. The CHAIRMAN, speaking as a member of the Commission, said he was in favour of postponing consideration of article 14, even though postponement might prejudice the question whether nullity applied in certain cases.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of the cleavage of opinion which had become apparent in the Commission, he supported the suggestion that consideration of article 14 be postponed until the next session, on the understanding that the position of members would be reserved.

70. His own views were very close to those of Mr. Ago. He could not agree with the suggestions of some members regarding *jus cogens*. It was dangerous to suggest that the *pacta sunt servanda* rule had the character of *jus cogens* with regard to the main clauses of a treaty, but not with regard to the other clauses; in fact, the *pacta sunt servanda* rule applied equally to all the clauses of a treaty. Moreover, if the Commission were to be consistent with the provisions it had adopted in article 13, then nullity must be automatic; it could not be left to the parties to invoke it. Such an approach would be too strict to apply to a case of conflict between treaty provisions.

71. With regard to the joint amendment, the position of States which were parties to the later treaty but not to the earlier one deserved more careful treatment than it was given in that proposal. As Mr. Ago had pointed out, the question arose whether the later treaty would be regarded as automatically void in regard to those parties which had not participated in the earlier treaty. That question raised the issue of knowledge; it would be difficult to apply the proposed provision on nullity without entering into the question whether the States

parties to the later treaty were aware of the existence of the earlier treaty and of the conflict between the two.

72. Other difficulties had been pointed out by Mr. Rosenne, who had pertinently asked how the nullity would be invoked. The provisions of article 25 on procedure would not be applicable and perhaps an additional paragraph would have to be introduced into that article to cover the situation.

73. Another question which arose was whether the party injured by the later treaty was entitled to object to its registration with the United Nations or to demand the cancellation of that registration if it had been effected.

74. He agreed with Mr. Ago regarding such cases as neutralization, which might give rise to a problem of capacity.

75. Generally speaking, the law of state responsibility covered the main requirements of the situation under discussion. Personally, he found the idea of nullity attractive from the academic point of view, but it did not reflect the present position in international law. The situation contemplated undoubtedly involved the international responsibility of the State. If that responsibility were made good, it could lead to cancellation of the treaty, but cancellation would be only one of the remedies applicable. In fact, cancellation might well prove impossible, because there were other parties involved whose acts might be necessary to dissolve the later treaty. The whole matter could really be best handled through the law of state responsibility and not by means of nullity.

76. It had been suggested that the joint amendment reflected the views of the two previous special rapporteurs. It was true that, in his first report, Sir Hersch Lauterpacht had adopted that approach, but in his second report he had narrowed his proposals considerably because he had realized that his original suggestion could have been a cause of serious embarrassment to the development of international legislation. Sir Gerald Fitzmaurice had started from the point of view embodied in article 14, suggesting that the sanction of nullity should apply only in special cases, and had drawn a distinction between different types of obligations. His position had in fact been much narrower than had perhaps been suggested during the present discussion.

77. In view of the desire expressed by a number of members, he would not object to postponement of the discussion of article 14 until the following session. There would be some advantage in that course, because certain matters needed further investigation. For example, even the provisions of paragraph 1, which did not appear to have given rise to any serious differences, raised the question of the effect of the cancellation on parties who were beneficiaries under the earlier treaty, but were not parties to the later one.

78. Mr. de LUNA said he wished to set the minds of certain members at rest with regard to the postponement.

79. The *pacta sunt servanda* rule had been mentioned, but that rule applied both to the earlier and to the later treaty, so that the problem was only one of chronology.

80. The argument of *jus cogens* had been used, and the Special Rapporteur had himself said that it was difficult

to distinguish between clauses of a treaty which had the character of *jus cogens* and clauses which had not. There was no need to mention *jus cogens* in article 14, as it was amply covered in article 13. If a later treaty infringed a *jus cogens* obligation under an earlier treaty, the question of what rule would apply would be simple: if it was really a matter of *jus cogens*, article 13 would apply and article 14 was redundant.

81. To retain article 14 in the section on validity would be to build a veritable bastion of ultra-conservatism or even reaction in international law.

82. History showed that States imitated the national legislator who, in enacting new laws, amended or repealed earlier laws. That raised the thorny problem of the severability of articles.

83. In order to avoid resorting to revision or to the *rebus sic stantibus* clause, States often concluded treaties which conflicted with prior treaty obligations. If all the parties to the earlier treaty acceded to the later one, there was no problem; but when only some of them did so, it was found that in practice the States not parties to the later treaty were generally tolerant.

84. He therefore supported the Chairman's view.

85. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to postpone consideration of article 14 until the next session, without prejudice to the positions of members.

It was so agreed.

The meeting rose at 12.40 p.m.

704th MEETING

Thursday, 20 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Statement of the observer for the Asian-African Legal Consultative Committee

1. The CHAIRMAN, welcoming the observer for the Asian-African Legal Consultative Committee, Mr. Justice Thambiah, of the Supreme Court of Ceylon, said that his presence was evidence of the Committee's interest in the work of the International Law Commission; the fact that the Commission had been represented by an observer at the fourth and fifth sessions of the Asian-African Committee showed that the interest was mutual.

2. Mr. THAMBIAH, observer for the Asian-African Legal Consultative Committee, said he was pleased to extend, on behalf of the Committee, an invitation to the International Law Commission to be represented at the Committee's next session, to be held at Cairo for a period of two weeks starting on 15 February 1964.

3. The Commission's work was highly esteemed in the Asian and African countries. As a first step towards strengthening international law, it was necessary to