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690th MEETING

Thursday, 30 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

85. It had been suggested that the intention to permit denunciation could be inferred from the *travaux préparatoires*. But it was a rule that, where the text of a treaty was clear, it was not permissible to refer to the *travaux préparatoires*. And, where a treaty contained no clause on the subject of denunciation or termination, it could be urged that the text of the treaty was clear and that it did not provide for the right to denounce. The difficulty could perhaps be resolved by a provision stating that reference could be made to the *travaux préparatoires* for the purpose, with due regard to the nature of the treaty.

86. With regard to the proposals that paragraph 3 (b) should be deleted, his purpose in including that provision had been to exclude from the operation of the rule embodied in article 17 treaties which were constituent instruments of international organizations. When adopting the various articles of Part I at the previous session, the Commission had usually made an exception for such treaties or referred to the constitutional practice of international organizations.

87. With regard to Mr. Gros' suggestion, the idea of re-negotiation was very interesting, but he felt that cases which came under that heading would hardly present any real difficulty. The purpose of article 17 was to deal with cases in which no agreement had been reached by the parties and it was necessary to determine whether a right to denounce the treaty existed. If such a right were granted, it would have the important effect of persuading the other party to re-negotiate; the absence of such a right could leave one of the parties at the mercy of the other. The absence of a specific provision on the subject of denunciation or termination of a treaty was often due to mere oversight, especially in the case of treaties in simplified form.

88. His views had not been influenced in any way by those of Giraud or indeed of any other writer, although he had drawn inspiration from certain writers, mainly English, in the selection of examples. Essentially, the provisions of article 17 were based on state practice. Since, in the great majority of cases, treaties contained provisions on the subject of denunciation or termination, it was reasonable to assume that States normally regarded it as important that treaties should have a limited duration.

89. He suggested that he should undertake the re-formulation of articles 15, 16 and 17 in the light of the discussion; in the case of article 17, he would endeavour to formulate the rule first and to make the exceptions follow. The Drafting Committee could consider and finalize the new texts, which would then be submitted to the Commission for its consideration.

90. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur.

It was so agreed.

The meeting rose at 1.5 p.m.

1. The CHAIRMAN invited the Commission to consider article 18 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 18 (TERMINATION OF A TREATY
BY SUBSEQUENT AGREEMENT)

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing the article, said he had prepared a somewhat lengthy text because he considered it necessary to formulate a number of problems that arose in connexion with the termination of a treaty by subsequent agreement in order to give members an opportunity to express their views on those problems.

3. Paragraph 1 dealt essentially with the question of the unanimity necessary for the termination of a treaty. Its provisions followed from the position adopted by the Commission regarding the articles in Part I of the draft on the participation of new States in a multi-lateral treaty.

4. Some members might perhaps feel that the provisions of paragraph 1 (a) were unnecessarily complicated. Basically, like those of paragraph 1 (c), they embodied the rule that the unanimous agreement of the parties to a treaty was necessary for its termination. Paragraph 1 (a), however, took into account an additional point: the interest of other States which might have a right to accede to the treaty. It would be for the Commission to consider whether article 18 should specify that the consent of those States would also be required, at least for a certain period after the conclusion of the treaty.

5. Paragraph 1 (b) dealt with a somewhat exceptional case and its provisions were analogous to the corresponding ones in Part I on the subject of participation in a treaty. Some members might wish to omit that paragraph, but he thought the point should be covered in article 18.

6. Paragraph 2 was based on the logic of applying to the question of termination the provisions contained in the treaty itself concerning the procedure for its amendment or revision. It could, of course, be argued that the parties were masters of their own procedure and it might therefore be necessary to insert at the beginning of the paragraph the proviso "Unless the parties otherwise decide".

7. Paragraph 3, although it related to the form of the agreement, in fact dealt with certain points of substance. It was not at all uncommon for a treaty to be terminated by drawing up a new treaty to replace it. The

question which arose was whether less formal ways of termination could be accepted, such as negotiations which did not lead to the signature of a new treaty. The case covered in paragraph 3 (c) was close to that of desuetude; it was often not at all easy to distinguish between one form of termination and another.

8. Paragraph 4 was purely procedural; it could perhaps be transferred elsewhere in the draft but he thought that, for the time being at least, there was some advantage in keeping it in article 18.

9. Paragraph 5 was merely intended to cover the possibility of suspension as an alternative to termination of an agreement.

10. Mr. CASTRÉN said that in general he approved the line taken by the Special Rapporteur and the way he had formulated the article. He would therefore confine himself to comments on a few points of detail.

11. The distinction made in paragraph 1 between treaties drawn up at an international conference and other kinds of treaties was fully justified. Some account should, indeed, also be taken of the opinions of States which had participated in the conference but had not yet become parties to the resultant treaty, when termination of that treaty was contemplated.

12. It was also normal practice to consult governments on the length of the period for which such States retained the right to become parties to the treaty. The Special Rapporteur had stated in his commentary that he had in mind a period of ten years; in his (Mr. Castrén's) opinion, a much shorter period could be fixed.

13. The provision in paragraph 2, which contained a rule *de lege ferenda*, seemed both logical and practical. When a treaty prescribed a specific procedure for its amendment or revision, it was arguable that that procedure could also be applied for its termination, since complete revision in fact meant the replacement of the original treaty by a new one, and consequently the termination of the first treaty.

14. The provision in paragraph 3 (c), on the other hand, might perhaps lead to difficulties in application, but it should no doubt be considered in the light of paragraph 4, which satisfactorily regulated the procedure to be followed for treaties having a depositary. It might be advisable to extend the application of paragraph 4, to make it cover all multilateral treaties.

15. Paragraph 5, which likewise seemed to state a rule *de lege ferenda*, was justified and acceptable.

16. Mr. ROSENNE said that on the whole he shared the views expressed by Mr. Castrén. However, paragraph 1 (a) made no distinction between signatories as such and other States which had participated in drawing up the treaty. In that respect it followed article 9 of Part I on participation in treaties. However, in article 19 of Part I, dealing with acceptance of and objection to reservations, the position of the signatories had been rather more definitely brought out in connexion with a similar problem, and he thought that example should be followed in the present context.

17. With regard to the concluding provision of paragraph 1 (a), he thought that a specified period somewhat shorter than the ten years suggested by the Special Rapporteur — perhaps five years — would better protect the interests of signatories, and that the specified period should run not from the date of the adoption of the treaty, but from the date of its entry into force.

18. Paragraph 2 should be retained, but the commentary should make it clear that it referred to the termination of the treaty as a whole and not to the cessation of participation in it by an individual State.

19. Paragraph 4 (a) should ultimately be included in article 29 of Part I. At the present stage, however, its provisions should be left in article 18, so that the point they covered was not overlooked during the second reading. Paragraph 4 (b) ought to remain in article 18 on the analogy of article 19, paragraph 3, in Part I.

20. Mr. YASSEEN said that the rules proposed by the Special Rapporteur in article 18 were logical and in conformity with the general principles of law. While he readily acknowledged that account should be taken of the interests of States which had not yet become parties to the treaty, and that their right to accede to it should be respected, he suggested that it might be possible to go a little further and require the agreement, not only of two-thirds of the States which had drawn up the treaty, but of two-thirds of the States which were entitled to accede to it.

21. The expression "within an international organization", used in paragraph 1 (b), seemed to him to be too broad, for it could include treaties drawn up at an international conference. It would therefore be preferable to speak of a treaty adopted by an organ of an international agency.

22. Moreover, it would seem logical to lay down stricter conditions concerning the binding force of the instrument by which a treaty was terminated, and to require that it should have the same legal force as the instrument by which the treaty had been concluded.

23. Mr. LACHS said he agreed with the general outline of article 18 and, in particular, with the principle of a qualified majority stated in paragraph 1 (a). The figure of two-thirds corresponded to the majority specified in most treaties of the type under consideration, though there were exceptions; the Universal Postal Convention of 1878, for example, specified a majority of three-fourths.

24. In paragraph 2 of his commentary, the Special Rapporteur touched on a point which was not fully reflected in the text of the article, namely, the "strongly entrenched principle of international law that a treaty cannot by itself deprive third States of their rights under a prior treaty". It was essential to define what was a third State, a problem to which the Chairman of the Commission had made an important contribution in an article published in the *American Journal of International Law*.¹ The Special Rapporteur appeared

¹ Jiménez de Aréchaga, E., *Treaty Stipulations in favour of third States*, *American Journal of International Law*, 1956, Vol. 50, pp. 338 ff.

to consider as third States those which had participated in the drafting of the treaty but had not become full parties to it. There were cases, however, in which some States participated in the drafting of a treaty, but *ex definitione* took no part in it and were not meant to become parties to it. Their rights were specifically laid down in the treaty, however, and they intended to avail themselves of those rights. It had been stated by the Permanent Court of International Justice in a well-known judgment that "rights of third States should not be lightly presumed," but there were cases in which they were quite clearly stated.

25. There were also cases in which a treaty contained provisions in favour of third States that had not participated in the drafting. The Paris Peace Treaties of 1947² contained certain provisions in favour of the States termed "the United Nations". In fact, a number of the States which constituted the "United Nations" — as defined in those treaties — were not signatories to them, but nevertheless benefited from the rights stipulated in the treaties, especially the most-favoured-nation clause. Another example was the Aaland Islands Convention of 1856, which had stipulated certain rights in favour of a non-contracting party, Sweden. The Committee of Jurists appointed by the League of Nations Council had held that Sweden was entitled to benefit from the treaty, although not a party to it, until the treaty was terminated by the parties.³

26. When certain rights were clearly specified in favour of a third State, and that State had availed itself of those rights, the parties to the treaty were no longer free to dispose of the rights of that third State. For example, Poland had not been a party to the 1918 Armistice Agreement or to the Convention of Spa, but was nevertheless entitled to certain rights under those agreements.

27. A case of that kind could arise under the provisions of paragraph 1 (b); an agreement could be entered into within an international organization to set up a new State, which would not, of course, be a party to the agreement. He had in mind United Nations decisions setting up as independent States certain countries formerly under trusteeship. He invited the attention of the Special Rapporteur to the question whether the parties to an agreement of that type, which could take the form of a treaty, were entitled to go back on its terms to the detriment of the newly independent State, which was not a party to the agreement under which it had come into independent existence.

28. Mr. AGO observed that article 18 was one which raised no question of principle, but only a question of expediency in regard to certain rules to be followed in order to secure the best possible results. Any rule would be to some extent arbitrary, since time limits and majorities had to be fixed. On the whole, however, the Special Rapporteur's draft seemed entirely acceptable.

² United Nations *Treaty Series*, Vols. 41, 42 and 49.

³ League of Nations *Official Journal*, 1920, Special Supplement No. 3, pp. 18-19.

29. Article 18 dealt with the termination of a treaty by subsequent agreement, where the treaty contained and — more important — where it did not contain, an express termination clause. It might perhaps be preferable to start from the essential rule stated in paragraph 1 (c), that the mutual agreement of the parties was required for the termination of a bilateral treaty. That also applied to a multilateral treaty, when it was not a general multilateral treaty, even though the rule was sometimes difficult to apply in practice.

30. In the case of a treaty "drawn up within an international organization" the solution proposed in paragraph 1 (b) was self-evident. He also approved of the rule stated in paragraph 2 for treaties prescribing a special amendment or revision procedure, since in the extreme case amendment was tantamount to termination.

31. A practical problem arose where a treaty had been drawn up at an international conference. In addition to the agreement of all States which had become parties, paragraph 1 (a) required the agreement of two-thirds of the States which had drawn up the treaty. In most cases it was, of course, a majority of two-thirds of the States which had drawn up the treaty that was required for its adoption, but perhaps the principle should be, precisely, that the majority required for terminating a treaty must be the same as that required for its adoption. That would make the rule appear rather less arbitrary. He also agreed with Mr. Yasseen that it would be better to refer to the States entitled to accede to the treaty than to those which had taken part in drawing it up.

32. As to the need for the agreement of "all those which have become parties to the treaty", he would make no proposal or criticism. He pointed out, however, that a single State would be able to veto the termination of the treaty, and he wondered whether the rule might not sometimes prove rather inflexible.

33. The most usual case was, of course, that provided for in the last phrase of paragraph 1 (a). It was unlikely that the parties would wish to terminate a treaty drawn up by an international conference until a long period had elapsed since its conclusion. In the normal case provided for, the States which were entitled to accede to the treaty but had not done so would have nothing more to say. But should complete unanimity of the parties be required? That would be the most logical rule, but where a treaty had many signatories there would be some danger of a veto by a single State. A certain arbitrary element could not be avoided in any case, but from among the possible arbitrary rules the most practical rule should be chosen.

34. With regard to paragraph 3, he was not sure that an enumeration of the various forms of agreement terminating a treaty was needed in the article; it might be more appropriate in the commentary.

35. As to paragraph 4, he wondered whether withdrawal, which had already been considered in conjunction with denunciation and which did not result in termination of the treaty, should be dealt with in sub-paragraph (a).

36. Mr. de LUNA said that, as several previous speakers had observed, article 18 should start from the general principle, not from an enumeration of particular cases. Paragraph 1 should therefore be in the form of a declaration, which might read:

“A treaty may be terminated at any time by any kind of mutual agreement, even tacit, between all the parties.”

37. He doubted whether States which had participated in the adoption of a treaty but had not yet become parties to it should have the right granted them by paragraph 1(a). The commonest reason for States failing to ratify a treaty was oversight or negligence. Legally, such States had no acquired right, but only an expectation of a right. The only right they could be accorded was that of acceding to the treaty so long as it existed.

38. He had some doubts about the unanimity principle. As Mr. Ago had stressed, the danger of giving a State a right of veto, as it were, and thus obstructing the development of international law, should be avoided.

39. The CHAIRMAN, speaking as a member of the Commission, said that he too was opposed to paragraphs 1(a) and (b), which appeared to suggest that a treaty might be terminated by the will of States not parties to it, even though the States actually bound by the treaty might wish to keep it in force.

40. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that in the case contemplated in paragraph 1(a), such a result was precluded by the proviso “including all those which have become parties to the treaty.”

41. The CHAIRMAN, speaking as a member of the Commission, said that his point remained valid for paragraph 1(b), which appeared to disregard the will of the States parties to the treaty. The existing rule of international law in the matter was that termination of a treaty by dissent required the concurrence of all States bound by the treaty. He saw no reason for departing from that basic rule.

42. The approach adopted by the Special Rapporteur in article 18 was similar to that of article 6, of Part I, on the adoption of the text of a treaty. In fact, there was a great difference between the adoption of a text and the extinction of a treaty. In the former case, the participating States had a legitimate interest in the text which they had adopted and opened for signature and ratification; at that stage, it was open to States to assume obligations under the treaty or not, at their choice. Article 18 dealt with a completely different situation: the treaty was already in force and the question which arose was that of putting an end to the obligations assumed by States under the treaty; it did not seem at all appropriate to apply, for that purpose, a procedure similar to that chosen for the adoption of the text.

43. Mr. TUNKIN pointed out that paragraph 1 of the commentary began with the passage: “Where the treaty itself provides for an express right of denunciation, or, where such a right is to be implied under

article 17, the termination of the treaty is unlikely to give rise to any problem. Where, however, there is no such right, serious difficulties may arise.” Hence article 18 as drafted by the Special Rapporteur was apparently intended to deal only with the case in which the treaty was silent regarding termination. If that was the intention, it should be expressed more clearly in the text of the article. He himself would be opposed to any different rule, because it would be manifestly unjust to override the will of the parties in that respect.

44. With regard to paragraphs 1(a) and (b), he agreed with the Chairman that article 6 of Part I and article 18 dealt with completely different situations. In the case of the adoption of a text, States remained free to sign and ratify the treaty or not to do so; article 18 contemplated the termination of the mutual rights and obligations arising from the treaty. He could not see how it was possible to adopt a rule to the effect that a two-thirds majority could set at naught the rights of other States under a treaty without the consent of those States.

45. Paragraph 1(a) raised the question whether States other than those bound by the treaty should have a voice in its termination. The Special Rapporteur had been right to include a provision giving such a voice to States that had participated in drawing up the treaty. Contemporary practice showed that a certain lapse of time was necessary for a State to decide whether to ratify a treaty or not. It was therefore appropriate to take that fact into account and to allow potential contracting parties a voice in the termination of the treaty for a certain period. However, he thought the suggested period of ten years was too long and that, probably, five years should be sufficient for a State to make up its mind.

46. Paragraph 1(a) could give rise to another problem to which attention had not yet been drawn. The actual parties to an agreement might wish to terminate it, but they could apparently be overruled by a two-thirds majority of the States which had participated in drawing up the treaty and which might be benefiting from it without being parties. That situation could arise because under paragraph 1(a) a two-thirds majority of those States was required to terminate the treaty, quite apart from the consent of the parties.

47. Another possible solution of the problem contemplated in paragraph 1(a) would be to apply the system it provided for not to the actual termination of the treaty, but to the decision to convene a new international conference to discuss the revision or possible termination of the treaty.

48. With regard to paragraph 1(b), he considered that the character of a treaty was in no way affected by the fact that it had been drawn up within an international organization. The treaty was still an agreement between States, binding upon them; in principle, it was for the States parties to the treaty to settle all problems arising from it, if the rules in force within the organization did not provide otherwise.

49. As he saw it, there were only two possibilities. Either the treaty itself contained a provision concerning

its termination, in which case that provision should apply, even if the treaty had been drawn up within an international organization. Or the treaty was silent on the subject; but even in that case, he could not accept paragraph 1 (b), which constituted an innovation and, in his view, an unjustified one.

50. He saw no reason to impose on international organizations a rule that a treaty could be terminated "by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ". The constituent instrument of an international organization might well contain no provision for such action and might not give any organ of the organization the power to put an end to treaties concluded within its framework. It was unlikely that States would be prepared to accept a rule that would give international organizations such overriding powers over the States parties to a treaty.

51. Paragraph 1 (b) should state that the decision concerning termination would be taken in accordance with the rules in force in the international organization, if a rule conferring power to terminate treaties on a specific organ existed, and if it did exist, States would be aware of the fact.

52. With regard to paragraphs 3 and 4, he shared the doubts expressed by Mr. Ago. Their provisions were too detailed and it might prove difficult to secure for them the assent of States at a large international conference.

53. Mr. AMADO observed that article 18 faced the Commission with an example of the new problems raised by the development of international relations. Bilateral treaties, or treaties to which only a few States were parties had not been as complicated as the big contemporary multilateral treaties. Consequently, the problems relating to the termination of the earlier treaties had been easier to solve; it had been sufficient to follow existing practice.

54. In considering the possibility of terminating a treaty, the difficulty lay in interpreting the will of the States which had concluded it. It certainly went against the grain to use the word "arbitrary" in speaking of law; but there was no alternative in the circumstances. In the case dealt with in paragraph 1 (b) the question was to what extent the States concerned had delegated their will to the international organization within which the treaty had been drawn up. The Special Rapporteur, who had understood the problem very well, had given the reasons for his position in paragraph 4 of his commentary, where he said "Nevertheless, when a treaty has been drafted within an organization and then adopted by a resolution of one of its organs, there is a case for saying that the organization has an interest in the treaty and that its termination should be a matter for the organization".

55. He agreed with those members who advocated beginning with a statement of the general principle of mutual agreement between States. To meet Mr. Yasseen's objection to the French wording "*dans le cadre d'une organisation internationale*", the words

"*au sein d'une organisation internationale*" might be substituted.

56. Mr. PAL said he had at first felt inclined to accept paragraph 1 with certain minor drafting changes, but the remarks of the Chairman had led him to consider it more carefully.

57. As he read paragraph 1 (a), two conditions were required for the termination of the treaty: first, the agreement of all the States which had become parties to the treaty, and, secondly, the agreement of not less than two-thirds of the States which had drawn up the treaty. He still believed that that was the meaning intended, and if so he was in favour of accepting the provision. To make the first of those conditions clear, however, a few drafting changes would be needed. The provision "including all those which have become parties to the treaty" was intended to mean "including the agreement of all those States which have become parties to the treaty". As the draft stood, the clause seemed to qualify "the States which drew up the treaty"; if that were so it would mean quite a different thing, and even a majority of the States parties to the treaty would suffice. He believed that was not the intention and therefore suggested that the drafting be changed as he had indicated to clarify the position.

58. The last part of paragraph 1 (a) showed that the intention of the provision was to require, for a specified number of years for purposes of the termination of a treaty, the unanimous consent of the States parties thereto and also the agreement of not less than two-thirds of some, but not all, of the potential parties thereto. On the expiry of the specified period, only the agreement of the States parties to the treaty would be necessary, as expressly stated at the end of paragraph 1 (a). That approach was consistent with the principle underlying articles 5 to 9 of Part I, which the Commission had adopted at its previous session.

59. He agreed with Mr. Yasseen that it would be advisable to give some voice in the termination of the treaty not only to the potential parties indicated in paragraph 1 (a), but to other potential parties as well.

60. He also agreed with the view that the general principle stated in paragraph 2 should take the form of an express opening provision of the article.

61. Mr. YASSEEN said that the discussion had cast some doubt on the solution adopted in paragraph 1 (b). It was true, as the Special Rapporteur maintained, that the treaty referred to in that paragraph was almost a treaty of the organization, but that was no reason for overlooking the fact that it also belonged to the parties; consequently the difference in treatment between the cases dealt with in sub-paragraphs (a) and (b) of paragraph 1 should not be so marked. It should be laid down in sub-paragraph (b) that the majority required for a decision of the competent organ must comprise all the parties to the treaty.

62. He accepted Mr. Amado's suggestion for the wording of the French text of sub-paragraph (b).

63. Mr. BRIGGS said he agreed that there was need for a provision concerning termination by subsequent

agreement. He considered that article 18 should begin with a statement of the rule contained in paragraph 1 (c). He certainly did not subscribe to the view that the provisions of the treaty concerning termination must always be complied with, for if a treaty concluded for a specific term of years were found, before that term had expired, no longer to serve any purpose, there was nothing whatsoever to prevent the parties putting an end to it by agreement.

64. He was not in favour of retaining the substance of paragraph 1 (a) because he did not recognize that signatories possessed any vested right in regard to termination. The case which paragraph 1 (a) was intended to cover was in any event largely hypothetical: it seemed far-fetched to imagine, for example, that the Geneva Conventions on the Law of the Sea, which required twenty-two ratifications or accessions to enter into force, might be ruled out of existence by the States which had ratified while others were still waiting to do so.

65. He agreed with Mr. Tunkin's view of paragraph 1 (b); once a treaty had been created, the fact that it might have been drawn up within an international organization became irrelevant and the parties must have the decisive voice on its termination. That provision also should be omitted.

66. The obligation prescribed in paragraph 2 was not particularly stringent, but he doubted whether such detailed provisions, or those set out in paragraphs 3 and 4, were appropriate; perhaps paragraph 4 might be taken up in connexion with article 29 of Part I, as suggested by Mr. Ago. Paragraph 5 was not objectionable.

67. Mr. EL-ERIAN said that on the whole he found article 18 acceptable, but it ought to be reformulated to state first the principle that a treaty could be terminated by agreement between the parties and in accordance with the relevant provisions, and then the residual rules.

68. It was important to distinguish between treaties concluded at a conference convened by an international organization and those adopted by a resolution of an organ of an international organization.

69. In paragraph 1 (a) the Special Rapporteur had rightly recognized the interest of the States which had taken part in drawing up the treaty; they ought to have some say in its termination.

70. With regard to paragraph 1 (b) he agreed with Mr. Tunkin that a treaty drawn up within an international organization was still an agreement between States and that its character as such was not affected. It should be noted, however, that there was a class of treaties initiated by, and drafted within, an international organization, and then adopted by a resolution of one of its organs. The special interest and concern of the international organization in the future and fate of such treaties would justify granting it some say in their termination. He thought, therefore, that the solution suggested in paragraph 1 (b) should reconcile two considerations: namely, the continuing character of the treaty as an agreement between the States parties to it and the special interest and concern of the international organi-

zation within which the treaty was initiated, drafted and adopted.

71. Mr. AGO said he had two comments to make. First, it seemed that some members of the Commission considered that article 18 governed only cases in which the treaty itself prescribed no termination procedure. That was perhaps not entirely correct. If all the parties agreed to terminate the treaty, even by a procedure other than that prescribed in it, they could obviously do so. The Commission should simply take care to express itself in such a way that the formula adopted could not be interpreted otherwise.

72. Secondly, he agreed with Mr. Tunkin in recognizing that termination was a different act from adoption. Nevertheless, there was no reason why the same majority should not be required for both. For terminating a general multilateral treaty, Mr. Tunkin had himself envisaged the procedure of convening another conference of the same States; but the majority required for termination of the treaty at the Conference would certainly be the same as the majority required for its adoption. Hence Mr. Tunkin's comments militated in favour of the proposal he had put forward.

73. The Special Rapporteur, for his part, had envisaged other procedures: for example, the depositary of the treaty might be instructed to communicate any proposal for termination to all the States concerned; in that case, too, it was obvious that the majority required for terminating the treaty should be the same as that required for its adoption. Otherwise, a treaty whose adoption had required a majority of three-fourths might be terminated by a majority of only two-thirds, if that procedure were followed, whereas a majority of three-fourths would be required if the procedure adopted was to convene another Conference of the States concerned, which would be illogical. Any procedure requiring a specified majority had something arbitrary about it, but if the same majority were prescribed for termination as for adoption, arbitrariness would be kept to a minimum.

74. Mr. TUNKIN said that, in the case of bilateral agreements or treaties concluded by a group of States, the parties could amend or terminate the treaty at any time by common consent, whatever its provisions regarding termination. The real problem arose with general multilateral treaties, when a number of States had already become parties and others could reasonably be expected to do so. Mr. Ago had contended that for that category the same majority rule as was laid down in article 6 of Part I should be applied, though he had recognized that the two situations were not the same. In fact there was a profound difference between termination and adoption and the same rule would certainly not do for both.

75. To impose a two-thirds majority rule wherever a treaty was silent on termination procedure would open the door to numerous abuses and to every kind of political manoeuvre to secure a two-thirds majority for terminating treaties and extinguishing the rights of a minority. Such a dangerous rule might well exacerbate international tension and would certainly be unaccept-

able to many States because it would be used as a form of international legislation. Subject to a few modifications, he was prepared to support the provision put forward by the Special Rapporteur in paragraph 1 (a).

76. Mr. ROSENNE said he questioned whether the difference between adoption and termination was as great as some members seemed to think. In fact, from the legal point of view, the transactions of adopting a treaty, when the rules of article 6, Part I would apply, and terminating a treaty by means of a new agreement, were very similar.

77. There was considerable force in the argument that the rights of the parties required special protection and, as the Chairman had pointed out, that matter had not been expressly provided for in paragraph 1 (b). The point could be covered by drafting changes; otherwise paragraph 1 (b) would not be acceptable.

78. Apart from the rights of the States taking part in drawing up the treaty, there was a case for recognizing, for a certain period, the special status of signatory States, corresponding to their rights under some of the provisions of Part I, because with the act of signature they assumed certain obligations.

79. The CHAIRMAN, speaking as a member of the Commission, said that his comments on paragraph 1 (b) might perhaps have been misunderstood. He had wished to draw attention to the serious consequences that such a provision would have for treaties drawn up at Pan-American Conferences. Paragraph 1 (b) seemed to provide no safeguard for the parties already bound by the treaty, and could expose them to decisions by non-signatories concerning termination of a treaty in force between a limited number of States.

80. Mr. AGO pointed out that he had never proposed that any majority of the States which had drawn up a treaty could be a substitute for the agreement of the parties. He had always based his position on the Special Rapporteur's formula, which required both a majority of the States which had drawn up the treaty and the unanimous agreement of the States which had become parties to it. Far from being too liberal, his formula was in fact stricter than that advocated by Mr. Tunkin. He had merely raised the question whether a single party could be allowed to veto a treaty's termination.

81. Mr. de LUNA said he still thought that to give a voice in the matter of termination to States which had merely drawn up a treaty, but had possibly not even signed it, and had in any case not become parties to it, would introduce an unnecessary complication. It would be the first time that such States had been granted any such right, and by a negative vote preventing the required majority, some of them might completely frustrate the unanimous will of the parties. Any such rule would be tantamount to rewarding States for negligence and would be completely contrary to practice, which allowed a few parties to terminate a multilateral treaty *inter se* and conclude a fresh treaty, and at the same time to continue to recognize the validity of the earlier treaty vis-à-vis those of their former co-signatories who were not parties to the new treaty.

82. Mr. TSURUOKA said that, to view the matter from a practical standpoint, the actual circumstances in which treaties were terminated must be borne in mind. In the case of a bilateral treaty it was a simple enough matter. In the case of a multilateral treaty, whether general or restricted, a new treaty was usually substituted. In that case the existing rules were entirely adequate.

83. Article 18, therefore, dealt solely with residual cases. For instance, a conference might adopt the text of a treaty, which might then be ratified by some, but not all, of the participating States, and the States which had become parties to it might subsequently agree unanimously that they wished to be relieved of their obligations. The States which had taken part in the conference, but had not ratified the treaty would then have to be allowed to participate in drawing up a new treaty to replace the earlier one. That was a very simple matter, and did not constitute an innovation.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the cases dealt with in paragraph 1 (a), to which some speakers seemed to have taken exception, might not be frequent or present serious difficulties. Nevertheless cases under that provision could arise. For example, a multilateral treaty on a technical matter might be open to participation by a large number of States, but might be found to be in need of replacement before many States had ratified or acceded to it. The question might then arise whether the treaty should be terminated. Again, a number of modern multilateral treaties only required a small number of ratifications to bring them into force and it would be unthinkable that the two or three States which had ratified and brought a treaty into force should be able to terminate it shortly afterwards, thereby frustrating all the others that might be contemplating ratification. He had not found Mr. de Luna's argument opposing paragraph 1 (a) convincing.

85. He agreed that the omission regarding the consent of the actual parties to the treaty in paragraph 1 (b) must be made good.

86. Although there was a certain similarity between the problems posed by adoption and termination there was also an important difference, for when a treaty had been brought into force, it gave rise to acquired rights which must be safeguarded if it were being terminated. The interests of States which had negotiated and signed the treaty must also be taken into account to a certain extent as they had been in article 9 of Part I, which dealt with the question of opening a treaty to participation by States not entitled to accede to it under the clauses of the treaty, and which gave a say in the decision to do so only to the States which "drew up" the treaty. The Special Rapporteur had followed the formula adopted by the Commission for that article. If the Commission were now to decide in the present connexion to give a voice also to States merely entitled to become parties, it might later have to reconsider its position with respect to the drafting of article 9 of Part I.

87. Mr. Ago had raised the question whether a two-thirds voting rule should be applied or the voting rule used

for the adoption of the treaty. The Commission should keep in mind that the two-thirds rule had been inserted in article 9 of Part I, and that no provision had been made in that article to cover cases of a different rule being applied during the negotiations.

88. He agreed with Professor Briggs in doubting whether the article should be so worded as to exclude treaties containing clauses on termination; for such treaties were not infrequently expressed to continue in force for comparatively long periods and occasion might arise for their termination by agreement of the parties. That was perhaps a matter which could be covered in drafting together with a number of other points made during the discussion, which could be left to the Drafting Committee.

89. He did not propose to take up the question mentioned by Mr. Lachs of cases in which it was arguable that the treaty created substantive rights in favour of third parties, because the whole question of the effect of treaties on third States was a very complex one which properly belonged to his next report. He might, however, remind the Commission that Sir Gerald Fitzmaurice, in his fifth report, had taken the view that such rights could exist in favour of non-parties, but that the beneficiaries were not entitled to obstruct the action of the States parties to the treaty creating the rights, if by common consent they had agreed on its termination.⁴

90. Rather special considerations applied to the category of treaties of a constitutional character mentioned by Mr. Lachs, and for the purposes of the present discussion they could perhaps be left aside.

91. Some members seemed to think that paragraph 2 could serve a useful purpose and it might be considered by the Drafting Committee.

92. He did not favour Mr. Briggs' suggestion that paragraph 3 be deleted and believed that in modified form it should be retained. If its sub-paragraphs (b) and (c) were retained, then the provisions in paragraph 4 would also be necessary, since without them the procedural clauses concerning the means of arriving at an agreement to terminate the treaty would be incomplete. But at a later stage of the Commission's work, it might be found more appropriate to include the substance of paragraph 4 in the article in Part I dealing with the functions of a Depositary.

93. Mr. VERDROSS said he regarded the provisions of article 18 as *lex ferenda*. The Commission could, of course, make proposals, but it was governments that would decide whether to accept or reject them.

94. In his view paragraph 1 (a) was a revolutionary provision which went beyond conventional law and opened the door to international legislation.

95. Mr. AGO observed that there was no question of terminating a treaty solely by the decision of a specified majority of the States which had drawn it up. A second condition was stipulated in paragraph 1 (a): the agreement of the parties to the treaty. Hence the provision was not as revolutionary as Mr. Verdross thought.

96. Mr. de LUNA said he recognized that the unanimity rule was *lex lata*, but the other condition stipulated in paragraph 1 (a) was quite revolutionary. The least that could be required was that the States which had drawn up, but had not ratified, a treaty should be obliged to show their goodwill, perhaps by a purely formal ratification, before they could participate in the decision on its termination.

97. Mr. AMADO said that in modern times a single State could hardly be allowed to frustrate the will of a hundred other States that wished to terminate a treaty. The discussion on reservations at the previous session had shown that times had changed since the days of the League of Nations. The Commission's task was to develop the law, and it should not hesitate to take a decision *de lege ferenda*.

98. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Lachs' views on the rights of third parties. It was to be inferred from the judgment of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex case*⁵ that the acquired rights of third parties were not necessarily extinguished when the treaty from which they emanated was terminated by the contracting parties. As the problem would be coming up for discussion at the sixteenth session, it should be understood that the question of the survival of acquired rights of third parties was reserved under article 18.

99. Mr. LACHS said it was important that that point should be made clear in the commentary.

100. The CHAIRMAN suggested that article 18 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

The meeting rose at 12.50 p.m.

⁵ *P.C.I.J.*, Series A/B, No. 46.

691st MEETING

Friday, 31 May 1963; at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 19 in Section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 19 (IMPLIED TERMINATION BY ENTERING INTO A SUBSEQUENT TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 19, said that its contents followed

⁴ *Yearbook of the International Law Commission, 1960*, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), pp. 79 ff.