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**Summary record of the 692nd meeting**

Topic:  
**Law of Treaties**

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## 692nd MEETING

Tuesday, 4 June 1963, at 3 p.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 continue consideration of article 20 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

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

2. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 5 of article 20 dealt with the special case of a treaty which was the constituent instrument of an international organization. The formula it embodied had been used in a number of articles of Part I, such as the article on the participation of additional States in a multilateral treaty and the article on the effect of reservations. During the present session, many members had expressed a preference for not inserting a substantive provision on that special case in the articles, but adopting the alternative course of excluding such treaties from the provisions of the draft. If the Commission wished to adopt that course, it might be simpler to transfer paragraph 5 to a general provision covering all the cases in which the question of such treaties arose in the draft articles.

3. Mr. TUNKIN said that in substance he agreed with the Special Rapporteur's approach to the subject-matter of article 20. He had some comments to make, however, partly on the substance of the various paragraphs and partly on the general structure of the article.

4. To begin with, paragraph 1 was redundant; it did not state any rule and was in the nature of a preliminary explanation which could well be dropped from the article.

5. The Special Rapporteur had, very properly, drawn a distinction between the application of the principles of the article to bilateral treaties and to multilateral treaties. Where bilateral treaties were concerned, he preferred the text proposed by Mr. Castrén at the previous meeting (para. 67) which was much simpler. He also agreed with Mr. Castrén that the provision on the subject of bilateral treaties should form the first paragraph of the article, instead of the third as proposed by the Special Rapporteur.

6. The Special Rapporteur and Mr. Castrén both envisaged two situations: one in which the injured party might denounce the treaty or suspend its operation, and one in which the injured party might terminate or suspend the application of only that provision of the treaty which had been broken. With regard to the latter situation, he did not believe that it was possible to envisage the actual termination of the application of a single provision of a treaty; the article should only

provide for the suspension of a single provision. It would be dangerous to recognize a right to terminate only part of a treaty; many treaties, by their very nature, did not lend themselves to such treatment. The removal from a treaty of some of its provisions could completely change the substantive characteristics of the treaty.

7. Where multilateral treaties were concerned, he favoured a provision along the lines of paragraph 2 of Mr. Castrén's amendment. It would not be appropriate to recognize a right to terminate or suspend only the provision of the treaty which had been broken; only a right of suspension should be specified.

8. A problem arose in connexion with general multilateral treaties, which established or tended to establish rules of general international law. It would not be appropriate to provide for the right of a State to denounce such a treaty when another State happened to commit a breach of it. International practice showed that such breaches were not uncommon. However, in many instances it would be unthinkable for a State to invoke a breach by another State in order to violate a general norm of international law in its relations with that State. It would therefore be advisable to exclude general multilateral treaties from the application of the rule stated in paragraph 4 of the Special Rapporteur's text and in paragraph 2 of Mr. Castrén's amendment.

9. With regard to the definition of a material breach in paragraph 2 of the Special Rapporteur's text, the examples given seemed to have been somewhat arbitrarily chosen. He would have preferred a general formula which, although perhaps less precise, would provide better guidance. If the Commission accepted the method of enumeration, he would prefer the list contained in Mr. Castrén's paragraph 4, subject to the deletion from paragraph 4 (a) of the words "or impliedly excluded".

10. With regard to paragraph 5, he was in full agreement with the Special Rapporteur's suggestion that treaties which were the constituent instruments of international organizations should be excluded from the application of the draft by a general provision. Such a provision would be justified, because each international organization was a separate entity and could be left to settle for itself the difficult problems that might arise in connexion with its constituent instrument. Such constituent instruments were sometimes very different from international treaties. However, no exception should be made with regard to treaties concluded within an international organization; they were ordinary treaties and all the provisions of the draft articles should apply to them.

11. Mr. BRIGGS said that the only paragraph in article 20 that embodied an existing rule of international law was paragraph 1 (a) which, as pointed out in paragraph 10 of the commentary, stated "what appears to be the universally accepted principle that the violation of a treaty, however serious, does not of itself put an end to the treaty". The remainder of the article constituted a proposal, and one which was based neither on State practice nor on the decisions of international tribunals, but on the theories of writers and on speculation.

12. Paragraph 3 permitted the unilateral termination of a bilateral treaty. Paragraph 4 permitted a State to release itself from its obligations under a multilateral treaty; on that point he agreed with Mr. Tunkin that general multilateral treaties should be treated as a special category.

13. With regard to the checks or limitations which the Special Rapporteur's text placed on the unilateral right to terminate a treaty or repudiate its provisions, the first was that which confined the operation of article 20 to the more serious breaches termed, in paragraph 2, "material" breaches. Paragraph 2(a) stated that a repudiation of the treaty constituted such a material breach while paragraph 2(c) gave the further example of refusal to implement a provision requiring submission to arbitration or judicial settlement. He had no objection to those examples, but could hardly agree with the examples in paragraph 2(b), particularly sub-paragraph (ii): "the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty". Almost any breach would be covered by that provision, and the whole criterion of a "material" breach would seem to fall down.

14. A second check was provided in article 25 of Section IV, which set out certain steps to be taken prior to the unilateral termination of a bilateral treaty or the unilateral repudiation of the provisions of a multilateral treaty. The provisions of that article fell a long way short of submitting to the International Court of Justice the question whether a breach had been committed and, if so, whether the breach was "material".

15. Therefore, in the absence of more adequate safeguards, he would prefer an article 20 which contained, first, a statement of the principle in paragraph 1(a) of the Special Rapporteur's text and, secondly, a statement of the right to suspend the application of the treaty pending judicial determination of the issues involved. The Commission could very well put forward such a suggestion to governments, but if it felt that the suggestion was not politically feasible, he would propose, as an alternative, that the article should be confined to the statement in paragraph 1(a), leaving to state practice its practical application to the questions which arose. Though he had no enthusiasm for the existing system, which consisted in retaliatory practices, it would be better to leave matters as they stood than to introduce a unilateral right of repudiation which was no part of contemporary international law.

16. He agreed with Mr. Tunkin that there should be no question of terminating the application only of the provision of the treaty which had been broken; a right of suspension was all that should be provided.

17. Mr. TABIBI said that the difficulties in article 20 arose from the lack of machinery for supervising treaties and determining whether a breach had been committed. It was necessary to avoid endangering the security of international transactions by opening the door too wide to the repudiation of treaty obligations by one party on the pretext of a breach committed by another.

18. The easiest way of dealing with the problem would be for the parties to the treaty to establish procedure

for the submission of any dispute to arbitration or to the International Court of Justice. Where the parties could not agree on such procedure, it was difficult to decide which was in the right. Article 20 should state a general rule to deal with such situations; its provisions should not be too rigid, but should be designed as a guide.

19. With regard to the text proposed by the Special Rapporteur, paragraph 1 should be dropped. Sub-paragraph (a) did not state any rule and was therefore redundant; he could not accept sub-paragraph (b), because a treaty should always be considered as a unit and it was not appropriate to provide for termination or suspension of its operation "in whole or in part".

20. He shared Mr. Tunkin's view that general multilateral treaties should receive separate treatment; they often established their own procedure for dealing with breaches and it was therefore desirable not to lay down too rigid a rule in the matter.

21. As far as the form of the article was concerned, he found Mr. Castrén's text more acceptable than that of the Special Rapporteur. He agreed with the Special Rapporteur's suggestion that paragraph 5 should be transferred to a separate article.

22. Mr. LACHS said that article 20 dealt with a very important question. On the whole, he supported the Special Rapporteur's general approach, particularly his idea of a "material breach". The construction of certain parts of the article had raised some doubts in his mind, but his objections were partly met by the amendment proposed by Mr. Castrén.

23. In defining the consequences of the breach of a treaty, it was necessary to strike a balance between the preservation of the principle *pacta sunt servanda* and the need to safeguard the position of the injured party.

24. For the purpose of defining a "material breach" the Special Rapporteur had put forward two criteria. The first was the formal one stated in paragraph 2(b)(i) which linked the definition with the making of reservations; he did not like the reference there to reservations "impliedly excluded". If the provision was regarded by the parties as an important one, they would not have failed to prohibit reservations to it expressly. He therefore suggested that paragraph 2(b)(i) should be amended to refer only to reservations "expressly prohibited under article 18...".

25. He shared the doubts expressed by Mr. Tunkin and Mr. Briggs regarding general multilateral treaties. It would hardly be fair for a State to invoke a breach of a general multilateral treaty by another State in order to avoid its obligations under that treaty.

26. The question of general multilateral treaties also raised the issue of treaties which had a specific relationship with general principles of international law. Sometimes a treaty such as the United Nations Charter confirmed certain general principles of international law; its provisions were then declaratory of international law and the source of the obligations was outside the treaty. Sometimes, as a result of the long existence of a treaty, its provisions became part of international law. Thus the

Nuremberg Tribunal had found that the Hague Convention of 1907 and the Red Cross Convention of 1929 had, by 1939, become part and parcel of international law, and had accordingly over-ruled the objection that Germany was not bound by the Red Cross Convention of 1929 in its relations with those allied belligerents which were not parties to it.<sup>1</sup> An attempt had been made in the *Asylum* case (Colombia/Peru)<sup>2</sup> to invoke the provisions of the 1933 Montevideo Convention on Political Asylum as evidence of customary law, although the other party in the case had not ratified that Convention: but the attempt had failed.

27. In the application of article 20, exceptions should be made for treaties which embodied rules of general international law; otherwise, a State might be tempted to invoke a breach by another State as an easy way out of its obligations under a rule of general international law.

28. He supported the Special Rapporteur's suggestion that the question of the constituent instruments of international organizations should be dealt with in a general provision. That question arose in connexion with a number of articles and could best be dealt with by a general formula.

29. Mr. BARTOŠ said that in addition to the rule *pacta sunt servanda*, article 20 embodied a number of principles recognized in international law. The first of those principles was that laid down in paragraph 1 (a), but it was by no means certain that the rule admitted of no exception.

30. Furthermore, the rule *pacta sunt servanda* was linked to the rule *do ut des*. The literature and the case-law spoke both of the obligation to respect treaties and of the equivalence of the reciprocal stipulations of the parties. Modern treaties concluded under United Nations auspices often contained provisions under which one State could not demand of another something that it refused to accord itself, contrary to the provisions of the treaty or by a restrictive interpretation of it. It followed from the principle *do ut des* that a party which was asked for specific performance could decline to do whatever the other party did not perform; that entailed the potential right to suspend the application of a clause in the treaty until a settlement was reached or until a remedy had been found.

31. There was a fundamental rule, referred to by Mr. Lachs, that the right to refuse to perform a treaty was not absolute. There were cases in which, by the very nature of things, and in a purely material sense, the parties found themselves confronted by rules regarded as part of international public order and having the force of general custom. Mr. Lachs had rightly mentioned in that connexion the interpretation which the Nuremberg Tribunal had placed on the Geneva and Hague Conventions. While it was permissible to refuse certain concessions provided for in a treaty, it was not permissible to refuse to observe rules of *jus cogens*, which

expressed an absolute duty towards the international community, even if the other party did not fulfil its obligations under the same rules.

32. The Special Rapporteur seemed to have taken careful account of the rules to which he had just referred, and had found himself compelled to codify them as rules *de lege ferenda*, or, in other words, as provisions contributing to the progressive development of international law. It was therefore necessary to consider whether the Special Rapporteur's proposal satisfied the principles and needs of the modern international community.

33. To begin with, what was meant by a "material" breach? Was the term to be construed in an objective or in a subjective sense? Those questions raised the dangerous matter of the severability of clauses, and severance itself might be harmful. He agreed with Mr. Tunkin that it would be dangerous to provide for the possibility of denunciation in the case of any and every breach of a treaty.

34. With regard to paragraph 5, he endorsed the comments made by Mr. Lachs. It would be difficult to grant, so explicitly, to an organ of an international organization which was not a judicial organ, the right to determine whether or not a treaty had been violated and whether the rights or obligations of one of the parties were terminated. There, the Commission was moving from law into politics. Even the Charter itself made no provision for anything more than suspension if it was violated. The Commission could hardly grant to organs which were not judicial, rights that vested solely in the court.

35. He commended the efforts made by the Special Rapporteur to seek out the problems which really arose in modern international life and find the means to solve them. The comments he had made also applied to Mr. Castrén's proposal, which really only differed from the Special Rapporteur's text in that it was more concise.

36. Mr. YASSEEN said that the principle on which article 20 was based could not be impugned either in international or in municipal law, but international case-law threw little light on it. The lack of case-law, however, did not necessarily mean that there was no rule, especially when the rule was too evident. In that connexion Lord McNair had rightly said: "As in municipal law, the more elementary a proposition is, the more difficult it often is to cite judicial authority for it."<sup>3</sup>

37. Paragraph 1 (a) stated an indisputable truth. It was clear that a private person could not, by pleading the breach of an agreement by the other party, claim that the agreement had become unenforceable. An injured party might resort to non-performance as one alternative, but if it did not do so, the treaty remained in force. Nor was the rule laid down in paragraph 1 (b) open to dispute; there was no need even to look for supporting evidence in positive law, for that rule was the logical consequence of the way in which conventions operated in general.

<sup>1</sup> Judgment of the International Military Tribunal, London, 1946, H.M. Stationery Office, Cmd. 6946, pp. 45 ff.

<sup>2</sup> *I.C.J. Reports*, 1950, pp. 277 ff.

<sup>3</sup> *Law of Treaties*, 1961, p. 554.

38. With regard to Mr. Briggs's argument that the principle in article 20 was acceptable subject to provision for the submission of disputes to judicial settlement, the difficulty was no greater than in the case of a treaty voided for error, fraud or coercion. It had proved possible to draw up rules covering such defects in consent without the necessity of accepting the idea of compulsory jurisdiction or a prior undertaking to resort to arbitration. The institutions of the international order were still very imperfect, and the vagueness of the rules of international law, as compared with those of municipal law, went a long way towards explaining why most States were reluctant to accept an international jurisdiction in advance; for they did not know exactly what rules would be applied. If the Commission refrained from drawing up rules of international law because of such refusal to accept an international jurisdiction, it might end up with a text that would retard the development of international law. After all, the international legal order provided several means of settling disputes.

39. On the whole, he agreed with the substance of the Special Rapporteur's draft. He had been right to include the concept of a "material" breach. Most writers recognized that any breach of a treaty by one party could entitle the other party to denounce it. At the beginning of the twentieth century, only a few writers had seen any need to distinguish between an insignificant derogation and a material breach. That wholly logical distinction had gradually gained acceptance in doctrine, and quite rightly so. Besides, it should not be forgotten that the concept "material" was entirely relative; for a rule might be of great importance to one party and of much less to the other.

40. He was doubtful about the final proviso in paragraph 4, however. In particular, should that paragraph apply to general multilateral treaties?

41. Furthermore, as Mr. Lachs had pointed out, certain *jus cogens* rules expressed in a treaty or convention might originate outside the convention itself, which did no more than declare those rules. The fact that one of those *jus cogens* rules declared in a treaty clause was not applied did not, therefore, mean that the other party was not bound by the rule in question, which had been binding even before the treaty was concluded.

42. He shared Mr. Tunkin's views on the possibility of denouncing a single clause of a treaty. Although he had argued that in other cases of defective consent, a single article might perhaps be voided — for instance, if it conflicted with *jus cogens* — in the case under consideration, the injured party should only be allowed to suspend the application of the article which had not been observed by the defaulting party, for denunciation would impair the treaty's unity and sometimes its indivisibility. The article in question would not be void *per se*, as it would be if it conflicted with a *jus cogens* rule; nor did denunciation affect its essential validity in any way. A State which did not wish to exercise its right to denounce the treaty as a whole because a single article had not been complied with should therefore be entitled to suspend the application of that article alone.

43. With regard to paragraph 5, he approved of the exception made in the case of a material breach of a treaty which was the constituent instrument of an international organization, but treaties concluded within an international organization should not be assimilated to such constituent instruments.

44. Mr. VERDROSS said he would not comment on paragraph 1 (a) since it had met with general approval.

45. He agreed with Mr. Tunkin that a clear distinction should be made between bilateral and multilateral conventions. In the case of a multilateral convention, provision should be made only for suspension, the convention remaining in force in other respects. The *jus cogens* rules would of course have to be excepted from suspension, as Mr. Lachs had rightly observed. International practice supplied examples, notably the Red Cross Conventions of 1929<sup>4</sup> and 1949<sup>5</sup> on the treatment of prisoners of war, which expressly provided that if a State infringed the humanitarian rules for the treatment of prisoners, the other States were not entitled to suspend the performance of their obligations. The rules in question were, therefore, plainly formulated *jus cogens* rules permitting of no derogation even if they were broken by one of the parties.

46. So far as paragraph 5 was concerned, he agreed that a distinction should be made between the breach of a treaty which was the constituent instrument of an international organization and the breach of a treaty which had been concluded under the auspices of such an organization; in the latter case there was no need to establish rules derogating from the general rules.

47. Bilateral treaties, however, posed a more difficult problem. According to the doctrine which had prevailed hitherto, if a party to a bilateral treaty committed a breach, it was open to the other party either to ask for specific performance or else to denounce the treaty. Mr. Briggs had quite rightly said that cases of denunciation were very rare in international practice. The most recent was perhaps the denunciation of the Treaty between Egypt and the United Kingdom, which Egypt had repudiated after the Suez incident.

48. There remained the particularly delicate question what was a "material" breach. The Commission should either admit that the breach of a bilateral treaty conferred the right to denounce or else accept Mr. Briggs's proposal, which came to practically the same thing, for he too recognized that the innocent party was free, by way of reprisal, to suspend the operation of a treaty. The Commission's decision should be unambiguous, for no objective criterion existed for distinguishing between breaches which were material and those which were not. In the case of a bilateral treaty on consular relations or on establishment, it was virtually impossible to say which articles were "material" and which were not. Hence, either the word "material" should be deleted, or the Commission should adopt Mr. Briggs's proposal and grant the right of suspension only.

<sup>4</sup> League of Nations *Treaty Series*, Vol. 118, pp. 345 ff.

<sup>5</sup> United Nations *Treaty Series*, Vol. 75, pp. 135 ff.

49. Mr. TSURUOKA said that his position on the principle of article 20 was very close to that taken by Mr. Briggs. On the one hand, a sanction had to be provided for the breach of a treaty, and, on the other, the stability of the international order had to be maintained; in that dilemma he would, for practical reasons, prefer a provision allowing the injured party to suspend the performance of the treaty.

50. The question which more particularly engaged his attention was whether the expression "material breach" in paragraph 2 should stand. If so, then the meaning of "material" would have to be defined. For the purposes of the definition, the Special Rapporteur had inserted a cross-reference to certain provisions of article 18 of Part I concerning the formulation of reservations. Admittedly, the idea of a "material" provision and that of a provision admitting of no reservations coincided to some extent; yet the two ideas were distinct, and the provision in sub-paragraph 2 (b) (i) would hardly operate in the case of bilateral treaties, in which reservation clauses were very rare. He therefore considered that the cross-reference should be deleted and that the meaning of "material" breach should be defined.

51. Mr. ROSENNE said that some of the difficulties to which the article was giving rise were due to the fact that the Commission was dealing with generalities and had to take into account the existence of many different types of treaty and the varieties of breach which could, and did, occur. He was uncertain whether the various suggestions for differentiating between certain classes of treaty would prove adequate. Perhaps some additional ones would also need to be considered.

52. Generally speaking, he subscribed to the very similar approaches adopted by the Special Rapporteur and by Mr. Castrén in his amendment. A statement of the rule contained in paragraph 1 (a) of the Special Rapporteur's text was necessary whatever the article's ultimate form, and it would not be altogether correct to claim that the general principle was already covered in articles 2 and 3 of section I.

53. As Mr. Tabibi had pointed out, many treaties included express provisions dealing with breach. For example, a number of both bilateral and multilateral instruments contained a compromissory clause conferring jurisdiction over disputes arising out of their interpretation or application on the International Court of Justice. A more complex example was the elaborate provisions laid down in the Constitution of the International Labour Organisation for dealing with allegations of breach of the International Labour Conventions. Article 20 could not be formulated in terms of a residual rule and must clearly indicate that such special provisions, whether incorporated in the treaty itself or in an ancillary instrument, took precedence over the more general rules to be set out in the article.

54. He did not agree with the view expressed by some members that judicial machinery, particularly that of the International Court, was the only machinery that could properly deal with breaches of a treaty. That might be the desirable ultimate aim, but in the present state of the international community and considering

current conceptions of international relations, he was by no means convinced that every breach would give rise to a justiciable dispute. However, some provision for third-party control, whether political or judicial, along the lines of Article 33 of the Charter would be useful, particularly if framed in rather more specific terms, such as the Special Rapporteur was proposing in a later article.

55. At the present stage, he could accept, in principle, the proposals of the Special Rapporteur and Mr. Castrén for the definition of a material breach, though he would prefer the Special Rapporteur's text; both were preferable without the amendment suggested by Mr. Tunkin. In view of the tenor of the discussions that had taken place at the previous session and the conclusions reached about the implied right to make reservations, some reference to article 18 of Part I should appear in the article.

56. In the case of bilateral treaties, the definition of a material breach by reference to the criteria for the admissibility of reservations could hardly apply, since the Commission had agreed at the previous session that no right of reservation could exist in regard to such treaties. Accordingly every provision must be regarded as being important to both sides and by the same token any breach would be a material one. The same was probably true of treaties concluded between a small group of States. In the case of multilateral treaties, however, a provision that was important for one party might not necessarily be important for the others and it was not clear how so subjective a matter could be referred to political or judicial adjudication by a third party.

57. If paragraph 2 (c) of the Special Rapporteur's text were retained, it must be made absolutely clear that a State which had accepted jurisdiction and was brought before the Court retained intact its right to raise preliminary objections.

58. Furthermore, the wording of that paragraph should be brought into line with the text of the Charter which, in Article 94, paragraph 1, spoke of compliance with a decision of the Court, but made no mention of acceptance of its judgment. There was a difference between compliance and acceptance. For instance, one of the International Court's recent judgments had not been accepted by one of the parties to the dispute; that party had gone so far as to inform all Members of the United Nations, through the Secretary-General, of its reasons for not accepting the judgment, but had announced at the same time that, in conformity with its obligations under Article 94 of the Charter, it would comply with the judgment.

59. Mr. Tunkin's suggestion that general multilateral treaties should be given special treatment had considerable merit, but before committing himself finally on that point, he wished to see how such a provision could be formulated.

60. With regard to the possible remedies available in case of a breach, of the three mentioned, namely, termination, denunciation and suspension, only denunciation was defined in article 1 of the Special Rapporteur's second report. He was not altogether clear as to what termination or suspension involved; he assumed suspen-

sion meant that the innocent party or parties would temporarily refrain from carrying out their obligations under the treaty following a breach of the same treaty by the offending party. But the questions then arose for what period they would refrain and what the legal relations between the parties would be during that period.

61. It would seem preferable to choose the term denunciation to describe the remedy for a breach, it being understood that the injured State or States possessed the usual right of election as to the action to be taken.

62. Some members had ventured into other realms of international law, such as the law of reprisals, presumably within the limits set by the Charter and in conformity with *jus cogens*. If the Commission felt that the situation caused by the breach of a treaty came within the application of the contemporary law of reprisals, then it should say something explicit in that regard rather than try to devise some other formula which might only confuse the issue.

63. Some mention of when the injured State must take action should be made in the article to supplement the provisions of article 4.

64. He reserved his position on the question of severability until it was discussed under article 26 in section IV.

65. He welcomed the Special Rapporteur's constructive suggestion that the constituent instruments of international organizations should be dealt with separately.

66. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 1 (a) in article 20 would serve a useful purpose even though it might not contain a rule of conduct for States.

67. He supported Mr. de Luna's suggestion that paragraph 1 (b) should be expanded to include an illegal as well as a material breach of a treaty.

68. The provision in paragraph 2 (a), which had been omitted by Mr. Castrén in his amendment, was worth retaining.

69. The Special Rapporteur's definition of a material breach was acceptable and the provision in paragraph 2 (c) provided a helpful indication of one important type of violation.

70. Paragraph 3 was also acceptable as expressing an established rule of international law.

71. The most difficult problems were connected with paragraph 4. In the case of multilateral treaties which provided for the reciprocal interchange of concessions and where the contractual character of the *do ut des* was evident, the same right of suspension or termination should be recognized as for bilateral treaties in so far as such a right was a general principle of law. On the other hand, a similar privilege might not exist to the same extent if there were breaches of a multilateral treaty enunciating general rules of law which must continue to be observed by the other parties. For while the violation of a contract in municipal law gave rise to a right to suspend or terminate the application of the agreement, the violation of a municipal law by one of those submitted to it did not give the same privilege

to others, because that would lead to anarchy. Similarly, in the international field a breach of the Convention on the Continental Shelf, for example, would not entitle the other parties to encroach upon the Continental shelf of the defaulting State, because in such a case they would be affecting the rights and interests of other States in the maintenance of general law and order on that matter.

72. However, it was not certain that the solution of the problem would be to confine the right of the complying parties to suspending the application of a multilateral treaty with respect to the defaulting State, thus depriving those parties of the right to consider the treaty terminated with respect to the defaulting State. The complying parties might be interested in depriving the defaulting State of its status as a party to the treaty, with all the rights that entailed as to participation in its revision, and the prestige of continuing to be a party although with suspended rights. Furthermore, the right of suspension might lead to the same difficulties, with respect to the maintenance of general law and order, as those originated by the exercise of the right to consider the treaty terminated with respect to the defaulting State.

73. In his opinion, the essential point was that the right of the complying parties to suspend or terminate the treaty did not release them from their mutual obligations and from their duty to respect the general interest in the maintenance of international order. There was a phrase in paragraph 4 (a) which covered that important point and to which more emphasis should perhaps be added. It was provided that the right to terminate or suspend the application of the treaty could only be exercised by a party "in the relations between itself and the defaulting State". Perhaps the words "without affecting the rights or interests of the other complying States" should be added.

74. The possibility of collective action envisaged in paragraph 4 (b) and in the final proviso constituted a welcome contribution to the progressive development of the law on the subject which did not appear in Mr. Castrén's text.

75. The rule proposed by the Special Rapporteur in paragraph 5 was a valuable one, but a distinction should be made between treaties drawn up under the auspices of an international organization, which then had no further interest in the matter, and those whose execution was supervised by an international organization. In the former case, the States parties should not be deprived of the rights they would possess by virtue of paragraph 4.

76. Subject to article 20 being amended to take account of those observations, he could support the Special Rapporteur's proposals.

77. Mr. CASTRÉN noted that several speakers had taken the view that the Special Rapporteur's draft assigned excessive rights to the injured party. He agreed that it might be wise to make an exception in the case of general multilateral treaties.

78. The principle of the indivisibility of treaties had also been referred to. That was a problem which the Commission would consider later, in connexion with article 26.

Some speakers held that, in the case of a minor breach, the only permissible remedy should be the suspension of the treaty's operation. In practice, the cases which could arise were so diverse that the relevant rules should be very flexible, as the Special Rapporteur had rightly endeavoured to make them. It might happen that a single provision of a treaty was of the utmost importance. The breach of one article might cause very serious prejudice to the other parties, and in those circumstances the right of denunciation seemed to be justified.

79. According to the procedure proposed in article 25, all cases contemplated in article 20 were to be the subject of searching inquiry, and generally speaking it was possible to work out acceptable solutions. Thus article 20 did afford some protection against possible abuses.

80. Mr. TUNKIN said that there seemed to be some misunderstanding about the purport of paragraph 1 (a) of the Special Rapporteur's text. Some members had asserted that it embodied an essential principle, but in his opinion it amounted to nothing more than a paraphrase of the maxim *pacta sunt servanda*, which was the basis of the whole draft. The remainder of article 20 dealt with derogations from that principle.

81. Paragraph 1 (b) was extremely general and merely provided an explanation without laying down any rule. Contrary to the view expressed by Mr. Briggs, he considered that the only well-established rule in the matter of material breach was that it entitled the other party or parties to denounce or withdraw from the treaty. That right had often been invoked for purposes of annulling a treaty so that the principle must be regarded as *lex lata*.

82. General multilateral treaties which were purely declaratory of customary norms of international law presented no problem, because even denunciation by one party could not entitle the others to repudiate their obligations, the source of which might lie either in customary or in conventional law. Modern general multilateral treaties should be placed on the same footing as customary rules, which had become part of general international law.

83. He would hesitate to exclude from the scope of article 20 only those rules deriving from general multilateral treaties and possessing the character of *jus cogens*.

84. He associated himself with Mr. Yasseen's comments concerning the view that it was useless to elaborate norms of international law in the absence of a compulsory international jurisdiction. That issue would have to be discussed in another context outside the law of treaties.

85. He agreed with Mr. Rosenne that it must be clearly stated that, when a treaty contained express provisions concerning its breach or when the constituent instrument of an international organization contained machinery for dealing with breaches of conventions concluded within it, such *lex specialis* would prevail over any of the rules which might be laid down in article 20.

The meeting rose at 6 p.m.

## 693rd MEETING

Wednesday, 5 June 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 continue consideration of article 20 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

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

2. Mr. de LUNA said that, like Mr. Yasseen, he had been disturbed by the views expressed by Mr. Briggs at the previous meeting (para. 11) concerning the principles stated in article 20. Mr. Briggs thought that, apart from paragraph 1 (a), the article was based on the theories of learned writers and on speculation. But he (Mr. de Luna) considered that the Special Rapporteur had stated the problem with remarkable clarity and had proposed a sound solution.

3. He went further than Mr. Tunkin and maintained that the principle that "a material breach of a treaty by one party entitles the other party or parties to denounce or withdraw from the treaty or to suspend, in whole or in part, its operation" was not an exception to the rule *pacta sunt servanda*, but rather a corollary of the principle of the sanctity of treaties. In the application of its provisions, a treaty should not conflict with the principle of good faith, without which the rule *pacta sunt servanda* was meaningless. That explained the maxim of the Roman jurists: "*frangenti fidem, fides non est servanda*".

4. According to a universally recognized principle, failure to observe the obligation to act in good faith in the performance of a contract constituted, in municipal law, a fraud entitling the defrauded party to denounce the contract without prejudice to any claim for damages. That principle had been proclaimed many times in international case-law, for instance, in the cases of the *Polish Nationals in Danzig*,<sup>1</sup> the *Serbian and Brazilian Loans*<sup>2</sup> and the *North Atlantic Coast Fisheries*,<sup>3</sup> in all of which the Permanent Court of International Justice and the Permanent Court of Arbitration had stressed the element of good faith. Moreover, under Article 2, paragraph 2, of the United Nations Charter, Members were bound to "fulfil in good faith the obligations assumed by them".

5. If the party injured by a breach continued to be bound by the treaty without having the right to denounce it, there would be a violation of the principle of reciprocity, which itself was merely the expression of the principle,

<sup>1</sup> P.C.I.J., Series A/B, No. 44.

<sup>2</sup> P.C.I.J., Series A, Nos. 20/21.

<sup>3</sup> Hague Court Reports, New York, 1916, Oxford University Press, pp. 141 ff.