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Summary record of the 743rd meeting

Topic:
Law of Treaties

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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.

to decide whether it intended to comply with the later treaty or not, and its international responsibility would be engaged in the event of non-performance.

8. Mr. REUTER observed that article 65 contained two kinds of provisions. The first kind, in paragraphs 2 and 3, concerned what was called a "conflict" between treaty provisions agreed between the same parties. That situation was very simple: the Commission was merely laying down rules of interpretation on the subject — not general rules such as those to be included in the section on interpretation, but concrete and specific rules of the same nature as those for the settlement of alleged conflicts between different provisions of the same treaty. It was necessary to ascertain the intention of the parties, in doing which various elements could be taken into account and it could be considered that where there were two successive rules the presumption was that the later rule prevailed. He thought that paragraphs 2 and 3 raised only drafting problems; they could be simplified and condensed.

9. The provisions of paragraph 4 were quite different. Sub-paragraph (*c*) of that paragraph was both the most original and the most delicate part of the article. He accepted the Special Rapporteur's general conclusions; it would certainly be wrong to lay down a rule of nullity, which would in any case be meaningless because nullity must be determined by a judicial authority and no such authority existed in the international community. The Commission must therefore rely on the concept of responsibility.

10. But it was open to question whether, in dealing with specific situations, it was advisable to lay down so strict a rule and to formulate it in terms that were both precise and incomplete. In the case of conflict between two treaties, he did not think that awareness of the existence of the earlier treaty would be sufficient to establish a State's international responsibility. It would be better to refer to the theory of State responsibility, by replacing the final proviso of sub-paragraph (*c*), starting with the word "unless", by some form of words such as "subject to the application of the rules concerning international responsibility". In that way the Commission would show its awareness of the fact that there were cases in which the conclusion of the later treaty was a wrong, not only because it infringed an earlier treaty, but because it contravened rules of general conduct. The penalty should then be more severe, in other words, the second treaty should be considered invalid.

11. Mr. TSURUOKA said he had only a few comments to make on the drafting of article 65. In paragraph 1, he thought it would be better to replace the first phrase "Subject to Article 103 of the Charter of the United Nations" by the words "In cases where Article 103 of the Charter of the United Nations does not apply". That wording would have the advantage of not weakening the effect of Article 103, but, on the contrary, showing its precedence over other rules.

12. With regard to paragraphs 2 and 3, he endorsed the comments just made by Mr. Reuter. Strictly speaking there was no conflict in the situations contemplated, except perhaps, from the practical point of view, in cases of misunderstanding or disputed claims. A simpler and more concise text would doubtless make it possible to avoid the difficulties which had been pointed out.

13. With regard to paragraph 4 (*c*), he still hesitated to adopt the point of view of the Special Rapporteur, who had himself expressed some doubts on the matter. From the standpoint of rules of general conduct, he supported the idea that the concept of morality in the conduct of States and in their relations with each other should be taken into conisideration; but to lay it down as a rule of law would raise unnecessary difficulties. Moreover, it would be difficult to say whether any specific case corresponded to the legal situation referred to in parragraph 4 (*c*). He therefore agreed with those speakers who had proposed that the final proviso, beginning with the word "unless", should be deleted.

14. As to the connexion between articles 41 and 65, he thought there was no difference or contradiction between the two articles so far as substance was concerned. It might perhaps be advisable to combine them in a single article and to formulate the rules not in the section on termination of treaties, but where article 65 stood at present.

15. Mr. EL-ERIAN said that by orientating article 65 towards the application and revision of treaties, the Special Rapporteur had placed the complex question of the conflict of treaties in force in its right perspective. The article related only to conflicting provisions of treaties in force; cases of nullity and implied termination were outside its scope.

16. Where the conflict between treaty provisions involved infringement of a rule of *jus cogens*, the case was one of invalidity. Where no such infringement was involved, if the parties to two successive treaties were the same and they had intended the second treaty to supersede the first, the case was one of implied termination, covered by article 41. There remained to be covered by article 65 the case in which there was no infringement of a *jus cogens* rule and total termination was not implied. He supported the suggestion in paragraph (20) of the commentary that the words "in whole or in part" in article 41, paragraph 1, should be deleted, so that the question of partial termination would be left to be covered by article 65.

17. With regard to the general tenor of the article, he accepted the Special Rapporteur's treatment of the problem as one of priority and State responsibility.

18. As to the formulation, he did not read paragraph 1 as reserving the Commission's position on Article 103 of the Charter, but rather as preserving the supremacy of the Charter. The Commission should not attempt to interpret Article 103 or go into the question of its application to non-member States, which, with the near-universality of the United Nations, had become largely academic. Any restrictive interpretation of the Charter should be avoided; it could not be viewed merely as a treaty; it was the supreme law of mankind, to borrow the language of article 6 of the United States Constitution, which spoke of "the

supreme law of the land". He supported Mr. Bartos's views on Article 103 with regard to the wide scope of the expression "any other international agreement".

19. He also agreed with Mr. Lachs that, if a treaty between a Member of the United Nations and a non-member State conflicted with the provisions of the Charter, the non-member State was not entitled to invoke the rules of State responsibility against the Member State in support of a charge of violation of the treaty.

20. On one specific problem he had some doubts. where a later treaty superseded certain provisions of an earlier treaty it might happen that the remaining provisions of the earlier treaty could no longer stand alone; and if they were impossible to fulfil in isolation, article 65, as he understood it, would treat the matter as one of implied total termination. He would like to know whether that interpretation was correct.

21. Article 65 was closely connected with the question of the effects of treaties on third States and also with that of revision. He therefore supported Mr. Elias's suggestion that it should be placed at the beginning of the articles on revision, rather than immediately after those dealing with the effects of treaties on third States.

22. The comprehensive, logical and practical approach to the problem of conflicting treaty provisions adopted in article 65 could, however, generate a certain lack of orderliness by encouraging the conclusion of inconsistent treaties. As Mr. Lachs had pointed out, it would therefore be useful to bring the matter to the attention of the General Assembly, which had already given some consideration to it when examining the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, on the basis of Chapter III of the Commission's report on its fifteenth session. The General Assembly had initiated action on the matter by its resolution 1903 (XVIII).

23. One example of conflicting treaty provisions was the case of the Treaty of San Stefano of 1878 between Russia and Turkey,[3] which had been inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, to both of which Russia as well as various other States had been parties. The Congress of Berlin of 1878[4] had been convened to regulate the situation.

24. It was doubtful whether the conclusion of inconsistent treaties could ever be entirely prevented; it was part of the general international situation. But a study by the General Assembly with a view to some measure of regulation of the situation would be useful.

25. Mr. de LUNA pointed out that there was an exception, confirmed by practice, to the rule stated in paragraph 4 (*a*). When a multilateral treaty contained certain provisions that concerned some, but not all of the parties, the presumption was that the parties affected by those provisions could amend them by subsequent agreement among themselves, without the consent of the other parties. For example, by their Memorandum on Trieste,[5] Italy, the United Kingdom, the United States of America and Yugoslavia had changed the regime established by the Treaty of Peace with Italy without even notifying the other contracting States which had not been those mainly concerned with that regime. The Soviet Union had subsequently informed the Security Council of the United Nations that it had taken cognizance of the Memorandum. That was an instance of application of the principle of the separability of treaties stated by the Commission in article 46. Paragraph (6) of the commentary on that article explained that the application of the principle was subject to two conditions: first, the clauses to be dealt with separately must be clearly severable with regard to their operation and, secondly, it must not appear that acceptance of those clauses was an essential condition of the consent of the parties to the treaty as a whole.[6] He did not suggest that article 65 should be amended in that sense, but the commentary on it should contain a reference to article 46.

26. There was some analogy between the provision in paragraph 4 (*c*) and article 31, adopted at the previous session,[7] concerning the international effects of constitutional limitations affecting the exercise of the treaty-making power. As adopted, article 31 represented a compromise to which he had been opposed; it stipulated that a treaty could not be invalidated by reason of such limitations unless the violation of the State's internal law was manifest. He did not believe that there was any rule of international law under which States were required to possess a thorough knowledge of all the instruments in force. Treaties were becoming increasingly numerous and complicated; some matters had been the subject of successive treaties which amended each other without invalidating each other completely. There was thus a danger that, instead of introducing an element of certainty, the Commission might aggravate the confusion. A State could act in perfect good faith and be unaware of the existence of a particular treaty. He therefore agreed with Mr. Lachs's remarks and thought that the provision in paragraph 4 (*c*) was rather dangerous from the point of view of the security and clarity of international obligations; he did not believe it would contribute to the progressive development of international law.

27. Mr. YASSEEN said he recognized that the final proviso in paragraph 4 (*c*) raised a question of responsibility, not of nullity; he had said so at the previous meeting.

28. He was not sure, however, that the proviso stated sufficient grounds for responsibility. The case contemplated was that in which States A and B concluded a treaty with each other and State A subsequently concluded a treaty with State C that was incompatible with

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

[3] *British and Foreign State Papers*, Vol. LXIX, p. 732.

[4] *Ibid.*, p. 749.

[5] United Nations *Treaty Series*, Vol. 168, p. 66.

[6] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 24.

[7] *Ibid.*, p. 3.

the first treaty, the existence of which was known to State C. The rule proposed in paragraph 4 (*c*) was that "as between a State party to both treaties and a State party only to the later treaty, the later treaty prevails, unless the second State was aware of the existence of the earlier treaty..." Even the authorities who supported that exception, by whom the Special Rapporteur had been guided in drafting the final proviso, did not seem to be very sure on the matter. For instance, McNair merely said that State C "contracted at its own risk and would probably not be entitled to reparation from A for failure to perform".[8] In fact, it could hardly be said that State A could plead innocence, for, having been a party to the first treaty, it knew of its existence even better than State C. If the criterion was to be prior knowledge, it must at least be applied to both the States parties to the second treaty. The best course would be to base responsibility on a wrongful attitude of the State, but that might be encroaching on the field of State responsibility. Hence the Commission would do better to drop the provision.

29. Mr. TUNKIN said that he regarded article 65 as dealing with a question of priority and on the whole he could accept it, subject to a few amendments.

30. First, he doubted the correctness of the proposition in paragraph 4 (*b*), which should be qualified by the inclusion of some proviso such as "unless otherwise specified in the earlier treaty". That would cover cases like the 1963 Vienna Convention on Consular Relations which stated, in article 73, paragraph 1, that "The provisions of the present Convention shall not affect other international agreements in force as between States parties to them".[9] The purpose of that provision was to make it clear that the Vienna Convention was not intended to abrogate the pre-existing network of bilateral consular conventions.

31. A provision should be included somewhere in the article embodying the rule stated in the opening sentences of paragraph (17) of the commentary, on treaties laying down "integral" or "inter-dependent" obligations. It was essential to state clearly that provisions of that type in the earlier treaty should prevail. Such a statement would reflect the facts of the present international situation. An example was the Declaration on the neutrality of Laos;[10] if one or more of the States parties to that treaty were to conclude with a third State a treaty containing provisions that conflicted with the earlier treaty, the earlier treaty must prevail. The provisions of paragraph 4 (*c*) might provide some safeguard in such cases, but they were not entirely adequate; moreover, he shared the misgivings of other members regarding the formulation of that paragraph.

32. Finally, he wished to state his position on two further points: first, the article did not imply any interpretation of Article 103 of the Charter; secondly, he doubted whether the terms of the article covered the whole of the intended field.

33. Mr. LIU said that article 65 dealt concisely with a subject of great complexity.

34. He shared the misgivings of other members concerning paragraph 4 (*c*). It was obviously very difficult to determine whether the existence of a treaty was known. The test was subjective and in a matter in which the element of certainty was of the utmost importance, an objective standard was required. It should be remembered, however, that in practice, the veil of secrecy which had surrounded treaties in the past had been largely removed by the treaty registration provisions contained in the League of Nations Covenant and the United Nations Charter. The provisions of paragraph 4 (*c*) appeared, to some extent, to introduce the common law concept of contract into the realm of international law.

35. During the discussion of the term "conflict" at the previous meeting, it had been suggested that it should be replaced by the word "incompatibility". There was no great difference in meaning between the two terms, but he would not object to the change if it served to bring the terminology of the various articles into line.

36. Since the subject-matter of article 65 was closely connected with the question of treaty revision and peaceful change, it might be desirable to defer a final judgement on it until the Commission came to consider the articles on revision.

37. Mr. ROSENNE said that after the discussion prompted by the Chairman's remarks at the previous meeting, he had come to the conclusion that while the article was correct in principle, it probably needed fairly substantial redrafting, with particular regard to the importance of integrating it with provisions already adopted by the Commission.

38. He agreed with the Special Rapporteur that the article should be placed squarely in the context of application, and perhaps its title, in contrast to that of article 14 submitted at the previous session with the title "Conflict with a prior treaty", slightly distorted the focus. When treaty provisions apparently in conflict came to be applied, it might well be found that there was no incompatibility, and it therefore seemed preferable to amend the title to read "Application of conflicting treaty provisions", and to amend the article to make it refer to the application of one treaty or the other, rather than to the obligations under the treaty.

39. It seemed that article 41, coupled with article 55 in the new form given it by the Drafting Committee, with the emphasis on performance, provided the answer to the questions raised by paragraphs 2 and 3 of article 65, and that the substance of those two paragraphs could be transferred to the commentary. It should also be remembered that article 41 itself was subject to article 48 as a matter of substance and to article 51 as a matter of procedure.

40. On the point raised by Mr. Tunkin, he suggested that when a general treaty such as the Convention on Consular Relations contained a clause expressly maintaining in force prior agreements between States and

[8] *Law of Treaties, 1961*, p. 222.

[9] *United Nations Conference on Consular Relations, 1963, Official Records*, Vol. II, p. 187.

[10] United Nations *Treaty Series*, Vol. 456, p. 302.

giving them priority, there was no real conflict between the two sets of obligations. It would be difficult to draft a residual rule that might have to apply both to the earlier and to the later treaty.

41. With regard to paragraph 4 (*c*), he considered that as a matter of principle the starting point was that the later treaty was valid and had to be applied in good faith, reasonably and in a manner that would not be in breach of the first treaty; but the same would also hold good for the first treaty in relation to the second, and the provisions of articles 55 and 61 would apply to both instruments. Perhaps too much importance had been attached to the final proviso in paragraph 4 (*c*) since in modern practice there was in fact widespread publication of treaties both in the various national treaty series and in the United Nations Treaty Series. The Commission did not need to discuss secret treaties, which in any case were on the border line of invalidity and, under Article 102 of the Charter, could not be invoked.

42. Some consideration should be given to the question whether the provisions of article 51 which referred to Article 33 of the Charter could be brought into play to solve the problems that arose in regard to treaty provisions which would be incompatible for purposes of application and which might result in violation of the rights of a State, thus giving rise to an issue of responsibility. Article 51 was already applicable, to a limited extent, where the conclusion of the later treaty could be regarded as a breach of the earlier one.

43. With regard to paragraph 1, he shared the view that the Commission must not prejudice the interpretation or application of Article 103 of the Charter and agreed with Mr. El-Erian that that instrument should not necessarily be regarded as a treaty for the purposes of the general law of treaties. If Article 103 were regarded as an independent rule of contemporary international law, it would be generally applicable to the whole of the law of treaties and not only to article 65.

44. Another question which came to mind was whether Article 103 should be regarded as applicable to all States, whether Members of the United Nations or not. If it were not, the position of parties to a multilateral convention on the law of treaties which were Members of the United Nations would not be the same as that of parties which were not Members. It would not be as radical as appeared at first sight to make Article 103 applicable to non-member States, for the provisions of the Charter concerning the registration of treaties had been extended to all States under article 25 of the draft.[11]

45. In conclusion, he asked whether the Special Rapporteur could re-examine the *Aerial Incident* Case,[12] to which reference was made in the commentary. One of the features of that case was that both parties to the litigation had been Members of the United Nations, so that there had been no question as to the position of a Member *vis-à-vis* a non-member State. The question that the Court had examined had been whether an understanding reached at the San Francisco Conference and embodied in the *disposition transitoire* of Article 36, paragraph 5, of the Statute of the Court could be binding on a State that had not been present at the Conference and had not signed the Charter in 1945. Possibly the Special Rapporteur had read too much into that case, in the course of which the rule *pacta tertiis nec nocent nec prosunt* had not been discussed.

46. Mr. JIMÉNEZ de ARÉCHAGA said that in the course of informal discussion with the Special Rapporteur, he had learned that the word "priority" was not being used to mean that the State which had assumed conflicting obligations could only comply with the treaty to which priority was assigned. The formula the Special Rapporteur had in mind was that a State which assumed conflicting obligations always retained an option as to which treaty it would observe and that its responsibility towards the other State would be determined *a posteriori* by reference to the treaty to which it had decided not to give priority. That being so, the word "priority" did not seem particularly well chosen. Such an interpretation also rendered the article rather less acceptable to him than it had been at first sight, but as it seemed to be gaining general support he would not withhold his own.

47. It appeared to him that according to that interpretation the provision contained in paragraph 4 (*a*) should cover the class of treaty to which Mr. Tunkin had referred at the previous meeting.

48. Mr. Yasseen's observations concerning the final proviso in paragraph 4 (*c*) were very pertinent and it would indeed be unjust for a State to derive benefit from treaty provisions that violated earlier ones. Moreover, in its present form the proviso might encroach on the realm of State responsibility. It ought to be restricted to a limited function within the law of treaties, operating as a kind of estoppel, whereby a State which was aware that the conclusion of a later treaty violated an earlier one, could not insist on compliance with the later treaty. He therefore proposed that the proviso be redrafted as a separate sentence reading:

> "However, the party to the later treaty is not entitled to invoke it against a State party to both treaties if it was aware of the previous obligation and that the later treaty necessarily involves action in direct breach of the other party's obligations under the earlier treaty".

49. The CHAIRMAN, speaking as a member of the Commission, said that the text submitted by the Special Rapporteur fell into two completely different parts, one comprising nearly all the article, and the other only the propositions in paragraph 4 (*a*) and (*c*).

50. In the first part, the problem was what the Special Rapporteur himself had defined as a question of priority between instruments concluded successively by the same parties. If, in such a case, the earlier treaty was terminated under the terms of article 41, only the second treaty remained in force and the only problem was one of application. If, on the other hand, the earlier

[11] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 182.

[12] *I.C.J. Reports, 1959*, p. 127.

treaty remained in force, there were several possible cases.

51. The first case to which the Special Rapporteur referred in paragraph 2, was that in which the earlier treaty had been so drafted as to make it appear that the parties had not intended that another treaty could be concluded between them derogating from provisions of the earlier one. The later treaty must then be so interpreted as to make its application compatible with the provisions of the earlier treaty. That was a rather exceptional case, since the general rule was that when the same parties had concluded two successive treaties, the second prevailed; but the interpretation of the earlier treaty made it necessary to take that special circumstance into account, for otherwise it was obvious that the earlier treaty could only apply in so far as it was not replaced by the later treaty.

52. Between that case and the case of complete replacement of the first treaty by the second, it could happen that the first treaty continued to apply, but only where its provisions had not been replaced by those of the second treaty.

53. The discussion had shown that the Commission was not divided on a question of principle, but was concerned over the drafting of the article. The simplest and easiest possible wording should be found, and that which best took account of the rules laid down by the Commission at its previous session and of the various points which had been raised during the discussion, whether in connexion with certain provisions of the United Nations Charter or with the problems of interpretation which might arise in regard to certain special treaties.

54. The situation contemplated in paragraph 4 (*a*) and (*c*) were quite different, as they did not raise any problem of validity or of priority. The rule in paragraph 4 (*a*) seemed self-evident. For only one treaty remained in force as between the two parties in question; the other was *res inter alios acta*. At most, it might be said that the existence of the later treaty could not be pleaded by one of the parties as an excuse for not fulfilling its obligations under the earlier treaty, which was the only one governing relations between the two parties in question. Incidentally, that was more an issue of responsibility than of validity or choice between the two treaties: so perhaps it was not essential to deal with it there.

55. Paragraph 4 (*c*) was not concerned with priority either, for it was obvious that the earlier treaty governed relations between State A and State B, whereas a new treaty was in force between State A and State C. That being so, the clause proposed would amount to saying that where State C had concluded a treaty with State A knowing that State A was already bound by a treaty with State B, State C could not demand performance of the later treaty. In his opinion the later treaty was, on the contrary, perfectly valid. State C which had concluded a treaty with State A, was not in any way at fault, whether it knew of the existence of the earlier treaty or not; it was State A that should be held responsible. If it came to light that State A had concluded the earlier treaty under undue pressure, a problem of coercion would arise, which might perhaps have to be taken into account. But in themselves neither the existence of the earlier treaty, nor the fact that the third State had been aware of it, could be pleaded as an excuse for not fulfilling an obligation under the later treaty. It would be very dangerous to introduce such a rule into international relations, for it would also be very difficult to prove that the third State had or had not been aware of the earlier treaty when it had negotiated the later one. Besides, he did not see why the earlier treaty should prevail *a priori*.

56. Admittedly, in that case there was a problem of responsibility — not the responsibility of State C, which was not bound by any earlier obligation, but only of State A, on the assumption that the mere fact that State A had negotiated a treaty with State C made State A responsible to State B for having derogated from the earlier treaty. It might be that in the earlier treaty States A and B had undertaken not to conclude another treaty with another party. In other cases, the violation was not in the conclusion, but in the application of the new treaty, whose performance was in itself a breach of the obligation to the first State. But he was sure that the Commission should consider the issue of responsibility which arose in all those cases.

57. The rule which should be stated was that the existence of a treaty between two States could not exempt one of them from fulfilling its international obligations, whether previously or subsequently assumed, towards a third State, just as a State could not plead domestic constitutional provisions to evade undertakings it had entered into in an international treaty. If the Commission thought it necessary to state that rule in the article, it would have to consider where such a rule ought to be placed.

58. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said he largely agreed with what had been said by the Chairman and with his analysis of article 65. All members seemed to think that the provision in paragraph 1 should remain where it stood, so as to give the necessary prominence to Article 103 of the Charter.

59. Paragraph 2 should perhaps be kept more or less in its present form; it was intended to be general in character, covering both clauses comtemplating treaties concluded in the past and clauses contemplating treaties to be concluded in the future. Thus it would cover provisions such as those in article 73 of the Vienna Convention on Consular Relations.

60. The drafting of paragraph 3 had in some measure been dictated by the form of article 41, which he regarded as being fairly well conceived, and which was intended to cover cases in which the conclusion of a second treaty by the parties to the first, covering the same subject, implied the supersession of the first treaty. It was also intended to cover the rather more complex situations in which the later treaty only covered part of the same ground as the earlier one, and the provisions of the two were not entirely compatible, though both were intended to survive. The question then arose which of the provisions were really applicable. He agreed with the Chairman that para-

graph 3 (*a*) was unnecessary and could be dropped, as its substance was already covered in article 41. The provision in paragraph 4 (*b*) also concerned a situation in which the rule in paragraph 3 (*b*) was applicable. Paragraph 4 (*b*) should therefore be worded so as to make that rule applicable there also.

61. With regard to terminology, he said that the Chairman's objection to the word " conflict " might perhaps be due to the fact that he was thinking of the word in terms of conflict of laws in private international law. However, the word had been used in the draft article in the same general sense as in Article 103 of the Charter and in certain other treaties. Its use in that sense was in fact normal in treaty practice, but as it had given rise to criticism he would be prepared to replace it by the word " incompatible ". He would have no objection, either, to substituting the word " applies " for the word " prevails " in paragraph 4.

62. Although, on a purely theoretical plane, it was possible to reach the conclusion that the statements in paragraph 4 (*a*) and (*c*) were self-evident, in practice it often did not seem so. For example, what would be the position when States A and B had concluded one treaty and States A and C another, and State B invoked its obligations under the second treaty, which might be a general multilateral treaty. The performance by State B of treaty obligations *vis-à-vis* State A might entail violation of the multilateral treaty. Yet, equally, non-performance of State B's obligations towards State A would constitute a violation of the State A's right unless the provisions of the general multilateral treaty were of a *jus cogens* character. Thus it seemed desirable to spell out the legal position of the various parties to the two treaties as in paragraph 4 (*a*).

63. He agreed with Mr. Rosenne that at some later stage the Commission would have to examine all its draft articles carefully, so as to ensure that they were properly dovetailed and co-ordinated.

64. In view of the concern that had been expressed in the Commission lest the draft should appear to condone, or pass over as normal, the conclusion of treaties which were clearly contrary to earlier obligations, particularly those of the " interdependent " type, perhaps it would be advisable to insert a general provision to the effect that article 65 was without prejudice to any issue of State responsibility that might arise out of the conclusion of the later treaty.

65. With regard to the point raised by Mr. Tunkin about treaties imposing " integral " or " interdependent " obligations, he did not believe it made any difference whether or not they contained an express stipulation forbidding the parties to contract out, because the very object and purpose of the treaty would bring out sufficiently the fact that such contracting out constituted a potential violation. In that connexion the Chairman had rightly distinguished between the conclusion of a treaty and its application. There could be cases in which, if there were an express undertaking not to contract out, it would be a violation to conclude the treaty at all. In such cases the State entering into the second treaty might be doing so for the purpose of cancelling or modifying its obligations under the earlier instrument, and doing so without prior reference to the other parties to that instrument.

66. He would be glad to follow the suggestion made by Mr. Elias at the previous meeting and mention in the commentary the recent developments concerning the Niger River regime.

67. Article 65 could now be referred to the Drafting Committee for re-drafting more or less on its present lines, but bringing out its relationship with article 41.

68. At some later time the Commission would no doubt wish to discuss the position of the article in the draft. It had been convenient, for purposes of discussion, to consider the question of conflicting treaty provisions in close connexion with the effect of treaties on non-parties and with the revision of treaties. In the same way, it had been convenient to study the invalidity and the termination of treaties in Part II at the previous session, though to deal with the termination of treaties immediately after their conclusion and validity was not altogether logical. At a later stage of its work the Commission would have to go carefully into the whole question of the arrangement and order of the various articles.

69. The CHAIRMAN said the Commission had made definite progress towards solving the difficult problems raised by article 65, which should now be referred to the Drafting Committee to be formulated as concisely as possible, taking the provisions of article 41 and certain other articles into account. The Drafting Committee would also have to consider whether a general reservation on State responsibility should be inserted in the text.

It was so agreed.

The meeting rose at 1 p.m.

744th MEETING

Friday, 12 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167/Add.1)
(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a a treaty)

1. The CHAIRMAN invited the Commission to take up section II of Part III in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the section on the amendment and revision