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Summary record of the 691st meeting

Topic:
Law of Treaties

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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.

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

[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

logically from article 14, which dealt with conflict with a prior treaty. Since the Commission had reserved its decision on article 14, he suggested that the decision on paragraph 2 of article 19, which dealt with the question of *inter se* revision of a prior treaty, and which was very closely linked with article 14, should also be deferred.

3. The problem of the implied termination of a treaty by entering into a subsequent treaty on the same subject-matter was a very real one. It had been clearly explained by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia* case,[1] referred to in paragraph 2 in the commentary.

4. The problem could be said to arise only in connexion with interpretation where two instruments were set side by side and there was perhaps disagreement between the parties as to whether they were inconsistent with each other and, if so, what was really the effect of the second instrument on the first. A point of principle would arise, however, if after interpretation of the two instruments it was found that in the second instrument the parties appeared to have intended wholly to displace the first. The point was whether that situation did not give rise to an implied termination, even though no clause had been inserted in the second treaty to cover the problem of its effect on the first. Sometimes, the parties to the new treaty would include in it an express provision on the termination of the earlier one, but more often than not, they would omit to do so.

5. The provisions of paragraph 1 were intended to cover the point in the more straightforward type of case, where all the parties to the earlier treaty were also parties to the later one. The language was based upon the treatment of the matter in the separate opinion of Judge Anzilotti to which he had referred. That opinion showed that a problem of interpretation arose. Judge Anzilotti had also dealt with the question whether, in the event of the new treaty coming to an end, the parties were thrown back on the earlier treaty, which would thus be revived.

6. Questions of interpretation were very much at the root of the application of article 19. Accordingly, it might be suggested that the article was not necessary in section III, though he personally believed that it was. Article 18, when it emerged from the Drafting Committee, would probably recognize tacit agreement to terminate a treaty; it was therefore appropriate also to include article 19 to deal with the particular form of tacit agreement to terminate which consisted in adopting a subsequent treaty that wholly displaced the earlier one.

7. Paragraph 3 was largely procedural. He therefore suggested that for the time being the Commission should concentrate its attention on paragraph 1.

8. Mr. ROSENNE said that he would confine his remarks to paragraph 1. He had the greatest difficulty in accepting article 19 at present because, as the Special Rapporteur had pointed out, the real question was largely one of interpretation, and not essentially one of termination of a treaty. Furthermore, he was not fully convinced by the commentary, particularly paragraph 2.

9. The Special Rapporteur's commentary was largely based on the separate opinion of Judge Anzilotti in the *Electricity Company of Sofia* case. That opinion was one of the few opinions of Judge Anzilotti which he had been unable to understand. He did not believe that the obligations arising out of a declaration under the optional clause of the Statute of the Permanent Court of International Justice or the Statute of the International Court of Justice could be regarded as equivalent to an obligation arising out of an international treaty within the meaning of the draft articles under discussion, and therefore he could not accept the premiss taken by Judge Anzilotti and now followed by the Special Rapporteur. The conflict between that type of transaction and a treaty was not analogous to the problem, dealt with in article 19, of the conflict between two treaties. Furthermore, he was unable to understand the concept of the revival of a treaty to which both the separate opinion and the Special Rapporteur had referred.

10. He was impressed by the fact that the commentary relied on a separate opinion which was not really germane to the problem of article 19. No instance of State practice had been cited in support of the proposed provision.

11. In view of the complexities of the issues involved, it was not advisable at that stage to deal with the problem, which was essentially one of interpretation necessitated by bad drafting. If the two successive treaties concerned were both bilateral treaties, the negotiators of the second should be aware of the precise treaty relationship between the two countries. The problem might be somewhat different in the event of a conflict between a multilateral treaty and a bilateral treaty.

12. He was not criticizing the actual provisions of paragraph 1, but could not agree that it was either necessary or desirable to introduce them into the present text. The inclusion of too many provisions depending on implication in the draft articles relating to termination of treaties was to be deprecated.

13. Another important point was the necessity to preserve the hierarchical relationship between the concept of *jus cogens* and the principle stated in Article 103 of the Charter, on the one hand, and the substantive provisions of individual treaties on the other. The provisions on implied termination of a treaty could not apply where the earlier treaty contained rules having the character of *jus cogens* or was an obligation to which Article 103 of the Charter applied.

14. Article 19 supplied a presumption which would operate only under the terms of the second treaty. The matter was therefore really one of the application and interpretation of treaties rather than of their termination.

15. If Mr. Verdross's proposal for an introductory catalogue of modes of termination were adopted, the inclusion of a reference to obsolescence could very well cover such problems of termination as might arise in the cases contemplated in article 19.

[1] *P.C.I.J.*, Series A/B, No. 77.

16. Termination of a treaty meant its termination as a source of binding rules of conduct. However, he would hesitate to say that the treaty necessarily terminated in so far as it affected rights acquired and situations created under it; that distinction had been well brought out in the *Ambatielos* case.[2]

17. Mr. VERDROSS said he approved of article 19 in principle, and in particular of paragraph 2 (*b*), but he had some doubt about paragraph 2 (*a*). The provision was acceptable if the earlier treaty embodied only dispositive rules from which the parties could depart, but if the earlier treaty embodied peremptory rules, then the position was different.

18. Mr. TUNKIN said he found the provisions of paragraph 1 acceptable in principle, but agreed with Mr. Rosenne that they should be made subject to other provisions of the draft.

19. The principle stated in the opening sentence of paragraph 1 would seem to apply where the parties to the second treaty failed to express therein their intention to abrogate the first treaty. To bring out that meaning more fully, the proviso " without expressly abrogating the earlier treaty " should be replaced by some such wording as " if the new treaty does not contain a provision expressly abrogating the earlier treaty ".

20. The provisions of paragraph 1 (*a*) seemed logical: if all the parties to the earlier treaty were also parties to the later treaty and if their intention to terminate the earlier treaty were expressed in declarations at the Conference or in some other way, then there were sufficient grounds for considering the earlier treaty as having been abrogated by the will of all the parties. The will of the parties was expressed not in the new treaty itself, but in some other way, and could be manifested after the conclusion of the second treaty, so that it appeared unnecessary to limit the operation of paragraph 1 (*a*) to the time the new treaty was concluded.

21. He was prepared to accept paragraph 1 (*b*), which laid down two important conditions: that the provisions of the later treaty must be incompatible with those of the earlier one, and that the two treaties must not be capable of being applied at the same time.

22. He could not, however, accept paragraph 2 (*a*). It was not always permissible for two parties to a treaty to enter into a subsequent agreement setting aside some of the provisions of the treaty in relations between themselves. They could do so, for example, in the case of certain provisions of the Vienna Convention on Diplomatic Relations: [3] two parties to that Convention could enter into an agreement between themselves not to accord diplomatic privileges to the technical and administrative staffs of their respective embassies; such an agreement was not prohibited by the Convention because it did not affect the interests of the other parties to the treaty in any way. But the position was altogether different in the case of treaties such as the agreement on the cessation of hostilities in Laos.[4] That agreement contained a provision (article 6) prohibiting the establishment of foreign military bases on the territory of Laos; it was not possible for Laos and one of the other parties to the agreement to conclude a new treaty purporting to establish such bases. That situation obtained even though the prohibition in question was not a *jus cogens* norm of general international law. The new treaty would represent a breach of obligations to all other participants in the earlier treaty. In a case of that type, it was the nature of the treaty itself which did not permit the new transaction. Paragraph 2 (*a*) should contain a qualification to that effect.

23. Mr. BARTOŠ said he agreed with Mr. Verdross and Mr. Tunkin, and, on many points, with Mr. Rosenne. He would add only three comments, the first two of which related to the possible application of paragraph 1.

24. First, it was questionable whether all the parties to the first treaty necessarily had to participate in the second. There were cases in which some of the parties to a treaty lost, in the interval, their status as parties directly and legitimately concerned in the regulation of the matter covered by the treaty. For example, States which had possessed " recognized rights " in certain territories claimed always to be entitled to participate in a treaty concerning those territories. Later, the status of the territories having changed, international relations had also changed, in his opinion; if it was a question of modifying the conventional régime established by the treaty, could it be said that the agreement of all the original parties was essential ? If that condition had to be fulfilled — if, for example, all the parties to the General Act of the Berlin Congo Conference of 1885,[5] had to participate in the establishment of a new régime governing the Congo river — then the new States would never be able to free themselves completely from the tutelage of the former colonial Powers. The phenomenon of a State losing its status as a party through a change in circumstances without ceasing to be a subject of international law raised a delicate question both on the political and on the legal plane.

25. His second comment related to the case already mentioned by the three previous speakers: that in which the parties wished to replace an earlier treaty by a new one embodying *jus cogens* rules. Manifestly, the parties could not change such rules. But where was the borderline of *jus cogens* ? Should the *jus cogens* rules laid down by the initial treaty be taken into account, or the *jus cogens* rules existing when the amendment or termination of the treaty was contemplated ? A treaty such as the Convention of Constantinople [6] concerning the legal status of the Suez Canal in fact established several exceptions to the general rules on straits and canals. Had those exceptions the status of *jus cogens* ? During the two world wars, the Allied Powers had not respected the provisions of that Convention. Conse-

[2] *I.C.J. Reports*, 1953, pp. 10 ff.

[3] United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 1961, *Official Records*, Vol. II, pp. 82 ff.

[4] Command Papers, H.M. Stationery Office, London, Cmd. 9239, pp. 18 ff.

[5] British and Foreign State Papers, Vol. 76, pp. 4 ff.

[6] *Op. cit.*, Vol. 79, pp. 18 ff.

quently, the question had since been raised whether those Powers had or had not estopped themselves from claiming the right, as Contracting Parties, to participate in the modification of the status of the Canal.

26. Thirdly, there was the case in which a new treaty established a régime that was applicable so far as certain States were concerned, though the earlier treaty remained in force for other States. There was no great difficulty if the matters involved were technical or related to the enjoyment of certain privileges, but if the treaty was of paramount importance to international relations, it was impossible to allow two different régimes to subsist side by side. In the Treaty of Peace signed in Paris in 1947, Italy and Yugoslavia had agreed on a plan for the establishment of a free territory of Trieste,[7] which was to constitute a kind of separate State. Subsequently, a provisional settlement had been arrived at under which the territory in question had been placed under the civil administration of the two States. They had then indirectly agreed that the settlement might be permanent. Three of the signatories to the Treaty of Paris — the United States of America and the United Kingdom by prior approval, and the Soviet Union by a political statement approving the peaceful settlement of the dispute — had indirectly approved that settlement. That being so, could it be said that the other signatories to the Paris Treaty still had the right to invoke the terms of that Treaty in regard to Trieste ?

27. Those three questions might have great practical importance, especially in the event of a political dispute between States, and in view of the substantial territorial changes that had occurred, the recognition of the principle of self-determination, the establishment of new States and, in general, the development of international relations. They should not be dealt with in the article itself, but they should at least be mentioned in the commentary.

28. Mr. CASTRÉN said that article 19 to some extent duplicated article 14, as the Special Rapporteur had noted in his commentary, but without going into the relationship between the two. It might, of course, be argued that article 14 dealt generally with cases in which there was a conflict between treaties, whereas article 19 considered the more particular question, not settled by article 14, whether such a conflict could have the effect of extinguishing the earlier treaty. In any case, the two articles could certainly be continued but as the Commission had not yet decided either on the substance or on the final form of article 14, his remarks would be quite general.

29. He proposed that the substantive idea set out in paragraph 1 should be added to article 14, paragraph 1, at the end of sub-paragraph (*b*), and that paragraph 2 (*a*) should be substituted for article 14, sub-paragraph 2 (*b*) (ii). Paragraph 2 (*b*) could be deleted, as it was covered by sub-paragraph 2 (*b*) (i) of article 14. Paragraph 3 could also be deleted.

[7] United Nations *Treaty Series*, Vol. 49, pp. 186 ff.

30. If article 19 were retained as a separate article, then paragraphs 1 and 2 (*a*) would perhaps need to be supplemented by a proviso dealing with cases covered by *jus cogens* and with the obligations of States Members of the United Nations and other international organizations, similar to the proviso in article 14.

31. Mr. TSURUOKA said that, although largely in agreement with Mr. Rosenne, he would not go quite so far. He thought that there might be some advantage in retaining the main idea of article 19. The essence of paragraph 1 should be retained, but it might be enough to specify that a treaty was abrogated if such was the common will of the parties. As such a provision would have to be interpreted in the light of the will of the parties, there would be no need to give further details. The final passage in paragraph 1 was unnecessary, for it stated the obvious.

32. The situation covered by paragraph 1 (*b*) was hard to define and he doubted whether such a provision should appear in article 19. That a later treaty could not be contrary to a *jus cogens* rule was obvious, but where an earlier treaty permitted certain actions, the question was whether the later treaty contained provisions incompatible with those of the earlier one. That was a question he would prefer to leave to an international court. Even if the later treaty did not constitute a breach of the earlier one, it was by no means certain that the earlier treaty should cease to be operative; if the parties had assumed obligations in the later treaty which conflicted with those under the earlier one, their responsibility was involved, but that did not mean that the earlier treaty should cease to be applicable.

33. Paragraph 2 raised questions of interpretation and was out of place in article 19.

34. There was no need for paragraph 3; if it was to be kept, the superfluous words " by implication " should be dropped.

35. Mr. YASSEEN said he would confine his remarks to paragraph 1, as the Commission could not discuss paragraph 2 until it had decided on the final form of article 14.

36. The idea of implied termination of a treaty by reason of the conclusion of a subsequent treaty was correct. The criteria laid down by Judge Anzilotti in his separate opinion, to which the Special Rapporteur had referred, had great logical force, although the Court had considered them inapplicable to the particular case.

37. The word " manifested " should be interpreted to mean that the parties had signified their agreement in some way other than by an express clause in the treaty, for instance, in statements during the conference at which the treaty had been drawn up, for it was solely a matter of terminating a treaty by tacit agreement.

38. He doubted whether paragraph 3 was necessary, since it was obvious that the earlier treaty was only terminated because the later treaty had come into force.

39. Mr. TUNKIN said that Mr. Bartoš had raised two very important problems. The first was that of certain old treaties such as the General Act of Berlin of 1885, and the position of the newly independent States with regard to them. The position was really quite clear: a treaty such as the General Act of Berlin was void under article 13 because it infringed a general rule of international law having the character of *jus cogens*. The newly independent States were not called upon to terminate such a treaty, because no valid treaty existed. The position was not in any way affected by the fact that, as pointed out by Mr. Elias at an earlier meeting (687th meeting, para. 40), newly independent States might insert in a contemporary treaty some material provision drawn from an obsolete treaty.

40. Mr. Bartoš had also, and quite properly, raised the question of *jus cogens*. When the Commission had discussed article 13, it had clearly understood the term *jus cogens* as meaning norms of general international law which were binding on all States and from which no derogation was permitted. He himself had drawn attention to certain particular norms of international law from which no derogation was permitted, such as the prohibition of foreign military bases in neutral Laos: that type of provision had much in common with *jus cogens* rules, but nevertheless belonged to a separate category. It was not advisable to widen too much the concept of *jus cogens*, which should be confined to general norms of international law.

41. Mr. BRIGGS said that he would confine his remarks to paragraph 1 since he agreed that the Commission could hardly discuss paragraph 2 until it had taken a decision on article 14.

42. Where the parties to the second treaty expressly abrogated the first, no problem arose; the provisions of paragraph 1 were intended to deal with the narrow point whether that result could be brought about implicitly. While he had no strong theoretical objections to those provisions, he had in practice some hesitation in going so far as to say that the case would be one of implied termination. He preferred the approach adopted in article 22 (*a*) of the Harvard draft, which stated that: "A later treaty supersedes an earlier treaty between the same parties to the extent that the provisions of the later treaty are inconsistent with the provisions of the earlier treaty." It seemed much more satisfactory to view the whole question as one of priority and of the later treaty superseding the earlier one to the extent to which the two were incompatible. He did not favour treating the question as one of outright termination of the treaty.

43. With regard to the remarks made on the subject of *jus cogens*, he noted that all speakers had so far assumed that the *jus cogens* rules would be in the first treaty; in fact, they could just as well be in the second.

44. Mr. BARTOŠ said he had wished to raise the general problem of changes in the composition of the parties to a treaty — what might be called the dynamism of the status of party to a treaty. A State might cease to be a party to the purpose of a treaty not only as a result of the succession of States and governments, but also as a result of a change in the situation. Conversely, a State might be directly interested in the amendment or termination of a treaty to which it was not a party, either because it was a newly created State or because a new state of affairs had arisen. That question was not directly connected with the application of the *rebus sic stantibus* clause and it was not settled by any existing rule of international law, but practice called for the establishment of a rule.

45. Mr. PAL said that he also would confine his remarks to paragraph 1. He did not see why the question of *jus cogens* had been brought into the discussion of article 19 at all. The provisions of that article assumed that there were two valid treaties, but that there was some incompatibility or conflict between their provisions. If one of the treaties was invalid for other reasons, there could be no question of applying article 19.

46. As far as the formulation of paragraph 1 was concerned, he preferred a simplified wording along the lines suggested by Mr. Briggs.

47. Mr. EL-ERIAN said he too would confine his comments to paragraph 1, because it was impossible to express any conclusive view on paragraph 2 until a decision had been taken on article 14 and other articles with which article 19 was closely connected. There could be no doubt, however, that it would be useful to establish some guiding principles concerning implied termination, because of the difficulty governments often encountered in drafting provisions on express termination. The problems had come up in acute form during the 1954 negotiations over the Anglo Egyptian Treaty, following Egypt's unilateral abrogation in October 1951, which the United Kingdom Government had not recognized, of the 1936 treaty.[8]

48. The problem of the effects of subsequent treaties was closely connected with articles 21 and 22 and would probably have to be held over until those articles were taken up.

49. He doubted whether articles 14 and 19 could be combined in the manner suggested by Mr. Castrén because the former was concerned with conflict between two treaties from the point of view of validity and the latter from the point of view of termination.

50. He agreed with the Special Rapporteur that article 19 should cover incompatibility between two treaties as well as cases of conflict when the subject-matter was identical.

51. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed the majority view that a provision on implied abrogation on the lines of that contained in paragraph 1 was needed.

52. Paragraph 1 (*b*) was preferable to the wording of the Harvard Draft suggested by Mr. Briggs, because it laid down stricter requirements for implied termination of the treaty.

[8] League of Nations *Treaty Series*, Vol. 173, pp. 402 ff.

53. Paragraph 2 raised the question whether *inter se* agreements between some of the parties to the previous treaty were valid. In his opinion an affirmative reply was called for in view of the changes in the number and identity of States and of the evolution of what might be termed international legislative organs. Apprehension had been expressed about the Commission giving general approval to such procedure, because it might provide a few of the parties to a treaty, the observance of which was of interest to all the parties, with an easy way of violating its provisions by entering into an agreement with one another that was incompatible with the original purpose of the earlier treaty. Perhaps that issue might be held over for further consideration and it might be feasible at a later stage to find means of avoiding such a possibility.

54. Sir Humphrey WALDOCK, Special Rapporteur, commenting on the points made during the discussion, said that the most radical criticism of paragraph 19 had come from Mr. Rosenne, who considered that implied termination was a matter of interpreting the will of the parties and should not be the subject of an article in section III of the report but could perhaps be taken up in connexion with the articles to be discussed at the next session, concerning the application of treaties. He did not subscribe to that view because he believed that the question whether or not a prior treaty had actually been terminated could arise in practice. No doubt, there was in such cases a preliminary question of interpretation as to the relation between the provisions of the two treaties. But the interpretation having been made, there remained, in cases where the parties had said nothing express on the point, the question whether the second treaty displaced the first and terminated it or left it in being. From the juridical point of view there was clearly a major difference between a mere question of conflict between two treaties and the question whether one of them had come to an end. Although there had not been many instances of such cases, they could arise in the future and Judge Anzilotti had drawn attention to the importance of having a rule concerning implied termination in order to determine whether a prior treaty had become extinguished when, for some reason or other, the later treaty had ceased to be in force. The majority of the Commission seemed to be of the opinion that a provision on the subject of implied termination was necessary.

55. Mr. Rosenne, when referring to the Special Rapporteur's reliance on the statements made by Judge Anzilotti, had deprecated unilateral declarations under the optional clause being treated on the same footing as treaties for the purposes of article 19. But that had clearly been the way the matter had been viewed by Judge Anzilotti in the *Electricity Company of Sofia* case, when he had dealt with the Belgian and Bulgarian declarations under the optional clause and the earlier Belgo-Bulgarian Treaty of Conciliation as two contractual instruments which conflicted with each other and whose relative status required to be determined. That case had turned essentially on the issue of the intention of the parties with regard to the two instruments, which also constituted the core of the problem in article 19, so that Judge Anzilotti's opinion had been most pertinent and helpful to him as Special Rapporteur in formulating the provision contained in paragraph 1.

56. Paragraph 2 raised the difficult problem of agreements *inter se* — a matter which had not been yet sufficiently thrashed out to enable the Commission to reach a conclusion on that paragraph. At first it had seemed to him dangerous to open the door too widely to such agreements, but practice indicated that they were being given increasing recognition.

57. He entirely agreed with Mr. Briggs and Mr. Pal that considerations of *jus cogens* had no relevance whatever to article 19, which was concerned with valid treaties that, by virtue of the definition to be inserted in article 13, could not be contrary to *jus cogens*. If article 13 could be satisfactorily drafted, no saving clause on that point would be necessary in article 19.

58. On the other hand some further thought might have to be given to the question raised by Mr. Bartoš concerning the possible existence of a special class of treaties possessing an imperative character from which derogation was not permitted in particular circumstances. Such treaties did not, strictly speaking, possess the character of *jus cogens*, the boundaries of which, as Mr. Tunkin had pointed out, should not be unduly widened.

59. Certain other points raised in the discussion were more germane to provisions concerning revision, which was the more normal procedure for putting an end to a certain treaty régime.

60. A number of issues brought up by Mr. Bartoš would certainly need further thought and might have to be referred to in the commentary. To mention only one of them, he would hesitate to deal, in article 19, with the particularly difficult subject of changes in the composition of the parties, which might prove extremely difficult to express in a paragraph of an article on implied termination. He must point out that that question, as indeed a number of other questions which had been raised in the discussion of article 19, was no less relevant for the previous article and perhaps for some other articles.

61. He agreed that paragraph 3 might be self-evident and therefore redundant.

62. At the present stage it would probably be wiser to refer only paragraph 1 to the Drafting Committee. As far as wording was concerned, he still thought that the article should refer to termination, rather than supersession, as advocated by Mr. Briggs, because the latter term was ambiguous and could mean not only termination, but also partial replacement.

63. The CHAIRMAN suggested that paragraphs 1 and 3 should be referred to the Drafting Committee and that paragraph 2 should be considered in connexion with article 14. It would then be possible for the Commission to decide whether or not any part of paragraph 2 need be retained in article 19.

It was so agreed.

ARTICLE 20 (TERMINATION OR SUSPENSION OF A TREATY FOLLOWING UPON ITS BREACH)

64. The CHAIRMAN invited the Special Rapporteur to introduce article 20.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that before introducing article 20 he wished to inform the Commission that he was preparing a section V of his second report, which would contain two or three short articles dealing with the effects of treaties. He had delayed completing that section, and would not do so until he had seen what decisions were taken by the Commission on the main issues concerning termination.

66. He had set out the issues in article 20 at some length and no doubt members would have suggestions for shortening it. Because of the difficulty and importance of the subject he had provided a very full commentary, and that made it unnecessary for him to say much in introducing the article. The authorities seemed to be divided into two schools of thought, one holding that the right to terminate was a necessary sanction that could be imposed upon breach of the treaty, the other that the value of such a sanction was outweighed by the danger of abusive assertions of breach by States wishing to terminate a treaty no longer to their political advantage. Like his predecessor, Sir Gerald Fitzmaurice, he had been influenced by the latter consideration.

67. The CHAIRMAN drew attention to the amendment submitted by Mr. Castrén, which read:

" 1. In the case of a material breach of a bilateral treaty by one of the parties, the other party may denounce the treaty or only the provision of the treaty which has been broken or suspend its operation, subject to the reservation of its rights with respect to any loss or damage resulting from the breach.

" 2. In the case of a material breach of a multilateral treaty other than one falling under paragraph 3 by one of the parties, any other party may:

" (*a*) in the relations between itself and the defaulting States, apply the provisions of paragraph 1;

" (*b*) in the relations between itself and the other parties, withdraw from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty.

" 3. (Former paragraph 5)

" 4. A breach of a treaty shall be deemed to be material if it is tantamount to setting aside any provision:

" (*a*) with regard to which the making of reservations is expressly prohibited or impliedly excluded; or

" (*b*) the failure to perform which is not compatible with the effective fulfilment of the object and the purpose of the treaty."

68. Mr. PAREDES said that although the problems dealt with in the last few articles seemed to him to have most important implications and to have been treated with deep insight, he had not expressed his opinion on them because he had been constantly hoping that the Commission would meet the wish, so opportunely expressed by Mr. Verdross, that classes of treaties should be specified. He did not understand how a common rule could be applied to the different kinds of treaty, since it was well known that they differed in many respects: sometimes by the importance of their content, which ranged from general rules of international application and *jus cogens* to trade agreements of limited interest; and sometimes by the manner of their fulfilment, since some treaties concluded legal proceedings and stabilized a situation, so that there was a definitely acquired right without any need for subsequent acts by the contracting States, whereas others required subsequent acts by the obligated party. There were also differences in the obligations imposed, for some treaties provided for mutual obligations, while others placed obligations on only one of the parties. All those characteristics should be covered by the law of treaties.

69. With regard to the last mentioned variety of treaties, it seemed that the Special Rapporteur had only had in mind those placing obligations on both parties, since the only solution he proposed was denunciation by the injured party. But to invalidate the treaty was the aim pursued by the party which had violated it and would thus completely satisfy that party's purpose. What was needed was to prescribe sanctions.

70. His second reason for not having spoken was that he had expected another need to be met: the drafting and discussion of those key articles to which the rest frequently referred and which seemed likely to be amended in the light of the discussions. The Commission was thus continuing to discuss the referring articles without the text they referred to. But if the latter were drafted in different terms it would be necessary to reconsider the articles referring to it from a different viewpoint.

71. There was no doubt that the rule stated by the Special Rapporteur in paragraph 1 was correct. Nevertheless, he feared that the provision in paragraph 1 (*b*) would open the way for unjustified denunciation, especially where a treaty did not offer equal advantages to the parties. The provision should be clarified by adding the requirement that the breach must be of a really serious nature.

72. He could not understand the purpose of paragraph 2 (*b*) which seemed to refer to the case of a legislative body refusing to ratify a treaty; in such a case the treaty would not exist for the State in question, so that it would be wrong to speak of a material breach.

73. Mr. de LUNA said that, while he agreed in substance with the Special Rapporteur's views, he regarded Mr. Castrén's amendment as an improvement, because it simplified the wording and yet retained the essence of the Special Rapporteur's draft. His comments on the substance would therefore apply to both texts.

74. Paragraph 1 of the Special Rapporteurs' draft seemed to have one or two gaps. For the breach of a treaty by one party to entitle the other to denounce the treaty or suspend its operation, the breach must obviously be unlawful. For example, in the case of a bilateral or

multilateral treaty concerning means of communication, it might happen that, under Article 41 of the United Nations Charter, State A completely interrupted its rail communications with State B, those communications being vital to State B. Would State B be entitled under article 20, paragraph 1, to denounce the treaty in force between the two countries ? Obviously not; he thought it would be advisable to say so and to provide for that case in paragraph 1.

75. Another point seemed to have been left out of account in paragraph 1: the possibility of a State invoking, for the purpose of denouncing the treaty or suspending its operation, a breach committed perhaps fifty years earlier, whereas the other clauses of the treaty had been complied with throughout that period. It would be advisable to fix a reasonable period, say 5 to 10 years, within which a State was entitled to invoke a former breach as grounds for terminating a treaty.

76. Paragraph 2 seemed dangerous for the stability of treaty law. It was equivalent to the *clausula si omnes* of the Hague Conventions on the Laws and Customs of War.[9] For if a Power sought to withdraw from a treaty that was contrary to its national interest, but did not dare to take the initiative of a unilateral denunciation for fear of international opinion, of the reparations it might have to pay, or of the risk of reprisals by the other parties, then paragraph 2 offered it a chance of releasing itself from its obligations without risk by inducing a small satellite State to commit a breach of the treaty that could be described as " material ".

77. In addition, according to Sir Gerald Fitzmaurice, certain categories of treaty embodied absolute obligations, though not obligations prescribed by *jus cogens*. Not only did their breach by one of the parties not entitle the other parties to denounce the treaty; it did not even justify non-observance of the treaty by the other parties with respect to the defaulting party.

78. With regard to paragraph 4, he approved of the expression " material breach ", which was preferable to " fundamental breach ", as had been shown by Talalayev in an article published in the *Soviet Year Book* for 1959.[10] However, the provision should take account of cases in which the breach was extenuated, though not nullified, by the circumstance that it had been provoked by the earlier attitude of the injured State.

79. Admittedly, article 20 contemplaced only the termination or suspension of a treaty in consequence of a breach; but it might happen that the denunciation of one treaty was lawful because of the breach of another. That situation could arise where two treaties were so closely inter-related that the breach of one frustrated the purpose and object of the other, or where the breach was of a treaty vitally important to the injured State, which had previously fulfilled most of its obligations. The defaulting party would not be affected by the denunciation of that treaty, and the injured State could then, as a reprisal, suspend the application of another treaty.

80. A State might decide to denounce a treaty for reasons other than a breach. If, for example, a State was seeking to overthrow the established régime of another State by all the means at its command, it would probably be absurd to maintain a treaty of friendship in force between the two countries, even though the treaty did not prescribe any grounds for denunciation.

81. He considered that in article 20 the expression " unlawful breach " would cover all the cases to which he had referred.

82. Mr. CASTRÉN said he agreed with the Special Rapporteur on all matters of principle; the purpose of his amendment was merely to simplify the formulation of the draft by eliminating anything that repeated provisions of other articles, or was not essential.

83. Paragraph 1 (*a*) of the draft stated a universally recognized principle. It need not be retained, because the same idea followed indirectly from paragraphs 1 and 2 of his amendment, which also covered paragraph 1 (*b*) of the draft. It was more logical to state the main rule first, specifying the cases and circumstances in which a State could denounce or suspend a treaty on its breach by the other party. Then should follow the definition of a " material " breach which could lead to denunciation.

84. Paragraph 1 of the amendment corresponded in substance to paragraph 3 of the draft, sub-paragraphs (*a*) and (*b*) of which had been incorporated in it.

85. Paragraph 2 of the amendment reproduced the essence of the Special Rapporteur's paragraph 4 in more concise terms. Paragraph 4 (*b*) had been deleted, because the other parties to a treaty, which were not concerned in its breach, could obviously terminate or amend it by subsequent agreement.

86. He had included the whole of paragraph 5 of the draft as paragraph 3 of his amendment.

87. Paragraph 4 of his amendment reproduced the Special Rapporteur's paragraph 2 in shortened form. Paragraph 4 (*a*) of the draft, which was self-evident, had been deleted; the reference to article 18 in paragraph 4 (*b*) was also unnecessary.

88. He had deleted paragraph 2 (*c*) of the draft because it was covered by paragraph 4 (*b*) of his amendment.

89. Mr. de LUNA had said there were gaps in his amendment; but the same gaps appeared in the Special Rapporteur's draft on which his amendment was based. The answer to Mr. de Luna's point about a breach of a treaty which had occurred long ago was that such cases were covered by article 25. With regard to Mr. de Luna's criticism of paragraph 2, there might indeed be some classes of treaty to which the paragraph should not apply.

The meeting rose at 12.55 p.m.

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[9] Scott, J. B., Hague Conventions and Declarations of 1899 and 1907, 3rd edition, New York, 1918, Oxford University Press, pp. 100 ff.

[10] Talalayev, A. N., The Termination of International Treaties in the History and Practice of the Soviet State (in Russian), *Soviet Yearbook of International Law*, 1959, Moscow, Publishing House of the Academy of Science of the USSR, pp. 144 ff.