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Summary record of the 828th meeting

Topic:
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point. It was, of course, possible to argue that there was a small legal gap in that text and it was perhaps also possible to argue that the text was too wide, in that it would make a whole treaty void if a subsequent act of participation in it was procured by the threat or use of force.

59. He agreed with Mr. Ago that it was important to obtain maximum support for the article which, as he had stressed, allowed for further development of the law in the United Nations.

60. He agreed with Mr. Tunkin's remarks on the subject of a peace treaty imposed on an aggressor; such a treaty was not in violation of the Charter of the United Nations and was not, therefore, invalid under article 36. That point had been made clear in paragraph 7 of his own commentary to his original proposal for article 36, then numbered article 12 and entitled "Consent to a treaty procured by the illegal use or threat of force", where he had stressed that "There is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor".[10] He suggested that, in the final commentary to article 36, a passage should be included on the same lines.

61. He shared the general views expressed by Mr. Briggs on the subject of independent adjudication, but did not think it was appropriate to take up that question with reference to each individual article. The procedural aspects of all the articles in the section now under discussion were covered in article 51. When the Commission came to consider that article, he would give his own reaction to the government comments thereon. On the whole, he was inclined to the view expressed by Mr. Rosenne, and doubted whether at the present stage it would be possible to go beyond what was said in article 51 as drafted in 1963.

62. He suggested that article 36 be referred to the Drafting Committee with the comments made during the discussion. It was his strong impression that the Commission on the whole wished to adhere to the brief lapidary statement of the very important rule adopted after a lengthy discussion in 1963.

63. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to refer article 36 to the Drafting Committee, on the terms suggested by the Special Rapporteur.

It was so agreed.[11]

The meeting rose at 5.45 p.m.

[10] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 52.

[11] For resumption of discussion, see 840th meeting, paras. 84-119.

828th MEETING

Tuesday, 11 January, 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Golsong, Observer for the European Committee on Legal Co-operation.

Co-operation with Other Bodies

[Item 7 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited Mr. Golsong, Observer for the European Committee on Legal Co-operation of the Council of Europe, which was the third regional international organization to enter into a working relationship with the Commission, to address the Commission.

2. Mr. GOLSONG said that, on behalf of the Council of Europe and the European Committee, he wished to thank the Committee for its decision to establish working relations with Strasbourg and for its cordial welcome. He was sure that co-operation between the Commission and the European Committee would contribute to the improvement of the international legal order.[1]

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law *(jus cogens)*)

Article 37

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (A/CN.4/L.107, p. 34)

3. The CHAIRMAN invited the Commisssion to consider article 37. It would be seen from paragraph 7 of the Special Rapporteur's observations (A/CN.4/183/Add.1, p. 26) that he was suggesting that the opening phrase be revised to read:

" A treaty is void *ab initio* if at the time of its conclusion it conflicts . . . ".

[1] For Mr. Golsong's address to the Commission, see 830th meeting.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that article 37 had attracted a considerable amount of attention from governments, the great majority of which approved of it in principle, though some expressed misgivings about the way in which it would operate in the absence of a system of compulsory, independent adjudication.

5. The principal observations were directed to the problem of the time factor for the application of the article. Of course, it had to be read in conjunction with article 45, which dealt with the subsequent emergence of a rule of *jus cogens*. The United States Government appeared to interpret article 37 as capable of having retroactive effects, but he doubted whether that interpretation was possible if article 45 were borne in mind. In order to emphasize the close connexion between the two articles, he had proposed the insertion in the first line of article 37 of the words " at the time of its conclusion ", before the words " it conflicts ".

6. He wished to withdraw his suggestion for the insertion of the words " *ab initio* ", because on reflection it seemed undesirable to distinguish between one kind of voidance and another.

7. Mr. VERDROSS said that, after the first part of the session, two articles had come to his notice in which Professor Schwarzenberger had sharply attacked the Commission's article 37. To defend the Commission, he (Mr. Verdross) had published an article replying to that attack, in which he made it clear that he was writing on his own responsibility and without having consulted the other members of the Commission.[2]

8. Professor Schwarzenberger had conceded that norms of *jus cogens* could be created by bilateral or multilateral treaty, but had denied that such norms existed in general international law. He had further denied that such norms were created by the Charter, since it was not a universally binding treaty but only a treaty concluded among a large number of States. Lastly, he had maintained that article 37 could lead to abuse, since there was no authority with international jurisdiction competent to rule whether *jus cogens* existed or did not exist.

9. It was gratifying to note that nearly all the governments had accepted the basic principle of article 37. It might, however, be useful if the Commission were to indicate in the commentary what rules it regarded as *jus cogens* rules. A careful study of the summary records of the discussion during the first reading made it clear that there were some rules of international law that governed the reciprocal interests of States, and others that related to the interests of the international community, in other words, to those of all mankind; the first had the character of *jus dispositivum*, but the second were norms having the character of *jus cogens*.

10. Mr. CASTRÉN said he had been glad to see that nearly all the governments which had commented on article 37 approved the attitude adopted by the Commission towards the concept of *jus cogens*. The doubts expressed by some governments concerning the usefulness and applicability of the article should be dispelled by the full explanations given by the Special Rapporteur in his report.

11. With regard to the drafting, the point made by the Netherlands Government (A/CN.4/183/Add.1, p. 16) was well taken; the phrase " a peremptory norm of general international law from which no derogation is permitted " was certainly pleonastic. He agreed with the Special Rapporteur that the expression " imperative norm " did not by itself suffice to convey the notion of a rule of a *jus cogens* character. The pleonasm could be avoided simply by omitting the word " imperative " from the body of the article, while keeping it in the title: a norm of general international law from which no derogation was permitted was in fact a peremptory norm.

12. He was not sure that the additions which the Special Rapporteur proposed to make to the 1963 text in order to make it clearer and to meet the wishes of certain governments were either necessary or an improvement. If a treaty was concluded with provisions that were incompatible with *jus cogens*, it was surely obvious that it would be void *ab initio*. That term was superfluous, and he had been glad to hear that the Special Rapporteur now proposed to withdraw it.

13. The words " at the time of its conclusion " gave the impression that the new *jus cogens* rules did not affect the validity of the treaty, an impression which would conflict with the provisions of article 45. He realized that one of the reasons why the Special Rapporteur proposed that change was his desire to emphasize the difference between articles 37 and 45, which should, of course, be taken together; it might be possible, however, to combine those two articles, which dealt with the same topic from different angles, or at all events to make a cross-reference to article 45 in article 37.

14. Mr. AGO said he had noted with satisfaction that most governments endorsed the Commission's text. He was surprised, however, that they should have sometimes expressed opinions and criticisms of the provisions of the article which showed that they had either misread or misunderstood the commentary. The commentary would, of course, eventually disappear but was of great importance at the codification stage.

15. He could not understand how it could be said that the introduction of *jus cogens* would have the effect of introducing the question of the conflict of rules resulting from successive treaties; members had explained in their statements and the Commission had explained in the commentary that a rule of *jus cogens* could only be a rule of general international law. Even if a rule of *jus cogens* had originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty or when expressed in the treaty, it was already a rule of general international law.

16. That remark also disposed of one of the criticisms made by a writer on the subject, who would hardly have raised his objection with regard to the United Nations Charter if he had carefully perused the commentary and the summary records. It was true that the Charter was a treaty, but the Commission did not consider all the rules contained in the Charter as rules of *jus cogens*. Some had that character because they were rules of

[2] " *Jus dispositivum* and *jus cogens* in International Law ", *American Journal of International Law*, January 1966, p. 55.

general international law and were therefore valid for both Member States and non-member States.

17. Some governments had complained that the Commission had not given examples of treaties conflicting with rules of *jus cogens*, but in fact it had given three,[3] and indicated that they were not to be regarded as exhaustive. Another typical case was that of a treaty of offensive alliance, of which there had been quite a number in the nineteenth century; such an alliance would now be void as a flagrant breach of *jus cogens*.

18. Other governments had asked whether the nullity of a treaty could be invoked only by the parties, or by third States as well. His reply would be that a treaty that was in conflict with *jus cogens* was void and that any State could therefore invoke its absolute nullity.

19. The Commission should again emphasize in its commentary what it had clearly established in 1963. He was grateful to Mr. Verdross for what he had done, although he had been acting in his individual capacity. The 1963 text should be retained. There was no need for the changes proposed by the Special Rapporteur, since if article 37 was read in conjunction with article 45, it would immediately be clear what system the Commission intended to establish.

20. Mr. ROSENNE said that article 37 was the outcome of long and arduous discussion in the Commission and the Drafting Committee, and he had been glad to note that, in the opinion of the Uruguayan delegation to the Sixth Committee, it was of the greatest significance that the Commission, representing jurists from many legal systems, had agreed to include so vital a principle in a multilateral convention on the law of treaties. He was not impressed by the criticism of Schwarzenberger, whose conclusion, given his very controversial point of departure, was inevitable. In the long run, article 37 might prove as important for the development of international law as Article 38 (3) of the Statute of the Permanent Court of International Justice of 1920.[4]

21. He regretted that, at its fifteenth session, the Commission had decided to omit from the commentary any reference to international public order, on the ground that it was a highly controversial issue. He asked whether those members who had held that view would now be prepared to reconsider their attitude and allow at least one reference to be reinstated in the commentary so as to focus attention on what lay behind article 37.

22. Article 37 might be retained in the form approved at the fifteenth session and must be kept as concise as possible. The problem of the time factor in the application of the article could best be dealt with in the commentary.

23. Mr. TUNKIN said that, at its fifteenth session, the Commission had very thoroughly examined the subject of article 37 and had reached the important conclusion that the rules of *jus cogens* formed part of contemporary international law. There was no need to reconsider all aspects of the problem, particularly as most governments had expressed agreement with the article and had stressed its importance.

24. He more or less shared Mr. Castrén's opinion concerning the change in wording proposed by the Special Rapporteur. The phrase " if at the time of its conclusion " was not an improvement and was unnecessary if, as was essential, article 37 was read in conjunction with article 45. Moreover, if that change were introduced and article 37 were read on its own, the erroneous inference might be drawn that the treaty would only be invalidated if it conflicted with a rule of *jus cogens* existing at the time of its conclusion. There was no doubt in his mind that the original text of article 37 was preferable. The idea that the treaty was void *ab initio* was already implicit in that text.

25. The notion of international public order was a highly controversial one that belonged to the realm of theory rather than practice. Some authors viewed it as a kind of natural law, imposed on States. In his view, rules having the character of *jus cogens* were created by agreement between States, as were all other rules of international law. There was no need to mention in the commentary a matter on which there was so much disagreement.

26. Mr. YASSEEN said that the concept of *jus cogens* in international law was unchallengeable and should not be disputed. No specialist in international law could contest the proposition that no two States could come to an agreement to institute slavery or to permit piracy, or that any formal agreement for either purpose was other than void. Those two examples proved that there was such a thing as *jus cogens* and that States could not derogate from it, even by agreement *inter se*.

27. It was admittedly difficult to discern which rules of international law were rules of *jus cogens*, just as it was difficult in internal law, where the notion of public order was not easy to define, since it was relative in time and space.

28. In order to cast doubt on the utility of article 37, it had been objected that, in the existing international order, there was no international authority capable of ruling on the existence of rules of *jus cogens*. But that objection did not apply only to the *jus cogens* theory; it applied to nearly all international law. A distinction should be drawn between two aspects of the international legal order, the normative aspect and the institutional aspect. The latter was still in its early stages, but that should not affect the development of norms. In preparing a general convention on the law of treaties, the Commission had to bear in mind as a fact that *jus cogens* existed and that there were rules of international law from which States could not derogate.

29. Incompatibility of the treaty with *jus cogens* posed the problem of the hierarchy of the rules in the international legal order. Contrary to what was in principle the case in internal law, the order of that hierarchy could not be determined by some formal criterion which relied on the authority from which the rule of law derived. It was therefore necessary to employ an objective criterion which gave full weight to the substance of the rule and its intrinsic value. In his view, a rule of

[3] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 199.

[4] " The Court shall apply : . . . (3) the general principles of law recognized by civilized nations; " The corresponding provision of the Statute of the International Court of Justice, article 38, 1(*c*), reads : " The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the general principles of law recognized by civilized nations; ".

jus cogens was a general rule, indispensable to international life and rooted in the international conscience.

30. It was interesting to note that those States which had commented on the draft had unanimously accepted the idea on which article 37 was based. He preferred the original text, for the reasons given by previous speakers and because article 37 could only be read in conjunction with article 45, which dealt with another aspect of the same question.

31. Mr. de LUNA said that in no legal order was the freedom of will of its subjects unbounded; if it were, that would be the negation of legal order. For many years the positivists had held that the common weal coincided with the success of the strong at the expense of the weak and had maintained that established rights to exploit others should be respected. At that time there had been no limits to the will of a great Power. But already in the days of the Permanent Court of International Justice, in the Oscar Chinn case[5] the German jurist Schücking, in a dissenting opinion had expressed the view that the League of Nations would not have embarked on the codification of international law if it were not possible to create a *jus cogens*, the effect of which would be that, once States had agreed on certain rules of law and given an undertaking that those rules might not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void. Lord McNair had said in that connexion " It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract. In every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements ".[6]

32. He himself regarded *jus cogens*, without which there could be no legal order, not as natural law but as positive international law. It was difficult to define in practice, but such difficulties were not peculiar to *jus cogens:* they arose throughout international law.

33. Instances of the limitations of the object of a treaty were total impossibility of performance — for instance, the extradition of a person who had died; impossibility in practice — a State signing a treaty by which it was annexed to another State could not, if it was to remain a State, accept political and economic obligations that were incompatible with the minimum requirements for a State's existence; and legal impossibility, which could be absolute or relative.

34. *Jus cogens* was the indispensable minimum for the existence of the international community; it was positive law created by States, not as individuals but as organs of the international community, in order to safeguard the community's existence. Such positive law was capable of development. An instance was the " *Asiento de Negros* ", part of the Treaty of Utrecht of 1713,[7] by which England had obtained from the King of Spain a monopoly for thirty years of the slave trade with Spanish America. Such a treaty would be impossible nowadays, when the international community regarded slavery as an illegal institution.

35. He preferred the 1963 text, on the understanding that it was read in conjunction with article 45.

36. Mr. AMADO said it was a profoundly satisfying experience to re-read the summary records of the debates at the Commission's fifteenth session, when many members, notably Mr. Bartoš, Mr. Tunkin and Mr. Ago, had spoken so soundly on the question of *jus cogens*. It was a credit to the Commission that the opinions of such very different authorities coincided. As Mr. de Luna, quoting Mr. Bartoš, had said at the 685th meeting, *jus cogens* was indeed the " minimum framework of law which the international community regarded as essential to its existence at a particular time ".[8]

37. He could endorse the comments made by the Brazilian delegation in the Sixth Committee, as set out in the Special Rapporteur's fifth report (A/CN.4/183/Add. 1, p. 18) and for the reason given in those comments he preferred the text of article 37 as adopted in 1963.

38. The CHAIRMAN, speaking as a member of the Commission, said that, like Mr. Ago, he had been glad to note that nearly all governments accepted the principle on which article 37 was based, which concerned the existence of *jus cogens* in international law.

39. What was surprising was that, in the Sixth Committee of the General Assembly, the delegations of some States whose governments had not yet commented should have expressed doubts about the correctness of the principle; those delegations had apparently relied on the notion of the absolute sovereignty of States which, in their opinion, was alone capable of creating a rule of law, inasmuch as treaties were the first of the sources of law mentioned in the Statute of the International Court of Justice.

40. While not opposed to the idea that the sovereignty of States was the basis of the international community, he did not think that sovereignty could be absolute now that the international community had become organized. Already at the time of the League of Nations, Litvinov had said that every treaty was a voluntary restriction on national sovereignty in an organized international community. There was not necessarily a surrender of national sovereignty, but membership of a community required the respect of certain rules. If that were not so, society would remain in the condition of savagery described by the phrase *homo homini lupus*, which had lasted until the First World War and had prevailed almost unchallenged in the inter-war period. By becoming members of the international society, States recognized the existence of a minimum international order, which was none other than *jus cogens*. The abstract notions of absolute freedom and absolute sovereignty were not compatible with the existence of international society.

41. In the light of those remarks, he continued to support the text adopted in 1963, subject to possible improvement by the Drafting Committee.

[5] *P.C.I.J.*, Series A/B, No. 63, pp. 65-152.

[6] McNair, *Law of Treaties*, 1961, p. 213.

[7] *British and Foreign State Papers*, 1812-1814, Vol. I, Part I, p. 611.

[8] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 77.

42. Mr. BRIGGS said that his objections to the concept of automatic nullity introduced in article 37 were even stronger than they had been to that concept in article 36. He doubted whether there was any agreement, either within the Commission itself or outside it, about the scope and content of the rule laid down concerning treaties conflicting with a peremptory norm of general international law. The Commission made no attempt to define such norms. Indeed, it was puzzling why so many States should have endorsed the article; he presumed one of the reasons was that jurists considered that the notion of international public order appropriately crowned a theoretical structure. It cost States nothing to adopt a high moral tone and to condemn treaties that in any case they were unlikely to conclude, such as those promoting the use of force, traffic in slaves or genocide.

43. His second objection to the article was the same as that put forward by the United States and United Kingdom Governments, namely, that it made no provision for independent adjudication as to whether a peremptory norm had been violated.

44. The idea of a peremptory norm was not unfamiliar to United States citizens, and under the doctrine of judicial review the courts had been required to examine the constitutionality of acts of Congress, not as a moral issue, but as an administrative matter concerning the distribution of powers between the Federal and State Governments. The concept of public order was also one recognized by the courts.

45. The need was not so much for a rule on the lines of that contained in article 37 as for the collective consideration of the problems involved.

46. Mr. PESSOU said he wished to endorse the views expressed by Mr. Yasseen, who had cited some very pertinent examples. He did not think that the objections raised by some States could deprive *jus cogens* of its obligatory character.

47. He also agreed with Mr. Ago that the Commission should follow a certain method; it should consolidate in a single article all the provisions relating to *jus cogens*, which were at the moment contained partly in article 37 and partly in article 45.

48. The Special Rapporteur's revised version of article 37 should perhaps be amended by the addition of the word " obligatory " before the concluding word " character ".

49. He did not share Mr. Castrén's view that the word " peremptory " was pleonastic; it meant that *jus cogens* was binding *erga omnes*, on all States. Besides, in some cases it was better to say the same thing twice over than to leave any doubt. On that point, however, he would support the majority view.

50. Mr. CADIEUX said he recognized that the rule laid down in article 37 marked an important stage in the progressive development of international law. It was significant that the Commission had been well-nigh unanimous on the subject of the article and that most governments had considered it acceptable.

51. The rule was not perhaps as precise as might be wished, but it was better to have some rule, even an imperfect rule, than no rule at all.

52. He admitted the distinction that had been drawn between normative development and institutional development, but he still believed that there was a connexion between the two and that the second was indispensable to the first. As Mr. Briggs had said, a normative development that disregarded institutional problems would be fraught with danger, and the Commission would be wrong to gloss over the gaps in its work.

53. With regard to the drafting, the words " *ab initio* " were not perhaps strictly necessary, but the words " at the time of its conclusion " were, because they added a useful detail. If it omitted to define what was definable, the Commission might be encouraging the continuance of undesirable practices.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission was generally agreed that it was both necessary and important to state the concept of the invalidity of a treaty when it conflicted with a rule of *jus cogens*. Governments, in their comments, had expressed agreement on both the reality and the importance of that concept.

55. He appreciated the point made by Mr. Briggs and Mr. Cadieux regarding the possible dangers involved in the general terms in which the rule was couched in article 37. However, he felt that the Commission was justified, at the present stage of international law, in stating the rule as it had done, and leaving its full content to be worked out in practice.

56. He agreed with the remarks of Mr. Verdross and Mr. Yasseen. The examples given by the latter provided particularly good illustrations; the more the international community became integrated, the more its attention would be directed to the position of the individual. Significant *jus cogens* developments could therefore be expected in the direction of the protection of the rights of the individual in the interests of the world community as a whole.

57. He did not believe it would be useful to try to elaborate the detailed content of the rules of *jus cogens*; the terms of article 37 were sufficient for both jurists and governments to understand what the Commission meant.

58. With regard to the wording of the article, he would not press the small drafting amendments which he had put forward in order to take certain government comments into account. In the light of the discussion, he was inclined to agree that those comments were based on a lack of appreciation of the close connexion between articles 37 and 45. If those articles were read together, the 1963 wording of article 37 was quite sufficient and there was no need to introduce the additional words " at the time of its conclusion ".

59. The Drafting Committee should be invited to consider the drafting suggestions by Mr. Castrén and Mr. Pessou.

60. Article 37 should be referred to the Drafting Committee for consideration in the light of the discussion, bearing in mind the strong feeling in the Commission in favour of maintaining the 1963 text.

61. Mr. AGO said that, before the Commission concluded its debate on so important a matter, he wished to make two comments prompted by the remarks of Mr. Briggs and Mr. Cadieux.

62. First, in saying that the Commission was working out rules of substance and that the question of determining the content of those rules must not be mixed up with the question of whether or not machinery existed for the settlement of disputes over the application of those rules, he had in no way meant to express opposition to an institutional development of that kind. He had intended to stress that the problem of such development was important in relation to the rules of substance as a whole rather than in relation to such and such a problem. Indeed, he was convinced that the progress made in the development of the rules of substance would very soon demonstrate the absolute need for institutional development with regard to the means for the settlement of disputes over their application in a specific case.

63. Secondly, the Commission had been criticized for failing to draw up a list of the rules of *jus cogens*. In his opinion, the time when it was laying down the rule that a treaty was void if it derogated from *jus cogens* was not the right moment for drawing up such a list. Rules of *jus cogens* could be found in the various branches of international law: that on diplomatic relations, the law of the sea, the law concerning State responsibility, and others. Consequently, the Commission should, in its future work on the codification of international law, bear in mind at all times the rule laid down in article 37 of its draft, but it could not settle in advance which were the rules from which no derogation would be permitted, and that applied to all the various branches of international law. Perhaps his views could be recorded in the commentary to article 37.

64. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 37 to the Drafting Committee.

It was so agreed.[9]

ARTICLE 38 (Termination of treaties through the operation of their own provisions)

Article 38

Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions:

(*a*) On such date or on the expiry of such period as may be fixed in the treaty;

(*b*) On the taking effect of a resolutory condition laid down in the treaty;

(*c*) On the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (*a*) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation takes effect.

(*b*) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force. (A/CN.4/L.107, p. 35)

65. The CHAIRMAN invited the Commission to consider article 38, for which the Special Rapporteur had proposed a new title and text reading:

Termination or suspension of the operation of a treaty under its own provisions

1. A treaty terminates or its operation is suspended or the withdrawal of a party from a treaty takes effect on such date or on the fulfilment of such condition or on the occurrence of such event as may be provided for in the treaty.

2. A multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number specified in the treaty as necessary for its entry into force. (A/CN.4/183/Add.1, p. 28)

66. Sir Humphrey WALDOCK, Special Rapporteur, said that article 38, which was the first article of section 3 entitled " Termination and suspension of the operation of treaties ", had attracted few government comments. Some of those comments, however, were on the same lines as the remarks of several members during the 1963 discussion, to the effect that the contents of much of article 38 were self-evident. Parts of the article seemed to do no more than state that the provisions of the treaty would operate to terminate it in accordance with the intention of the parties. For those reasons, he had abbreviated the text of the article without altering its substance in any way.

67. Paragraph 2 of his redraft reproduced the only provision of substance in the previous version of article 38. It was a common feature of multilateral treaties to lay down a minimum number of ratifications for the purpose of entry into force. It was therefore always possible that, as a result of the withdrawal of one of the parties, the number of ratifications or accessions might fall below the minimum number required. It was accordingly desirable to lay down the rule that the multilateral treaty did not terminate by reason only of that new situation. He drew the Commission's attention, however, to the fact that the rule would also apply in cases falling under article 39, where the right to withdraw was implied rather than expressed in the treaty.

68. The CHAIRMAN, speaking as a member of the Commission, said that if it yielded to the observations of certain governments and omitted anything which, for one reason or another, might be regarded as superfluous, the Commission would eventually leave nothing of the draft articles. Too much pruning would obscure the text. For example, what was the " condition " and what was the " event " referred to in the Special Rapporteur's revised version of article 38? A treaty laid down a large

[9] For resumption of discussion, see 840th meeting, paras. 120-131 and 841st meeting, paras. 1-4.

number of conditions and made provision for many events that were unconnected with the termination of the treaty.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that he had radically revised the text of article 38, not only in deference to government comments but also because during the 1963 discussion many members had suggested that the article contained much that was self-evident.

70. Mr. ROSENNE said that if paragraph 1 was to be retained, the draft proposed by the Special Rapporteur would represent a considerable improvement. It was, however, purely descriptive and more suitable to a code than to a draft convention. He therefore doubted the need to retain it.

71. Paragraph 2 ought to constitute a separate article. Its provisions did not deal with the termination or suspension of a treaty, but rather laid down a very necessary rule to the effect that a treaty would not be terminated or suspended in certain circumstances. The Special Rapporteur had indicated that the same rule should apply in the circumstances envisaged in article 39; in fact, it could well be applicable to some other provisions on termination. It was accordingly preferable to embody it in a separate article. The rule was a new one but it had received the support of all the governments that had commented on article 38.

72. Mr. YASSEEN said that the history of article 38 was one of a constant striving for brevity and succinctness. The latest text proposed by the Special Rapporteur was evidence of further progress in that direction.

73. Paragraph 1 was well drafted; the condition in question was undoubtedly a condition concerning the termination or suspension of the treaty.

74. The rule laid down in paragraph 2 had from the beginning been regarded by the Commission as a useful rule of positive law. The revised version embodied all that the earlier text had said, but in fewer words and possibly in clearer language. In general, therefore, he supported the redraft, subject to possible improvements by the Drafting Committee.

75. Mr. AGO said that, though less important than the preceding articles, article 38 was by no means unimportant. It did not only contain explanations: it laid down the principle that, where a treaty stipulated a term or resolutive condition, or specified some future event for the termination of the treaty, that treaty could not be terminated before the expiry of the term or before the fulfilment of the condition or the occurrence of the event. The rule was justified and the only problem was how to draft it in appropriate terms. To meet the Chairman's point, the word " resolutive " should be added before the word " condition ".

76. Article 38 as adopted in 1963 had contained two important provisions: paragraph 2 and paragraph 3 (a). Although many treaties made provision for denunciation, most of them also provided that denunciation did not become effective until after the lapse of a certain period; that being so, the treaty itself could not expire, or cease to be applicable to the withdrawing party, until the denunciation had become effective. It would be wrong to omit those two very useful provisions.

77. Mr. CASTRÉN said that, when the article had been discussed in 1963, he had proposed that it should be dropped, with the exception of paragraph 3 *(b)*, which stated a useful rule of law, whereas the remainder of the article was merely descriptive. He still held the same opinion, which was if anything strengthened by the comments of governments.

78. In keeping with his conciliatory attitude, the Special Rapporteur had made a great concession in his latest redraft by condensing in a single sentence all the descriptive passages previously contained in three paragraphs, but he had not been able to change the nature of those passages. He had added to the article a provision concerning the case of the suspension of the operation of a treaty.

79. He had difficulty in accepting even the revised version of the article, which was still open to criticism. The title, though very long, did not mention the withdrawal of a party to a multilateral treaty, though that was admittedly a minor defect.

80. Paragraph 1 gave the impression — if one disregarded the title, which would perhaps be dropped by the diplomatic conference that would continue the Commission's work — that all treaties contained provisions concerning their termination or the suspension of their operation or, in the case of a multilateral treaty, for the withdrawal of a party, and that the article indicated the only modes of termination, suspension and withdrawal. The draft articles should, of course, be read as a whole; nevertheless, each rule should be drafted in such a manner as to prevent as far as possible any misunderstanding. From that point of view, the earlier text was better.

81. Paragraph 2 should be retained, but a saving clause should be added concerning treaties containing provisions that stipulated otherwise.

82. Mr. de LUNA said he supported Mr. Ago's views. Simplification was a very good thing but it should not be carried too far. In particular, paragraph 3 (*a*) of the 1963 text had been an important provision. The new redraft ignored the case — which was, after all, very frequent — where the treaty provided that denunciation would not become effective until after the expiry of a certain period and where the party was bound to discharge the obligations stipulated in the treaty up to a certain point in time. In the absence of a rule on that point — and the rule might be a residuary rule — the denunciation of a multilateral treaty would make it too easy for a State to evade its obligations under a multilateral instrument. The problem was probably largely one of drafting.

83. The CHAIRMAN, supporting Mr. de Luna's remarks, said a case in point was the Convention for the Establishment of a European Organization for Nuclear Research, under article 12 of which no Member State might give notice in writing of withdrawal from the Organization until after the Convention had been in force for seven years, a necessary provision in that

particular case to ensure that CERN should be able to amortize its very expensive installations.[10]

84. Mr. BRIGGS said that he wished to know what was the relationship between the provisions of article 38 and those of article 40, on the agreement of all the parties to terminate a treaty.

85. The new draft proposed by the Special Rapporteur represented an improvement on the 1963 text but he was not convinced of the need for the article at all.

86. Mr. TUNKIN said that, as he had maintained in 1963, the article did not involve a matter of great importance. Like the former paragraphs 1, 2 and 3 (*a*), the new paragraph 1 stated a self-evident truth and would do no harm if the Commission as a whole wished to retain it.

87. Paragraph 2 embodied a useful legal rule. The case envisaged therein might arise, although he had not heard of any dispute arising on the point in question.

88. On the whole he preferred the Special Rapporteur's redraft because it was short.

89. Mr. VERDROSS said he agreed with Mr. Tunkin. Paragraph 1 of the article as redrafted was not strictly necessary, since it stated the obvious. Paragraph 2, on the other hand, was necessary because it contained a rule never before formulated in international law. He would not object, however, if the whole of the article proposed by the Special Rapporteur were retained.

90. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Ago, said that it was necessary to bear in mind the provisions of article 53 on the legal consequences of termination. Again, the question of the time at which a treaty terminated upon its denunciation was covered by the new version of paragraph 1, which dealt with the termination of treaties " through the operation of their own provisions "; it was therefore clear that termination would operate in accordance with the provisions of the treaty itself, including those dealing with the giving of notice of termination.

91. He suggested that article 38 be referred to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[11]

The meeting rose at 1 p.m.

[10] United Nations *Treaty Series*, Vol. 200, p. 149.

[11] For resumption of discussion, see 841st meeting, paras. 5-11, but see also 836th meeting, paras. 53-55.

829th MEETING

Wednesday, 12 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 39 (Treaties containing no provisions regarding their termination)

Article 39

Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a 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 depositary not less than twelve months' notice to that effect. (A/CN.4/L.107, p. 36)

1. The CHAIRMAN invited the Commission to consider article 39, for which the Special Rapporteur had proposed a new title and text which read:

Treaties containing no provisions regarding their termination or the suspension of their operation

1. When a treaty contains no provision regarding its termination and does not provide for termination or withdrawal or for the suspension of its operation, a party may denounce, withdraw from or suspend the operation of the treaty only if it appears from the treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended to admit the possibility of such denunciation, withdrawal or suspension of the treaty's operation.

2. A party shall in every case give not less than twelve months' notice of its intention to denounce, withdraw from or suspend the operation of the treaty under the provisions of paragraph 1. (A/CN.4/183/Add.1, p. 35)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that governments had on the whole accepted the general concept embodied in article 39 and recognized that, where there were indications of an intention to that effect on the part of the States concerned, a treaty could be subject to denunciation or withdrawal even though it did not contain any actual provision on the subject.

3. He had discussed in his own observations a number of suggestions by governments for improving the text and had redrafted the article in the form of two separate paragraphs, which made for a clearer and simpler presentation.

4. In the light of discussions in the Drafting Committee on other articles, the formula " only if " in paragraph 1 might have to be replaced by the negative formulation: " may not denounce, withdraw . . . unless it appears . . . ".

5. Mr. YASSEEN said he thought the wording of the article still left room for doubt as to whether the possibility of terminating, suspending or denouncing a treaty under the article was based on the treaty itself or on a tacit agreement of the parties. It must be made absolutely