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Summary record of the 831st meeting

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the provisions of a new treaty excluded the application of a rule of general international law.

78. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin and Mr. Cadieux. The provisions of article 41 were necessary because they dealt with a separate situation. Consequently, the Commission should hesitate to drop the article without careful reflection and without being sure that all the necessary provisions could be embodied in other articles. Articles 40 and 41 expressed different ideas which could not be grouped together in one and the same article.

79. Furthermore, as he had explained in his remarks concerning another article, he thought it would be dangerous to look into the preparatory work of multilateral treaties for the purpose of determining the intention of the parties to those treaties.

80. Mr. YASSEEN said that, if article 41 dealt only with the termination or the suspension of the operation of a treaty by a special tacit or express agreement, the article would not be necessary; its provisions could be incorporated in article 40, which dealt with the termination or suspension of a treaty by subsequent agreement.

81. In fact, however, as Mr. de Luna had said, article 41 dealt also with another problem, that of the objective incompatibility of two treaties. Such incompatibility deserved to form the subject of a separate article, largely because the point could not be covered in article 63, which dealt not with the termination of treaties but with the question which of two treaties prevailed. It would therefore be better to keep article 41 as a separate provision.

82. Mr. AGO said he had some doubt concerning the so-called objective reason for the termination of a treaty. In order to decide whether the provisions of a treaty were incompatible with those of another, both treaties had to be interpreted to enable the intention of the parties to be discussed; in other words, the criterion was still subjective.

83. The CHAIRMAN said it sometimes happened that, without any intention by the parties to terminate the earlier treaty, the actual object of the second treaty conflicted with that of the first. If a conflict of objects appeared in one and the same instrument, that instrument would be void; but if the conflict appeared between successive instruments, it was the later instrument which prevailed, just as in private law the testator's last will prevailed.

84. It was true that, where there were two treaties, both had always to be compared and interpreted for the purpose of determining whether there had been any change in the intention of the parties.

85. Sir Humphrey WALDOCK, Special Rapporteur, suggested that article 41 be referred to the Drafting Committee for general examination in the light of the discussion. His own position was much the same as that of Mr. Tunkin. A close study of articles 41 and 63 would reveal that article 63 did not come into play until it was decided that the treaty had not been terminated under article 41. He doubted whether it would be advisable to amalgamate articles 41 and 40.

86. He subscribed to the view that it would be better not to deal with the application of rules of interpretation, and that it would suffice to refer to the intention of the parties. The circumstances of each case would determine whether a reference to the preparatory work was admissible under articles 69 and 70.

87. He agreed with Mr. Tunkin that the word " exclusively " should be dropped.

88. Mr. ROSENNE said that he would have no objection to the article being referred to the Drafting Committee on the terms proposed by the Special Rapporteur.

89. The CHAIRMAN suggested that article 41 be accordingly referred to the Drafting Committee.

It was so agreed.[7]

The meeting rose at 1 p.m.

[7] For resumption of discussion, see 841st meeting, paras. 91-100.

831st MEETING

Friday, 14 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Other Business: Organization of Future Seminars on International Law

[Item 8 of the agenda]

1. The CHAIRMAN said that, during the first part of the Commission's seventeenth session, the European Office of the United Nations had, as an experiment, organized a seminar on international law. During the debates in the Sixth Committee of the General Assembly, several representatives had approved that action and had thanked the members of the Commission for their contribution. The General Assembly had expressed the hope that further seminars would be organized in connexion with the Commission's sessions and, if possible, would be attended by more participants, including a reasonable number of nationals of developing countries. He invited the representative of the Director-General of the United Nations Office at Geneva to make a statement.

2. Mr. RATON (Secretariat), speaking on behalf of the Director-General of the United Nations Office at Geneva, said that the first seminar had been organized on

an *ad hoc* basis by improvised means, without any special financial resources. It had nevertheless been a distinct success, thanks to the contribution of members of the Commission. In conformity with General Assembly resolution 2045(XX) of 8 December 1965, the United Nations Office at Geneva was ready to organize further seminars and to accept responsibility for their administration, while the Commission would be responsible for the academic side. In planning the next seminar, a number of questions would have to be considered, including the date, duration and programme of the seminar, the designation of the lecturers, choice and number of participants, and the question of fellowships.

3. In 1965, the seminar had begun in the second week of the Commission's session. The wish had been expressed that there should be some connexion between the date of the seminar and that of the courses of the *Académie de droit international* at The Hague. For practical reasons, however, the United Nations Office at Geneva would prefer the seminar to begin in the second or third week of the Commission's session, since early in the session the members of the Commission would have more time to devote to the seminar, and that was also the time when the Commission's own proceedings held most interest for participants in the seminar; later on in the session the discussions became more esoteric, particularly for those who had not followed them from the beginning.

4. The 1965 seminar had lasted two weeks. Most of the participants who had sent in comments in writing had expressed the wish that, while the number of lectures should not be increased, the duration of the seminar itself should be longer in order that participants might have more time to work in the library of the Palais des Nations. The idea was probably sound, and perhaps a seminar lasting two or three days longer might be arranged.

5. The programme of the seminar was naturally bound up with the Commission's own work; in 1966 it would again, therefore, deal with the law of treaties and with special missions, though lecturers would be free to deal with more general matters affecting the codification and development of international law, or other specific topics previously dealt with by the Commission.

6. He appealed to all the members of the Commission, in particular to those who had not done so at the first seminar, to agree to lecture to the next seminar. The participation of members of the Commission was obviously essential to the organization of seminars.

7. With regard to the choice of participants, there had been few developments since the summer of 1965. Out of the 18 candidates accepted for that seminar, 16 had actually attended. In order to secure a better geographical distribution of participants, provision would have to be made for a larger number, though 20 or 21 would be a maximum, since participants ought to be able to play an active part and to have personal contacts with the members of the Commission.

8. If participants were to be brought from Africa and Asia, funds would be needed to defray their travel and subsistence expenses. The United Nations Office at Geneva had no funds for that purpose and that was the weakest point of the scheme. The Governments of Israel and Sweden had announced their intention of granting one fellowship each to enable a national of a developing country to attend the next seminar. He hoped that other governments would follow that example so that in that way three or four persons from developing countries would be able to attend.

9. Mr. PESSOU said it appeared to be difficult to arrange for nationals of developing countries to attend, but countries like the United Kingdom, the United States, the USSR, Austria, France, Israel and others granted large numbers of scholarships for legal and diplomatic studies for African students, and those countries were Members of the United Nations. Similar grants were made by the Carnegie Endowment, the Ford Foundation and others. Surely it should be possible to deal with the problem of coordination.

10. Mr. AMADO, after thanking the United Nations Office at Geneva for its enterprise, which was in keeping with the Commission's function, said that, without wishing to commit himself, he hoped to be able to give some lectures, for he felt in duty bound to help to show the kind of work the Commission was doing.

11. The CHAIRMAN, speaking as a member of the Commission, said that of the six Yugoslav candidates, two had been officially admitted to the first seminar, while three had attended as observers. On his return home he had talked with all five and gathered that they had taken a keen interest in the Commission's work and in the lectures organized for the seminar, and that they had been pleased with the direct contact they had been able to have with members of the Commission. They would have liked other members of the Commission, in addition to the lecturer, to attend the lectures, for in that way it would have been possible to enlarge the debate. Perhaps the Commission might make plans for several of its members to attend some lectures dealing with general topics.

12. So far as the number of participants was concerned, 30 should be the maximum. Since some were bound to drop out and others would be absent from time to time, that would mean that about 20 would participate regularly and actively.

13. He hoped that fellowships would be granted for future seminars, but he realized that the choice of candidates raised a delicate problem. In order to ensure that fellowships were awarded to the best candidates, they should perhaps be chosen by the universities of their countries of origin.

14. Mr. RATON (Secretariat) thanked Mr. Amado for his kind words and, replying to Mr. Pessou's remarks, said that more than a question of coordination was involved, since the countries which offered fellowships generally wished their names to be associated with the fellowships and did not want the awards to be made through an international body.

15. The Chairman's suggestion that the candidates to whom fellowships were awarded should be chosen by universities deserved consideration. Perhaps a small committee could be appointed to study the entire question of the selection of participants.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach)

Article 42

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*b*) The other parties by common agreement either:

(i) To apply to the defaulting State the suspension provided for in sub-paragraph (*a*) above; or

(ii) To terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(*a*) The unfounded repudiation of the treaty; or

(*b*) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2 above, is subject to the conditions specified in article 46.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach. (A/CN.4/L.107, p. 38)

16. The CHAIRMAN invited the Commission to consider article 42, for which the Special Rapporteur in his fifth report had proposed a new text which read:

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) Any other party whose interests are affected by the breach to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*b*) The other parties by unanimous agreement to suspend or terminate the operation of the treaty either

(i) only in the relations between themselves and the defaulting State or

(ii) as between all the parties.

2 (*bis*). Notwithstanding paragraph 2, if theprovision to which the breach relates is of such a character that its violation by one party frustrates the object and purpose of the treaty generally as between all the parties, any party may suspend the operation of the treaty with respect to itself or withdraw from the treaty.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(*a*) The unfounded repudiation of the treaty; or

(*b*) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach. (A/CN.4/183/Add.2, p. 26)

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the former paragraph 4, on separability, would be left aside for the time being, as had been done in the case of other articles. He would not, therefore, discuss the Netherlands Government comment on that paragraph.

18. It was particularly significant that no government had raised any difficulty over the rule laid down in paragraph 1 for bilateral treaties, or the crucial paragraph 3, which defined the term " material breach " for the purposes of the article.

19. Government comments (A/CN.4/183/Add.2), had centred on the provisions of paragraph 2. The Netherlands and United States Governments had suggested that the words " Any other party " should be qualified so as to specify that only a party whose rights or obligations were adversely affected by the breach could invoke it as a ground for suspending the operation of the treaty. In his own observations on that point he had pointed out that paragraph 2 (*a*) had been intended by the Commission to refer primarily to the rights of parties whose own interests were affected. But since in every multilateral treaty there was a certain general interest by all the parties in the observance of the treaty, he personally would hesitate to introduce any qualification. However, in order to enable the Commission to discuss the problem, he had inserted in his redraft of paragrapq 2 (*a*), after the opening words " Any other party ", the words " whose interests are affected by the breach ".

20. The United States Government had proposed the introduction of a similar qualification in paragraph 2 (*b*), and in his own observations he had explained the reason why such an amendment seemed to him inadmissible, namely, that it would be contrary to the whole approach adopted by the Commission for paragraph 2 (*b*). It was significant that the Netherlands Government had not associated itself with that United States proposal.

21. The Government of Canada had suggested that, in the event of the breach of a treaty which required the parties to refrain from some action, an individual party other than the defaulting State should be entitled to suspend the operation of the treaty with regard to all the parties without having first to obtain the agreement of the others. He had some doubts as to the validity of that suggestion, which in any case appeared to go

much too far. He had therefore put forward tentatively an additional paragraph 2 (*bis*), which introduced the proposed exception in somewhat more restrictive terms and would enable the Commission to examine the question.

22. He had redrafted paragraph 2 (*b*) so as to enable the other parties to the treaty not only to suspend, but also to terminate, the treaty in the relations between themselves and the defaulting State. The 1963 text had only made provision for suspension *vis-à-vis* the defaulting State. Yet both the 1963 text and the new text enabled the other parties to suspend or terminate the operation of the treaty as between all the parties.

23. Mr. ROSENNE said that he fully agreed with the Special Rapporteur's statement in paragraph 1 of his observations (A/CN.4/183/Add.2, p. 21) in support of his refusal to make a distinction between contractual and law-making treaties. Any such distinction could only be arbitrary. In the arguments submitted to the International Court of Justice by Sir Hartley Shawcross, Sir Gerald Fitzmaurice, Professor Rousseau and himself in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, that Convention had been dissected and extremely divergent opinions expressed as to what parts were normative and what parts contractual. In his view, the expression of those opinions had not facilitated the task of the Court.

24. On the point raised by the United States and Netherlands Governments, he doubted the validity in law of the distinction which those governments attempted to draw, in the case of a multilateral treaty, between an interested party whose rights and obligations were affected by the breach, and other parties to the treaty. It was significant that paragraph (7) of the commentary to article 42 as adopted by the Commission in 1963 used the expression " party affected by the breach ".[1]

25. The concept of a " legal interest " was extremely ill-defined in international law and the International Court of Justice, in a number of recent major cases, had refused to attempt any general definition of what that term contained.

26. As a matter of principle, he felt strongly that all parties to a multilateral treaty had the same interest with regard to the observance of a treaty, so long as it was in force. It was on that basic philosophy that were based the provisions of Article 63 of the Statute of the International Court of Justice, which gave the right to any party to a multilateral treaty to intervene in a case which involved the construction of the treaty. That absolute right to intervene in a case stood in marked contrast with the qualified right of intervention for which provision was made in Article 62 of the Statute.

27. The Special Rapporteur had put forward a similar view when he had stated in paragraph 3 of his observations : " that the interests of one party may be seriously affected by the violation of the rights of another party; and also that every other party to a multilateral treaty — even a treaty which is essentially bilateral in its application — has a certain interest in the observance of the provisions of the treaty by every other party " (A/CN.4/183/Add.2, p. 23). In paragraph 4, the Special Rapporteur mentioned " the right which every party to a multilateral treaty has to the observance of the treaty by every other party ".

28. If the qualification requiring a legal interest were introduced into paragraph 2, and a case were submitted to the International Court of Justice under article 51 of the draft and Article 33 of the Charter, the result might well turn out to be in complete contradiction with the terms of Article 63 of the Statute of the Court.

29. A number of examples from the draft articles adopted by the Commission in 1965 could be given in support of that conception of the general interest of all the parties to a multilateral treaty in its observance. Thus article 20, paragraph 1, as adopted at the first part of the session,[2] required the notification to all the contracting States not only of a reservation but also of the acceptence of, and the objection to, a reservation. In the light of the element of bilateralism which the Commission had adopted on the subject of reservations, such notification of acceptances of and objections to reservations to all the parties was understandable only on the basis that they all had both a right and a legal interest in all that concerned the treaty.

30. Similarly, paragraph 2 of article 29 stated that any difference that might appear between a State and the depositary as to the performance of the latter's functions must be brought " to the attention of the other contracting States ". The Commission had thereby recognized that all the contracting States had a legal interest in all that concerned the execution and the application of the treaty.

31. Another strong argument against the introduction of the concept of legal interest into paragraph 2 of article 42 was that it would also have to be introduced into such articles as article 44, on fundamental change of circumstances, a course which he for one would strongly oppose.

32. For those reasons, he shared the Special Rapporteur's hesitations and urged that the amendment proposed by the Netherlands and United States Governments should not be introduced into paragraph 2.

33. He accepted the Special Rapporteur's rewording of paragraph 2 for the purpose of covering both suspension and termination, but felt that the relevant passage should read " to terminate or suspend " rather than " to suspend or terminate ".

34. With regard to the Canadian Government's suggestion, he felt that the new paragraph 2 (*bis*) introduced a highly subjective element. The problem raised by the Canadian Government should be covered by the provisions of article 44. In any case, it would not be appropriate to introduce into article 42 the concept of frustration of the object and purpose of the treaty, which had its origin in a ruling introduced by the International Court of Justice on the specific question of the admissibility of a reservation.

[1] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 205.

[2] *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009), p. 8.

35. On the whole, he preferred the 1963 text of article 42, with some necessary drafting changes.

36. Mr. VERDROSS said that, with regard to the drafting, paragraph 1 could be simplified and would be more correct if the words " invoke the breach as a ground for " were omitted, so that the passage then read " ... entitles the other to terminate the treaty or suspend its operation ... ", for the real reason might be quite different. The State had the right to terminate the treaty or to suspend its operation in whole or in part if the conditions laid down in the article were present. Paragraph 2 (*a*) should be amended in the same way.

37. With regard to the substance, he agreed with Mr. Rosenne that each of the parties to a multilateral treaty had an interest in the observance of the treaty. A breach of the treaty might affect the rights of one particular party more specifically, but it undoubtedly prejudiced the interests of all the parties. Consequently, the word " interests ", in paragraph 2, should be replaced by the word " rights ".

38. Paragraph 3 had the merit of being the first attempt to define what was meant by " a material breach " of a treaty, but the expression " unfounded repudiation " did not seem quite right. A breach could hardly be justified, and therefore the word " unfounded " should be omitted.

39. Mr. CASTRÉN said that article 42 dealt with important and delicate questions. Paragraph 2 in particular, which covered the case of a breach of a multilateral treaty, raised some very complex problems. The Special Rapporteur's revised version seemed to take into account the main comments by governments and was a great improvement on the earlier text.

40. The Special Rapporteur proposed that, in paragraph 2 (*a*), the words " whose interests are affected by the breach" should be added. The addition did not change the meaning of the paragraph to any great extent for, as the Special Rapporteur observed in his report, every party to the treaty had an interest in the observance of the treaty. For the reasons mentioned by other speakers, he (Mr. Castrén) would prefer that the 1963 text should not be amended in that respect.

41. Under paragraph 2 (*b*) of the redraft, the innocent parties had the right, if in unanimous agreement, to exclude the defaulting State from the treaty, and that was a possibility that should be provided for in the draft. From the drafting point of view he preferred the expression " *d'un commun accord* " (" by common agreement ") to the expression " *de façon unanime* " (by unanimous agreement).

42. He was also prepared to accept the new paragraph 2 (*bis*). The provision it contained should satisfy the concern expressed by several governments and which he had himself voiced in 1963. As the Special Rapporteur had observed, the case dealt with by the new paragraph was comparatively rare, but it was conceivable and should therefore be covered in the draft. Unlike Mr. Rosenne, he did not think that the case was covered by the provisions of the article concerning fundamental change of circumstances.

43. With regard to the drafting, the new paragraph 2 (*bis*) raised a difficulty in that it defined the meaning of " breach " for that particular case, whereas the general definition of breach did not come until the next paragraph. It was hardly likely that the difficulty could be removed by simply reversing the order of the two paragraphs.

44. Mr. Verdross's proposal for paragraph 1 was more than a drafting change; it would involve a change of substance which would prejudice the stability of treaties. That was why he (Mr. Castrén) was reluctant to agree to it.

45. Mr. BRIGGS said he was opposed to Mr. Verdross's suggestion to replace in paragraph 1 the words " to invoke the breach as a ground for terminating " by the words " to terminate ". That suggestion was perhaps based to some extent on the inaccurate rendering of the word " ground " by " *motif* " in the French version. In 1963, he himself had abstained from voting on the corresponding provision because of the possible implication of a unilateral right to withdraw from the treaty. If the present wording of paragraph 1 were retained, and the understanding was that there existed not a unilateral right of withdrawal but a right to invoke the breach as a ground for terminating the treaty, he would be prepared to accept it.

46. Incidentally, there was a contradiction in paragraph (6) of the commentary that would have to be remedied. The second sentence correctly stated " that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated ", but the fourth and fifth sentences incorrectly went on to state " ... the action open to the other party ... is either the termination or the suspension ... " and referred to " the right " to take such action.[3]

47. He was not in favour of the amendment suggested by the United States Government to paragraph 2 (*a*) and shared the view of Mr. Rosenne that all the parties to a multilateral treaty had the same interest with regard to any violation of the treaty, although particular interest might vary with the type of treaty — consular, right of passage, disarmament, or law-making.

48. Similarly, in paragraph 2 (*b*), he was not in favour of introducing language which would limit the application of the paragraph to States whose rights or obligations were adversely affected. The original language, which extended the right to all the other parties, should be retained.

49. The wording of sub-paragraph (i) of the Special Rapporteur's rewording of paragraph 2 (*b*) was ambiguous, and he suggested as an alternative: " only in their relations with the defaulting State ".

50. The provisions of paragraph 2 (*bis*) went much too far and he could not support their inclusion; they appeared to establish a right to suspend the operation of the treaty by unilateral action, not only with the defaulting State but with all parties. It should be noted that paragraph 2 (*b*) gave the right to suspend or terminate the operation of the treaty to " the other parties by unanimous agreement ". Such a right was perfectly

[3] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 206.

admissible, since it involved unanimous action by all the parties concerned.

51. Paragraph 2 (*bis*) raised a further difficulty through its reference to " the object and purpose of the treaty ". It was difficult to see the difference between that criterion and the one laid down in paragraph 3 (*b*).

52. The provisions of paragraph 3 were still imperfect. Did, for example, mere non-performance constitute a breach of a treaty?

53. He could accept article 42 without paragraph 2 (*bis*), and subject to drafting changes.

54. Mr. YASSEEN said that in his opinion article 42 was fully justified; therefore, since governments had not questioned its presence in the draft, he would confine his comments to the changes proposed by the Special Rapporteur.

55. If a multilateral treaty was violated by any one of the parties, that breach might be said to affect the interests of all the parties, for by being a party to a multilateral treaty a State had an interest in the observance of the treaty by all the parties. Apart from that general interest, however, a party might have a more specific interest in seeing that another party fulfilled towards it the obligations laid down in the treaty. Treaties which, in a multilateral form, regulated what were essentially bilateral relations — for example, the Vienna Convention on Consular Relations — demonstrated both the general interest of the parties in the observance of the treaty, and the particular interest of each party in seeing that its own rights under the treaty were respected. That idea was reflected in paragraph 2 as redrafted, but he hoped that it would be expressed even more clearly.

56. The Special Rapporteur's redraft made provision for the exclusion of the defaulting party, a sanction not contemplated in the earlier text. Possibly, however, the suspension of the operation of the treaty with respect to that party might suffice, in that it would compel that party to reflect and would encourage it to respect its obligations. It was not a desirable step to exclude a party, even if decided upon by common agreement among the parties. And incidentally, even if the expressions " *d'un commun accord* " and " *de façon unanime* " were synonymous, he preferred the former.

57. With regard to paragraph 2 (*bis*), while appreciating the idea underlying the comments of governments, he did not think that provision should be made for so far-reaching a step as withdrawal, even in the circumstances contemplated in the paragraph. It would be sufficient to authorize the State concerned to declare that it was suspending the operation of the treaty so far as it was concerned.

58. In general, he approved the revised draft of paragraph 42.

59. Mr. CADIEUX said that, on the whole, he approved of the revised draft proposed by the Special Rapporteur, which stated a principle that was generally accepted.

60. He agreed with Mr. Yasseen that paragraph 2 (*a*) should distinguish between the general interest of all the parties and the specific and direct interest which might arise out of an adjustment made, within the general context of the treaty, between two or more parties but not all the parties to a treaty.

61. He supported paragraph 2 (*bis*). The Special Rapporteur had rightly noted that the Canadian Government's proposed amendment had been directed particularly towards possible conventions concerning disarmamant. He had also been right to modify in narrower terms the more general formula proposed in 1963. While it was possible to argue, as Mr. Rosenne did, that the case might conceivably be covered by the *clausula rebus sic stantibus*, the specific change in circumstances visualized by the article was the breach of a treaty. There was nothing wrong in defining that more clearly in a provision devoted to the specific problem.

62. The case was not that covered by the terms of paragraph 2 (*b*), where collective action was indicated. In the type of treaty covered by paragraph 2 (*bis*), a treaty concerning the non-proliferation of nuclear weapons, for example, a State which noted that a neighbouring State had violated the treaty would certainly not be disposed to contemplate the annulment of the treaty only if all the other parties agreed.

63. Nor was the case one of material breach covered by paragraph 3, though there was a connexion between paragraph 2 (*bis*) and paragraph 3. It was really a drafting question rather than one of substance. If the Commission accepted the idea that some treaties might be so important for the parties that the violation of such treaties made it impossible for the States which had committed themselves to the treaty to remain parties thereto, it might amend paragraph 2 (*bis*) by adding a reference to the case covered by paragraph 3 or, conversely, redraft paragraph 3 so as to refer to the idea mentioned in paragraph 2 (*bis*).

64. Mr. de LUNA said he fully agreed with the Special Rapporteur's statement of the principle that the material breach of a bilateral or multilateral treaty by one of the parties constituted grounds for terminating or suspending the operation of the treaty. That principle followed not from the law of reprisals but from that of the reciprocity of the rights and duties of the contracting parties, which in turn followed from the overriding principle laid down in the Charter — the sovereign equality of States.

65. It was true that the Permanent Court of International Justice, when asked to decide in the Case concerning certain German Interests in Polish Upper Silesia whether the violation of the Geneva Convention[4] by Germany authorized Poland to suspend the operation of that treaty, had refrained in its judgment from giving a decision on that point.[5] However, although there was not much case-law, there were plenty of examples in treaty practice. Under article 35 of the Universal Postal Convention,[6] which dealt with the transit of mail, if a country violated that multilateral convention by not allowing mail to pass through, the other member-countries were at liberty to suspend the operation of the convention and to discontinue their postal service with that country.

[4] Convention between Germany and Poland relating to Upper Silesia, 15 May 1922, League of Nations document C.396.M.243.

[5] *P.C.I.J.*, 1925, Series A, No. 6.

[6] United Nations *Treaty Series*, Vol. 364.

66. Mr. Verdross had rightly said that a breach was never justified. It was self-evident that the non-performance of a multilateral treaty in pursuance of economic sanctions under Article 41 of the Charter was not a breach and so did not constitute grounds for the suspension or termination of a treaty. The point might, however, be mentioned in the commentary.

67. With regard to Mr. Rosenne's remark that the *clausula rebus sic stantibus* should operate in cases where article 42 was not applicable, he said that the clause would certainly operate if, through no fault of its own, a State was not applying a treaty by reason of a change of circumstances. Was it right to speak of a material breach by one party if the breach was the consequence of a provocation by another party? In such a case, there was indeed a breach but it could no longer be described as a material breach.

68. With regard to the case of a breach of multilateral treaties envisaged by Sir Gerald Fitzmaurice in his second report,[7] what he (Mr. de Luna) had in mind was not so much a treaty for the non-proliferation of nuclear weapons, the example already cited, as a multilateral treaty of humanitarian character. Where the treaty was violated, suspension should not be made too easy — and in that respect he agreed with Sir Gerald — for the treaty was necessary to and in the interests of the entire international community.

69. Paragraph 1 should not be simplified quite as radically as Mr. Verdross had suggested. It would be a psychological mistake to encourage States to think that they could denounce an instrument unilaterally.

70. He agreed with Mr. Yasseen's remarks concerning paragraph 2. The word " rights " would be better than the word " interests ", for whereas all the parties to a multilateral treaty had an interest, only some had a subjective right deriving from the objective law laid down in the treaty. Besides, even where a multilateral treaty was intended to regulate bilateral relations, it manifestly satisfied a general interest, for if it were not so, there would have been neither an international conference nor a multilateral treaty. To take an example from his own experience, shortly before the opening of the Vienna Conference on Consular Relations, he had taken part in the negotiation of a consular convention with the United Kingdom, which had concluded some 14 treaties of the same nature because it had had a general interest in seeing that certain principles, which had been confirmed at Vienna, should be established by a treaty even before the Conference. That was understandable seeing that the United Kingdom, which had followed a policy of decolonization and had interests throughout the world, now employed more consuls than other countries.

71. He approved paragraph 2 (*bis*), which caused him no anxiety, for the case of a treaty whose object was frustrated by a breach was governed by pure logic. If, for example, there was a treaty regulating passage through a strait and as the result of a nuclear explosion the strait disappeared, then passage ceased to be possible and the object of the treaty was frustrated.

72. Mr. TUNKIN said that, as in 1963, he was concerned about the way in which article 42 would affect general multilateral treaties[8] as distinct from treaties that were not of a general character. The distinction between contractual and law-making treaties was not relevant to the subject of the article. The practical effect of applying, say, paragraph 2 (*a*) might be to suspend the whole operation of a treaty when only one of its provisions had been violated. That would be the very undesirable result, for example, if a State refused to grant customs privileges to the diplomatic agents of another State, both having ratified the Vienna Convention on Diplomatic Relations. He therefore suggested that the Drafting Committee consider the possibility of stipulating that, in cases of breach of a general multilateral treaty, the suspension might apply only to the provision that had been violated. It seemed to him that some kind of limitation of that kind was definitely needed. Such a limitation would not exclude reprisals whenever authorized by international law.

73. He agreed with what had been said about all the parties having an interest in the observance of a general multilateral treaty; the Special Rapporteur's suggestion to include the words " whose interests are affected " seemed wide enough to cover any kind of interest, including indirect interests. If it were thought preferable to substitute the words " rights " for the words " interests ", that should not give rise to any serious objection.

74. He had not had time to study paragraph 2 (*bis*) of the Special Rapporteur's new text with sufficient care, but at first sight it seemed to contain a useful provision concerning contingencies which occurred in real life and to the existence of which the attention of States ought to be drawn.

75. Mr. VERDROSS, referring to comments by members of the Commission on the words " invoke the breach as a ground for terminating . . . ", said that in the past the Commission had always clearly distinguished between rules of substance and rules of procedure. If it intended to say that, in the case covered by the provision in question, a certain diplomatic procedure had to precede the declaration terminating the treaty or suspending its operation, then it was mixing up the two types of rules. If such was its intention, it should say so expressly.

76. In reply to Mr. Yasseen, he said that there might be legitimate reasons for repudiating a treaty, but if that was the idea to be conveyed it should be stated in terms by means of some such wording as: " The repudiation of the treaty if not authorized by another provision of this convention ".

77. The CHAIRMAN, speaking as a member of the Commission, said that the only point which caused him concern was that of multilateral treaties of general interest, a point which had been stressed by Mr. Tunkin. The question whether, in the event of a material breach, the parties should have the right to withdraw from the treaty altogether had arisen when the Vienna Conference had considered the Commission's draft on diplomatic relations. In the end, the Conference had not recognized

[7] *Yearbook of the International Law Commission, 1957*, Vol. II, pp. 30 and 31, art. 18, para. 3 (*a*), and art. 19.

[8] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 245.

the right of the parties to regard the mistaken application of the Convention as a general violation entitling them to escape from the obligations of the entire convention. There was, of course, a shade of difference between the two cases, but the fundamental idea was the same: to disturb as little as possible the international legal order in cases where it was undoubtedly in the general interest to uphold the established order.

78. If it followed the solution proposed, the Commission would be endorsing André Weiss's theory of " circles " in the application of one and the same convention. Weiss had said that, in time of war, the operation of multilateral treaties and of so-called universal conventions was suspended between the belligerents: there was one circle comprising neutrals, another circle comprising neutrals and belligerents on both sides, and a third circle comprising the belligerents on one side or the other and neutrals. The question had had a practical interest for the purpose of dealing with problems of infringements of trade-marks, patents and artistic and literary rights; it had been introduced into the Treaty of Versailles and other related treaties.

79. In view of the increase in the number of multilateral treaties of general interest, Mr. Tunkin's statement was very pertinent. The Commission should endeavour to work out a solution which would have the effect of mitigating as far as possible the consequences even of a material breach. If the breach was purely bilateral, it was easier to determine at what point reprisals stopped, but the reactions between the two States might prejudice the stability of inter-State relations throughout the world. Consequently, in drafting a convention on the law of treaties which it regarded as a source of general rules, the Commission should endeavour to forestall any possible malpractice and should not admit anything that would allow of a broader interpretation than it intended.

80. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer to sum up the discussion on article 42 at the next meeting, as a number of interesting points had been raised and it would be useful to have further time for reflection.

The meeting rose at 1 p.m.

832nd MEETING

Monday, 17 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 42.

2. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that on paragraph 1, which dealt with the comparatively simple problem of the material breach of a bilateral treaty, the only point raised had been the suggestion by Mr. Verdross that the words " to invoke the breach as a ground for terminating " be replaced by the words " to terminate ". Like many members of the Commission, he felt it preferable to retain the wording which had been deliberately chosen in 1963.

3. The important provisions of paragraph 3, which defined the term " material breach ", had not attracted much comment. Mr. Verdross had suggested the deletion of the world " unfounded " before " repudiation of the treaty ", but the general feeling had been that a qualification of that kind was necessary because, under the draft articles, there could well be some cases of perfectly legitimate repudiation. The Drafting Committee might consider replacing the adjective " unfounded " by some such formula as " not justified by any of the provisions of the present articles ".

4. It was paragraph 2 that had attracted the bulk of government comments. The Netherlands and United States Governments had suggested that the words " Any other party " be qualified so as to specify that only a party whose rights or obligations were adversely affected by the breach could invoke it as a ground for suspending the operation of the treaty. In order to give the Commission an opportunity of discussing the problem raised by those two governments, he had introduced into his redraft of paragraph 2 (*a*) the more general wording " whose interests are affected by the breach ", after the words " Any other party ". The discussion had shown that many members of the Commission felt that all parties to a multilateral treaty had a general interest in its observance by every other party. At the same time, others considered that parties might have different degrees of interest in a breach committed by a party.

5. On that same paragraph, Mr. Tunkin had raised an important question of substance when he had suggested that, for certain general multilateral treaties, especially such codifying treaties as the two Vienna Conventions of 1961 and 1963, the suspension should relate only to that part of the treaty which had been the subject of the material breach. He hesitated to support that suggestion, although he appreciated the reason which had inspired it. When a State committed a material breach of one of the clauses of a general multilateral treaty, it might be totally unconcerned at the possible suspension

[1] See 831st meeting, after para. 15, and para. 16.