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Summary record of the 829th meeting

Topic:
Law of Treaties

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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

clear in the article that a tacit agreement of the parties could not form the basis, since the termination of treaties by agreement between the parties was dealt with in another article. The termination with which article 39 was concerned could not therefore be based on anything but the treaty itself, or rather, the meaning of the treaty. But how could the meaning of the treaty be determined if not by the application of the rules of interpretation already contained in the draft?

6. Article 39, however, appeared to be not entirely consistent with the articles concerning interpretation already adopted. Under article 39, recourse to the preparatory work was given the status of an independent procedure for determining the intention of the parties, whereas under article 70 recourse to the preparatory work, and to the circumstances of the conclusion of the treaty, was merely an auxiliary procedure, to be employed only after the means mentioned in article 69 had been exhausted.

7. From the point of view of form, the redraft, which divided the article into two paragraphs, was a real improvement.

8. Mr. VERDROSS said he shared Mr. Yasseen's doubts regarding paragraph 1 of the Special Rapporteur's redraft. Paragraph 1 weakened the principle *pacta sunt servanda.*

9. Furthermore, it contained a contradiction, for if the treaty made no provision for its termination, it could hardly be said that it " appears from the treaty " that parties had intended to admit the possibility of denunciation. At the very least the word " appears " should be dropped and some such wording as " unless the parties had agreed in some other way to admit . . . " should be employed. The expression " the parties intended " was too weak; it must be a requirement that the parties had agreed. Anything else would open the door to arbitrary denunciation.

10. Mr. TUNKIN said that he too had some doubts regarding the proposed new formulation of article 39. He preferred the text adopted by the Commission in 1963, which began by stating clearly the rule that a treaty which contained no provision on termination, denunciation or withdrawal was not subject to denunciation or withdrawal. It then went on to state possible exceptions to that rule, based on the character of the treaty combined with the circumstances of its conclusion or the statements of the parties.

11. The proposed new text seemed to raise the exception to the level of a general rule by stating: " When a treaty contains no provision regarding . . . a party may denounce, withdraw from or suspend the operation of the treaty . . . ". A formulation of that kind could open the door to possible violations of the *pacta sunt servanda* principle. For those reasons he was in favour of reinstating the general rule as formulated in the opening clause of the first sentence of the 1963 text.

12. With regard to the second part of the sentence, he agreed with Mr. Verdross that it would be contradictory to say that an intention to admit the possibility of denunciation " appeared " from a treaty which was expressly stated to contain no provision on denunciation. The question was one of interpretation and on that point he agreed with Mr. Yasseen that the proposed redraft went further than article 70. Indeed, it went too far when it appeared to raise the preparatory work to virtually the same level as the text of the treaty itself.

13. It would be wisest for the Commission to adhere to the more cautious text adopted in 1963.

14. Mr. ROSENNE said that he largely agreed with the views expressed by Mr. Tunkin. In 1963, when the Commission had discussed at its 689th meeting what was then article 17 of the Special Rapporteur's second report, the view had prevailed that, in the words of Mr. Tunkin, " The article should be redrafted so as to state, first, the principle that a treaty could be dissolved only with the consent of the parties, after which the exceptions would follow ".[1] That decision by the Commission was reflected in the text adopted in 1963 and no government had seriously questioned it, the only government comments related to drafting details. In the circumstances, he could not accept the new direction given to the article and favoured a text closer to that of 1963.

15. With regard to the drafting, the division into two paragraphs was an improvement. He noted with satisfaction the Special Rapporteur's intention to adopt a negative formulation for article 39, although, in his view, the Commission should not adopt that practice as a matter of general principle; each article should be considered separately. In the particular case of article 39, the negative formulation was the appropriate one.

16. He had failed to find in the Special Rapporteur's observations any explanation of the replacement of the 1963 wording " if it appears from the character of the treaty " by the wording " if it appears from the treaty "; the reference to the character of the treaty had been an essential feature of the 1963 text.

17. On the question of preparatory work, he could not agree with previous speakers. The difficulties to which the Special Rapporteur had referred in paragraph 3 of his observations (A/CN.4/183/Add.1, p. 33) arose from the unfortunate formulation adopted in 1964 by the Commission in article 70, and fully justified the reservations which he (Mr. Rosenne) had himself expressed on that point, especially at the 770th meeting.[2] In practice, the preparatory work was always used, and must always be used, in establishing the intention of the parties. Wherever the provisions of the draft articles required an investigation of the intention of the parties, the preparatory work would have to be consulted. That remark applied particularly to such provisions as articles 4, 11, 12, 18, 19 and 24. His views on that point found support in the reasoning of the International Court of Justice in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[3] In that case, the Court had tried to discover the intention of the parties precisely by examining the preparatory work and indeed there was no other way in which the Court could have achieved its aim.

18. The question of interpretation could not, however, be dealt with piecemeal; it would have to be examined

[1] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 105, para. 67.

[2] *Yearbook of the International Law Commission, 1964*, Vol. I, p. 317, para. 38.

[3] *I.C.J. Reports 1951*, p. 15.

when the Commission came to consider articles 69 and 70 on second reading.

19. Mr. BRIGGS said he was glad that the Special Rapporteur had dropped the reference to " the character " of the treaty. In 1963 he had voted against the text then adopted, precisely because of the inclusion of that term.

20. He preferred a negative formulation to express the rule that a treaty which contained no provision on termination, denunciation or withdrawal could not be denounced, unless the parties agreed to permit such termination, denunciation or withdrawal.

21. The premise upon which the article was based was that expressed in paragraph (2) of the commentary adopted in 1963[4] and repeated in paragraph 1 of the Special Rapporteur's observations in his fifth report, (A/CN.4/183/Add.1, p. 32) that the existence of a unilateral right of termination or denunciation of a treaty depended on the intention of the parties in each case. On a treaty entering into force, it became binding and was subject to the *pacta sunt servanda* rule. Since that rule could not be subject to the intention of the parties, article 39 could only mean that the right of termination or denunciation existed only by virtue of the agreement of the parties under the *pacta sunt servanda* rule. Therefore, if the parties made no provision in the treaty for termination or denunciation, the problem became one of interpretation, or of attempting to discover an unexpressed intention of the parties.

22. In 1964, in adopting articles 69 and 70 on the subject of interpretation, the Commission had rejected the thesis that the expectations or intentions of the parties constituted the starting point of interpretation. It had excluded any rules of interpretation based on presumption of intention and had required actual evidence of the common intention of the parties in each case.

23. The 1963 text of article 39 had not followed the wise approach later adopted by the Commission in 1964 for its articles on interpretation, but had directed attention to the presumed intention of the parties based on the pseudo-scientific concept of the " character " of treaties, a classification which referred to the content rather than to the juridical nature of treaties. Unless a time limitation was expressed, or the interpretation of the treaty under article 69 permitted the inference of an agreement on the subject of denunciation, the treaty remained binding under the *pacta sunt servanda* rule.

24. It was a fallacy to approach the subject as though there existed a choice between two presumptions of equal merit: first, that where a treaty was silent on the subject of termination or denunciation, no unilateral right of denunciation existed and, secondly, the contrary presumption, that where a treaty was silent on the point, the right of denunciation existed. In fact, there was no such choice: the rule that a treaty was binding was not a presumption; it was an objective rule of law and it excluded the possibility of unilateral denunciation.

25. For those reasons, he found the new draft acceptable subject to certain drafting improvements, particularly in order to reconcile it with articles 69 and 70. The Drafting Committee should also bear in mind the relationship between article 39 and article 40, on the termination of a treaty by agreement. He himself would favour a statement that, where the treaty was silent on the point, no right of denunciation existed except by agreement of the parties.

26. Mr. de LUNA said that, like Mr. Verdross, he thought that there was some defective logic in the drafting of article 39.

27. It had been said that the Commission should lay down a residuary rule which was to operate in cases where the treaty was silent on the question of denunciation. Mr. Yasseen considered that that residuary rule should be contained in the provisions of the draft concerning interpretation; Mr. Briggs had said that the principle *pacta sunt servanda* should be paramount.

28. Actually, the case to be covered was rather that where the treaty did not contain any express provisions concerning denunciation. In that case, which was an important one, the Commission should not be expected to make an exception to the rules in its own draft concerning the interpretation of treaties. It could not read something into the treaty that was not there. Either the will of the parties was expressed directly in the treaty, or else that will could be inferred indirectly from the treaty in the light of the rules concerning interpretation.

29. The only residuary rule which the Commission might lay down in article 39 was the rule that, where the possibility of denunciation was not expressly provided for in the treaty but where, according to the rules of interpretation, it appeared that the parties had intended to admit that possibility, the denunciation required twelve months' notice.

30. Mr. CASTRÉN said that, after listening to previous speakers, in particular Mr. Yasseen, Mr. Verdross and Mr. Tunkin, he too felt some reluctance to accept the redraft proposed by the Special Rapporteur. Without wishing to repeat the arguments already advanced, he would support the proposal that the Commission take as a basis the text adopted in 1963 and amend it only, if at all, on certain minor points of drafting.

31. As Mr. Yasseen had pointed out, there was a certain discrepancy, despite the Special Rapporteur's efforts, between article 39 and the articles concerning interpretation.

32. Mr. AMADO said that in 1963 the discussion on the article—at that time numbered 17—had been influenced by the theories of Professor Giraud, who held that multilateral treaties could not be as enduring as bilateral treaties; those theories had been challenged by Mr. Castrén.[5] His personal opinion was that the Commission should revert to the more emphatic formula adopted in 1963.

33. He did not care very much for the idea of referring to a rule of interpretation in a provision laying down a rule of law, for interpretation was an independent process.

34. Mr. AGO said that, at the fifteenth session, he had urged that article 39 should be drafted in the strictest

[4] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 201.

[5] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 100.

possible terms.[6] He had not changed his mind and accordingly found himself in agreement with previous speakers.

35. It would be going too far to drop the article altogether, for, if it were omitted, whoever studied the Commission's draft might infer that denunciation was always possible, even if the treaty did not contain express provisions concerning denunciation. On the contrary, it was the Commission's duty to say specifically that a treaty not containing such provisions could not be denounced save in exceptional cases, in other words, that it could be denounced only if either the nature and character of the treaty were such that it was necessarily open to denunciation, or it was evident from the circumstances of the conclusion of the treaty that the parties had intended denunciation to be possible, even if they did not expressly say so in the treaty.

36. The 1963 text was perfectly adequate; the Drafting Committee might try to improve it but should not depart too far from it.

37. The CHAIRMAN, speaking as a member of the Commission, said that he did not object to the use of the expression " if it appears from the treaty ", which meant that the treaty itself might provide some clue to the intention of the parties.

38. The Commission could very well make an exception in article 39 to the general rules concerning interpretation, though in the case of multilateral treaties, it might be difficult to determine the intention of the parties by reference to the preparatory work. If the article were concerned with bilateral treaties only, it would be sufficient to add a cross-reference to the rules of interpretation in part III of the draft. But the article dealt with all treaties, both bilateral and multilateral. Already in 1963 he had expressed doubts about the reference to the intention of the parties. The latest redraft left an even greater uncertainty.

39. All members were familiar with the process by which the text of a multilateral treaty was worked out. There were invariably some contradictions, as could be seen from a thorough study of the records of meetings. The final report of the body which adopted the text likewise gave only vague and sometimes conflicting indications as to the will of the parties. In most cases the treaty was the outcome of a compromise which did not really satisfy anybody; important provisions were revised at the last moment in a drafting committee, and the reasons for concessions were not always given or recorded, and only rarely were the texts of the instruments accompanied by commentaries. Yet it was undeniable that a whole series of factors eventually caused the majority to approve a text, and that text became the authentic text of the treaty.

40. The Commission should revert to the 1963 text, subject to a slight redrafting, though the negative form of the principal proposition, " is not subject to denunciation . . . unless ", should be retained.

41. His remarks related only to paragraph 1 of the Special Rapporteur's redraft which, as Mr. Ago had pointed out, dealt with an important question of substance and laid down a principle which should appear in the draft.

42. Mr. CADIEUX said that, like Mr. Rosenne, he considered that the division of the article into two paragraphs was an improvement. He further considered that the rule contained in paragraph 1 of the redraft should be retained.

43. The apparent contradiction noted by some speakers in that paragraph raised what was essentially a drafting question. The contradiction would disappear if the provision were divided into two parts: the first would lay down the general rule that a treaty which did not contain a provision concerning denunciation could not be denounced, and the second would state that, where it appeared from the character of the treaty, from the circumstances of its conclusion, or from statements made by the parties, that the parties had intended to admit the possibility of denunciation, the treaty could be denounced.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that the divergence of opinion on article 39 proceeded partly from differences in the approach to substance and partly from the difficulties involved in reconciling with articles 69 and 70, on interpretation, such provisions as article 39, which referred to the intention of the parties.

45. The Commission appeared to be in general agreement on the need to adopt a negative formulation which would state that, where a treaty had no specific provision on the subject of termination or denunciation, no such right existed unless the exceptional circumstances set forth in paragraph 1 obtained. The question was one of drafting, since the use of the words " only if " in his own redraft led to the same result.

46. In expressing the exception to the rule laid down in the opening words of article 39, the use in the 1963 text of the conjunction " and " after the words " the character of the treaty " was significant; in his redraft, he had had no intention of departing in that respect from the substance of the provision adopted in 1963. As pointed out by Lord McNair, such treaties as commercial treaties would, because of their very nature, normally be intended to be subject to denunciation.[7] However, the provisions of article 39 required not only that the treaty should have that special character, but also that the circumstances of the conclusion of the treaty or the statements of the parties thereto should provide further support for the inference that the parties intended to admit the possibility of denunciation or withdrawal.

47. The reference to the preparatory work was contained in the words " statements of the parties " which, as explained in paragraph (5) of the commentary adopted in 1963, " was not meant by the Commission to refer only to statements forming part of the *travaux préparatoires* of the treaty, but was meant also to cover subsequent statements showing the understanding of the parties as to the possibility of denouncing or withdrawing from the treaty; in other words, it was meant to cover interpretation of the treaty by reference to ' subsequent

[6] *Ibid.*, p. 104.

[7] McNair, *Law of Treaties*, 1961, pp. 501-505.

conduct ' as well as by reference to the *travaux préparatoires* ".[8]

48. He was prepared to accept the suggestion to restore the words " the character of " after the words " it appears from " and before the words " the treaty ". The authors of that suggestion felt that the expression " the character of the treaty " indicated more aptly the notion of certain categories of treaties, but personally he found it somewhat narrow. The indication that a treaty was subject to denunciation or termination could emerge from the provisions of the treaty as a whole. Moreover, he did not see how it was possible to determine the character of the treaty without looking for that character in its provisions.

49. With regard to the relationship between article 39 on the one hand and articles 69 and 70 on the other, unless the application of those articles on interpretation were wholly excluded in a particular article of the draft, it must be assumed that both applied *in toto*. The question whether it was desired to set aside the normal rules of interpretation arose in connexion with a number of other articles as well, in particular those dealing with ratification and reservations. Both the Commission and the Drafting Committee would have to take good care to bring the various articles into line with the provisions adopted in articles 69 and 70, and, in particular, to avoid referring to statements of the parties as a basic source for ascertaining their intentions, if it was desired to exclude reference to *travaux préparatoires*.

50. Article 39 should be referred to the Drafting Committee for reconsideration of the text in the light of the discussion, especially the view that the article should be couched in terms as narrow and restrictive as possible.

51. The CHAIRMAN, speaking as a member of the Commission, said that the statements by the parties to a treaty were of two kinds: those made in the general debate during the preparation of the text, and those made at the close of the negotiations, which formed an integral part of the consent expressed by the parties. It was to the latter that the Commission had undoubtedly been referring in 1963.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the language used in 1963 was admittedly somewhat loose. However, as pointed out in paragraph (5) of the commentary, the term " statements of the parties " was not meant by the Commission to refer only to statements forming part of the *travaux préparatoires* of the treaty, but was meant to cover also " subsequent conduct ".[9]

53. The Commission agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential; unless the statements by parties were an indication of a common intention, their admission as evidence of a right of denunciation or withdrawal would be very dangerous.

54. Mr. de LUNA said that, in saying that a treaty either did or did not contain provisions regarding its termination or suspension and that, if it did not, the Commission could not make good the deficiency, he had not meant to oppose what had been approved by States. The article would be useful to rebut the alleged presumption that, if a treaty did not contain any provisions concerning denunciation, it could be denounced unilaterally.

55. In the course of his brilliant defence of his text, the Special Rapporteur had suggested a very satisfactory expression, " specific provision ", which was even better than " express provision ". Subject to that change, and on the understanding that paragraph 1 would be subdivided in accordance with Mr. Cadieux's proposal, he fully supported the text.

56. Mr. BRIGGS said that article 39 should make it clear that, where a treaty was silent on the point, no right of denunciation existed unless such a right could be inferred from the intention of the parties. In 1963, he had objected to the expression " the character of the treaty " because it appeared to suggest that a right of denunciation could be presumed from the very class to which the treaty belonged. He had therefore been glad to note the stress placed by the Special Rapporteur on the implications of the use of the conjunction " and ", which was that the " character " of the treaty was not being set up as an individual criterion. However, he would prefer to see any reference to the " character " of the treaty deleted.

57. As rightly pointed out by Mr. Yasseen, the Special Rapporteur's proposed redraft was not compatible with the rules of interpretation laid down in articles 69 and 70, which placed the primary emphasis on the text of the treaty and relegated the preparatory work to a subsidiary rule. Perhaps it was articles 69 and 70 that required to be reconsidered, and that was a point that should be kept in mind when they came to be considered by the Commission in second reading.

58. Mr. AGO said that his understanding was that, in referring to " the statements of the parties ", the Commission had had in mind, not all the statements that might be made during the preparatory work, but those made after it had been concluded, in other words, those made at the time when the consent of the State was finally expressed. What it had intended to say was that sometimes the parties might not include denunciation clauses in the text of the treaty but that, at the time when they expressed their final consent, one party might state that it reserved the right to denounce the treaty and the other might not object. In such a case, there was to all intents and purposes agreement on the possibility of denunciation. In his view, the Commission should make it very plain that in article 39 that was the only situation it dealt with.

59. Mr. YASSEEN said it could be argued that that situation was covered by the other article, which provided for express or tacit agreement. The expression of a like intention by both parties could be regarded as a tacit agreement.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would take into account all the points raised in the discussion.

61. The CHAIRMAN said that, if there were no objection, he would consider that the Commission accepted

[8] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 202.

[9] *Ibid.*

the Special Rapporteur's proposal that article 39 be referred to the Drafting Committee for consideration in the light of the discussion, bearing in mind the view expressed by several members that the article should be drafted in terms as narrow and restrictive as possible.

It was so agreed.[10]

ARTICLE 40 (Termination or suspension of the operation of treaties by agreement)

Article 40

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the 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 the parties, the consent of not less than two thirds of all the States which drew up the treaty; however, after the expiry of . . . 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. (A/CN.4/L.107, p. 36)

62. The CHAIRMAN invited the Commission to consider article 40, for which the Special Rapporteur had proposed a new text reading:

1. A treaty may at any time be terminated or its operation suspended, in whole or in part, by agreement of all the parties, subject to paragraph 2.

2. Until the expiry of six years from the adoption of its text, or such other period as may be specified in the treaty, the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text. (A/CN.4/183/Add.2, p. 9)

63. Sir Humphrey WALDOCK, Special Rapporteur, said that the most important observation by a government on article 40 was that by Israel, which had pointed out that the possibility of tacit agreement to terminate a treaty seemed to have been excluded from the 1963 text. That interpretation was certainly a possible one if sub-paragraphs (*a*) and (*b*) in paragraph 1 were regarded as exhaustive. The reason for inserting those two sub-paragraphs had been to make it clear that it was for the parties to decide what form the agreement to terminate should take. Some authors went so far as to argue that the agreement to terminate must take the same form as the original treaty. But that was not a theory to which the Commission itself had subscribed.

64. In modifying paragraph 1, he had tried to take account of some of the suggestions made by governments and had dropped the sub-paragraphs contained in the original text, on the ground that it was unnecessary to specify what form the agreement to terminate might take. It seemed reasonable to provide that a treaty might be terminated in part, as had been suggested by some governments. The issue of separability did not arise, as the parties would themselves decide in such a case which parts of the treaty would be terminated.

65. He had transferred to paragraph 1 the clause concerning suspension, which in the original text appeared in paragraph 3, as that was a matter for decision by the parties and not by all the States taking part in the adoption of the text.

66. When considering the time-limit to be imposed in paragraph 2, he had sought to find a mean between the various suggestions made by governments, having due regard to the need for a reasonable length of time in order to allow for the completion of the constitutional procedures required for ratification, accession, acceptance or approval.

67. The object of paragraph 2 was to protect the interests of States that had taken part in the negotiations against the premature termination of the treaty, particularly in cases where few ratifications were required to bring it into force. It was not easy to devise fully satisfactory wording to describe the States, but he had chosen the phrase " which adopted the text " instead of the phrase " which drew up the treaty ".

68. Mr. YASSEEN said that the Special Rapporteur's new text posed a serious problem, since it implied that the agreement between the parties to terminate or suspend a treaty could be oral. Although not a supporter of the theory of the *acte contraire*—the theory that the mode of terminating a treaty had to be the same as the mode of its conclusion—he was reluctant to admit the idea that an instrument which in most cases had been adopted with some ceremony could be terminated by an oral agreement. Nor did he consider that the addition of the words " in whole or in part " was an improvement: since the parties could terminate the whole of a treaty, they could obviously terminate a part of it.

69. Paragraph 2 contained a rule which might be useful in the case of multilateral treaties, as he had said in 1963. A period of ten years seemed to him to be reasonable. The paragraph was unquestionably better arranged in the new version; it was better to mention suspension directly in both paragraphs than to make it the subject of a separate paragraph.

70. Mr. CASTRÉN said that he found the Special Rapporteur's new text satisfactory, and he accepted all the amendments he had proposed to the 1963 text. The Special Rapporteur had rightly omitted all the superfluous detail in paragraph 1, which might have resulted in interpretations not intended by the Commission. It was also right that the article should take the rule of the separability of treaties into account. The words " in whole or in part " were not absolutely necessary, as Mr. Yasseen had pointed out, since, if a treaty could be abrogated *in toto*, it could also be abrogated in part.

71. With regard to paragraph 2, he agreed with the Special Rapporteur that, if it was merely intended to suspend the operation of a treaty, the consent of the parties should be sufficient, and that it was not necessary to obtain, within a particular period, the agreement of a specified number of the States which had drawn up the treaty. So far as the termination of a treaty was con-

[10] For resumption of discussion, see 841st meeting, paras. 12-17.

cerned, he agreed with the Special Rapporteur's proposal relating to the period within which the consent of at least two-thirds of the States which had adopted the text was required; the proposal seemed to be acceptable to most of the States which had commented on the point.

72. Mr. de LUNA said he agreed with Mr. Yasseen that the theory of the *acte contraire* was not applicable in international law. International law was essentially non-formalistic and did not establish any hierarchy of norms or forms. Whatever the manner in which a State had accepted an obligation, whether in writing, orally or by indication, it continued to be bound. There was therefore no need to require a written instrument.

73. It was worth noting that constitutions, which were so careful to lay down the rules concerning the treaty-making capacity, made no reference whatever to the denunciation of treaties. In the course of his diplomatic career, he had known cases where a treaty had been terminated by a mere *note verbale*—a document which, given the atmosphere of mutual trust prevailing in diplomacy, might be typed by anybody and bear illegible initials. Accordingly, both from the point of view of doctrine and in the light of his experience, he fully agreed with the Special Rapporteur.

74. As Mr. Yasseen had rightly said, the words " in whole or in part " were unnecessary, but there was no harm in stating the obvious.

75. Mr. ROSENNE said that, for the time being, the phrase " which adopted the text " could be retained, but it might eventually have to be altered because of a new practice whereby treaties were not adopted by States at all; an example of that was the Convention on the Centre for the Settlement of Investment Disputes. After consideration by a committee of experts appointed by governments, the text of that convention had been adopted and opened for signature by the Board of Governors of the International Bank for Reconstruction and Development. The possibility of such a procedure was perhaps not covered by the new article 3 (*bis*).[11]

76. Mr. TUNKIN said that paragraph 1 of the Special Rapporteur's new text was certainly an improvement and was acceptable. There had been no justification in the 1963 text for limiting the forms of agreement to terminate to an instrument drawn up by the parties or to communications. The new text would cover a tacit agreement, including the case of desuetude.

77. The question of the time-limit to be laid down in paragraph 2 should be left to be decided by a diplomatic conference.

78. He had misgivings about the phrase " which adopted the text", which seemed to him as imprecise as the wording used in the 1963 version. There was no knowing whether it referred only to the States which had voted in favour of the text of a treaty, or whether it would include all States which had participated in the Conference. The alternative was to cover by that provision only those States which had signed the treaty and had thereby associated themselves more closely with the text of the treaty. The other possible solution would be to provide that termination could only take place by consent of all the parties; that would be a sufficient safeguard against arbitrary action.

79. Mr. VERDROSS said that he could appreciate the force of Mr. Yasseen's comment on paragraph 1; but since it was one of the governing principles of international law that the parties were free to adopt whatever form they wished for a treaty, he supported the views expressed by Mr. de Luna and Mr. Tunkin.

80. In paragraph 2, the Commission was proposing a new rule for adoption by States as a part of international law; there too it might be best to make use of Mr. Tunkin's suggestion.

81. Mr. BRIGGS said that the new draft of paragraph 1 was acceptable, but he would prefer paragraph 2 to be dropped, as well as the words " subject to paragraph 2 " at the end of paragraph 1.

82. He had never understood why there should be so much solicitude for the States participating in the adoption of the text of a treaty which they had not proceeded to accept as binding; nor did he see what legal right that conferred upon them. If some hundred States participated in a conference to draw up a treaty which only required two ratifications to enter into force—as was the case with the Geneva Conventions for the Amelioration of the Condition of the Wounded in Armed Forces in the Field[12] —and the two ratifying States agreed to terminate it before any others had had time to ratify, such a case could be dealt with by a provision reading: "A treaty may be terminated between the parties by agreement of all the parties ". Other States which had participated in the drawing up of the treaty could still bring it into force between themselves.

83. Mr. AGO said that the Special Rapporteur's proposed redraft was superior to the earlier text in that it was simpler and less descriptive. Unfortunately, the French version was almost unintelligible and should be redrafted by the Drafting Committee.

84. He wished to deal with the question whether the suspension of the operation of a treaty—the subject of a separate paragraph in the 1963 text—should be governed by the same provision as the termination of a treaty. Even on the assumption that the agreement of all the parties was really necessary for the purpose of the termination of a treaty, could one go so far as to say that some of the parties could not *inter se* suspend the operation of a multilateral treaty without the agreement of all the parties? Was it absolutely essential to treat suspension in the same way as termination? Could not the Commission confine the scope of article 40 to termination? The inclusion of suspension in that context seemed a little odd and, moreover, made for a very clumsy text.

85. With regard to paragraph 2, he realized what had been in the Commission's mind. He could imagine a case where a conference drew up a text—and in that connexion Mr. Tunkin had rightly said that the meaning of the words " all the States which adopted the text " should be explained—and certain States became parties to the treaty. Shortly afterwards, however, just when other States were perhaps planning to ratify the treaty, only

[11] *Yearbook of the International Law Commission, 1965*, Vol. I, 820th meeting.

[12] United Nations *Treaty Series*, Vol. 75.

the consent of the first-mentioned States would be needed for the purpose of terminating it. It seemed to him that that was a rather hypothetical situation and that it was perhaps hardly necessary to state such a rule, which would in any case be a complicated one since the terminology used would necessarily be somewhat arbitrary. It was barely conceivable that some States which had become parties to a treaty should be at liberty to terminate it so soon after its adoption, without consulting the other States. Indeed, it was so unlikely that it was probably unnecessary to provide for it. Moreover, difficulties might arise, especially because an arbitrary time-limit would have to be fixed. He would be in favour of deleting paragraph 2.

86. The CHAIRMAN, speaking as a member of the Commission, said the Special Rapporteur had found a more elegant formulation than that of 1963. So far as suspension was concerned, he did not entirely agree with Mr. Ago's view that it was open to the parties at any time to suspend a multilateral treaty without consulting all the other parties; such a procedure might upset the balance required in the application of treaties. The Drafting Committee should ponder the question.

87. Paragraph 2 stated that " the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text", without mentioning suspension, whereas paragraph 1 stated that the agreement of all the parties was required to suspend the treaty's operation. The Special Rapporteur had certainly not intended to produce that result, which was the consequence of the omission of paragraph 3 of the 1963 text; if the text was applied literally, the suspension of the treaty would necessitate the consent of all the parties. It would be better to use some such expression as " the termination or the suspension of the operation of a multilateral treaty ".

88. He agreed with Mr. Tunkin that there were cases where States accepted a text only because others had also accepted it. It was conceivable that several States, whose consent was unwanted, might formally accept a text for the sole reason that certain other States had accepted it, and that if those certain other States then abandoned the treaty, again for that sole reason the first-named States would then ask to be permitted to withdraw their consent. Without such permission they would then be in a delicate position. Consequently, it might be best to revert to the 1963 text.

89. He was in favour of Mr. Tunkin's suggestion, which had been supported by Mr. Ago. The time-limit should preferably be placed between square brackets; at all events, paragraph 2 of the new text should be drafted in the form of a residuary rule.

90. Sir Humphrey WALDOCK, Special Rapporteur, said the consensus of opinion was that the Commission should maintain the position it had adopted at its fifteenth session, but that no indication need be given in article 40 of the form which the agreement to terminate or suspend might take. It was evidently not in favour of the principle of the *acte contraire*.

91. He entirely agreed with Mr. Tunkin that one of the merits of a simple formula would be that it covered cases of desuetude as well as tacit agreement to terminate.

92. The point raised by Mr. Ago as to whether suspension would require the agreement of all the parties must be considered, otherwise there was a risk of the text not being consistent with articles 66 and 67, on amendment and modification of multilateral treaties. It was important to maintain a distinction between an amendment of a multilateral treaty agreed upon by all the parties, and modifications agreed upon between some parties only. If a parallel distinction were to be made in regard to suspension, it must be made explicit. An alternative procedure would be to lay down a general rule concerning termination and to cover the problem of suspension in article 67. The issue was one to which he had not yet given sufficient thought.

93. Paragraph 2 of his new text, although similar to a paragraph adopted in 1963, had not met with much support in the Commission. Its purpose was to protect for a specified period the legal interest of States which had taken part in the adoption of a general multilateral treaty and had thereby shown an interest in it, even if they had not proceeded to ratify at once. The matter might have some importance, particularly in modern times when technical conventions were apt to get out-of-date quickly and require either termination or modification. His own view was that it would be inadmissible for a few parties only to dispose of such treaties, without some form of consultation with the States that had helped to draw them up. Any such action was so inconsistent with the proper conduct of international relations that it was not perhaps very likely to occur.

94. The issue was not a major one and if the Drafting Committee considered that it would be simpler to exclude paragraph 2, he would accept that conclusion.

95. The CHAIRMAN suggested that article 40 be referred to the Drafting Committee.

It was so agreed.[13]

The meeting rose at 12.55 p.m.

[13] For resumption of discussion, see 841st meeting, paras. 57-90.

830th MEETING

Thursday, 13 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. Caicedo Castilla, Observer for the Inter-American Juridical Committee; Mr. Golsong, Observer for the European Committee on Legal Co-operation.