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Summary record of the 709th meeting

Topic:

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and such divergences of view as had emerged related more to the way in which it was drafted.

86. He hoped that Mr. Gros would not press his amendment to paragraph 1 (*c*), as it would shift the emphasis from the temporal element of termination to its mode, which had not been the Drafting Committee's intention. Nor would he favour the replacement of that paragraph by the text proposed by Mr. Castrén during the first reading.

87. The amendment suggested by Mr. Ago to meet the point made by the Chairman would not alter the sense of the paragraph and he did not believe that anyone reading the article in the context of section III as a whole could possibly conclude that treaties containing provisions regarding their termination fell wholly outside the application of certain general provisions contained in the succeeding articles. Any such construction would be in defiance of the normal rules of interpretation. Perhaps the Drafting Committee could be relied on to make such changes as were necessary to cover the points raised during the discussion.

88. The CHAIRMAN suggested that, subject to drafting changes, the Commission might vote on article 15.

89. Mr. CASTRÉN, supported by Mr. YASSEEN, asked that the vote be postponed until the Commission had the Drafting Committee's new text before it; otherwise he would be obliged to abstain.

It was so agreed.

The meeting rose at 12.30 p.m.

709th MEETING

Thursday, 27 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*)

Articles submitted by the Drafting Committee (continued)

1. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 16.

ARTICLE 16 (TREATIES CONTAINING NO PROVISIONS REGARDING THEIR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed, in replacement of articles 16 and 17, a new article 16 entitled "Treaties containing no provisions regarding their termination" which read:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation unless it appears from the nature of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties did not intend to exclude the possibility of denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depository twelve months' notice to that effect."

3. The detailed article 17 he had originally put forward on the implied right of denunciation (A/CN.4/156/Add.1) had not commended itself to the Commission, in which two trends of opinion had emerged. Some members had been opposed to any article on the subject and others, while not in favour of anything as comprehensive as the original article 17, had thought it necessary to provide for the possibility of an implied right of denunciation or withdrawal when it could be inferred from the intention of the parties that those acts had not been excluded.

4. He emphasized that the Drafting Committee was not proposing that the intention of the Parties could be inferred solely from the nature of the treaty without having regard to the circumstances of its conclusion.

5. Consideration of the title of the article might be held over until the Commission came to consider the new text of article 15 which was to be prepared as a result of the discussion at the previous meeting.

6. Mr. VERDROSS proposed, first, that in the phrase "unless it appears from the nature of the treaty", the word "nature", whose meaning was debateable, should be replaced by the word "object".

7. Secondly, and more important, since article 16 was based on the very sound principle that such a treaty could not be denounced, the condition for derogation from that principle should be expressed in positive rather than negative form. He therefore proposed that the words "the parties did not intend to exclude" should be replaced by some such wording as "it was the intention of the parties to admit".

8. Mr. CADIEUX said he wished to make a few suggestions relating only to the form of the article, and apologized for raising questions which might perhaps already have been settled at the first reading or in the Drafting Committee.

9. First, it seemed to him that the idea expressed by the words "the statements of the parties" was already contained in the expression "the circumstances of its conclusion"; if it was desired to refer specifically to the statements of the parties, that could be done in the commentary.

10. Secondly, it would be better if the word "possibility", near the end of the first sentence, were replaced by "right" or "faculty".

11. Thirdly, the expression "In the latter case" at the beginning of the second sentence was not very felicitous; since in fact only one case was contemplated, it would be better to say simply "In that case".

12. Sir Humphrey WALDOCK, Special Rapporteur, explained that the phrase "statements of the parties"

was intended to denote not only statements made during the negotiations, but also later statements; the latter could be regarded as an element in subsequent conduct which, according to a well-known principle, had to be examined when interpreting intention.

13. Mr. CASTRÉN said that he could accept as it stood the new article 16, which was a distinct improvement on the former articles 16 and 17. Nevertheless, he would like to ask a few questions.

14. First, the word " and " before " from the circumstances " replaced the word " or " used in the corresponding sentence in the original article 17, paragraph 5. The new wording certainly reinforced the permanence of treaties, but it might be going too far to require both conditions to be fulfilled.

15. His second question concerned the commentary on article 16. Was it intended, as some members of the Commission had proposed, to give examples of permanent treaties and temporary treaties according to their nature and the circumstances of their conclusion ? And if so, what examples would be given ?

16. Lastly, article 16 in its new form introduced a new element as evidence of intention, namely, the statements of the parties. The idea was acceptable, but should it not be specified that the statements referred to were those made by all the parties during the negotiations or at the time of concluding the treaty ? For statements made after that time could hardly be taken into consideration as well. Perhaps that could be made clear in the commentary.

17. Mr. LACHS said that the new article 16 was much clearer than the original article 17 and had the merit of brevity. He supported both the changes proposed by Mr. Verdross.

18. With regard to the time-limit, provision should be made for extending the period of twelve months where the nature of the rights and duties created by the treaty so required.

19. Mr. de LUNA approved of the new text in principle, but agreed with Mr. Verdross and Mr. Lachs that the condition for derogation should be drafted in positive form. The essential question was whether the treaty's silence on the possibility of termination meant that the parties intended the treaty to be perpetual or, on the contrary, to be terminable. In some cases it was manifest that the parties did not wish to permit denunciation or withdrawal. In other cases, chiefly in commercial treaties, which were of an essentially temporary nature, he was inclined to believe that there was already an international norm according to which the silence of the treaty meant that denunciation and withdrawal were possible.

20. Another question regarding article 16 to which he attached particular importance was that of the possible effects of constitutional limitations on the expression of the will of States concerning the termination of a treaty. The effects of such limitations had been taken into account in connexion with the conclusion of treaties, and it was equally essential to mention them in the section dealing with termination.

21. Mr. YASSEEN said that the text proposed by the Drafting Committee for article 16 was a cautious attempt to meet a real need of international law. The important point of the article was that among other factors determining the possibility of denouncing a treaty it included the circumstances of the treaty's conclusion. That was quite proper, and was consistent with the view he had expressed during the first reading, when he had stressed the need to give States an opportunity of reviewing their positions, especially where political treaties were concerned (689th meeting, paras. 30 and 31).

22. He supported Mr. Verdross's comment concerning the formulation of the derogation clause. Since the possibility of denunciation was to be based on the intention of the parties, that intention must be positive; it was not enough to say that denunciation must not have been excluded, it should be specified that the parties must have admitted the possibility of denunciation.

23. Mr. BRIGGS said he would be unable to vote in favour of article 16 because it ran counter to an existing principle of international law, namely, that the right of denunciation existed only if provided for in the treaty itself or by agreement between all the parties. The proposed conditions for inferring an intention to allow denunciation or withdrawal were extremely vague. If such a provision were nevertheless retained, he might find it more acceptable if the intention were described in positive form, as proposed by Mr. Verdross, and if the subsequent conduct of the parties were mentioned in place of the last condition.

24. Mr. PAREDES said he regretted that he could not accept the text proposed for article 16. He did not believe that there could be perpetual treaties, either against the will of the parties or by virtue of their decision.

25. Law-making treaties, in other words treaties which laid down general rules of law, could be of indefinite duration; other treaties, which had brought some legal proceeding to a conclusion and finally established a right, were accordingly final; but there were all the treaties establishing future relations between the parties which could not be carried on indefinitely — they could not be enforced in perpetuity. And that was so even if the parties had provided for the perpetuity of the treaty when concluding it. For a perpetual treaty would be a form of slavery which was intolerable in international life.

26. In internal law, the contracting of personal services for life was prohibited, because it was contrary to the great principle of the liberty of man. That applied even more strongly to nations, because their life was far longer. Mr. de Luna had referred to commercial treaties, but many other examples could be given of treaties under which the mutual relations of the parties changed with time, so that it became necessary to adopt amendments or terminate the treaties, even in spite of the agreement of the contracting parties expressed in the text of the instrument.

27. Mr. BARTOŠ said that although he was a member of the Drafting Committee, he would have to abstain from voting on article 16 because its formulation in

fact amounted to the adoption of an idea that the Commission had wished to reject: the existence of perpetual treaties. To say that if the parties had not intended to admit denunciation or withdrawal no party could denounce the treaty or withdraw from it, was surely to recognize the perpetuity of the treaty.

28. Mr. EL-ERIAN said that he too would have to abstain from voting on article 16, which he found unacceptable for the same reasons as the two previous speakers.

29. Sir Humphrey WALDOCK, Special Rapporteur, said it was clear that opinion in the Commission was divided; some members, including himself, favoured an article which went further in allowing an implied right of denunciation or withdrawal, while others believed that such a right did not exist at all. The Drafting Committee had probably been justified in its cautious approach.

30. He found both Mr. Verdross's suggestions acceptable and believed that the purpose of the second could be achieved by substituting some such wording as " intended to admit " or " contemplated " for the words " did not intend to exclude ".

31. Perhaps the point made by Mr. Lachs, which had not previously been considered, could be referred to the Drafting Committee. Personally, he would hesitate to introduce a more complex provision concerning the length of the notice and would have thought twelve months ought to be sufficient for making any arrangements consequential on termination. Many modern treaties — treaties of a technical or commercial nature, for example — provided for even shorter periods of notice.

32. The drafting suggestions made by Mr. Cadieux seemed acceptable and could be referred to the Drafting Committee.

33. Mr. ROSENNE said he reserved his position concerning Mr. Verdross's proposal that the word " nature " should be replaced by the word " object ".

34. Mr. TUNKIN said that, although he had no particular liking for the word " nature ", he certainly could not support Mr. Verdross's amendment. Perhaps the word " character " might be a better alternative.

35. Mr. de LUNA suggested that the expression " nature of the object " should be used, rather than " nature " or " object " and that the word " possibility " should be replaced by the word " faculty ".

36. Mr. BRIGGS said that there was no need to refer to either the nature or the object of the treaty.

37. The CHAIRMAN suggested that, as some of the amendments were of quite a substantial character, perhaps article 16 ought to be referred back to the Drafting Committee before a final decision was taken.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would need firmer guidance as to the Commission's wishes. Was he to understand, for instance, that Mr. Verdross's second amendment had gained general support ?

39. A decision would also have to be taken on whether or not the reference to the nature of the treaty was to be retained. He found Mr. Briggs's suggestion that it should be omitted quite unacceptable.

40. The CHAIRMAN said that the discussion had clearly shown that on the whole the Commission was in favour of the Drafting Committee's text and of Mr. Verdross's second amendment, and wished the Drafting Committee to consider some alternative to the word " nature ". He therefore proposed that article 16 be referred back to the Drafting Committee in the light of the discussion.

It was so agreed.

Article 18 (Termination or suspension of the operation of treaties by agreement)

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had amended the title of article 18 to read " Termination or suspension of the operation of treaties by agreement " and proposed a new text which read:

" 1. A treaty may be terminated at any time by agreement of all parties. Such agreement may be embodied:

" (*a*) in an instrument drawn up in whatever form the parties shall decide;

" (*b*) in communications made by the parties to the Depositary or to each other.

" 2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all parties, the consent of not less than two-thirds of all the States which drew up the treaty; however, after the expiry of X years the agreement only of the States parties to the treaty shall be necessary.

" 3. The foregoing paragraphs also apply to the suspension of the operation of treaties."

42. The detailed original text of article 18 (A/CN.4/156/Add.1), setting out the different instances in which the parties might wish to suspend or terminate a treaty by agreement, had been severely abridged. The original paragraph 1 had been made to conform with certain parallel provisions in Part I of the draft, in which a distinction had been made between treaties drawn up at an international conference convened by an international organization, treaties drawn up within an international organization and treaties drawn up at a conference convened by the States concerned. After some discussion, the Drafting Committee had concluded that termination raised rather different issues from those dealt with in Part I, which would justify the simpler provision now presented in paragraph 2 of the new text, in which all types of multilateral treaty were placed on the same footing.

43. In considering that paragraph, the Commission should bear in mind that a special article was to be

inserted in section I, under which certain types of treaty concluded within an international organization would be excluded from the scope of the draft.

44. Mr. CADIEUX suggested two drafting amendments. First, in the title the word " subsequent " should be added before the word " agreement ", since, as the draft stood, there might be some confusion between the titles of articles 15 and 18.

45. Secondly, the words " subject to the provisions of paragraph 2 " should be added at the beginning of paragraph 1. The rule stated in paragraph 1 was not an absolute rule, for in the case contemplated in paragraph 2 the agreement of the parties was not sufficient, the consent of two-thirds of all the States which had drawn up the treaty being also required.

46. Mr. BARTOŠ said he intended to vote for article 18, but subject to a reservation on the words " in addition to the agreement of all the parties " in paragraph 2. That condition would be retrograde, inasmuch as it would allow a single party to impose a kind of veto on the will of all the others, even against the wishes of two-thirds of all the States which had drawn up the treaty. It would be a mistake to adopt such a rule, in spite of all the arguments which could be advanced in its favour, such as the sanctity of treaties, the protection of minorities, and the need for the consent of all States participating in the treaty. In his opinion the need to avoid any hindrance to the development of international law prevailed over all other considerations.

47. Mr. VERDROSS said he would vote for article 18, though in his opinion the agreement of all the parties was sufficient for the termination of a treaty. To require in addition the consent of two-thirds of all the States which had drawn up the treaty was certainly taking a position *de lege ferenda.*

48. Mr. LACHS said that on the whole the new text of article 18 was acceptable; he supported Mr. Cadieux's second amendment, which would show that paragraph 1 did not cover every type of treaty.

49. Perhaps the doubts expressed by Mr. Bartoš and Mr. Verdross concerning paragraph 2 would be removed if the period provided for at the end were not too long. It was only necessary to allow a reasonable interval for the completion of ratification processes, after which time it could be assumed that States which had taken part in the conclusion of the treaty and had not yet ratified it were no longer interested in doing so.

50. The Commission would have to take a separate decision on whether all the provisions concerning suspension should be incorporated in a single article.

51. Mr. de LUNA asked whether, in article 18, the Special Rapporteur contemplated the case of implied termination of a treaty resulting from important acts by the parties other than the conclusion of a subsequent treaty. He cited the decision of the Supreme Court of Germany in 1925 on the implicit termination of the Treaty of Brest-Litovsk, when the USSR had declared that it regarded the treaty as abrogated: that had been simply a unilateral declaration, but it had been accepted by Germany.

52. It might be thought that that point could have been raised during the discussion of the preceding article, since many writers regarded the case as an instance of tacit agreement. Personally he took the view that it was not a case of a request for termination addressed by one of the parties to the other, but of an acceptance of a unilateral denunciation which had originally been irregular. The irregularity was cancelled by the conduct of the other party, which accepted it either by inaction or silence or by important positive acts. If that case was not covered by article 18, he thought a paragraph should be added on that point, which was of some importance. But he would not press his proposal to a vote.

53. Mr. ROSENNE said he agreed with Mr. Lachs concerning paragraph 2, but must warn against fixing too short a period. Recent experience with the conventions drawn up at the first Geneva Conference on the Law of the Sea and with the Vienna Convention on Diplomatic Relations had shown that ratification processes could be delayed by the knowledge that another international conference on a closely related topic was to be held in the near future.

54. With regard to paragraph 3, he was becoming more and more convinced that it would be a great step forward in the development of the law of treaties if the Commission could deal more thoroughly with suspension. He had been impressed by McNair's comment that the precise juridical status of the practice of retaliatory suspension of the operation of a provision following a breach was not clear.[1] Article 18 could be adopted on the understanding that the Commission might finally decide to transfer all, or as many as possible, of the provisions on suspension to one or two separate articles on that subject, and perhaps include a definition in article 1.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that he could not accept Mr. Cadieux's first amendment, even though the word " subsequent " had appeared in his original text, because it had been deliberately omitted by the Drafting Committee. Mr. Cadieux's second amendment, was acceptable, however.

56. With regard to Mr. Lachs' comment on paragraph 2, the Commission had already decided to make no proposal on the period during which the consent of two-thirds of all the States which had drawn up the treaty would be necessary, because it wished to await the views of governments on what they would consider a reasonable period.

57. The general question of suspension had been discussed by the Drafting Committee, which had considered the possibility of defining the concept and of dealing with it either in a special article or in section V, which was concerned with the legal effects of nullity, avoidance or termination. It had been suggested that the right of suspension should be accorded as an alternative whenever the right of termination was recognized, but of course

[1] Law of Treaties, 1961, p. 573.

that would not be possible in cases of termination on grounds of conflict with *jus cogens* or because of a change of circumstances. He doubted whether it would ultimately be found desirable to group all the provisions concerning suspension together in a single article. For example, if paragraph 3 of the new text of article 18 were accepted, it would surely be preferable to keep it in its present context.

58. The comments made during the discussion concerning suspension would certainly be of assistance to the Drafting Committee in reconsidering the whole matter.

59. In answer to Mr. de Luna's question whether the new text of article 18 adequately covered the case of implied agreement to terminate, he said that he had provided for tacit agreement in paragraph 3 (*c*) of his original article. That reference had now been dropped, but the new text in paragraph 1 provided for various forms of agreement which might be held to cover implied agreement. For example, if one party communicated to another its desire that the treaty should be brought to an end, the other by its conduct, though perhaps not in any formal manner, might indicate that it had no objection. Perhaps it would be preferable not to make paragraph 1 any more specific than that, in order to avoid going into the many different kinds of circumstances that would have to be taken into account.

60. The CHAIRMAN, speaking as a member of the Commission, said it was clear from the second sentence of paragraph 1 that treaties might be terminated by the methods specified there, but not that they must be terminated by those methods, so that implied agreement was not excluded.

61. Mr. LACHS said he agreed with the Special Rapporteur that no proposal was necessary at the present stage concerning the length of the time-limit set in paragraph 2, but the attention of governments ought to be drawn to that point in the commentary.

62. Mr. TUNKIN, referring to Mr. Cadieux's first amendment, explained that the Drafting Committee had dropped the word " subsequent " from the title of article 18 on the ground that the article was concerned with a specific agreement on termination.

63. Mr. YASSEEN suggested that in paragraph 1 the words " by agreement of all the parties to that end " should be used, in order to show clearly that it did not refer to any subsequent treaty whatever, but only to a treaty whose object was to terminate the earlier treaty.

64. Mr. CADIEUX suggested that the Drafting Committee should be asked to examine the text of the article in order to prevent any misunderstanding.

65. The CHAIRMAN put to the vote the new text of article 18 with Mr. Cadieux's amendment to paragraph 1, adding the words " subject to the provisions of paragraph 2 ".

Article 18, thus amended, was adopted by 18 votes to none.

66. Mr. BARTOŠ, explaining his vote, said that he had voted for the article, subject to the reservation he had made.

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

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had slightly modified the title of article 19, of which the proposed new text read:

" 1. A treaty shall be considered as having been impliedly terminated if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either:

" (*a*) the parties to the later treaty have indicated their intention that the matter should thereafter be governed by the later treaty; or

" (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

" 2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty."

68. In his original draft of article 19 (A/CN.4/156/Add.1) he had dealt separately with the case in which the parties to both treaties were the same and the case in which not all the parties to the earlier treaty became parties to the later one.

69. The Commission had recognized during the discussion that paragraph 2 of his original text raised more complex problems of conflict with a previous treaty than paragraph 1, and was closely linked with article 14. It had decided to hold over article 14 for consideration at the next session in conjunction with the provisions on the interpretation and application of treaties (703rd meeting, para. 85).

70. The Drafting Committee had finally decided to retain the provisions of paragraph 1 of his original article 19, even though they touched on questions of application, because they did deal with a clear case of implied termination.

71. Mr. VERDROSS proposed that in paragraph 1 (*a*) the word " exclusively " should be inserted after the words " thereafter be governed "; that addition seemed to him necessary because, if it could be thought that the subject-matter was only partly governed by the later treaty, that treaty might be partly compatible with the earlier one.

72. Mr. YASSEEN said that paragraph 1 (*a*), as drafted, did not relate to implied agreement. If the parties had indicated their intention that the matter should thereafter be governed by the later treaty, that was a case of express termination, especially if, as Mr. Verdross proposed, the word " exclusively " were added.

73. Mr. CASTRÉN approved of the new text as to substance, but observed that the purpose of the article was to regulate only the mutual relations of States parties to the earlier and to the later treaty; and while that fact

was clear at the beginning of paragraph 1, sub-paragraph (*a*) only referred to the parties to the later treaty, which might give the impression that the States parties to the later treaty only would also have to be consulted concerning the termination of the earlier treaty. To avoid that possible misunderstanding, either the word " later " in the first line of paragraph 1 (*a*) should be omitted, or else, for greater clarity, the parties to the earlier treaty should be mentioned.

74. Mr. ROSENNE said that he had given his reasons for being unable to support article 19 during the earlier discussion (691st meeting, paras. 8-16). He must now confirm the position he had then taken and record his dissent from article 19 in the form in which it had emerged from the Drafting Committee.

75. In so far as there was, in the cases covered by article 19, any element of termination by treaty, it was covered by the provisions of article 18, which were rather wider. Basically, the contents of article 19 raised questions of the interpretation and application of treaties.

76. He would abstain from voting on article 19 and reserve his position completely.

77. Mr. BARTOŠ, explaining his position on article 19, said that he would vote for the article, but had reservations concerning the condition that all the parties to the terminated treaty must be parties to the later treaty. That was a logical consequence of the position he had taken on article 18.

78. However, since the necessity of avoiding a vote by one State in the case of multilateral treaties had not yet been recognized in international law, he would merely enter a reservation, though he intended to revert to the matter when the Commission had examined the comments of governments.

79. Mr. TUNKIN said that caution was necessary when making provision for the implied termination of a treaty. However, the rule stated in article 19 was subject to the safeguards contained in paragraph 1 (*a*) and (*b*) and he could therefore support the article.

80. He could not support Mr. Verdross's suggestion that the word " exclusively " should be inserted after the word " governed " in paragraph 1 (*a*). That might suggest that it was intended to exclude general rules of international law.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin's explanation of the Drafting Committee's intention. Mr. Yasseen's remarks provided an additional argument for not inserting the word " exclusively ", although he was not prepared to go as far as Mr. Yasseen and say that the provisions of paragraph 1 (*a*) related to a case of express rather than implied termination. It was quite common, when the parties to a treaty concluded a second treaty on the same subject matter, to include in the second treaty a provision which expressly terminated the earlier treaty in whole or in part. There were other cases, however, in which, although the parties did not expressly state their intention to terminate the previous treaty, they nevertheless made it clear that they engaged in the new treaty with the idea of covering the whole of the subject-matter of the old treaty. The contents of paragraph 1 (*a*) accordingly came within the scope of article 19.

82. With regard to the point raised by Mr. Castrén, the intention had been to refer in paragraph 1 (*a*) to States which were parties to both treaties.

83. Mr. VERDROSS said he acknowledged the soundness of Mr. Tunkin's comment concerning the addition of the word " exclusively ". Perhaps the idea he (Mr. Verdross) had intended to express by that adverb could be conveyed by adding the word " whole " before the word " matter ".

84. Mr. PAL said he found the word " impliedly ", in the opening sentence of paragraph 1, superfluous; it would be sufficient to say that the treaty would be " considered as having been terminated ".

85. Sir Humphrey WALDOCK, Special Rapporteur, said that although the point raised by Mr. Pal was valid, the word " impliedly " would do no harm and would lend additional emphasis to the intended meaning.

86. With regard to the suggestion made by Mr. Verdross, he had included the word " whole " before " matter " in paragraph 1 (*a*) of the original draft. The Drafting Committee had dropped the word as unnecessary but, if there were no objection, he was prepared to re-introduce it.

87. Mr. YASSEEN supported the proposal to amend paragraph 1 (*a*) so as to provide that the whole matter governed by the former treaty should also be governed by the new treaty; that would meet Mr. Tunkin's objection.

88. Mr. LACHS said he would not wish to see the word " impliedly " dropped; it was not uncommon for termination to be deduced from an instrument that had no direct formal link with the treaty it terminated. The case was quite different from that of a treaty which stated expressly that it would be terminated if another treaty was concluded on the same subject; for example, certain bilateral agreements on aerial navigation expressly provided that they would cease to be in force as soon as a multilateral treaty on aerial navigation was concluded.

89. Mr. CADIEUX was against reintroducing the word " whole " before " matter ", because it would unduly restrict the scope of the rule.

90. Mr. BRIGGS said that he would vote in favour of article 19, although he would have preferred the Commission to examine it together with article 14 as a question of priority of conflicting treaty obligations, rather than of termination.

91. The CHAIRMAN put article 19 to the vote, on the understanding that the Drafting Committee would amend the opening words of paragraph 1 (*a*) so as to make it clear that the reference was to States that were parties to both treaties and that the word " whole " would be reinserted before the word " matter " in the same paragraph.

Article 19, thus amended, was adopted by 14 votes to none, with 1 abstention.

ARTICLE 20 (TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH)

92. Sir Humphrey WALDOCK, Special Rapporteur, said that the title of article 20 had been slightly amended and the new text of the article proposed by the Drafting Committee read:

"1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground:

"(*a*) for terminating the treaty; or

"(*b*) for suspending the operation of the treaty in whole or in part.

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

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

"(*b*) the other parties by mutual agreement either:

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

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

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

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

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

"4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

93. Article 20 dealt with matters of considerable importance. He had originally drafted more elaborate provisions, but in compliance with the wishes of members a shorter text had been prepared by the Drafting Committee.

94. Paragraph 1 dealt with the material breach of a bilateral treaty and provided the right to terminate the treaty or suspend its operation as a consequence of its breach. As far as suspension was concerned, an element of severance was introduced by the concluding words of paragraph 1 (*b*): "in whole or in part". The matter had been discussed at some length, but it had been recognized that the injured party should have a certain election regarding the question whether suspension should relate to a particular part of the treaty or to the whole of it. There was no doubt that, whatever the Commission decided on the general question of severance, in the case of breach of a treaty the principle *inadimplenti non est adimplendum* and the principle of reprisals produced a situation which conferred the right to suspend the treaty either in whole or in part.

95. The possibility of severance was confined to cases of suspension. The Drafting Committee had considered that the termination of only part of a treaty could upset its balance and had therefore decided not to extend the principle of severance to termination.

96. Paragraph 2 deal with the material breach of a multilateral treaty, which had the same effects as the breach of a bilateral treaty. However, it raised the problem of the position of the general body of contracting parties in the face of a breach that constituted a serious disturbance of the régime of the treaty.

97. Paragraph 3 set out the definition of a "material" breach. The main provision was contained in sub-paragraph (*b*). It would be useful to retain sub-paragraph (*a*), however, because one form of material breach was the repudiation of a treaty, which made it manifest that the party concerned did not propose to observe the treaty in the future. He understood that, in French, the term "*répudiation*" was not very elegant and he would welcome any suggestions for a better word.

98. Mr. TUNKIN said that he was prepared to vote for article 20 although he was not altogether satisfied regarding the possible effects of the provisions of paragraph 2 (*a*) on general multilateral treaties. At his suggestion, the Drafting Committee had confined the effects of those provisions to suspension. That change represented an improvement, but even the possibility of suspending the operation of the whole of a treaty caused him concern. General multilateral treaties were often very extensive, and in his view they should be placed on the same footing, in regard to termination, as customary rules of international law. If a breach of a general multilateral treaty was committed, the problem of responsibility arose and there was a possibility of reprisals, but he would hesitate to say that there existed a right to suspend the treaty in whole or in part.

99. However, the provision was only being adopted in the first draft for submission to Governments, and he could accept it at that stage.

100. Mr. VERDROSS complimented the Drafting Committee on the new text of article 20, which was exceptionally well drafted. He would vote in favour of it.

101. Mr. BRIGGS said he shared Mr. Tunkin's views on the effects of paragraph 2 (*a*) on general multilateral treaties.

102. He proposed that paragraph 1 (*a*) should be deleted. He did not believe that a material breach of a bilateral treaty by one party gave the other a multilateral right of termination; the most that should be allowed in such circumstances was suspension of the treaty.

103. Mr. de LUNA said that his opinion was diametrically opposed to that just expressed by Mr. Briggs. At the time when liberal ideas had prevailed in international law, the termination of a treaty in consequence of its breach had been accepted without question. Any breach had given the injured party the right to declare the treaty terminated.

104. The new communal international law, with its emphasis on safeguarding the stability of treaties, endeavoured to make a distinction between the suspension and the termination of a treaty. And it was clearly for the injured party, precisely because it had been injured, to decide whether it wished to suspend the treaty or not to accept it. For a breach of a treaty could so upset the balance of the obligations and rights deriving from the treaty that the injured party had no further advantage in adhering to it. That being so, it could not be obliged, against its will, to remain bound by the treaty.

105. Mr. ROSENNE opposed Mr. Briggs' proposal to delete paragraph 1 (*a*) for the reasons stated in paragraph 1 of the commentary on article 20 (A/CN.4/Add.1) namely, that " good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect ".

106. Mr. CASTRÉN found the redraft of article 20 very satisfactory. He would vote for it, although, for the reasons mentioned by Mr. Tunkin, he still had some doubts on the question of general multilateral treaties.

107. Mr. LACHS said he shared the doubts expressed by Mr. Tunkin and Mr. Briggs regarding paragraph 2 (*a*). Multilateral treaties of a general character often consisted of many parts, some of which were not related to one another. Where the breach had no direct bearing on certain parts of the treaty, it would be excessive to provide for the suspension of the whole treaty. Such suspension would wrongfully release the party concerned from the observation of the other provisions of the treaty; moreover, it would deprive the parties of the benefits accruing from those parts of the treaty that were not affected by the breach.

108. In paragraph 2 (*b*), he was not altogether satisfied with the word " mutual " before the word " agreement "; the intention had apparently been to provide for unanimous agreement of the other parties concerned.

109. He also had some doubts about the use of the word " unfounded " before the word " repudiation " in paragraph 3 (*a*).

110. Mr. GROS, referring to Mr. Briggs' proposal, pointed out that paragraph 1 (*a*) did not give a State a discretionary right to terminate a treaty, but merely entitled it to invoke the breach of the treaty if the breach was a material one. If a really material breach occurred, a State could hardly be obliged to remain bound by a treaty which, as Mr. de Luna had well observed, might perhaps be of no further value to it. In all fairness, it was reasonable to allow the injured State such discretion and when the rule was considered in the context of all the articles adopted by the Commission, it did not appear open to abuses. If the existence and extent of the material breach were contested, there was a dispute to be settled and the State could not consider that it had been able to terminate the treaty unilaterally.

111. It was true that opinion in the Commission was divided on the methods of settlement of disputes to be applied, but those difficulties were not peculiar to article 20. Mr. Lachs had said that a material breach of a multilateral treaty should not relieve a State of its obligations. But the provisions of article 20 only entitled a State to invoke the breach; there was no question of its being released from its obligations.

112. To the extent that members could agree on article 25, which laid down the procedures to be followed, some of the difficulties mentioned by Mr. Briggs should disappear, and that might perhaps enable him to accept the proposed new draft.

113. Mr. PAL, referring to the definition in paragraph 3 (*b*), said that non-compliance with financial obligations under Article 17 of the United Nations Charter could be regarded as the " violation of a provision which is essential to the effective execution of any of the objects or purposes " of the Charter. Since the Charter was a multilateral treaty, could paragraph 2 be held to apply, so that any other Member could " invoke the breach as a ground for suspending the operation " of the Charter " in whole or in part in the relations between itself and the defaulting State "?

114. The CHAIRMAN pointed out that the Commission had agreed to insert in the draft an article excluding from its application treaties which were the constituent instruments of international organizations. The Charter would thus be excluded from the application of article 20.

115. Mr. PAL said he was satisfied with that explanation so far as the Charter was concerned, but his example showed the danger of the provision in regard to multilateral treaties in general.

116. Mr. BRIGGS said that the sentence from the commentary quoted by Mr. Rosenne had little relevance to his proposal that paragraph 1 (*a*) should be deleted, because a State could still suspend the operation of the treaty under paragraph 1 (*b*). However, since there had been little support for his proposal, he withdrew it.

117. The CHAIRMAN, speaking as a member of the Commission, said that in considering the application of paragraph 2 (*a*) to general multilateral treaties, great importance should be attached to the final words, which made it clear that the operation of the treaty would be suspended only in the relations between the injured State and the defaulting State. The suspension did not affect the rights and interests of the other parties, which included the right to the general application of the treaty.

118. Sir Humphrey WALDOCK, Special Rapporteur, said that he had dwelt at length on the matter in the commentary. In fact, it was very difficult to separate general multilateral treaties from other multilateral treaties. Again, as he had pointed out during the earlier discussion, even treaties which established general norms of international law also contained procedural provisions such as clauses for arbitration or the judicial settlement of disputes. It would not be right to compel an injured State to remain in treaty relations with the

offending State under the treaty, including its purely contractual provisions. During the earlier discussion, he had also drawn attention to the fact that certain law-making conventions such as the Genocide Convention dealt with matters of general customary law, but were nevertheless subject to denunciation under certain conditions (693rd meeting, paras. 31-32).

119. He had much sympathy with the reservations which had been made by a number of members, but he thought the point was to some extent covered by the provisions of Article 28 (A/CN.4/156/Add.3), paragraph 3 of which, as amended at the previous meeting (para. 37), specified that the termination of a treaty in no way impaired the duty of a state " to fulfil any obligations embodied in the treaty which are binding upon it under international law independently of the treaty ".

120. With regard to the drafting points raised by Mr. Lachs, in his original draft he had used the term " unlawful " instead of " unfounded ". The intention in speaking of " mutual agreement " in paragraph 2 (*b*) had been to refer to the unanimous consent of the other parties.

121. The CHAIRMAN pointed out that suspension under paragraph 2 (*b*) (i) at least should not require unanimous consent.

122. Mr. BARTOŠ said that he wished to enter the same reservation to article 20 as he had made to the previous article. It was hard enough to grant States a virtual right of veto, but it would be even worse to enable them to act as *agent provocateur* in the international community by committing a breach which gave other States a pretext for denouncing the treaty to the detriment of those acting in good faith. He would therefore abstain from voting on article 20.

123. Mr. CADIEUX thought that where suspension was concerned the provisions of paragraph 2 (*b*) did not raise any difficulties when the States acted in concert, for the right granted in sub-paragraph (i) was one which they enjoyed individually in any case. It did not seem necessary in that instance to specify the minimum number of parties to a multilateral convention required for a decision, but the question of a majority or a specified number of parties might arise where the termination of a treaty was concerned.

124. Mr. YASSEEN thought that a State might be allowed to take the initiative in suspending the performance of a treaty, but that unanimity must be required for the termination of a general multilateral treaty. A separate paragraph should have been devoted to the latter case, stressing the need for unanimity.

125. Mr. de LUNA supported Mr. Bartoš's remarks, and fully agreed with Mr. Yasseen. In present or future international relations it was very easy for a small State which had no responsibility not only to act as *agent provocateur*, but also to break a treaty in order to serve the secrets interests of a great Power and provide it with an opportunity of starting the whole procedure for terminating the treaty.

126. Sir Humphrey WALDOCK, Special Rapporteur, said that the unanimity intended in paragraph 2 (*b*) did not include the State that had broken the treaty. He agreed that paragraph 2 (*b*) (i) was not strictly necessary, because each of the other parties concerned had the right to take the action specified in paragraph 2 (*a*). The provision was useful, however, because perhaps not all the parties could be regarded as injured parties and it was useful to emphasize their solidarity in the face of a serious breach.

127. Mr. TUNKIN suggested that the words " mutual agreement " in paragraph 2 (*b*) should be replaced by " common agreement ", which would correspond to the expression " *d'un commun accord* ", in the French text.

128. The CHAIRMAN put article 20 to the vote, on the understanding that the change just suggested by Mr. Tunkin would be made and that the Drafting Committee would endeavour to improve upon the words " unfounded " in paragraph 3 (*a*) and " *répudiation* " in the French text of the same paragraph.

Article 20 was adopted on that understanding by 12 votes to none with 5 abstentions.

The meeting rose at 1 p.m.

710th MEETING

Friday, 28 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*)

Articles submitted by the Drafting Committee (continued)

ARTICLE 21 (EXTINCTION OF A PARTY)

1. The CHAIRMAN invited the Commission to consider the Drafting Committee's decision to delete the provision on the extinction of a party which had formed the subject of paragraph 1 of the original draft article 21 (A/CN.4/156/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that his original article 21 had dealt with three distinct problems: the disappearance of one of the parties to a treaty, the disappearance of the subject-matter and supervening illegality of performance because of a new rule of *jus cogens*. The discussion on the first reading having shown the advisability of dealing with those three problems in separate articles, he had submitted to the Drafting Committee three draft articles, the first of which was entitled " Extinction of a party " and was numbered article 21.

3. In the Commission, there had been very little support for paragraph 1 of article 21, dealing with the extinction of a party. In the Drafting Committee, it had become