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Summary record of the 857th meeting

Topic:
Law of Treaties

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scope would entirely change the basis of the agreement reached in 1964.

102. It might be argued that the article, which had been inserted to obviate any possible misunderstanding about the implications of articles 58 to 60, was unnecessary because any competent lawyer would be aware that the latter could affect the fundamental principle concerning the force of customary law. The Commission's desire to include article 62 had been reinforced by the compromise reached over article 60 and the reluctance of some members to drop an article dealing with objective régimes.

103. Both the Commission and the Drafting Committee had discussed the relationship between customary and treaty law, but had decided, possibly out of timidity but nevertheless wisely, not to go too far into the subject. The codification of the relation between customary law and other sources of law should be left to others. The problems it posed had come up during the consideration of the Commission's draft articles on the law of the sea and on diplomatic and consular privileges and immunities. They were not peculiar to the codification upon which it was at present engaged.

104. The amendment put forward by Mr. Ago had brought out into the open a slight discrepancy between the English and French texts. In the former, the word " being " had been chosen deliberately, to meet the point of view of those who wished the article to be wide enough to cover the case of a treaty which embodied already existing customary law. But the article had originated in one of his own proposals—article 64—to cover the case of treaties giving rise to rules of customary law through the formation of custom as a kind of incrustation on the treaty.[14]

105. The problem of the concordance of the text in the three languages would certainly have to be examined in the Drafting Committee in the light of the suggestions made during the discussion. But at the present stage the Commission could hardly embark upon a general study of the relationship between treaty and customary law.

106. The CHAIRMAN said that it seemed to be the general view that the article could be referred to the Drafting Committee.

It was so agreed.[15]

Co-operation with Other Bodies

(resumed from the 853rd meeting)

[Item 5 of the agenda]

107. The CHAIRMAN invited the Deputy Secretary to the Commission to report on the receipt of communications from other bodies.

108. Mr WATTLES, Deputy Secretary to the Commission, said that the Secretariat had just received copies of three papers prepared by a study group of the American Society of International Law, which had been examining the Commission's draft articles on the law of treaties. The Secretariat, which was simply acting as a channel for transmission of the papers, would be glad to make them available to any member.

109. A letter had also been received from the Secretary of the Asian-African Legal Consultative Committee, informing the Commission that the Committee's eighth session was to be held at Bangkok from 1 to 10 August 1966. A copy of the provisional agenda had been enclosed with the letter. Among the items to be discussed was the consideration of the Commission's report on the work of its seventeenth session and the law of treaties. It would be remembered that the Commission had a standing invitation to be represented by an observer at the Committee's sessions.

110. Mr. de LUNA proposed that the Commission should be represented at the Asian-African Legal Consultative Committee's session by its Chairman, Mr. Yasseen.

111. Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. AGO, Mr. TSURUOKA, Mr. BRIGGS, Mr. ROSENNE and Mr. REUTER supported that proposal.

112. The CHAIRMAN thanked the Commission for his nomination, which he accepted in principle, on the understanding that, if he found it quite impossible to travel to Bangkok, he could delegate the duty to any other member of the Commission who was willing to undertake it.

The meeting rose at 6 p.m.

857th MEETING

Tuesday, 24 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(resumed from the previous meeting)

(Item 1 of the agenda)

ARTICLE 63 (Application of treaties having incompatible provisions) [26]

[26]

Article 63

Application of treaties having incompatible provisions

1. Subject to Article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

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[14] *Op. cit.*, vol. II, p. 34.

[15] For resumption of discussion, see 868th meeting, paras. 80-115.

2. When a treaty provides that it is subject to, or is not inconsistent with, an earlier or a later treaty, the provisions of that other treaty shall prevail.

3. When all the parties to a treaty enter into a later treaty relating to the same subject matter, but the earlier treaty is not terminated under article 41 of these articles, the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

4. When the provisions of two treaties are incompatible and the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties, the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty applies;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty applies.

5. Paragraph 4 is without prejudice to any responsibility which a State may incur by concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

1. The CHAIRMAN invited the Commission to consider article 63. The Special Rapporteur's only proposal was for a revision of paragraph 3 (A/CN.4/186/Add.3, para. 4).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the problems dealt with in article 63 had engaged the Commission's attention on several occasions. In particular, the Commission had devoted close attention to the co-ordination of article 63 with article 41, which dealt with the termination or suspension of the operation of a treaty implied from entering into a subsequent treaty. During the second part of its seventeenth session it had adopted what it believed to be a good solution for article 41, and it now had to deal with the formulation of article 63.

3. Government comments on the text adopted in 1964 had not been very extensive. The Government of Israel had suggested that paragraph 1 should refer to rights as well as obligations. Although the emphasis of article 63 was on obligations, he would himself have no objection to that proposed change.

4. In paragraph 2, the United Kingdom Government had suggested that the reference to " an earlier or a later treaty " should be changed to " any earlier or later treaty " and he believed that change to be a drafting improvement. The Government of Israel had suggested that paragraph 2 should admit the possibility of a material examination of the treaty to determine the existence of any inconsistency. As he had explained in paragraph 2 of his observations, he did not consider that suggestion apposite, because paragraph 2 concerned cases where the treaty contained an express provision regulating its relation to other treaties.

5. With regard to the interrelation between article 63 and article 41, the Government of Israel had suggested that the question of partial termination should be removed from article 41 and placed in article 63. Since, at its last session, the Commission had removed the question of partial termination from article 41, that point had been largely covered. As for the Government of Israel's suggestion that suspension should be separated from termination, that had already been discussed both by the Commission itself and by the Drafting Committee, and it had been found that it would be difficult to achieve without introducing other complications. Moreover, there were articles in which it was essential to deal with suspension and termination together.

6. The Netherlands Government had found paragraph 4 " one-sided " and " unsatisfactory ". There was at the heart of that objection a point which the Commission had already closely examined in 1964, namely, whether the rule in article 63 was sufficient and satisfactory with respect to all categories of treaties. He was thinking of law-making treaties and of such treaties as disarmament treaties, which created a special relationship between the parties. The underlying issue was whether a State could, by a prior treaty, diminish its own competence to conclude treaties; the majority of the Commission had felt that no such diminution of competence occurred. The questions which arose were therefore matters of State responsibility.

7. The Yugoslav Government had suggested that article 63 should be co-ordinated with articles 66 and 67. He sympathized with the idea underlying that suggestion but did not think that a combination of the three articles would answer the purpose. Articles 63, 66 and 67 dealt with problems that were inherently complex. The Commission should adopt precise wording for the rules embodied in those articles and co-ordinate their provisions; careful attention should be given to that co-ordination when the Commission considered article 66, and especially article 67.

8. In paragraph 7 of his observations he had dealt with the comment by the Government of Israel on obsolescence or desuetude as an independent cause of termination. That question had already been raised in connexion with another article of the draft and the Drafting Committee had been invited to consider it and to report to the Commission. Since the Drafting Committee would thus have to advise on the desirability of including a specific provision on obsolescence or desuetude, it was not necessary to discuss the matter at length at that stage. Personally, he did not believe that obsolescence constituted a legally separate ground of termination. The real ground of termination in cases of obsolescence was some form of implied agreement by the parties.

9. Mr. JIMÉNEZ de ARÉCHAGA said that article 63 did not fulfil the promise contained in its title. Instead of solving the real problem of the application of treaties having incompatible provisions, it merely stated the obvious in its subparagraphs 4 (*b*) and (*c*), which contained the real substance of the article.

10. Article 63 dealt with those cases where it was possible, both from a practical and from a legal point of view, to apply simultaneously the earlier and the later treaties vis-à-vis different parties, but those cases did not in fact involve incompatible provisions. The article ought to deal with the case of treaties having incompatible provisions which could not be applied simultaneously vis-à-vis different parties. That situation occurred in particular in the case of treaties which laid down interdependent or integral obligations that required a

particular line of conduct from the State accepting the obligation, and one which could not be different vis-à-vis different States. The implication of article 63 was that, in that case, a State which had assumed two contradictory obligations was free to choose to conform with any one of them, and that its only duty was to give reparation to the State party to that particular treaty which the State bound by the two treaties had chosen not to perform.

11. The Commission had retreated gradually from the proposals submitted to it by its three Special Rapporteurs who had dealt with the matter until in 1964 it had adopted article 65, now 63, in a form which, as pointed out by the Netherlands Government, was hardly compatible not just with progressive development, but even with existing international law. In 1953, a proposal[1] had been made by Sir Hersch Lauterpacht which would provide for the invalidity of the later treaty if entered into with the intention to violate the earlier treaty and in 1958 a proposal[2] had been made by Sir Gerald Fitzmaurice which would provide for cases where the earlier treaty was a treaty creating " interdependent " or " integral " obligations, but the Commission had not had an opportunity to consider either proposal. In 1964, Mr. Tunkin had expressed concern at that omission and had suggested that the Commission ought to consider at second reading whether that point should be expressly covered in the article itself.[3]

12. In rejecting the tendency to give pre-eminence to the earlier treaty when the later one was obviously a violation of it, the Commission had gone too far in the other direction, and was now placing the two treaties virtually on the same level. It was thereby giving a sort of *carte blanche* to violate a treaty by means of a new agreement. The Commission had condemned breach in article 42, but in article 63 it appeared to legitimate it and give it a semblance of respectability, provided the State wishing to commit the breach could find another State to act as accomplice and thus enable it to present the breach in the guise of a new treaty.

13. In article 42, as approved at the previous session, the Commission had already recognized the existence of the integral type of treaty, described in paragraph 2 (*c*) of that article as being " of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty ". Where such a treaty was in existence, it could hardly be disputed that if one of the parties to it entered into a later treaty incompatible with it, with other partners, that act would constitute at least a repudiation of the former treaty.

14. When a State party to an earlier integral treaty concluded a later treaty incompatible with it with a State which was aware of the pre-existing obligation, the later treaty was not void, since the Commission had not accepted the theory of invalidity, but the conclusion of the later treaty undoubtedly constituted a violation of international law; the State which was bound by the earlier treaty was under an obligation not to enter into the later treaty and, if it did so, it was obliged to suspend the application of the later treaty and take steps to release itself from it as soon as possible. And the partner to the later treaty, if it had participated in it in full awareness of its unlawful character, would not be entitled to claim any rights which might otherwise have arisen from the non-performance or premature termination of the later treaty.

15. In 1964, the Special Rapporteur had proposed that formula in a somewhat broader form but his very modest proposal had not been accepted by the Commission. Personally, he regarded that formula as representing the least that the Commission should provide in order not to place the two treaties on the same level and so as to induce compliance with the earlier treaty. He therefore proposed the addition, at the end of paragraph 4 (*c*), of the following proviso:

> " However, in the case of a prior treaty of the character described in article 42, paragraph 2 (*c*) of the present articles, a party to that treaty is under an obligation not to enter into a subsequent agreement whose execution is incompatible with the earlier treaty, and, if such subsequent agreement has been concluded, that party is bound to suspend its execution and take the steps necessary for its termination. A party only to the later treaty is not entitled to invoke any right arising from such non-performance or termination, if it was aware of the existence of the previous treaty. "

16. Mr. CASTRÉN said he accepted the two drafting changes proposed by the Special Rapporteur, the first to paragraph 2, in response to the suggestion by the United Kingdom Government—although he personally considered that the paragraph was sufficiently precise—and the second to paragraph 3, in response to the suggestion by the Government of Israel. Otherwise, in his view, the Special Rapporteur had rightly concluded that the criticisms of some parts of the text adopted in 1964 were groundless.

17. The Commission had devoted much time to the question of the incompatibility of treaties in connexion with other articles, particularly article 41. Article 63 was based on recognized principles, such as respect for the rights of third States, as well as on State practice and international jurisprudence. It seemed possible and advisable to retain it as it was, subject to a few drafting changes.

18. With regard to the question of the obsolescence of treaties raised by the Government of Israel, he agreed with the Special Rapporteur that that was a general point which should be considered in all its aspects, first by the Drafting Committee and then by the Commission itself.

19. In principle, he was inclined to accept Mr. Jiménez de Aréchaga's proposal for the addition of a new provision to paragraph 4, if paragraph 5, which reserved the question of responsibility, was regarded as inadequate. The ideas underlying that proposal were sound in themselves, but the exact wording would need further consideration.

[1] *Yearbook of the International Law Commission, 1953*, vol. II, document A/CN.4/63, article 16.

[2] *Yearbook of the International Law Commission, 1958*, vol. II, document A/CN.4/115, article 19.

[3] *Yearbook of the International Law Commission, 1964*, vol. I, 755th meeting, para. 19.

20. Mr. PESSOU said that article 63 had caused a lot of difficulty in 1964, and was now presenting the same problems as it came up to be examined afresh. A solution to those problems was being sought by two different approaches. The first was by reference to general principles of law such as *lex posterior derogat priori* or *pacta sunt servanda* but those principles were taken from private law and were not very apposite. The second was by including incompatibility clauses in advance, as was now the tendency in international practice. But experience showed that the efficacy of legal solutions of that kind was limited, since the incompatibility of treaty provisions raised problems which mainly involved political factors.

21. During the discussion on the doctrine of *rebus sic stantibus* in 1963, he had mentioned[4] the practice worked out in the case of fourteen new African States, in their relationships with France and the United Kingdom as a solution to the problems resulting from the existence of successive conventions. That new practice had achieved a harmonization of contractual obligations in a spirit of mutual understanding and in accordance with the principle of good faith.

22. The Commission could certainly refer the article to the Drafting Committee, together with the proposals before it, especially that of Mr. Jiménez de Aréchaga, but he feared that it would be hard to find a solution along the lines on which the Commission was now working. It might, however, re-examine the matter and try to reconcile the contradiction with which article 63 was concerned.

23. Mr. AGO said he had some comments to make on both the substance and the form of article 63. In paragraph 1 he agreed with the Special Rapporteur that, as suggested by the Government of Israel, mention should be made of rights as well as of obligations. The Commission should also give careful consideration to the expression " the provisions of which are incompatible ", which was not perhaps quite correct. Under article 41, if a later treaty was wholly incompatible with an earlier treaty, the latter terminated. Article 63, paragraph 1 dealt with the case of treaties the provisions of which were partially incompatible. It was particularly necessary to add the word " partially ", since paragraph 2 dealt with the case in which the parties to the later treaty had taken care to specify that the two treaties must be compatible.

24. Paragraph 2, at least in the French version, was not very lucid; it should be made clearer that the paragraph referred to a treaty the provisions of which specified that it was subject to another treaty or must not be incompatible with another treaty.

25. With regard to paragraph 3, he agreed with the Special Rapporteur that both the situations dealt with in article 41, suspension as well as termination, should be mentioned. It might perhaps also be desirable to word the last sentence affirmatively so that it would read: " the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty ".

[4] *Yearbook of the International Law Commission, 1963*, vol. I, 696th meeting, para. 11.

26. Paragraph 4 was the paragraph which, in his opinion, raised the most serious problems. Sub-paragraph (*a*) really stated a consequence of paragraph 3 and might thus be amalgamated with the latter, since the problem was the same, whether all or only some of the parties to the treaty were involved. Sub-paragraphs (*b*) and (*c*) were statements of the obvious but were quite irrelevant to the question of the incompatibility of treaties; the rules they stated held good even if the two treaties were wholly incompatible. If the article was taken to relate to the incompatibility of treaties, those two sub-paragraphs should therefore be dropped. The whole of paragraph 4 would thus disappear. The Special Rapporteur had rightly stated that paragraph 4 had no bearing on a treaty conflicting with a rule of *jus cogens*, which was void by virtue of another article. The question of the desuetude of treaties would certainly have to be considered, either in that article or in another.

27. Lastly, the Commission should give some thought to the proposal by Mr. Jiménez de Aréchaga for paragraph 5.

28. Mr. REUTER said that while the Commission should avoid saying anything unnecessary in the article, it should, on the other hand, not be afraid to leave some uncertainty and vagueness, for such an extremely difficult problem could be solved only by adopting a flexible approach, not by seeking perfection.

29. As Mr. Ago had said, paragraph 2 could certainly be improved, at least in the French text. It dealt with the case in which a treaty took into account the problems arising out of its subjection to or inconsistency with another treaty.

30. The Special Rapporteur had suggested that, in considering article 63, the Commission should bear in mind the following articles, especially article 67. It might therefore be wise to insert in article 63 an explicit reference to article 67, the effects of which might be far-reaching, since paragraph 1 (*a*) of that article could mean that, if the possibility of concluding an agreement to modify the treaty as between certain parties was not provided for by the treaty, such an agreement would be void or possibly non-existent. If that was the correct interpretation of that provision it was much stricter than the rule relating to incompatibility of treaties in article 63, and that would justify including a reference to the provisions of article 67.

31. With regard to paragraph 5, it seemed to him that many of the problems that had been raised, especially by Mr. Jiménez de Aréchaga, might be affected by whatever view the Commission took of the consequences of responsibility. The theory of responsibility was not at present before the Commission, but the conclusions it reached on that subject might perhaps give some satisfaction to those who regretted that the Commission's draft was rather narrow in its treatment of the relativity of treaties. If, ideally, the consequence of responsibility was *restitutio in integrum*, it would follow that the unlawful act must be completely extinguished. Would the fact that a third State had been an accomplice in the breach of a previous undertaking by its partner in the conclusion of a treaty be an act of complicity in an international delinquency and so attract a penalty?

32. Those were bold ideas, but they had already been raised in practice. An organ of the United Nations had, for instance, already had to consider whether a State was entitled to collaborate in an act which it knew to be a breach of a particular undertaking; though it had hesitated to find that a breach of the law had been committed, that organ had nevertheless expressed the opinion that there had been a breach of a moral obligation.

33. If those considerations were valid, paragraph 5 would have to be drafted in as general terms as possible, so that the door remained open to all the consequences arising from the theory of State responsibility. A wording of that kind would not commit the Commission in any way, and would have the advantage of making things easier for the future.

34. Mr. de LUNA said that, subject to remedying the defects to which attention had been drawn by Mr. Ago, he was in favour of retaining the 1964 text with drafting improvements.

35. There appeared to be a tendency on the part of some members of the Commission to assign to international law a sort of policing role. International law would then be called upon to prevent offences by States, and even the concept of complicity had been mentioned. But it would not be wise to try to limit the freedom of States to make treaty stipulations. Even in private law, it was not an offence to purchase an object from a person who was not the owner; the only consequence was that the purchaser might ultimately find himself without the object and with a claim against the vendor as his sole remedy. There was in fact nothing illicit about a sale of that type under a *pactum de contrahendo;* the vendor merely undertook to do everything in his power to make the object available to the purchaser; if he failed to do so, the purchaser could claim compensation from him.

36. In international law, the matter was governed by the principle of the relativity of the effects of treaties, which was a consequence of the *pacta sunt servanda* rule. It would be at variance with international practice, and at the same time completely impracticable, to require a State which wished to enter into a treaty with another to investigate whether its prospective partner was already bound by some earlier treaty which was not compatible with the treaty under negotiation. The treaties to be examined could be extremely numerous, bearing in mind that there were estimated to be some 30,000 treaties at present in force among States.

37. The position would be completely different in the event of the conclusion of a treaty which violated a rule of *jus cogens,* but in that case the nullity was not attributable to the earlier treaty but to the higher law represented by the *jus cogens* rule.

38. There was no rule in international law which limited the capacity of a State to enter into treaties regardless of its ability to perform its obligations. As for its partner, even if it happened to be aware of the incompatibility of the later treaty with an earlier one, it was entitled to assume that the State which had subscribed to the two treaties would take the necessary steps to release itself from its obligations under the earlier treaty, and to perform those embodied in the later one.

39. He supported the Special Rapporteur's approach to the article.

40. Mr. TUNKIN said that he still felt the same concern as in 1964 with regard to article 63; he doubted whether article 63 really dealt with the question of the application of treaties having incompatible provisions.

41. Paragraph 1 was a saving clause relating to Article 103 of the Charter. Paragraph 2 stated a useful rule, but the case which it covered was not one of incompatibility; as Mr. Jiménez de Aréchaga had pointed out, that case really arose when the later treaty made it impossible to perform the obligations under the earlier treaty, especially, but not exclusively, with regard to States which were not parties to the later treaty. Paragraph 3 stated the rule *lex posterior derogat priori* and did not deal with the question of incompatibility as such. As for paragraph 4, its sub-paragraph (*a*) was already covered by the provisions of paragraph 3, while sub-paragraphs (*b*) and (*c*), as demonstrated by Mr. Ago, did not involve questions of incompatibility.

42. In 1964, he had drawn attention to the danger of giving the impression that there was nothing reprehensible about entering into a later treaty which was incompatible with an earlier one. There was very often no justification for analogies from private law; in international law, the conclusion of a later treaty incompatible with an earlier one could in some cases constitute a very grave violation of the first treaty. The Commission should therefore examine with great care the proposal by Mr. Jiménez de Aréchaga, which was intended to deal with cases of real incompatibility.

43. Mr. BRIGGS said that, subject to drafting changes, he found article 63 satisfactory. The most important drafting problem was that of the use of the term " incompatibility ".

44. Paragraph 1 was unobjectionable and he agreed with the Israel Government's suggestion that provision should be made for rights as well as obligations. Paragraph 2 accurately reflected existing State practice. And with regard to paragraph 3, since the Commission had adopted article 41, which he himself had opposed on the ground that the question it dealt with should have been treated as a matter of relative priority, it was only logical that it should also adopt paragraph 3.

45. Paragraph 4 raised questions of legal policy. The problem involved was that of the creation by the later treaty of obligations which a party to both treaties could not consistently perform; it was the performance of the obligations which was incompatible. An effort should be made to devise some form of words which would avoid the logical dilemma to which attention had been drawn in the course of the discussion.

46. With regard to the text of paragraph 4, he agreed that sub-paragraph (*a*) stated the same rule as paragraph 3 and he would have no objection to the two provisions being combined. Sub-paragraphs (*b*) and (*c*) dealt with the relative priority of obligations and stated in which case the obligation to perform one treaty prevailed over the obligation to perform the other.

47. He would reflect on the amendment proposed by Mr. Jiménez de Aréchaga; his first impression was that the idea embodied in it might help to improve paragraph 4 (*c*).

48. He agreed with the Special Rapporteur that obsolescence was not a distinct ground of termination.

49. Mr. AGO said that, in his opinion, the rules stated in paragraphs 4 (*b*) and (*c*) were correct when two treaties were wholly compatible as well as when they were wholly incompatible, but a completely different problem was perhaps concealed behind those two sub-paragraphs, that of the incompatibility that existed when a State party to a prior treaty, because of the obligations vis-à-vis a certain State provided for in that treaty, found itself unable to comply with the provisions of a later treaty vis-à-vis another State or vice versa. In that case, a problem of responsibility inevitably arose, since, owing to the incompatibility of the two obligations, the State could not fulfil its obligations towards its partners in one treaty or the other. In such a case, it was pointless to say that one of the two treaties should prevail over the other. A breach of one or the other would necessarily occur and the re-establishment of a situation fully in conformity with the law was impossible; if it was re-established in one case, it could not be in the other, and vice versa.

50. Mr. ROSENNE said that the discussion had confirmed his conviction that the Commission had been right in not dealing with the problems article 63 sought to cover in the section on invalidity; but at the same time he was disturbed by the present debate.

51. His main concern was with the question whether it would not be preferable to formulate two separate articles, one dealing with the aspect termed the " relativity " of treaties, which if he understood the purport of article 63 correctly was covered in paragraph 4, and the other with the real issue of incompatibility. The latter was at present covered in paragraph 5, which was closely connected with the revised version of article 41 as approved at the second part of the seventeenth session. On the face of it Mr. Jiménez de Aréchaga seemed to have made out a convincing case in defence of his amendment, especially after the revision of article 42 at that session. If the two sets of problems were dealt with in separate articles it would probably be easier to find a way out of the difficulties facing the Commission.

52. Paragraph 2 in the 1964 text, though not objectionable, was self-evident and could be dropped: its purpose was met by other provisions concerning interpretation and the *pacta sunt servanda* rule.

53. From the outset he had found it difficult to accept paragraph 3 in its present form, for it raised far more difficult problems of interpretation than other articles in the draft; and he doubted if either article 41 or paragraph 3 of article 63 ought to be maintained as entirely separate provisions. They should be combined, and then the Commission would need to consider the proper place for such an article.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that he wished to make a number of comments before the discussion went any further. The difficulties to which article 63 had given rise were not as great as might appear. Possibly the word " incompatible " had not been a very good choice, but it had been a deliberate one on the part of the Commission and the Drafting Committee. In his original proposal he had used the expression " conflicting treaty provisions ".[5] The word " incompatible " had also been chosen for article 41, but in that context it referred to the application of incompatible provisions.

55. In article 63, the Commission's purpose had been to cover the case which was frequently met in practice and which was usually the result of attempts to amend treaties when the provisions of two treaties could not be applied in their entirety at the same time. He would have thought that the Commission had been very nearly successful in expressing that idea in the 1964 article, which had not been misunderstood by governments, though some objections had been raised.

56. Drafting changes apart, paragraph 1 was not causing serious difficulty.

57. Paragraph 2 was worth keeping because many treaties contained express provisions concerning future agreements that might be incompatible with what might be called the " master " or original treaty, or clauses about the relative priority of the earlier or later treaty. The statement in paragraph 2 might be self-evident, but should be made in a general article.

58. Paragraph 3, which was the result of protracted discussion in the Commission and the Drafting Committee, was necessary and must be closely co-ordinated with article 41.

59. On paragraph 4 he disagreed with Mr. Ago. It might be a statement of the obvious, but the point at issue was extremely important, namely whether, as between two States, one of them could invoke the fact that it was already a party to a prior treaty with another State as a ground for non-performance of the later treaty. That in essence was the problem of the relativity of treaties, and it had real practical significance in the case of a conflict between treaty obligations. The point had arisen in cases brought before the Permanent Court of International Justice, which had applied the principle of relativity fairly strictly.

60. The argument advanced by Mr. Jiménez de Aréchaga in defence of his amendment was not new and he himself had put forward a shorter proposal to the same effect at the sixteenth session, which had been rejected. Sir Hersch Lauterpacht and Lord McNair would have agreed with the proposition that a State party to the second treaty, but not to the first, that had had knowledge of the fact that the provisions of the second violated those of the first, would not be entitled to invoke the second treaty as a ground for non-performance of the obligations under the first treaty.

61. The Commission would have to decide whether, and if so to what extent, the notion of complicity should be introduced in paragraph 4 (*c*), bearing in mind that it would then be dealing with a question of actual capacity, namely, whether in law a State was actually incompetent to enter into the second treaty knowing it to be a violation of the first. He had understood the consensus

[5] *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/167, article 65.

of opinion in 1964 to be against such a proposition and that the Commission wished to leave the matter aside as one that should be dealt with when it came to study the topic of State responsibility.

62. Paragraph 4 could not simply be jettisoned out of hand: it stated legal rules of practical significance, as the jurisprudence of the Permanent Court showed.

63. If an effort were made to reintroduce the notion of complicity the proper place would be in paragraph 4, because the separate issue of responsibility had been explicitly reserved under the terms of paragraph 5, which, as far as the English version was concerned, seemed to be sufficiently clear.

64. Mr. AGO said that he entirely agreed with some of the points just made by the Special Rapporteur. Unfortunately, paragraph 4 did not say at all what the Special Rapporteur meant it to say, a fact for which he himself accepted his share of responsibility as a member of the Commission and of the 1964 Drafting Committee.

65. It was essential to draw a clear distinction between two separate problems. First, in the case of incompatibility or conflict between two treaties to which the same States were parties, the problem was essentially one of interpretation. In that situation, either the provisions of the two treaties were so far incompatible that the earlier treaty must be deemed to have terminated; or they were not, in which case it was necessary to determine which provisions of the earlier treaty still applied and which had ceased to do so.

66. Secondly, in the case of two successive treaties to which different States were parties, the rule to be stated was the one just given by the Special Rapporteur: a State could not invoke the existence of a treaty with a third State as a ground for non-performance of the obligations arising from a treaty made with other States; in other words, a treaty concluded between A and B could not be a pretext for the non-performance of a treaty between A and C. That rule could hardly be extracted from the text of paragraph 4 as it stood. The rule should perhaps be stated in a separate clause, but the Commission would have to consider how such a clause should be worded and where it should be placed in the draft.

67. Mr. TUNKIN said he wished to amplify his earlier comments which might not have been clearly understood. He had no objection to the provisions set out in article 63 and regarded them as useful, but in its present form the article failed to counter a general risk, namely, the possibility of a new treaty being concluded in violation of a previous treaty. Indeed, the present text could be so construed as to suggest that such a case was normal. Some members had talked of the freedom of the parties but it must be remembered that the parties had freely assumed the obligations laid down in the first treaty and that those obligations were binding.

68. Some members might have had in mind obligations of a type to be found in private law when the rule of complete restitution would be relevant, but treaties could impose obligations of a very different character, such as those imposed by the 1954 Geneva Agreement on the Cessation of Hostilities in Viet Nam.[6] The provisions of article 63 in the Commission's draft could be wrongly construed to imply that any party to the Agreement was free to conclude a new agreement concerning Viet-Nam containing provisions incompatible with the earlier Agreement. The United States Government had often made public references to its solemn obligations undertaken in respect of South Viet-Nam, but its fulfilment of those obligations consisted in supplying armaments, etc., to that area in violation of the 1954 Agreement.

69. That example was a very pertinent one. Paragraph 5 could hardly be regarded as an adequate safeguard because the remainder of the text could still give the impression that the parties to a treaty were completely at liberty to conclude new agreements in violation of the old. In such situations the rule *pacta sunt servanda* would have been broken with all the implications that would have for the law of treaties. That being so, the priority as between two sets of obligations should be made clear, because it was a matter that fell within the province of the law of treaties, not of State responsibility. A more general formula would have to be devised to meet his points.

70. Mr. TSURUOKA said that he was prepared to accept the text of the article which the Commission had adopted at the first reading. Two treaties some of the provisions of which were incompatible were valid and could be applied. The problem of obligations which it was materially impossible for a State to fulfil and which gave rise to responsibility of the State, had been relegated to paragraph 5 where it was dealt with in very general terms. The text did, admittedly, contain several statements of the obvious; but it had some value as a means of dispelling the doubts which sometimes arose, and its general arrangement was well thought out.

71. Though he was not opposed to a more thorough study of the questions at issue, he feared that, if the Commission became involved in details, it would never succeed in extricating itself. He also feared that certain wordings which seemed at first sight to provide solutions might give rise to abuse. The notion of incompatibility, for instance, which appeared to be an objective one, was open to subjective interpretation, as was clear from actual experience. As a form of sanction was involved, the question was one of some consequence.

72. Consequently, instead of going too deeply into the problem, the Commission should deal with it in general terms and avoid drafting an article containing too many rules which could be open to subjective interpretations.

73. Mr. BARTOŠ said that the Commission had got on to very dangerous ground. Differences between treaties were further complicated by the fact that the parties were not always the same. It would, therefore, be preferable to adhere to the wording already accepted in 1964.

74. He was not in favour of the proposal by Mr. Jiménez de Aréchaga, although it was undoubtedly based on a very detailed study. The situation described by Mr. Tunkin clearly illustrated the danger which arose when a State changed its attitude towards an existing agreement by concluding with other States an agreement which was incompatible with the first. Para-

[6] H.M. Stationery Office, Cmd. 9239.

graph 5 of the existing text left the responsibility of that State intact. But if the Commission inserted in the article a provision whereby the party that was not bound to participate in the new treaty was invited, after the other party had changed its attitude, to suspend execution of the first treaty and to take the steps necessary for its termination, it would be encouraging that State to act on the assumption that a new policy called for a new treaty and would be helping to bring about the termination of the first instrument.

75. Mr. Jiménez de Aréchaga's proposal was therefore unacceptable. In his opinion, the case of conflict between treaties should not be taken into account in the convention on the law of treaties. The Commission had laid down that the party bound by the first treaty must comply with the *pacta sunt servanda* rule, and that the second treaty applied to the party which was not bound by the first. It should leave matters there, and not specify whether the first treaty continued to exist or not. If it did so, it might give one of the parties a pretext for evading the obligations it had assumed under the first treaty. That was certainly not Mr. Jiménez de Aréchaga's intention, but his text might imply it.

76. He hoped that the Drafting Committee would consider the question and make the minimum number of changes in order to avoid introducing further confusion into a situation already complicated by the existence of successive treaties and different parties.

77. Mr. EL-ERIAN said that the Commission's decision to deal with the application of treaties having incompatible provisions in the context of the application and modification of treaties had resulted in separate provisions dealing on the one hand, with cases of conflict with a peremptory norm, old or new—in articles 37 and 45—and on the other hand, with cases of explicit or implied termination by reason of the conclusion of a treaty conflicting with a previous one so that the two could not be applied at the same time, in article 41.

78. Article 63 was intended to deal with cases of successive treaties, the parties to which might or might not be identical and which contained incompatible provisions, as well as with the effects of such treaties for non-parties. The overriding rule was stated in paragraph 1. And when analysing the rest of the article it was important to bear in mind that its main object was to provide a residual rule, since other cases of nullity and termination were dealt with in other articles.

79. As indicated in the 1964 commentary, treaties usually contained clauses providing against conflict with a later treaty.[7] For example, provision might be made allowing for a supplementary agreement between two parties which would not derogate from the obligations of the original agreement. Article 73, paragraph 2, of the Vienna Convention on Consular Relations[8] was an example. Another type of clause was that contained in the 1958 Geneva Convention on the High Seas, article 30,[9] in which the parties had declared that the treaty was not incompatible with or would not affect their obligations under another treaty, such as a regional agreement. Such clauses provided a rule of interpretation in case of conflict between the provisions of two treaties. Article XIV of the 1962 Convention on the Liability of Operators of Nuclear Ships[10] was an example of a clause purporting to override the provisions of an earlier treaty.

80. He did not subscribe to the criticisms that certain elements in article 63 were self-evident and failed to add much to legal knowledge. That criticism held true of other articles, but should not be given too much weight because the Commission was engaged in preparing draft articles designed to be as comprehensive as possible.

81. He agreed with the Special Rapporteur's general conclusion about the observations presented by governments. Obsolescence should be treated as a ground of termination usually due to a fundamental change of circumstances and need not be covered in article 63.

82. The amendment proposed by Mr. Jiménez de Aréchaga had been useful in focusing attention on an important problem. Article 63 provided a rule of interpretation, the question of State responsibility being fully reserved under the provisions of paragraph 5. However, Mr. Jiménez de Aréchaga was right in thinking that the issue was not merely one of relative priority of treaty obligations. His amendment would lengthen an article that was already rather long, and perhaps the point could be covered by an express reference in paragraph 1 to the applicability of the *pacta sunt servanda* rule. That would make clear that States were bound to perform in good faith the obligations imposed in a treaty to which they were a party, and that they should refrain from entering into a subsequent treaty that imposed obligations in conflict with the earlier ones. The Drafting Committee should be able to devise a text that would take account of the point.

83. Mr. VERDROSS said that no serious objection had been raised to paragraphs 1, 2 or 3 or to paragraph 4 (*a*). Those paragraphs could, in fact, be of some value although, on close examination, they appeared to be self-evident, If two States concluded two different treaties, the problem to be solved was one of interpretation, and not of compatibility.

84. Difficulties did arise, however, with paragraphs 4 (*b*) and (*c*). According to existing law, Mr. Ago was, he thought, right and the two treaties were valid. But the Commission did not exist merely to take note of existing law; its function was, rather, the progressive development of international law, and it could fulfil that function by adopting simple proposals such as that made by the Special Rapporteur.

85. It was questionable whether the Commission should go as far as Mr. Jiménez de Aréchaga had suggested. Personally, he did not think so. The Commission was still engaged in codifying the law of treaties, and it could leave to its successors the task of considering the implications with regard to State responsibility.

86. The CHAIRMAN, speaking as a member of the Commission, said that the problem raised by paragraph 4

[7] See *Yearbook of the International Law Commission, 1964*, vol. II, p. 186, paras. (6) and (7).

[8] United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 187.

[9] United Nations Conference on the Law of the Sea, 1958, *Official Records*, vol. II, p. 138.

[10] *American Journal of International Law*, vol. 57 (1963), p. 275.

was not the problem of nullity, but that of responsibility and of priority as between treaties.

87. In reply to the Netherlands Government, which had commented that the problem was not yet ripe for codification, the Special Rapporteur had stated that his proposals were founded upon fundamental principles of treaty law—the *pacta tertiis non nocent* principle and the principle that States entering into a new agreement were presumed to intend that its provisions should apply between them. Those principles could undoubtedly be applied without difficulty in the case of treaties concluded between the same parties, but not in the case of successive treaties concluded by different parties.

88. He himself could not understand why priority should be given to the first treaty rather than the second, except on the basis of responsibility. Accordingly, the solution should be sought elsewhere, namely in the principles governing responsibility. He therefore believed that paragraph 5 was indispensable, as the question of responsibility should be reserved.

89. The proposal of Mr. Jiménez de Aréchaga was undoubtedly based on very praiseworthy principles. International agreements must be observed, and States should not be encouraged to try to violate treaties already concluded between them. On the other hand, the Commission would be going a little too far if it introduced that idea into the text; it would be entering into the details of the problem of responsibility, which it was inappropriate to discuss in connexion with conflict between different treaties. Wrongful conduct should undoubtedly be subject to sanctions, but the issue in question fell within the topic of responsibility and it would be better to consider it when the Commission came to deal with that topic.

90. Mr. AGO said he entirely agreed with the Chairman. When a State concluded with different parties and at different times two treaties so drafted that the performance of one excluded the performance of the other, he could not understand why preference or priority should be given to the first treaty rather than the second. Nor could he understand why it should be more important to safeguard the rights of the States which had concluded the first treaty, rather than those of the States which had concluded the second.

91. It was obvious that in international practice all kinds of possibilities had to be envisaged. Mr. Tunkin had mentioned one example in which the second treaty was less general, and less favourable to the cause of peace, than the first. But the converse was equally likely. It could easily happen that one State first concluded with another State a treaty in which it undertook to supply that State with arms, then later concluded with other States a treaty in which it undertook not to supply arms to the State which was the beneficiary under the first treaty. Which of those two treaties was the more general in scope, and which was the more important for peace? It was impossible to give an *a priori* answer to that question or to decide which course of action was more favourable to the advancement of international law. The Commission should be on its guard against any over-simplified idea of what was meant by contributing to the progressive development of international law. Such an idea might in the end lead to confusion rather than progressive development.

92. He therefore saw no reason for departing from the principles previously adopted. Apart from a proviso on the question of responsibility, drafted in the most general terms, the Commission should avoid introducing any idea of priority or preference between treaties concluded successively by the same party with different parties.

93. Mr. de LUNA said he must make it clear that he was far from advocating the non-fulfilment of contractual international obligations. Such obligations should be strengthened by every possible means, since the peace of the world depended on them, but not by the means which certain members of the Commission had suggested.

94. The attitude adopted by those members was not in keeping with their position on other articles. While the Commission had been divided on the question whether a treaty did or did not create rights for third States, it had agreed unanimously that obligations could not be imposed on third parties without their assent. But now, through the medium of an incompatibility clause, it was considering imposing on all third States which might be parties to a second treaty an obligation never to make any stipulation which was inconsistent with an earlier treaty. Such an obligation represented an undue limitation on the sovereignty and independence of States; and, what was more, it was to be imposed on third States in the name of the sacred principle of *pacta sunt servanda*. That applied, of course, to the first treaty but not to the second. He was opposed to the inclusion of a rule to that effect in the draft. He could understand the concern expressed by Mr. Tunkin, but he questioned whether a State which wished to violate an international obligation had no other means of doing so than by concluding another treaty.

95. Furthermore, if the Commission laid down the rule that the first treaty had priority over the second, even vis-à-vis a third State which had not been a party to the first treaty, what guarantee was there that the rule would be observed? Only the same as that imposed with respect to the first treaty, the knowledge that a violation would involve international responsibility—though not for having violated the provisions of the first treaty but for having violated the rule in the Commission's draft.

The meeting rose at 1 p.m.

858th MEETING

Wednesday, 25 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.