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Summary record of the 742nd meeting

Topic:
Law of Treaties

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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 session [1] 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 41 [2] 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

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

[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.

nullity, but one of priority, as the Special Rapporteur had shown in his commentary.

9. He was in favour of placing the revised article where the Special Rapporteur had put it and of keeping article 41, adopted at the previous session, where it was, with the changes suggested by the Special Rapporteur. Thus he was in agreement with the Special Rapporteur on the substance of article 65.

10. The form might possibly be improved, particularly in paragraph 3, by more concise drafting, but the Commission could safely leave that to the Drafting Committee.

11. There was one provision in the article which might be controversial, however — the last part of paragraph 4 (*c*) which provided that, as between a State party to both treaties and a State party only to the later treaty, the later treaty prevailed " unless the second State was aware of the existence of the earlier treaty ". That proviso, which had been suggested by McNair, was generally consistent with the principle of good faith, but it could be argued that for the second State the earlier treaty was, strictly speaking, *res inter alios acta.*

12. Sir Humphrey WALDOCK, Special Rapporteur, observed that the phrase " the circumstances of its conclusion or the statements of the parties ", in paragraph 2, was one previously used by the Commission in a number of articles. It had been agreed to reconsider the second part of that phrase, which would undoubtedly be amended by the Drafting Committee.

13. Mr. VERDROSS said that in principle he was in favour of the ideas embodied in article 65. Paragraph 2 involved a problem of interpretation, however ; where two treaties had been concluded between the same parties and the second treaty was not intended to replace the first, it must be interpreted in the light of the provisions of the first treaty. The paragraph should therefore be worded so as to convey that meaning.

14. The provisions of paragraph 3 were an application of the principle *lex posterior derogat anteriori* and raised no difficulty ; but he was rather doubtful about paragraph 4. If, for example, State A concluded a treaty with State B and then signed with State C a treaty conflicting with the earlier treaty, it could not be said that the earlier treaty " prevailed ", for both treaties were valid with respect to each party. Of course, if State A was unable to perform the second treaty, it was then responsible to State C and must give it compensation. That idea did not seem to be made clear enough in the provisions of paragraph 4 ; he wondered whether the Special Rapporteur disagreed with him.

15. Sir Humphrey WALDOCK, Special Rapporteur, said he did not disagree with Mr. Verdross. The provision in paragraph 4 (*c*) would cover the case in which one of the parties to a treaty concluded a second treaty that violated the first. The provisions of the first treaty would prevail and the action of entering into the second treaty would engage the responsibility of the State concerned.

16. Mr. VERDROSS said he fully agreed with the Special Rapporteur, but in that case " prevails " was not the appropriate word. In order to express the Special Rapporteur's idea, he suggested saying that the first treaty must be executed. But he doubted whether such a rule of law existed.

17. Mr. YASSEEN suggested that it would be better to say that the new treaty " applies " as between the parties.

18. Mr. TUNKIN said that article 65 raised two problems of the utmost importance. First, if the Commision adopted the article, would it thereby be giving its own interpretation of Article 103 of the United Nations Charter ? That was not clear from the proposed text. The Special Rapporteur's idea seemed to be that, if a treaty conflicted with Article 103 of the Charter, the validity of the treaty would not be in question, but the Charter would prevail. He doubted whether such an interpretation was progressive, even on the assumption that the wording of the Charter admitted of it. To his mind, the construction that might be placed on paragraph 1, and even on the article as a whole, rather weakened the scope of Article 103. That Article could equally well be interpreted to mean that treaties whose terms conflicted with those of the Charter were not valid — an interpretation which tended rather to strengthen the Charter provisions.

19. Secondly, the rules laid down in article 65 seem to be derived from private law, whereas the situation was entirely different in international relations, since States, not individuals, were involved. Admittedly, some rules might occasionally be borrowed from private law ; but, in this particular case, the rule did not fully cover the situation. In municipal law, if the provisions of a treaty conflicted with the law, it was invalid. In article 65, conflict with a previous treaty was not a ground for the invalidity of the second treaty unless it conflicted with a rule of *jus cogens*. That probably did not go far enough. The Special Rapporteur himself recognized in paragraph (17) of his commentary, that any treaties laying down " integral " or " interdependent " obligations did not admit of derogations ; but that problem did not seem to be covered by article 65 as at present worded.

20. Mr. JIMÉNEZ de ARÉCHAGA said that he was in general agreement with article 65. The discussion at the previous session had shown that the majority opinion was that a treaty concluded with the deliberate purpose of violating an earlier one should not be regarded as a nullity, but would merely engage the responsibility of the parties. He did not share that opinion, but the Special Rapporteur had now moved some way towards the opposite point of view by inserting the clause " unless the second State was aware of the existence of the earlier treaty and that it was still in force with respect to the first State " at the end of paragraph 4 (*c*). Such a proviso went some way towards meeting the concern expressed at the previous session by Mr. Pal and himself over the possibility of States buying themselves out of old treaties by paying an indemnity to those whose treaty rights had been

violated by the conclusion of a new instrument. To give an example, if State A concluded a treaty with State B and then another with State C having the same object, State C, if aware of the existence of the first treaty, could not invoke the second against State A and the second treaty would not be applicable.

21. Sir Humphrey WALDOCK, Special Rapporteur, referring to the first point raised by Mr. Tunkin, said he agreed that it was important not to minimise the significance of Article 103 of the Charter; on the other hand, it had been the Commission's consistent policy not to attempt to interpret that Article or to determine its effects, and he had been guided by that consideration.

22. In regard to Mr. Tunkin's second point, the rule of *jus cogens* apart, it seemed necessary to treat all instances of conflicting provisions as issues of priority. There was a definite tendency in the Commission not to admit limitations by treaties on the treaty-making capacity of States and it was very doubtful whether nullity would result where a small number of States failed to observe an undertaking that they would not derogate from the provisions of a treaty in the future. It might be that general multilateral treaties, such as the Vienna Conventions on Diplomatic and on Consular Relations and the Conventions on the Law of the Sea, contained certain rules from which the parties intended not to allow any derogation and which might have the status of rules of *jus cogens*.

23. As the principle of *jus cogens* had been very clearly enunciated in article 45,[3] he had not made express mention of it in article 65, though a general reservation in that regard could of course be inserted. But where a treaty was invalid for conflict with a rule of *jus cogens*, it was not a treaty for legal purposes and no question of a conflict between two treaties arose. It was therefore more logical not to mention the case.

24. Mr. TUNKIN explaining that he had put his two points without taking a position of principle on either, said he had understood the first two sentences in paragraph (17) of the commentary to mean that there were certain types of treaty or treaty obligations from which States could not contract out. But that proposition was not reflected in the text of the article itself.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that the first two sentences in paragraph (17) of the commentary referred to cases of special clauses against contracting out of a treaty. His purpose in paragraph 17 had been to emphasize that the mere insertion of such a clause in treaties of secondary importance would not mean the establishment of a compulsive regime from which no derogation was possible, for there were many cases in which such clauses had not been included in more important treaties containing interdependent obligations. In his view, an undertaking not to contract out was inplied in every treaty containing "integral" or "interdependent" obligations, but the consequence of the breach of any such undertaking, whether express or implied, was to raise an issue of priority rather than validity, except in cases of *jus cogens*.

26. Mr. de LUNA said that the Commission had a two-fold task: first, to promote the progressive development of international law, and, secondly, to formulate rules of law which would, if possible, avoid all ambiguity and uncertainty liable to lead to disputes and conflicts in international relations. While congratulating the Special Rapporteur and approving of the solution proposed in article 65, in the interests of clarity he nevertheless wished to make a few comments.

27. In the first place, paragraph 2 contained two different rules, the first of which was a rule of interpretation. He had no objection to that, although the Commission had decided to deal with the whole body of rules of interpretation separately. The general rule was that subsequent obligations of a State must always be so interpreted as to avoid the presumption that the State had failed to meet an international obligation, which would engage its responsibility.

28. The starting point chosen by the Special Rapporteur seemed to him entirely justified: a treaty whereby States declared the consensus of their wills could only be amended or terminated by the will of the same parties. Hence a State could not cease to be a party to a treaty merely because the obligations deriving from that treaty were incompatible with those of another treaty, except in the case covered by Article 103 of the Charter. The unanimous agreement of the parties was accordingly necessary before a treaty could be replaced by a new instrument. That was the normal case of one treaty being substituted for another. But it might happen that certain parties to a treaty were not entirely satisfied with it and concluded among themselves, or, as often occurred, with the participation of States which were not parties to the original treaty, a new treaty on the same subject. Some of the parties to the earlier treaty would then be bound by two instruments, with a consequent conflict between incompatible treaty provisions; that was the problem contemplated in article 65.

29. The second part of the paragraph was concerned with a new treaty which was not intended either to conflict with or to replace the previous one, but to supplement it or render it more specific. According to the Special Rapporteur's proposal, in the event of a conflict, the earlier treaty would prevail. It frequently happened, however, that the later treaty prevailed by virtue of a clause inserted in the earlier one. Geneva Convention No. IV of 12 August 1949, on the Protection of Civilian Persons in Time of War, provided, in article 154,[4] that the Convention should be supplementary to Sections II and III of the Regulations annexed to the Hague Conventions on the Laws and Customs of War on Land. Geneva Convention No. I, on the other hand, provided, in article 59,[5] that the Convention should replace former conventions in relations between the contracting parties. Lastly, in ILO practice,

[3] Ibid., p. 23.

[4] *The Geneva Conventions of August 12, 1949*, International Committee of the Red Cross, second revised edition, 1950, p. 212.

[5] *Op. cit.* p. 45.

cessation of participation by a party in a convention revised by a new instrument resulted from a clause inserted in the first convention providing that rectification of a new revising convention should *ipso jure* involve the immediate denunciation of the first convention.[6] Thus, ratification played the part of a resolutory condition. However, that was not the only possibility proposed by the Special Rapporteur, whose solutions varied according to the circumstances of the case.

30. He was glad, therefore, that the Special Rapporteur had taken the view that conflicts between the provisions of different treaties raised a question not of validity, but merely of priority as between the provisions of those treaties. For there was no rule of international law which invalidated treaties whose provisions were in conflict with those of an earlier treaty, except in case of conflict with a rule of *jus cogens*. The solution proposed by the Special Rapporteur would make it possible to maintain the legal relationships established in the original treaty and to create new ones.

31. It had been objected that that system of co-existence of the original treaty with the new one might involve unnecessary complications and conflicts between treaty provisions. The answer to that was that the complications were not very great and that concern for simplicity should not prevail over all other considerations or be allowed to obscure the objective of obtaining the maximum possible commitments from States. He recognized that there were exceptions, however; it was sometimes not possible for two States to be bound by two treaties simultaneously: that was the case when each treaty required one particular line of conduct which was incompatible with the other.

32. Mr. YASSEEN said that generally speaking he found article 65 acceptable: it proposed solutions that were accepted in practice and were based on the intention of the parties, in other words, on the treaties themselves.

33. With the exception of conflict between a treaty obligation and a rule of *jus cogens*, all conflicts which might arise between treaties should be regarded as raising questions of priority and responsibility, not of validity. Even where States had undertaken by a treaty not to enter into treaty relations with other States which derogated from that treaty, such a stipulation was only a treaty provision like any other and could not have the effect of limiting the State's treaty-making capacity. Such a stipulation could not invalidate a subsequent treaty unless, of course, the treaty obligation not to conclude other treaties derogating from the earlier one had been imposed to guarantee the supremacy of a rule *jus cogens*, in which case the conflict was settled in another way.

34. In view of the Special Rapporteur's comments he need not make the reservation he had already made to other articles in regard to the reference to "the statements of the parties".

35. His only serious objection related to the last clause in paragraph 4 (*c*), beginning with the word "unless". The fact that a State party to a treaty had been aware of the existence of an earlier treaty was not sufficient to justify invoking the earlier treaty against it. He could not admit that exception unless it was based on the concept of responsibility, but in that case no complaint would lie against the State which was not a party to the earlier treaty unless it had committed a wrongful act. If the Commission laid down that the earlier treaty was applicable, it would be relying on the idea of a sanction.

36. Mr. LACHS said the commentary contained a remarkably clear and detailed exposition of the considerations underlying article 65. In drafting paragraph 1, the Special Rapporteur had taken account of the views expressed at the previous session and had very properly not attempted to interpret Article 103 of the Charter which, being in the nature of a rule of *jus cogens*, was of the greatest importance. As almost all States were now Members of the United Nations, the effect of that Article on treaties concluded between Member and non-member States was becoming less significant, but it was still desirable to include in the commentary some mention of the consequences for third States of obligations deriving from the Charter. As the Charter was so widely known he doubted whether a third State could plead ignorance of its provisions, and particularly of the implications of Article 103, in attempting to hold a Member State responsible for breach of a treaty obligation which conflicted with that Article.

37. Paragraph 1 should not be restricted to conflicts between two treaties, because more than two were often involved, as for example, in the case of the Sanitary Conventions of 1903,[7] 1912[8] and 1926.[9]

38. He agreed with Mr. de Luna that the first part of paragraph 2 was concerned with interpretation, and perhaps it would be undesirable to encourage States to examine the compatibility of later and earlier treaties, as that might give rise to difficulties in practice; as an example he might mention the statement made by the United Kingdom Government to the effect that the 1956 Supplementary Convention on the Abolition of Slavery did not revoke or abrogate any previously existing treaty rights.[10]

39. With the present significant increase in the number of treaties, States should be urged to do away with obsolete or conflicting treaty obligations and to consolidate those that were still appropriate in new instruments; something, but not enough, was already being done in that direction by the United Nations.

Mr. Ago took the Chair.

40. Mr. ELIAS said that both the form and the substance of article 65 were largely acceptable and the Special Rapporteur had clearly gone far to meet most

[6] *International Labour Conference, Conventions and Recommendations 1919-1949*, Geneva, ILO, 1949, final clauses, *passim*.

[7] *British and Foreign State Papers*, Vol. XCVII, p. 1085.

[8] League of Nations *Treaty Series*, Vol. IV, p. 283.

[9] *Op. cit.* Vol. LXXVIII, p. 231.

[10] *Official Records of the Economic and Social Council, Seventeenth Session, Annexes, agenda item 15*, p. 7.

of the objections made to the text he had submitted in article 41 at the previous session.

41. In view of the obvious link between article 65 and the provisions concerning revision they should perhaps be brought together.

42. Notwithstanding the Special Rapporteur's argument in the last sentence of paragraph 8 of the commentary that the near universality of the membership of the United Nations had greatly reduced the area for the application of Article 103, he had been right to leave aside the question whether that Article was binding only on Member States. He had also been wise not to mention *jus cogens* rules expressly.

43. Paragraphs 25 to 31 of the commentary dealt with the relationship between an earlier and a later treaty, and in addition to the two cases mentioned — those of *Oscar Chinn* [11] and the *European Commission of the Danube* [12] — a reference should be made to the Convention and Statute concluded at the Niamey Conference to regulate the regime of the Niger River,[13] article 9 of which read :

> " Subject to the provisions of this Convention and of the annexed Statute, the General Act of Berlin of 26 February 1885, the General Act and Declaration of Brussels of 2 July 1890, and the Convention of Saint-Germain-en-Laye of 10 September 1919, shall be considered as abrogated in so far as they are binding between the States which are parties to the present Convention."

As that wording showed, care had been taken not to declare the Treaty of Berlin null and void, as some participants in the Conference had wished. The successor States to those which had concluded the original Treaty could plead that its provisions were abrogated as a consequence of a change in circumstances. That was a striking example of a third treaty replacing two earlier instruments.

44. Mr. JIMÉNEZ de ARÉCHAGA said that some of the confusion which had arisen during the discussion was perhaps due to doubts as to whether it was intended to follow the principle of nullity or that of State responsibility in the case of conflicting treaties. According to the principle of nullity, a treaty which conflicted with a prior treaty was void. According to the principle of State responsibility, it was valid, but the State which had assumed conflicting obligations was free to choose which of the treaties it would fulfil ; so far as the unfulfilled treaty was concerned, it was required to pay an indemnity. The State which had assumed conflicting obligations thus " bought " its choice.

45. The Special Rapporteur, however, appeared to have followed a system of his own — the system of priority. The State which had assumed conflicting obligations did not have a choice. There were four possible cases ; first, with respect to a party to an earlier treaty, the earlier treaty prevailed ; second, with respect to parties to both treaties, the later treaty prevailed ; third, with respect to an innocent party to the later treaty, the earlier treaty prevailed ; and fourth, with respect to a guilty party to the later treaty, the earlier treaty prevailed. That system could not be described as one of State responsibility. In the fourth case, the guilty party could not claim an indemnity for non-fulfilment of the treaty, as would have been the case under the rules of State responsibility.

46. Another problem, to which Mr. Tunkin had also referred, was that of a treaty which imposed indivisible obligations that must be fulfilled equally and simultaneously with respect to all the parties to the treaty. In many cases, it was not possible to separate the obligations *vis-à-vis* the various parties, as had been done in paragraph 4. As he understood it, the system proposed by the Special Rapporteur was that in that case the earlier treaty prevailed. The State which had assumed conflicting obligations had to fulfil the earlier treaty and would be obliged to indemnify the innocent new parties to the later treaty. In other words, the rule embodied in paragraph 4 (*a*) prevailed over the rules laid down in paragraph 4 (*b*) and (*c*). If that understanding was correct, the position should be stated clearly, perhaps in an additional paragraph.

47. Mr. BRIGGS said he fully agreed with the Special Rapporteur that article 65 did not deal with nullity, except for the matter of *jus cogens*, which was dealt with elsewhere. It raised a question of priority, with consequent State responsibility for derogation of obligations. In the third and fourth sentences of paragraph (17) of the commentary, the Special Rapporteur had clearly shown his support for the system of priority and responsibility in preference to that of invalidity or nullity.

48. He approved of the terms of paragraph 1, where he regarded the mention of Article 103 of the Charter as being in the nature of a reservation ; there was no intention to place any interpretation on the meaning of the Article. It would be regrettable if the Commission were to seek to broaden the meaning of that important provision of the Charter.

49. He agreed with Mr. de Luna that the first sentence of paragraph 2 raised a question of the interpretation of treaties. The second sentence should be read in the light of the first ; then the difficulty mentioned by Mr. de Luna would not arise. The later treaty itself would show whether it was intended as *lex specialis* and should therefore prevail over the earlier treaty.

50. With regard to paragraph 3, at the previous session he had been unable to support the provisions of article 41 on the termination of conflicting treaties, because he had considered that the matter should be dealt with as one of priority. Since the Commission had adopted article 41, however, he was now prepared to accept the modification to that article suggested in paragraph (20) of the commentary on article 65.

51. Paragraph 4 was acceptable, though he shared Mr. Yasseen's view regarding the final proviso in subparagraph (*c*). Mere awareness of the existence of the

[11] *P.C.I.J.*, 1934, Series A/B, No. 63.

[12] *P.C.I.J.*, 1927, Series B, No. 14.

[13] See *The American Journal of International Law, 1963*, Vol. 57, No. 4, pp. 873 *et seq.*

earlier treaty on the part of a State did not make it invocable against that State. The final proviso should therefore be deleted. It was not desirable to introduce the notion of guilty and innocent parties, without any criteria for differentiating between them.

52. He could accept article 65 subject to drafting adjustments.

53. Mr. ROSENNE said that, during the consideration of articles 14 and 19 of the Special Rapporteur's second report (ACN.4/156) at the previous session, he had explained his reasons for thinking that the whole question at present under discussion should be dealt with as one of priority rather than of termination or nullity. He agreed with the thought behind article 65, and the commentary, which had been considerably enlarged by comparison with the second report, was most enlightening.

54. It should be remembered, however, that even under the system of priority, two kinds of conflict could arise. The first kind involved no question of bad faith and was due to the technique of multilateral agreements; the conflict arose because, in international law, there was nothing that corresponded to renovating legislation for repealing *erga omnes* the earlier provisions. The second kind of conflict did involve an element of bad faith; it was brought about deliberately. The provisions of paragraph 4 (*c*) were intended to deal with that kind of conflict.

55. He agreed with Mr. de Luna that the first sentence of paragraph 2 contained a large element of interpretation, but he saw no reason for dropping it on that account. The difficulty could perhaps be overcome if article 65 were placed elsewhere in the draft, possibly after the articles on revision but before the articles on interpretation.

56. At the previous session, he had made an express reservation with regard to article 41,[14] and he must maintain it. He accepted the modification to article 41 suggested by the Special Rapporteur in paragraph (20) of his commentary on article 65, though it only disposed of the problem of partial termination. In addition to that problem, however, he had difficulties with regard to the inclusion in article 41 of the concept of suspension of a treaty. Consequently, he could not accept the reference to article 41 and the introduction of the concept of suspension of a treaty in paragraph 3 (*b*) of article 65.

57. The whole of article 65, except for paragraph 3 (*b*), was drafted in terms of a conflict between two treaties in their entirety. But in the case of a partial conflict between two treaties, where only one clause or a certain number of provisions conflicted, the concept of separability embodied in article 46 could be relevant.

58. He shared the misgivings of other members regarding the final proviso of paragraph 4 (*c*). Apart from the ambiguity of the concept of awareness of the existence of a treaty, it would be extremely difficult for the second State to know whether the treaty was still in force or not; the argument on that point in paragraph (22) of the commentary was difficult to follow. The proviso appeared to imply that the second treaty could be null and void, whereas there was a distinct difference between non-invocability and nullity, if only because nullity rendered the treaty altogether invalid, while non-invocability would be only relative so long as the first treaty was in force.

59. He reserved his position on the problem raised by Mr. Tunkin regarding the first two sentences of paragraph (17) of the commentary; he would like to know whether the Special Rapporteur considered that the fact of entering into a second treaty in the circumstances described in that passage would involve a breach of treaty provisions within the meaning of article 42.

60. He agreed with Mr. Lachs on the need to improve the drafting so as to cover cases in which there were more than two conflicting treaties.

61. He also agreed that attention should be drawn to the desirability of the General Assembly or some other appropriate organ initiating action for the modernization of obsolete treaties. The Commission had already referred to the matter in Chapter III of the report on its fifteenth session [15] and the General Assembly was contemplating some action. He therefore suggested that the Commission should once again draw attention to the problem in general terms, without, however, proposing any specific solution.

62. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he approved of the principles which the Special Rapporteur had embodied in article 65. Except on one point, his comments would refer, not to the substance but to the drafting of the article, which he thought could be simplified.

63. First, he doubted whether it was advisable to use the term "conflict". In article 41 the Commission had referred to "a further treaty relating to the same subject-matter". Article 65 was concerned, *inter alia*, with the case in which all the parties to a treaty decided to conclude a new treaty to regulate the same matter in a different way. Whether the second treaty replaced the first entirely or only in part, it was not correct in that case to speak of a "conflict" between the two treaties.

64. Secondly, it should be remembered that the article was in its right context in so far as it dealt with problems of the application of treaties, and not with problems of termination or validity, which were dealt with elsewhere.

65. In paragraph 2, the idea that the provisions of a treaty could be subject to obligations was not very satisfactory; it would be better to say that its provisions could be subject to other provisions.

66. Paragraph 3 (*a*) was unnecessary, for it referred to the case in which the new treaty entirely replaced the earlier one, and that was covered by paragraph 1 (*a*)

[14] Formerly article 19; see *Yearbook of the International Law Commission, 1963*, Vol. I, p. 244, paras. 74-76.

[15] *Official Records of the General Assembly, Eighteenth Session Supplement No. 9*, p. 35, para. 50 (*e*).

and (*b*) of article 41. If the parties had intended the second treaty to replace the first entirely there was no conflict and no question of precedence: the second treaty applied. On the other hand, if the parties had not intended to replace the first treaty or to regulate the matter in an entirely different way, a problem of application arose. Paragraph 3 should therefore be confined to cases in which the new treaty, though regulating the same matter as the earlier treaty, did not put an end to it. The essential provision of paragraph 3 was in sub-paragraph (*b*); at the end of that sub-paragraph the words "replaced by" should be substituted for the words "in conflict with".

67. Paragraph 4 dealt with the case in which the parties to the later treaty were not the same as the parties to the earlier treaty. Sub-paragraph (*a*) was perfectly clear and logical. Sub-paragraph (*b*) merely repeated paragraph 3 (*b*) and it should be possible to combine those provisions. Sub-paragraph (*c*) was acceptable but for the final clause beginning with the word "unless"; the fact that one of the new parties was aware of the existence of the earlier treaty was not sufficient to prevent the new treaty from being valid and applicable.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his opinion, it was appropriate to use the term "conflict", which was used in Article 103 of the Charter. The idea conveyed by that term was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another. The process of determining whether a conflict existed presupposed an element of interpretation. He did not believe that the fact that the parties to the two treaties might be the same made it inelegant to speak of a conflict; the point would be of interest only if the parties were in dispute as to the compatibility of the two treaties.

69. The CHAIRMAN, speaking as a member of the Commission, said he had not been convinced by the Special Rapporteur's arguments. He still believed that there could be no "conflict" between two successive treaties concluded by the same parties. Either the second treaty prevailed entirely over the first, or the provisions of the first treaty which were not replaced by those of the second remained in force. If, for example, all the States Members of the United Nations decided to replace the Charter by another instrument, the provisions of the existing Article 103 of the Charter would not apply to the new treaty.

70. Sir Humphrey WALDOCK, Special Rapporteur, replied that the problem with which article 65 attempted to deal was different. Even where the partie to the two treaties were the same, the case was not one of a desire to replace one treaty by another, but of a dispute in which one party claimed that the two treaties were incompatible.

71. Mr. BRIGGS said that the term "conflict" was used in Article 103 of the Charter, and asked the Chairman what other term he would prefer.

72. Mr. AMADO said that the word "compatible" at the end of the first sentence of paragraph 2 was important; in the next sentence, the words "in the event of conflict" might be replaced by the words "in the event of incompatibility".

73. Mr. YASSEEN thought that even where both treaties had been concluded by the same parties, the word "conflict" was preferable. In municipal law, where there was only one legislator, it could be said that conflict sometimes arose between different rules.

74. The CHAIRMAN, speaking as a member of the Commission, said he doubted whether it was possible to speak of "conflict" between two successive laws regulating the same matter.

75. Mr. AMADO said that the word "conflict" suggested contemporary things and was less appropriate when applied to successive ones. Consequently, he would prefer the word "incompatibility".

76. The CHAIRMAN suggested that that question could be settled by the Drafting Committee.

77. Mr. ROSENNE said that the discussion had confirmed his view that article 41 should be removed from Part II of the draft and linked with article 65.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that he had done precisely that by means of a cross-reference in article 65.

79. Mr. Rosenne regretted that he could not regard a cross-reference as sufficient to meet his point.

80. Mr. BARTOŠ said he would like to make some comments on the substance. First, with regard to the opening words of paragraph 1, "Subject to Article 103 of the Charter", he thought that matter had been settled by article 37 [16] of the draft, for he was firmly convinced that the provisions of the Charter were, in general, rules of *jus cogens*.

81. Secondly, there was one situation which, he thought, was not covered by article 65, but which nevertheless often arose in practice and had not been clearly settled either by the authorities or by case-law; that was the case in which two States concluded a treaty, and the question arose whether each of them was entitled to act freely and use its treaty-making capacity to make an independent treaty with a third State on the basis of the first treaty. What happened to the new treaty if the previous treaty was terminated? The relationship established by the first treaty might be recognized in the second treaty, but it might not even be contemplated there. There were several possible solutions: it could be held that it was impossible to apply the second treaty if the first was not in force; the *rebus sic stantibus* principle could be invoked, the termination of the first treaty being regarded as a change in the circumstances; and lastly, it could be argued that every treaty must be understood separately and applied reasonably. That kind of case could be mentioned in the commentary.

[16] *Official Records of the General Assembly, Eighteenth Session Supplement No. 9*, p. 11.

82. It had been asked during the discussion whether a party to a new treaty made with a third State must have acted in good faith if both treaties were to have effect. He had no wish to encourage States to act in bad faith, but he believed that in order to meet the needs of ordinary political life and facilitate international relations, States should not be obliged to remain bound by vestiges of treaties that were still formally in force, but no longer corresponded to reality. A State must be free to exercise its treaty-making capacity, subject only to the proviso that in doing so it engaged its international responsibility.

83. The CHAIRMAN said that two important problems had been raised during the discussion. The first was the fundamental difference between the cases contemplated in paragraphs 3 and 4. Paragraph 3 dealt with the chronological succession of treaties between the same parties. But paragraph 4 (*a*) and (*c*) dealt with an entirely different problem — that which arose when a State had assumed mutually conflicting obligations to two other States. The two treaties might even have been concluded at the same time.

84. The second problem was that raised by the final clause in paragraph 4 (*c*).

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had shown the need for him to obtain some guidance from the Commission on the final proviso of paragraph 4 (*c*).

86. As to the point raised by the Chairman, article 65 admittedly dealt with two different situations, but it was convenient to cover both in a single article.

The meeting rose at 1 p.m.

743rd MEETING

Thursday, 11 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

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

[Item 3 of the agenda]

ARTICLE 65 (Priority of conflicting treaty provisions) *(continued)*

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

2. Mr. RUDA said he approved of the Special Rapporteur's placing of article 65 in the section on the application of treaties, immediately after the articles on the effects of treaties on third parties. The case of conflict between two successive treaties was a matter of concern to a State that was not a party to the first treaty; it thus followed logically after the provisions on the effect of treaties on third parties.

3. The subject-matter of article 65 was also connected with the revision of treaties; whenever a multilateral treaty effected changes in a prior multilateral treaty, but was not subscribed to by all the parties to the prior treaty, the problem of revision arose.

4. As he had not participated in the discussion of articles 14 and 19 in the Special Rapporteur's second report,[1] he wished to state his position on the doctrinal issues involved. The Special Rapporteur had considered the matter in the context of the application of treaties and had treated it not as a question of nullity, but as one of State responsibility. Analysis of the case-law of international courts and, particularly, of State practice lent support to that approach and he endorsed it. If the solution of the problem of conflicting treaties were sought on the basis of the doctrine of nullity, the effect would be to curtail, implicitly, the capacity of States to enter into treaties. Such a conception would go beyond existing international law, under which the capacity of States to conclude treaties was limited only by rules of *jus cogens*.

5. There was also a practical argument in favour of the Special Rapporteur's approach. The problem of conflicting treaty provisions nearly always arose between two or more successive multilateral treaties. Not infrequently, and mainly for political reasons, the parties to successive multilateral treaties were not the same. If the theory of nullity were adopted, in order to amend a multilateral treaty it would become essential to secure the participation of all the parties. That would make amendment virtually impossible, thereby impairing the flexibility needed to keep abreast of changing international conditions.

6. With regard to the formulation of the article, he disliked the final proviso in paragraph 4 (*c*). The treaty-making capacity of the second State could hardly be limited merely on the grounds that it had been aware of the existence of the earlier treaty.

7. Sir Humphrey WALDOCK, Special Rapporteur, replying to the objections to paragraph 4 (*c*) put forward by several members, said he realized that the case which the provision was intended to cover was a difficult one; he himself had an open mind, though he agreed with most members that the problem should be approached from the point of view of State responsibility. The position in the case referred to in paragraph 4 (*c*) was that, if the second State was really aware that the conclusion of the later treaty by the first State constituted a breach of an earlier treaty, then, although the later treaty was valid, the second State would not be able to compel the first State to apply the later treaty; it would be for the first State

[1] See *Yearbook of the International Law Commission, 1963*: for discussions, Vol. I; for text of articles, Vol. II, document A/CN.4/156 and addenda.