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Summary record of the 714th meeting

Topic:
Law of Treaties

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714th MEETING

Thursday, 4 July 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]

(resumed from the 711th meeting)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the new text proposed by the Drafting Committee for article 23.

ARTICLE 23 (AUTHORITY TO DENOUNCE, TERMINATE OR WITHDRAW FROM A TREATY OR SUSPEND ITS OPERATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had slightly amended the title of his original article 23 (A/CN.4/156/Add.2) and proposed a new text which read:

> " The rules contained in article 4 of Part I relating to the authority to conclude a treaty also apply, *mutatis mutandis*, to the authority to denounce, terminate or withdraw from the treaty or to suspend its operation."

3. The Drafting Committee had thus reduced the provisions of the article to a comparatively simple statement of the general principle that the claim must proceed from some authority competent to exercise the treaty-making power under the rules laid down in article 4 of Part I.

4. Mr. ROSENNE said that, as with other articles, some confusion might result from the reference to an article in Part I. It would be better to renumber the articles in Part II to make the numbering consecutive throughout the draft. No confusion would then be possible.

5. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that article 1 of Part II contained a definition of the term " Part I " as used in the draft articles, so that the meaning of any reference to an article in Part I would be clear. The Commission had decided that the draft articles on the law of treaties should consist of three separate sets of provisions.[1]

6. Mr. ROSENNE said that his suggestion of consecutive numbering for all the articles was without prejudice to the Commission's decision to divide the draft into three separate parts. The method of defining the term " Part I " seemed unnecessarily cumbersome, and it was not unlikely that in the final draft the article in Part II containing the definition would be omitted. In view of the numerous cross-references to articles in Parts I and II, there was much to be gained by unifying the whole system of numbering so that no two articles had the same number and no confusion was possible.

7. The CHAIRMAN suggested that a decision on the numbering should be deferred until all the draft articles had been adopted. On that understanding, he put article 23 to the vote.

Article 23 was adopted by 15 votes to none, with 1 abstention.

8. Mr. PAREDES explained that he had abstained from voting on article 23 because the Spanish text was not yet available.

ARTICLE 24 (NOTICE OF TERMINATION, WITHDRAWAL OR SUSPENSION UNDER A RIGHT PROVIDED FOR IN THE TREATY)

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had slightly amended the title of article 24 and proposed a new text which read:

> " 1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated to every other party to the treaty either through the diplomatic or other official channel or through the depositary.
>
> " 2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect."

10. That shorter version of what had been a more elaborate article specified, first, the need for an official communication of the notice of termination, withdrawal or suspension, and secondly, that unless the treaty otherwise provided, the notice could be revoked at any time before the date on which it took effect.

11. Mr. CADIEUX suggested that the word " any " should perhaps be added before the words " other official channel " in the English text of paragraph 1, for the sake of conformity with the French text.

12. Mr. TSURUOKA said that he would vote for the article as a whole, but he maintained the objection he had made at the first reading concerning the possibility of revoking the notice (698th meeting, paras. 25-26). The rule stated in paragraph 3 of the original draft was reproduced with little change in the new paragraph 2; it too generously accorded an additional right to the State which gave notice.

13. Mr. VERDROSS asked whether the final words of paragraph 2 should not be " is received " rather than " takes effect ".

14. Sir Humphrey WALDOCK, Special Rapporteur, replied that the words " takes effect " were correct.

15. Mr. ROSENNE said he had no objection to article 24, but it should contain some provision, along the lines of article 15, paragraph 1 (*b*), in Part I, to the effect that, unless the treaty itself expressly provided otherwise, a notice must apply to the treaty as a whole. The inclu-

[1] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 3, para. 18.

sion of such a provision would not be necessary, however, if the Commission adopted an appropriate article on severance.

16. The CHAIRMAN put article 24 to the vote.

Article 24 was adopted unanimously.

ARTICLE 25 (PROCEDURE FOR ANNULLING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE APPLICATION OF A TREATY OTHERWISE THAN UNDER A RIGHT PROVIDED FOR IN THE TREATY)

17. Sir Humphrey WALDOCK (Special Rapporteur) pointed out that the original title of article 25, " Annulment, denunciation, termination or suspension of treaty obligations under a right arising by operation of law " had been re-drafted to read " Procedure for annulling, terminating, withdrawing from or suspending the application of a treaty otherwise than under a right provided for in the treaty ". The new text proposed for the article read:

" 1. A party invoking the nullity of a treaty, or a right to terminate, withdraw from or suspend a treaty otherwise than under a provision of the treaty shall be bound to notify the other party or parties of its claims. The notification must:

" (*a*) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

" (*b*) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

" 2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

" 3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter.

" 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

" 5. Subject to article 4, the fact that a State may not have made any previous notification to the other party or parties should not prevent it from invoking the nullity of or the right to terminate a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty."

18. A comparison of the new text with his original draft (A/CN.4/156/Add.2) showed that there was a gap after the new paragraph 3, which corresponded to the old paragraph 4. At that point his original proposal had been that, where a dispute arose, the claimant party should in certain circumstances be granted a right of suspension. The reason was that, if a settlement of the dispute had to be sought through one of the means indicated in Article 33 of the Charter, it might take a long time.

19. His proposal had met with opposition both from members who thought that it did not go far enough and from members who thought that any right of suspension was dangerous because a party, by blocking the negotiations, might make the suspension last indefinitely and thus confer upon itself a right of unilateral termination of the treaty.

20. He had therefore submitted to the Drafting Committee a new draft which widened the scope of the right of suspension, while at the same time attempting to avoid the danger of that right being transformed into a right of unilateral termination. His new draft had not gained the approval of the Drafting Committee, some members of which had thought that an undue restriction of the right of suspension in the event of a dispute could lead indirectly to some form of compulsory jurisdiction. In view of the profound and fundamental differences of opinion which had thus arisen, the Drafting Committee had reached the conclusion that the best course would be to provide that the parties must seek a solution by the means indicated in Article 33 of the Charter, and to stop there. A provision to that effect had accordingly been included as paragraph 3 of the new text.

21. If the parties were unable to agree on the choice of the means of settlement of the dispute or if they agreed, for example, on arbitration, but were unable to agree on the text of the *compromis*, under the new article each would have the right to resort to the General Assembly, the Security Council, the competent regional organization or other competent body under the Charter. In view of the division of opinion in the Commission and the strong objections to anything that might involve compulsory jurisdiction in any form, it was clear that the question of procedure could not be carried beyond the point reached at the end of the provisions of paragraph 3.

22. The Chairman had drawn his attention to an important point relating to the wording of the opening sentence of paragraph 1, which stated that " a party invoking the nullity of a treaty, or a right to terminate, withdraw from or suspend a treaty " must " notify the other party or parties of its claims ". It was not clear how that provision would operate where a treaty was void because it violated a rule of *jus cogens*, or because it had been imposed on a State by coercion. Those two cases of nullity were provided for in articles 12 and 13.

23. His own assumption had been that article 25 would apply to all the substantive articles, both those which referred to nullity being invoked and articles 12 and 13, which expressly declared a treaty void because it had been imposed by coercion of a State or because it violated a rule of *jus cogens*.

24. The CHAIRMAN said that the point could be met by amending the opening words of the paragraph to read: " A party invoking under any of the provisions

of Part II the nullity of a treaty, or a right . . ." Such a formulation would be less open to interpretation.

25. Mr. de LUNA said he approved of the Drafting Committee's text in principle. He was not sure that the addition proposed by the Chairman was necessary, since article 25 obviously applied to all cases governed by the articles in Part II. Even in the event of conflict with a rule of *jus cogens*, the preliminary question of the rights and obligations of the parties would have to be settled.

26. He suggested that, in the French text, commas should be inserted after the words "*application*" and "*traité*" in paragraph 1, after "*partie*" in paragraph 3, and after "*parties*" in paragraph 4.

27. Mr. CADIEUX thought that in the first sentence of paragraph 1 of the French text, the word "*démarche*" should be replaced by the word "*demande*", which was used in paragraph 1 (*a*).

28. Mr. BRIGGS said it was desirable to examine whether any actual right to invoke nullity or invalidity, or to terminate, withdraw from or suspend a treaty, was conferred by any of the substantive articles. Article 5 laid down that the consent to be bound could be withdrawn because of a manifest violation of internal law, thereby establishing by implication a right, in substance, of unilateral termination by withdrawal. Under articles 7 and 8, fraud and error could be invoked, as invalidating consent to be bound. Articles 11, 12 and 13 established an implied right to invoke the nullity or invalidity of a treaty. Article 16 conferred an implied right of denunciation or withdrawal. Article 20 conferred the right to invoke a breach as a ground for terminating a treaty. Impossibility of performance could be invoked as a ground for termination under article 21 *bis*, and a fundamental change of circumstances under article 22, on the doctrine of *rebus sic stantibus*.

29. The question thus arose whether those substantive articles conferred a unilateral right of termination or withdrawal. Admittedly, the complaining party must give notice and must seek a settlement by the means specified in Article 33 of the Charter. But in the absence of a settlement, whether agreed or imposed by an impartial authority, he could not agree that there existed any unilateral right to terminate a treaty or to withdraw from it on the basis of mere allegations by one of the parties.

30. On that point the second and third sentences of paragraph 6 of the Special Rapporteur's commentary on the original article 25 were very apposite. They read: "Some authorities and some States have almost seemed to maintain that in all cases annulment, denunciation or withdrawal from a treaty are inadmissible without the consent of the other parties. This presentation of the matter, understandable though it is in the absence of compulsory jurisdiction, subordinates the legal principles governing invalidity and termination of treaties entirely to the rule *pacta sunt servanda* and goes near to depriving them of legal significance."

31. In fact, the reason why alleged rules on the validity and nullity of treaties had been largely deprived of legal significance was, precisely, the dilemma they presented. In the absence of either agreement of the parties or impartial determination of the existence of the alleged facts on which invalidity was claimed, the instrument, as negotiated, must be presumed to have entered into force. Any assertion that when it invoked the nullity of a treaty on such a basis as article 11, article 12 or article 13, a State was not thereby releasing itself from an obligation because no valid treaty had ever existed, was pure equivocation.

32. In the absence of an impartial determination that the treaty was null or void, there existed a mere *ex parte* allegation, and there could be no justification for conferring a right of unilateral denunciation on such a basis alone. That was particularly true where the party making the assertion was afraid to submit the issue to impartial determination. In that situation, article 25 merely provided that the party invoking nullity, termination or withdrawal must, first, make the appropriate notification and, secondly, seek a solution if objection were made.

33. The question then arose what was the legal situation where a dispute existed as to the facts, assuming, of course, that the parties were unable to settle the dispute. Did the substantive articles on fraud, error, breach, etc. confer a unilateral right to terminate or withdraw from the treaty, or did they merely set out rules to be applied by a court or organ having jurisdiction over the dispute ?

34. If he could have concluded that, in the absence of more adequate procedural provisions under article 25, the substantive articles 5 to 22 left the existing international law intact, so that a State could not release itself from its international obligations without the consent of the other party, he would have been prepared to vote for the draft article. There was, however, a danger that the situation might be misinterpreted by those who were unaware of the Commission's discussions. A State might claim that, having complied with the procedural requirements of article 25 and the dispute having remained unsettled, it could fall back on such provisions as article 11, article 12 or article 13, in order to declare that the treaty was void or terminated or to withdraw from it.

35. He could not accept such a solution, which would represent, not progressive development of international law, but a weakening of the *jus cogens* principle of *pacta sunt servanda*.

36. The Drafting Committee or the Commission itself should re-examine the provisions of article 25 and couch them in such terms as to make it clear that unilateral action was not permissible.

37. Mr. TUNKIN, replying to Mr. Briggs, said that there could be no problem about certain rights being conferred upon States by the substantive articles. Where there was an objective rule of law, there must also be substantive rights and obligations for States. Unless subjective rights existed, there could be no objective rule in the matter.

38. As to the extent of the effects of article 25, it was the clear intention of the Drafting Committee and of the Commission itself, as stated by the Special Rapporteur, that article 25 should not in any way imply compulsory arbitration or jurisdiction. The Drafting Committee had drafted an article which went no further in that respect than the United Nations Charter.

39. Mr. PAREDES said that as he had not yet received a Spanish text of article 25, his remarks must be treated as subject to reservation.

40. The article should draw a clear distinction between treaties that were void *ab initio*, treaties that were voidable, and treaties that were denounced.

41. Where a treaty was void, the State invoking nullity clearly regarded it as non-existent. Under a treaty which had never existed, nothing could be claimed of the parties. However, there should be some international authority to decide whether the allegation made by the claimant party was justified.

42. Where a treaty was claimed to have been voided by some circumstance supervening after its entry into force, any acts performed under it while it was valid should remain valid.

43. Lastly, where a party to a treaty claimed the right to terminate its obligations by reason of a change of circumstances, the treaty should continue to produce its effects until all the acts specified in article 25 have been performed.

44. Mr. PAL said that article 25 dealt only with procedure. The ultimate fate of any claim would necessarily depend on how far the claimant established the grounds on which his claim was based. He therefore suggested that the opening words of paragraph 1 should be amended to read: " A party asserting the nullity of a treaty or claiming to terminate, withdraw from or suspend . . ."

45. Mr. AGO stressed that article 25, which laid down a procedure, must obviously apply to all cases involving nullity. The Commission had made a distinction between cases in which nullity could only be envisaged on the initiative of one of the parties, and cases in which a cause of nullity operated automatically by virtue of an objective rule of law. The procedure contemplated should apply in both cases.

46. He could agree to the addition proposed by the chairman, though in his opinion the text must be understood in the same way even without that explanation.

47. He supported Mr. Pal's suggestion, which would avoid giving the impression that article 25 gave a party a right to terminate a treaty.

48. Like Mr. Tunkin, he believed that article 25 went just as far as it should and no further. It laid down the procedure to be followed by a State which wished to secure recognition of the nullity of a treaty. It then specified what happened if the other party made no objection. If, on the other hand, the other party did not agree, a dispute arose, and the Commission could only note that fact and say that the dispute, like any other dispute, must be settled by the peaceful means prescribed by the Charter.

49. The CHAIRMAN, speaking as a member of the Commission, said that the wording suggested by Mr. Pal seemed to clarify the point raised by Mr. Briggs, to which Mr. Ago had also referred.

50. Actually, the danger of misinterpretation envisaged by Mr. Briggs would not arise. There was a significant difference between paragraphs 2 and 3. Paragraph 2 provided that if no party made any objection, the claimant party was entitled to take certain steps. Paragraph 3, on the other hand, laid down that if there were an objection, the parties must seek a solution by the means indicated in Article 33 of the Charter. No right of unilateral action was ascertained in that paragraph.

51. Mr. ROSENNE said that in paragraph 5, the word " should " should be replaced by " shall ".

52. Mr. TUNKIN stressed that any interpretation given to article 25 which might imply anything more than the obligations existing under the Charter would be without foundation.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the wording suggested by Mr. Pal would remove the difficulty to which Mr. Briggs had drawn attention, without altering the substance of the provision, but perhaps an even better wording would be " A party alleging the nullity of a treaty, or claiming a right to terminate, withdraw . . ." With that amendment, the article would embody the maximum that could be achieved on the subject.

54. Unlike Mr. Briggs, he believed that article 25 would be a valuable contribution to the progressive development of international law. It provided for an orderly procedure and laid down the obligation to take all possible steps to seek a solution by the means indicated in Article 33 of the Charter. He firmly believed that it would promote rather than impair the stability of treaties.

55. Mr. AGO said that paragraph 5 should be brought into line with paragraph 1, as amended, by changing the words " invoking the nullity " to " alleging the nullity " and the words " the right to terminate " to " claiming to terminate ".

56. The CHAIRMAN put article 25 to the vote with the amendments proposed by Mr. Pal and the Special Rapporteur, Mr. Rosenne and Mr. Ago.

Article 25, thus amended, was adopted by 19 votes to none, with 1 abstention.

Article 4 (Loss of a right to annul, terminate or withdraw from a treaty)

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 4 (A/CN.4/156) be amended to read:

" *Article 4: Loss of a right to annul, terminate or withdraw from a treaty*

" A right to invoke the nullity of a treaty or to terminate or withdraw from a treaty in cases falling under

articles 5-8 and 20 and 22 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

"(*a*) Waived the right;

"(*b*) So conducted itself as to be debarred from denying that it had elected in the case of articles 5-8 to consider itself bound by the treaty, or in the case of articles 20 and 22 to consider the treaty as unaffected by the material breach, or by the fundamental change in circumstances, which has occurred."

58. In accordance with the Commission's wishes, the terms "estoppel" and "preclusion" had not been used, but the general proposition had been maintained that failure to pursue a claim to invoke nullity or to terminate a treaty after the party had become fully aware of the facts giving rise to a right to do so, would bring that right to an end.

59. The opening words of sub-paragraph (*b*) clearly showed that the State must have been in a position to take action on the claim; it hardly seemed necessary to deal more explicity with the question, raised during the discussion (701st meeting), what the position would be if a State had not been free to act. Perhaps the matter could be mentioned in the commentary.

60. In the first sentence the word "claim" should be substituted for the word "right".

61. Mr. TUNKIN, referring to the Special Rapporteur's amendment, said that the Commission should not be afraid of its own shadow and shrink from speaking of a right to invoke the nullity of a treaty.

62. Mr. YASSEEN thought it was correct to speak of a "right to invoke the nullity" of a treaty in article 4: the right existed, and it was not the right to declare the treaty void.

63. He doubted the advisability of retaining the word "fundamental" at the end of sub-paragraph (*b*).

64. Mr. GROS stressed that the word "right" had been criticized not as first used in the article, but in connexion with the subsequent words "to terminate or withdraw from a treaty". The same terms must certainly be used in article 4 as in article 25. Similarly, the word "fundamental", if it was used in article 22, should be retained in article 4.

65. Mr. YASSEEN thought that the expression "change of circumstances" would cover both fundamental changes and changes that were not fundamental.

66. Mr. de LUNA agreed with Mr. Gros. Mr. Yasseen had given the reason why the word "fundamental" should be retained, not deleted. The opening words of the article should be brought into line with the wording adopted for the beginning of article 25.

67. The CHAIRMAN, speaking as a member of the Commission, said that the question whether the word "fundamental" should be retained or not should be left until the Commission had reached a final decision in the wording of article 22, since the two texts must obviously be uniform.

68. He was not sure that article 4 as re-drafted was in its proper place. Perhaps it should be the last article in section IV.

69. Mr. LACHS said he agreed with the Chairman's first point and also thought that the position of article 4 should be reconsidered. As a matter of drafting, it was always undesirable to refer to articles which came later in the text.

70. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the decision on the word "fundamental" should be deferred until the Commission had adopted article 22.

71. He had no firm opinion on the position of article 4 and recognized the force of Mr. Lachs' objection. However, the article dealt with a matter of substance and could hardly be included in section IV, which was concerned with procedure. Perhaps it could be placed in a separate section to follow section III, in which the Commission might also include the article he had prepared on severance, setting out the conditions under which severance was permissible. He was also going to propose separate provisions on severance for inclusion in certain articles. The question of the position of article 4 might be referred to the Drafting Committee.

72. Mr. de Luna's proposal, which would mean inserting the words "a claim" before the words "to terminate" at the beginning of the article, was acceptable.

73. The CHAIRMAN put article 4, thus amended, to the vote.

Article 4, thus amended, was adopted by 19 votes to none, with 1 abstention.

ARTICLE 27 (LEGAL CONSEQUENCES OF THE NULLITY OF A TREATY)

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title of his original article 27 (A/CN.4/156/Add.3) should be changed to "Legal consequences of the nullity of a treaty" and that the text should read:

"1. Subject to paragraph 2, a treaty established to have been void *ab initio* has no legal force or effect; and the situation which would have existed if the treaty had not been concluded shall be restored as quickly as possible.

"2. If the nullity of a treaty results from fraud or coercion imputable to one party, that party may not invoke the nullity of the treaty for the purpose of contesting the legality of acts done by the other party or parties in reliance upon the void instrument.

"3. Paragraphs 1 and 2 also apply where a particular State's consent to a multilateral treaty is established to have been void."

75. Paragraph 2 contained a new provision to protect the innocent party from the legality of its acts being contested by the party guilty of fraud or coercion.

76. Mr. TUNKIN questioned whether the drafting of the second clause in paragraph 1 was appropriate;

it might not be possible to restore the situation which would have existed it the treaty had not been concluded.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that his original wording " as far as possible " had been criticized as being too weak.

78. Mr. BRIGGS pointed out that the word " restored " was quite unsuitable, since it was impossible to restore what had never existed.

79. Mr. ROSENNE said that the original text, with the words " as quickly as possible " instead of the words " as far as possible ", would be preferable, because it would give the right emphasis, even though all questions of state responsibility would be left open and it would not escape the criticism made by Mr. Briggs.

80. The CHAIRMAN, speaking as a member of the Commission, asked whether paragraph 2 would apply if the legality of acts done by one of the parties were contested on the ground that the treaty was void because of error.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that he was still not entirely satisfied with the article because, if the grounds of nullity were comparatively innocent, it was difficult to accept the treaty being invalidated *ab initio*, particularly as certain acts mignt have been performed in good faith in execution of its provisions.

82. Mr. CADIEUX observed that in two respects the English and French texts did not entirely agree. There was a semi-colon in the middle of paragraph 1 in the English text, but not in the French text; and in paragraph 3 of the English text, the word " particular " was not needed, as the French text read " *consentement d'un Etat* ".

83. The Chairman said that the two texts would be brought into line; on that understanding, he put article 27 to the vote.

Article 27 was adopted by 16 votes to none.

Article 28 (Legal consequences of the termination of a treaty)

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the word " consequences " should be substituted for the word " effect " in the title of article 28 and that the text should read:

" 1. Subject to paragraph 2 and unless the treaty otherwise provides, the lawful termination of a treaty:

" (*a*) Shall release the parties from any further application of the treaty;

" (*b*) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

" 2. If a treaty terminates on account of its having become void under article 22 *bis*: a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

" 3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

" (*a*) That State shall be released from any further application of the treaty;

" (*b*) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

" (*c*) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

" 4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 of this article shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law."

85. The Drafting Committee had included the provision in paragraph 2 to satisfy those members who had asked what would be the consequence of a treaty becoming void owing to the subsequent establishment of a *jus cogens* rule with which it came in conflict.

86. The CHAIRMAN put article 28 to the vote.

Article 28 was adopted by 17 votes to none.

Article 29 (Legal consequences of the suspension of the application of a treaty)

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new article entitled " Legal consequences of the suspension of the application of a treaty ", which read:

" 1. Subject to the provisions of the treaty, the suspension of a treaty:

" (*a*) Shall relieve the parties from any application of the treaty during the period of the suspension;

" (*b*) Shall not otherwise affect the legal relation between the parties established by the treaty.

" 2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the application of the treaty impossible."

88. That text had been put forward in response to the suggestion made by Mr. Rosenne (709th meeting, para. 54) and supported by other members. The Drafting Committee had come to the conclusion that as questions of substance were involved the matter should be dealt with in a separate article rather than among the definitions.

89. Mr. YASSEEN said he was afraid the Commission was laying down rather too strict a rule in paragraph 2 by enjoining the parties to " refrain from acts calcu-

lated to render the resumption of the application of the treaty impossible." The prohibition might be understood also to apply to acts performed in order to claim the nullity of a treaty or to denounce it, in other words to exercise rights deriving from the articles under which States could resort to those procedures.

90. Mr. ROSENNE, thanking the Drafting Committee for complying with his request, said that the new article constituted a useful addition to the law of treaties.

91. He noted that the title referred to suspension of the " application " of a treaty, whereas in other articles the word used was " operation "; the same word should be used throughout the draft.

92. Mr. LACHS said that the article was a useful one, but paragraph 1 ought also to stipulate that suspension would not affect the legality of any act done in conformity with the provisions of the treaty prior to its suspension; the article would then be consistent with article 28, paragraph 3 (*c*).

93. Mr. AGO agreed with Mr. Lachs and thought it would be advisable to add a clause similar to that in article 28, paragraph 3 (*c*), so as to ensure that the legality of acts done before the suspension of the treaty was not impaired.

94. With regard to the fears expressed by Mr. Yasseen concerning paragraph 2, it was clear that that provision applied only to suspension. The termination of a treaty lay outside the scope of article 29, and an act legitimately intended to terminate a treaty could not be regarded as an act prohibited under the terms of article 29, paragraph 2.

95. Mr. ROSENNE said that Mr. Lachs' point was a pertinent one, but he thought it was already covered by paragraph 1 (*b*).

96. Mr. YASSEEN said he wished to be sure that paragraph 2 could not prevent a State which suspended the application of a treaty from undertaking any act required for invoking or establishing its nullity; the word " acts " might be interpreted as acts in law or material acts. It might perhaps be better to be more specific and say " unlawful acts ".

97. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Yasseen's point could be covered in the commentary. It would be quite arbitrary to interpret the provision as meaning that the parties were precluded from exercising lawful rights in connexion with the treaty.

98. Mr. BARTOŠ said that the Drafting Committee had intended the provision to prevent parties from behaving as if they had been released from their legal obligations, and to make it clear that, even though they were exempted from applying the treaty during the period of suspension, they were not thereby released from their legal obligations.

99. Mr. LACHS, replying to Mr. Rosenne, said that paragraph 1 (*b*) only covered the legal relation between the parties, not acts performed in conformity with the provisions of the treaty.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne had correctly interpreted the meaning of paragraph 1 (*b*), but in order to prevent any misunderstanding the paragraph could be amplified so as to cover the point made by Mr. Lachs more explicitly. That could be left to the Drafting Committee.

101. The Chairman put article 29 to the vote, subject to the drafting changes indicated by the Special Rapporteur.

Article 29 was adopted by 19 votes to none.

The meeting rose at 12.25 p.m.

715th MEETING

Friday, 5 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Co-operation with other bodies

[Item 7 of the agenda]

1. The CHAIRMAN invited the Commission to discuss item 7 of the agenda: Co-operation with other bodies.

2. Mr. LIANG, Secretary to the Commission, said that no meeting of the Asian-African Legal Consultative Committee or of the Inter-American Council of Jurists had taken place since the Commission's last session, so that there had been no occasion for the Chairman to appoint an observer.

3. The Asian-African Legal Consultative Committee had informed the Secretariat that its next session, which was to be of two weeks' duration, would be held at Cairo starting on 15 February 1964, and that it hoped an observer from the Commission would be able to attend.

4. Members were aware that Mr. Caicedo Castilla had attended some of the Commission's meetings as an observer for the Inter-American Juridical Committee.

5. The Inter-American Council of Jurists had not yet communicated the date of its next session, which was to be held at El Salvador.

6. The CHAIRMAN invited the observer for the Asian-African Legal Consultative Committee to make a statement.

7. Mr. TAMBIAH, observer for the Asian-African Legal Consultative Committee, said he regretted that he had been unable to be present at the beginning of the session; the Committee hoped that in future years its observer would be able to attend for a longer period.

8. Mr. PAL had said at the opening of the session (673rd meeting, para. 2) that international law must be largely the creation, not of professors, but of statesmen capable of judging where focal points of tension lay and where adjustments must be made to take account