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Summary record of the 693rd meeting

Topic:
Law of Treaties

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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*,[1] the *Serbian* and *Brazilian Loans* [2] and the *North Atlantic Coast Fisheries*,[3] 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,

[1] *P.C.I.J.*, Series A/B, No. 44.

[2] *P.C.I.J.*, Series A, Nos. 20/21.

[3] Hague Court Reports, New York, 1916, Oxford University Press, pp. 141 ff.

embodied in Article 2, paragraph 1, of the Charter, of the sovereign equality of all States.

6. The municipal law of most States recognized the defence of non-performance, which followed from the principle of the interdependence of obligations. Similarly, in municipal law, it was a general principle that a contract could be denounced forthwith if one of the parties, by its own fault, failed to perform its obligations. Accordingly, the article proposed by the Special Rapporteur, far from constituting a proposal *de lege ferenda* or *Begriffsjurisprudenz*, designed to fill a lacuna in positive international law by logical deductions, was in fact based on a principle of existing international law.

7. Although case-law offered no examples of express rulings on the point, he could quote three examples from general multilateral treaties of different periods: the Universal Postal Convention,[4] under article 78 of which the postal service with any country which did not respect the freedom of transit of mail could be suspended; the 1899 Hague Convention on the Laws and Customs of War on Land,[5] article 40 of which provided that any serious violation of an armistice by one of the parties gave the other party the right to denounce it and to recommence hostilities; and the 1923 Geneva Statute on the International Regime of Maritime Ports,[6] article 8 of which provided that each Contracting State could suspend the benefit of equality of treatment from any vessel of a State which did not effectively apply the provisions of the Statute.

8. He could also quote an example from state practice: that of the Soviet Union, which had denounced the treaties governing its alliances with the United Kingdom (1942) and France (1944) on the ground that the two treaties in question had been violated by the Treaty of Paris concluded in 1954 with the Federal Republic of Germany.

9. With regard to the question of reprisals, he did not share the view of Mr. Rosenne, but fully agreed with Mr. Verdross that non-aggressive reprisals, like self-defence, were of the very essence of international law.

10. He had already proposed that the concept of *faute* should be introduced in connexion with the non-performance of a treaty; international courts, even it they were competent to deal with cases of treaty-breaking of great political importance, could not always satisfactorily settle political disputes, which differed from legal disputes in that one or even all of the parties were opposed to the application of existing international law, which they considered unjust. That was why it had been said that, internationally, *de maximis non curat praetor*.

11. Mr. EL-ERIAN said there appeared to be general agreement regarding the principle stated in article 20; the differences which had arisen lay in the approach to the real scope of the principle and the proper conditions for its application. Article 20 struck a balance between recognition of the principle and the definition of its scope and conditions of application. As the Special Rapporteur had pointed out in paragraph 9 of his commentary, the application of the article was narrowed by " the modern practice of giving to many classes of treaties comparatively short periods of duration or of making them terminable by notice ".

12. There were three possible approaches to the problem. The first was a simple general formula of the kind to be found in some private drafts, such as that in article 202 of Field's draft code, which read: " An obligation created by treaty is extinguished, either, . . . 5. By breach of its conditions by the nation entitled to performance." [7] The same approach had been adopted by Bluntschli, article 455 of whose draft code read (translation): " When one of the contracting parties fails to carry out its undertakings or violates the treaty, the injured party is entitled to consider itself released from its obligations." [8]

13. The second approach was that adopted by Mr. Briggs, which would provide for provisional suspension that would only become definitive by judicial determination.

14. The third was the more elaborate approach adopted by the Special Rapporteur and, in substance, by Mr. Castrén.

15. Many members had expressed concern at the risk of abuse of the right embodied in article 20, but one safeguard was provided by the requirement that the breach involved must be a " material " breach, and another by the variety of the means of redress. Both the Special Rapporteur and Mr. Castrén envisaged suspension of the provision of the treaty which had been broken, or suspension of the whole treaty, culminating in its termination or the withdrawal of the injured party. The requirement of a time-limit for the exercise of a claim to suspend or terminate a treaty would also act as a check. For the more serious cases of termination, certain procedural requirements might be laid down, such as the submission of a reasoned statement by the injured party giving the defaulting party reasonable time to answer.

16. With regard to the relationship between the substance of the article and the machinery for judicial settlement, the Commission would have ample opportunity to discuss that matter when it considered article 25. The question of judicial settlement could not be approached in the abstract. The progressive development of international law should not be made to wait upon compulsory judicial settlement; in fact, that development would itself help to create conditions conducive to strengthening the machinery for the peaceful settlement of disputes. He had noted that the draft submitted by the United States delegation to the Disarmament Committee envisaged acceptance of compulsory jurisdiction only for disputes concerning the disarmament treaty at the first stage of disarmament, but for all disputes at the second stage.[9]

[4] League of Nations, *Treaty Series*, Vol. 40, pp. 27 ff.

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

[6] League of Nations, *Treaty Series*, Vol. 58, pp. 301 ff.

[7] Field, D. D., *Outlines of an International Code*, 2nd edition, New York, 1876, Baker, Voorhis & Co.

[8] *Le Droit international codifié*, 3rd ed., Paris, 1881.

[9] ENDC/30, pp. 18 and 25.

17. With regard to the question of inherent international obligations, referred to by Mr. Lachs, he pointed out that the previous Special Rapporteur, Sir Gerald Fitzmaurice, in paragraph 1 (iv) of article 19 of his second report, had described that type of obligation as one "... where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty ... so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions." [10]

18. Lastly, he agreed with those members who considered that the subject-matter of paragraph 5 should be treated separately.

19. Mr. AMADO pointed out that successive special rapporteurs had used different adjectives to describe the gravity of a breach of a treaty. Sir Gerald Fitzmaurice had used the word " fundamental "; the present special rapporteur, after some hesitation, had finally chosen the word " material ". It might be asked what other adjectives could be found to express the idea that the mere breach of a treaty could not bring about its extinction. He admitted that he was at a loss to find an answer.

20. Article 20 was concerned with two contrasting but fundamental ideas: the principle *pacta sunt servanda* and the maxim *frangenti fidem, fides non est servanda*, in other words, the principle of the stability of treaties and the principle of good faith. The writers taught that the breach or non-performance of a treaty did not directly entail its extinction *ipso jure* and did not necessarily render it void. A breach merely authorized the injured party to withdraw from the treaty. Another basic idea was that the mere allegation of a breach was not sufficient to enable the injured party to withdraw from the treaty. Either the party accused of a breach must admit its fault, or the fault must be established by an international authority, or all the parties must agree to the treaty's extinction. The Special Rapporteur had taken those points into account, as had Mr. Castrén in the simplified text he had submitted to the Commission (691st meeting, para. 67).

21. None of the differences of opinion that had arisen concerning the proposed text related to the substance, except where general multilateral treaties were concerned; for it was inconceivable that a single State should be able to obstruct a virtually universal agreement.

22. The Commission should adopt either the text submitted by the Special Rapporteur or Mr. Castrén's simplified version. With regard to the part of the article which referred to the United Nations Charter, however, he proposed that the discussion should be adjourned and that it should be examined separately.

23. Sir Humphrey WALDOCK, Special Rapporteur, said the discussion had shown that most members were reluctant to follow Mr. Briggs in the course he had suggested. Nevertheless, in view of the importance he attached to Mr. Briggs' opinions, he would comment briefly on the point.

24. It was going too far to say that the rule underlying article 20 was not an accepted rule of international law. An examination of diplomatic notes and official statements showed that there already existed a considerable state practice evidencing clear acceptance of the principle that a substantial breach of a treaty might create a right to terminate the treaty. The diplomatic material showed a striking difference in the attitude of States towards the question of termination resulting from a breach and the *rebus sic stantibus* doctrine. When the latter doctrine was invoked, it was often met by a denial of the right to denounce the treaty unilaterally on the basis of that doctrine, the respondent State claiming that its agreement was necessary for termination of the treaty by reason of the change in circumstances. In the situation contemplated in article 20, however, diplomatic correspondence showed not only quite frequent reliance by States on the principle that a serious breach gave rise to a right of unilateral termination, but no disposition on the part of the respondent State to dispute that principle itself. Consequently he had had no difficulty in accepting it as part of international law.

25. Like Mr. Briggs he attached the greatest importance to the procedural aspects of the question. But he must stress that, whatever conclusions the Commission might reach on questions of jurisdiction and procedure, it was still essential to formulate as precise rules as possible on the subject-matter of the article; in fact, the more uncertain the position with regard to jurisdiction, the more necessary it was for the substantive rules to be given a strict and precise formulation.

26. Mr. Tunkin and other members had suggested that the scope of the article should be restricted to those treaties which did not themselves provide a remedy for the situation contemplated. In principle, he was ready to accept that point of view, but he thought it would be going too far to restrict the scope of the article to treaties which were altogether silent with regard to the consequences of a breach. No doubt, as pointed out by Mr. Rosenne, a treaty might contain provisions on the peaceful settlement of disputes and those provisions would constitute a very important form of remedy in the event of a dispute arising between the parties. However, the existence of such a remedy would not necessarily mean there was no room for the application of the principle embodied in article 20, for instance, where there was no actual dispute as to the breach. He therefore suggested that the point should be met by making the provisions of article 20 " subject to any provisions on the subject of remedies which may be contained in the treaty itself ".

27. Several members had suggested that general multilateral treaties should receive special treatment. Personally, he was not at all convinced that it would be an easy matter to distinguish between general multilateral treaties and other treaties for the purposes of the present article. A general multilateral treaty might contain very diverse kinds of obligations. To take as an example the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, some of the norms they stated might have the character of rules of general customary international law from

[10] *Yearbook of the International Law Commission, 1957*, Vol. II (United Nations publication, Sales No.: 1957.V.5, Vol. II), p. 31.

which it was not possible for States to depart by agreement between themselves. But many of the norms contained in those conventions were not rules of *jus cogens*. On the contrary, they were designed to operate essentially in the bilateral relations between individual States which would in many cases be free to derogate from them by mutual agreement. It would seem difficult to exclude, in the relations between a defaulting State and injured State, the application to those conventions of the principles stated in article 20, especially in the event of a persistent breach.

28. A point to be borne in mind was that general multilateral treaties, which often took a long time to enter into force, took still longer to become universal, and it was in fact rare for anything like the full number of potential parties to take the necessary steps to be bound by the treaty. The acceptance of such treaties was very uneven, although some of the rules they embodied might become part of customary international law. It seemed questionable whether a " general multilateral treaty " should be excepted from the normal rules concerning denunciation and suspension when many States remained non-parties.

29. Another point to be remembered was that certain multilateral treaties contained a jurisdictional clause or there was a separate protocol containing an optional clause providing for judicial settlement or arbitration. If a State persistently violated certain clauses of a treaty in its relations with another State, it would seem unreal to exclude any possibility of the denunciation or suspension of the treaty, or of some of its clauses, by the injured party vis-à-vis the defaulting State. Unless such a right were recognized, the injured party might find itself still bound by the jurisdictional clause in its relations with a defaulting party with regard to the treaty as a whole, even though it was unable to secure observance of certain provisions by the defaulting State. True, the principle *inadimplenti non est adimplendum* might to a certain extent provide a solution. But the contractual element present in every general multilateral treaty made it difficult to draw a clear distinction between general multilateral treaties and other treaties for the purposes of article 20. Even a general law-making treaty had the dual aspect of an instrument embodying general legal norms and one establishing contractual obligations between each pair of States. Thus such essentially law-making treaties as the Genocide Convention [11] and the Geneva Conventions of 1949 [12] imposed procedural obligations of a contractual character and were open to reservations as well as being subject to denunciation.

30. He thought that the moment the Commission sought to exclude certain categories of treaty obligations from the operation of article 20, it would find it necessary to distinguish, as the previous special rapporteur had done, not between various types of treaty, but between the different kinds of obligation they contained, according to whether the obligation was of a reciprocal kind or not. As was pointed out in paragraph 6 of his commentary, he recognized the significance of the distinctions drawn by his predecessor between the different types of obligation — reciprocal, interdependent and integral. But, because of the contractual element inherent in every treaty obligation, he had not been convinced that those distinctions ought to be made the basis for excluding particular categories of treaty from the operation of the general rule in article 20. The distinctions drawn by the previous special rapporteur had been very elaborate and the Commission itself did not seem to wish to enter into such complications, though some members had raised the problem of multilateral treaties, more especially in relation to rules of a *jus cogens* character.

31. In his view, the point made by some members in regard to rules of *jus cogens* was really more a question of the effects of the termination of a treaty than of a right to denounce a treaty by reason of a party's breach, and he had already covered that aspect of the matter in section V, in an article on the legal effect of the termination of a treaty (A/CN.4/156/Add.3, article 23). That article would contain a paragraph reading:

> " The fact that under paragraph 1 or 2 of this article a State has been released from the further execution of the provisions of a treaty shall in no way impair its duty to fulfil any obligations embodied in the treaty which are binding upon it also under international law independently of the treaty."

In drafting that article, he had drawn inspiration from the provisions of the 1949 Geneva Conventions. But unlike those conventions, the great majority of general multilateral treaties did not contain any provision of the effect of denunciation on the position of the denouncing State in regard to obligations contained in the treaty forming part of general international law.

32. A particularly striking example was the Genocide Convention, which contained a clause setting out a right of denunciation without any provision for the continuance of obligations. Yet, it would be manifestly absurd to suggest that denunciation of the Genocide Convention by a party could affect the prohibition of the crime of genocide by international law. The fact of the matter was that the Genocide Convention contained, in addition to the substantive clauses relating to the prevention and suppression of genocide, certain procedural clauses in respect of which a right of denunciation was appropriate.

33. For all those reasons, he had hesitated to draw any distinction between treaties in regard to the right to denounce in article 20. He suggested that the Drafting Committee should be invited to consider the whole question in the light of the discussion and submit a revised text to the Commission.

34. Mr. Tunkin had suggested that the reference to the termination of individual clauses of a treaty should be dropped, so that the provision would specify only a right of suspension. The suggestion seemed attractive at first sight: excision of a particular clause from a treaty could easily affect its balance, although, of course, it could be suggested that the defaulting party had only itself to blame for that situation. He would therefore be prepared to support the suggestion that suspension alone should be contemplated.

[11] United Nations, *Treaty Series*, Vol. 78, p. 278.

[12] *Ibid.*, Vol. 75.

35. Mr. Rosenne had asked the meaning of the term " suspension "; his own view was that suspension would involve non-application of the clause in question until it became clear that the defaulting State was ready once again to apply the whole of the treaty.

36. Mr. de Luna had suggested that, when referring to a breach of a treaty, it should be made clear that the reference was to an unlawful breach, and had instanced the possibility of a breach being authorized by the Security Council. That point might be considered by the Drafting Committee to see whether it could be covered without unduly complicating the draft.

37. Mr. de Luna had also suggested that it should be made clear that the breach, in addition to being an important one, must not have been provoked or caused by the other party. In practice, allegations of provocation were very frequent and that point too should be considered by the Drafting Committee. Perhaps it would be appropriate to include in article 19 a reference to article 4 of Part II, which dealt with the loss of the right to denounce a treaty as a result of the acts or omissions of the State alleging the injury. The provisions of paragraph 4 of article 22, on the doctrine of *rebus sic stantibus*, were also very close to the line of reasoning put forward by Mr. de Luna.

38. The main problem to be solved was that of defining a breach, and Mr. Yasseen was right in saying that it would be a step forward to propose a rule providing for a right of denunciation only in the case of an important or material breach, for there were a number of authorities who did not differentiate between different kinds of breach. Certainly there seemed to be general agreement in the Commission on the need to keep the definition narrow. He had tried to provide some form of objective test whereby a breach would be regarded as substantial if it were tantamount to setting aside a provision concerning which reservations were excluded under article 18 of Part I. Some members seemed to favour another kind of definition, but the difficulty was to choose a suitable form of words that would avoid any element of subjectivity. Although he had an open mind on the matter, and although the whole question would obviously need further consideration by the Drafting Committee, he believed that his own solution might be acceptable if modified as suggested during the discussion, for instance, by Mr. Tunkin, who wished to omit the words " or impliedly excluded " in paragraph 2 (*b*) (i); but the reference to article 18 of Part I might have to be retained, since otherwise the case of bilateral treaties would not be covered.

39. He had already suggested that the constituent instruments of an international organization or treaties concluded within an international organization should form part of a separate general provision. The second category had to be covered because of treaties of the type of the international labour conventions.

40. It would also be necessary to maintain the distinction already introduced in Part I between treaties concluded under the auspices of an international organization at a conference convened by it, and those concluded within the organization; in the latter case, the application of article 20 would have to be limited to treaties whose execution was supervised by the organization.

41. Some members had touched on the question of the law of reprisals and Mr. de Luna had suggested that there could be cases in which termination might be justified because of the violation of another treaty; but in his opinion, the Commission could not enter into such issues in formulating the present article.

42. Although certain points still remained to be settled, he thought that article 20 could be referred to the Drafting Committee. The Committee might concentrate its attention on Mr. Castrén's text, which was based on his own, but was certainly neater, though he had some reservations about its wording. Once it had a simpler draft before it, the Commission could re-open discussion of the article.

43. Mr. BRIGGS said that before the article was referred to the Drafting Committee, he wished to say that, despite the great respect he had for the Special Rapporteur's opinion, he felt bound to reject his claim that there existed a unilateral right to repudiate treaty obligations on the ground that a breach had been committed. In paragraph 2 of his commentary, the Special Rapporteur had himself pointed out that state practice did not give much assistance in determining the true extent of such a right and that in most cases the denouncing State had put an end to the treaty for quite other reasons, alleging violation primarily in order to provide a respectable pretext for its action; and in paragraph 4 he had gone on to say that international jurisprudence had contributed comparatively little on the subject. He (Mr. Briggs) therefore continued to think that in article 20 grounds for termination were being provided which did not exist in international law.

44. The CHAIRMAN observed that, whatever collective decision might be reached by the Commission on individual articles, members would no doubt continue to hold different views on whether the rules formulated in particular cases expressed existing law or had been arrived at *de lege ferenda*.

45. He suggested that article 20 be referred to the Drafting Committee.

It was so agreed.

ARTICLE 21 (DISSOLUTION OF A TREATY IN CONSEQUENCE OF A SUPERVENING IMPOSSIBILITY OR ILLEGALITY OF PERFORMANCE)

46. The CHAIRMAN invited the Special Rapporteur to introduce article 21.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 21 was in a sense linked to article 22, it did deal with a distinct juridical issue, which should, he thought, be kept in a separate article.

48. As he had explained in the commentary, paragraph 1 dealt with a matter so closely connected with the problem of state succession that he had hesitated to include

it in the draft, although the Harvard Research group and the previous special rapporteur had included provisions of that kind in their drafts. He hoped members would give their views on whether or not paragraph 1 should be retained.

49. The core of the article was contained in paragraphs 2 and 3, which sought to cover contingencies that were unlikely to be frequent, but could nevertheless arise in practice.

50. Paragraph 4 was concerned with the effect on existing treaties of the development of new rules of *jus cogens*. In the course of its discussion on article 13 (683rd, 684th and 685th meetings), the Commission had agreed that provisions which conflicted with such rules would render a treaty void, and it was obvious that the paragraph required some re-drafting to bring its formulation into line with that decision. Perhaps paragraph 4 might be left aside for consideration by the Drafting Committee in the light of the provision concerning *jus cogens* to be inserted in article 13. It might ultimately prove desirable to embody paragraph 4, possibly in revised form, in a separate article.

51. Mr. VERDROSS said he approved, in principle, of the draft of article 21 submitted by the Special Rapporteur, especially paragraph 4.

52. However, he wished to comment on paragraph 1, which provided that a treaty could be dissolved if one of the parties to it was extinguished, provided always that the extinction of that party had not been brought about by means contrary to the provisions of the United Nations Charter. In his opinion, extinction could not occur in that way, for if a State were occupied or annexed in violation of the principles of the Charter, the occupation or annexation was void in law and the State annexed continued to exist as an international personality and as a legal entity. The last two lines of paragraph 1 (*a*) should therefore be deleted, but the commentary should explain how the paragraph was to be interpreted.

53. Mr. ROSENNE said that in his opinion paragraph 1 should form a separate article; the general proviso contained in paragraph 1 (*a*) should be retained either in the article itself or in the commentary.

54. After hearing the comment made by Mr. Verdross, he inclined to the view that some explicit reference should be made to *de facto* or temporary extinction of a State by means contrary to the provisions of the Charter, as opposed to extinction in conformity with the Charter, for example, when two States agreed to amalgamate.

55. Sub-paragraph 1 (*a*) (i) raised a serious question of principle when it stipulated that the extinction of one of the parties could be invoked as having dissolved a bilateral treaty. At its previous session the Commission, in article 1, paragraph 1 (*a*), of Part I, had accepted for its purposes the obvious principle that a minimum of two parties was required to create a treaty, and it could normally be assumed that if the number of parties fell below two, the treaty would be dissolved. However, since then the question had been raised whether that condition necessarily held for the continuation of every treaty, or if not of the treaty as such, then at least of the obligations arising under it.

56. His doubt had been prompted by reading the judgement of the International Court in the *South-West Africa* cases (preliminary objections) [13] regarding the mandate and its continuation in force despite the disappearance of one of its parties, the League of Nations; that decision had to be read in the light of some of the dissenting opinions in which specific reference was made to the Commission's pronouncement of 1962 concerning the number of parties needed to create a treaty.[14] Admittedly, the Commission had deliberately excluded from the scope of its draft articles the treaties to which an international organization was a party. Nevertheless, the Court's judgement might have some relevance to bilateral treaties between States. The question to be considered was whether in certain circumstances the surviving party to a bilateral treaty, which continued to enjoy the rights created by the treaty, continued to be subject to the obligations it had accepted under that treaty after the extinction of the other party; the *South-West Africa* cases seemed to indicate that the extinction of one party did not necessarily lead to impossibility of performance, and hence to the dissolution of the treaty.

57. The wording of paragraph 1 (*b*) would need some modification so as to make clear that, as stated in the last sentence of paragraph 4 of the commentary, it was intended to cover the possible extinction of a party to a treaty concluded among a small group of States, in which event the usefulness of the treaty might be greatly impaired.

58. He had no very strong views on whether paragraph 4 should remain in the same article as paragraphs 2 and 3 or be transferred to article 13.

59. Mr. CASTREN said he supported the line taken by the Special Rapporteur in article 21, subject to a few drafting amendments. Paragraph 1 should be deleted and its subject-matter dealt with in connexion with the succession of States and governments. If the Commission should decide to retain that paragraph, however, he would suggest that the words " provisions of the Charter of the United Nations " should be replaced by " principles of the Charter of the United Nations " or " rules of general international law ".

60. In paragraph 2, the phrase " after its entry into force " seemed unnecessary, for it was obvious that the performance of a treaty did not generally begin until it had entered into force.

61. According to paragraph 2 (*a*), a treaty might be terminated by reason of the disappearance or destruction of the physical subject-matter of the rights and obligations contained in the treaty, provided that the purpose of the treaty was not to ensure the maintenance of that subject-matter. But it might be impossible to replace the physical subject-matter of the treaty; hence the words " if it can be replaced " should be added at the end of the clause.

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[13] *I.C.J. Reports*, 1962, pp. 319 ff.

[14] *Ibid.*, p. 475.

62. For paragraph 3 he suggested a more concise text reading:

> "If in a case falling under paragraph 2 there is substantial doubt as to whether the cause of the impossibility of performance will be permanent, the treaty may only be suspended until the impossibility of performance has ceased."

Obviously, if the impossibility of performance became permanent contrary to expectation, the main rule applicable would be that stated in paragraph 2.

63. Mr. de LUNA endorsed the views expressed by Mr. Verdross, Mr. Rosenne and Mr. Castrén. The idea expressed in paragraph 1 should be retained, but placed in a separate article, as its subject-matter was separate. He agreed with Mr. Verdross that the proviso in paragraph 1 (*a*) should be deleted; for either the State in question continued to exist and the rule stated in paragraph 1 was not applicable, or else it had ceased to exist, in which case the treaty could not be said to remain in force.

64. The very interesting case mentioned by Mr. Rosenne — an obligation deriving from a bilateral treaty which subsisted after one of the parties had disappeared — was not an ordinary bilateral obligation. An obligation always had a certain element of "alterity" — to use a term from metaphysics; if an obligation of that kind survived, it was because it was an obligation not only to the party which had stipulated it in the treaty, but also to the international community, as had been maintained in the case of the mandates entrusted to the Union of South Africa by the League of Nations.[15] In the normal case of a bilateral treaty, in which there was no substitution of the treaty obligation, the obligation always ceased, because all the obligations deriving from a treaty were extinguished where there was no element of "alterity". But in any case, the Commission need not discuss that problem.

65. He approved of paragraphs 2, 3 and 4, and agreed with Mr. Verdross that paragraph 4 was essential. There were three cases of impossibility: physical, legal and moral; provisions concerning them would serve as a transition to article 22, which dealt with the doctrine of *rebus sic stantibus*. In the case of moral impossibility, the treaty could still be executed, but if the circumstances had changed it could not be held that a State was bound to execute the treaty.

66. Mr. AGO said he had some doubt whether paragraph 1 should be retained. It was true that the extinction of a State party to a bilateral or multilateral treaty raised a number of problems, but it was questionable whether it was really appropriate to deal with them in that context.

67. If the treaty conferred on one of the parties a specified right *in rem*, such as the right arising from a treaty of cession recognizing a State's sovereignty over certain territories, the right *in rem* clearly subsisted, even if the other contracting party to the treaty ceased to exist. In the case of a contractual right, the whole problem of state succession arose. If a treaty conferred a right that was connected, for example, with the particular situation of a certain State, it might, indeed, be thought that on that State's disappearance, the right subsisted vis-à-vis the successor State; that was a typical problem of state succession, but it should not be dealt with in article 21.

68. Moreover, in such a case it was not the treaty itself, but the right as such which remained in being. Even if there were a so-called succession relationship between the former State and the new State, the earlier treaty as such no longer existed, and the right it conferred, together with the corresponding obligation, was, in a sense, the subject of a new tacit agreement between the State possessing the right and the new State.

69. The extinction of a State contrary to the principles of the United Nations Charter raised another very difficult problem. Even if the State's extinction had been brought about by means contrary to the provisions of the Charter, it might also happen that the treaty became physically impossible to apply, and was therefore dissolved, at least so long as the lawful situation was not restored. In short, the two questions dealt with in paragraph 1 should not be considered in connexion with the dissolution of treaties; in any event, there was no necessity to mention rules that were self-evident.

70. Mr. BRIGGS said he agreed with the Special Rapporteur that the matter dealt with in paragraph 1 did not properly belong in the draft at all, and should be considered in the context of state succession.

71. Paragraph 4 ought to be transferred to some other part of the draft.

72. He was uncertain as to what was meant by the expression "to call for" in paragraph 2; did it refer to the act of bringing termination to the attention of an international organization or the International Court of Justice, or to the act of notifying the other party or parties?

73. On the more general question of whether an article consisting of paragraphs 2 and 3 was necessary at all, he said that the issue was not really one of termination, but of impossibility of performance as a valid justification for the treaty provisions not being carried out.

74. Mr. GROS, in reply to the questions put by the Special Rapporteur, said that it would be well to delete paragraph 1; on that point he endorsed the explanations given by Mr. Ago. Paragraph 4 could be incorporated in article 13.

75. With regard to paragraphs 2 and 3, he was reluctant to recognize impossibility of performance as a separate ground for the dissolution of a treaty; he was more inclined to regard it as a problem connected with the doctrine of *rebus sic stantibus*, dealt with in article 22, which might be supplemented by a provision concerning impossibility of performance.

76. But if the Commission adopted the Special Rapporteur's presentation in two separate articles, he saw no reason why article 21 should not consist of the existing

[15] See *I.C.J. Reports*, 1962, pp. 319 ff.

paragraphs 2 and 3; for the new paragraph 3 he would prefer the wording proposed by Mr. Castrén.

77. Mr. TUNKIN said that the problems dealt with in article 21 were extremely complicated and it would be wise to give members time for further reflection; in the meantime the Commission could take up article 22.

78. He did not feel able at that stage to express a final opinion on whether the problem with which paragraph 1 was concerned should be dealt with in the draft or taken up later in connexion with state succession.

79. He was in general agreement with paragraph 2.

80. Though he believed that a clause was needed to cover the complete disappearance or destruction of the physical object of a treaty, like Mr. Briggs he was not clear as to the meaning of the phrase " to call for the termination ". The rule stated in paragraph 4 was an important one and would represent real progress; he was strongly in favour of its inclusion.

81. Mr. LACHS said that articles 21 and 22 both dealt with impossibility or extreme difficulty of performance and should be discussed together with a view to their possible amalgamation. Article 21 was concerned with the effects of the extinction of one of the parties, the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty, the permanent disappearance of a legal arrangement or regime established by the treaty, and the establishment of a new rule of international law which rendered the performance of the treaty illegal. Article 22 was concerned with an essential change in circumstances which would frustrate the further realization of the object of the treaty or make performance of the obligations contained in it essentially different from what had been originally undertaken by the parties.

82. The dividing line between what certain writers described as absolute impossibility and relative impossibility of performance was not very clear in either article, but of course the cases that arose in practice varied widely and the whole range of possibilities could hardly be fully covered by the rules to be formulated.

83. In connexion with paragraph 1, the Commission would have to consider, in addition to the question of the extinction of one of the parties, the possibility of the discharge of an obligation leading to self-destruction — a plea that had been made by Turkey in the *Russian Indemnity* case of 1912.[16] On that occasion the plea itself had failed, but it was significant that the Permanent Court of Arbitration had admitted that such a plea could legitimately be advanced. Another question to be considered besides illegality of performance was what the International Court of Justice, in the *South-West Africa* cases, had described as insurmountable difficulties of a juridical nature.

84. In discussing various possibilities envisaged in both articles, the Commission must bear in mind the influence of the time factor and the inevitable changes that it could bring about in the nature of the object originally contemplated by the parties at the time of concluding the treaty.

85. He hoped that the title of article 22 would be changed because of the negative connotation which the doctrine of *rebus sic stantibus* had recently acquired, both for lawyers and laymen.

86. The CHAIRMAN invited members to give their views on the two procedural suggestions before the Commission.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that he preferred Mr. Tunkin's suggestion because, as he had already pointed out, there were juridical reasons for dealing separately with the matters covered in articles 21 and 22, and it might not prove expedient to combine them. On the other hand, if the Commission were first to take up article 22, it might subsequently find it easier to reach a conclusion on article 21.

88. He had used the doctrine of *rebus sic stantibus* as the title of article 22 because it was a convenient label, but he recognized the force of Mr. Lachs' objection and would be prepared to suggest an alternative: he had not used the expression " *rebus sic stantibus* " in the text of the article.

89. The suggestion that paragraph 4 should be incorporated in article 13 of section II did not commend itself to him; he believed that a provision concerning conflict with a rule of *jus cogens* that led to termination must remain in section III and should not be included in article 13 of section II, which dealt with conflict with *jus cogens* as a ground for invalidating the treaty *ab initio*.

90. The CHAIRMAN suggested that, since the Special Rapporteur had given it his preference, the Commission should follow Mr. Tunkin's suggestion and take up article 22, after which it would revert to article 21.

It was so agreed.

The meeting rose at 12.50 p.m.

694th MEETING

Thursday, 6 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Inter-American Juridical Committee

1. The CHAIRMAN welcomed Mr. Gaicedo Castilla, the observer for the Inter-American Juridical Committee.

2. Mr. GAICEDO CASTILLA, speaking at the Chairman's invitation, expressed his pleasure at being able to attend the meetings of the Commission and his keen interest in its work.

[16] *Hague Court Reports*, New York, 1916, Oxford University Press, pp. 297 ff.