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**Summary record of the 830th meeting**

Topic:  
**<multiple topics>**

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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.*<sup>13</sup>

The meeting rose at 12.55 p.m.

<sup>13</sup> 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.

### Co-operation with Other Bodies

[Item 7 of the agenda]

(resumed from the 828th meeting)

1. The CHAIRMAN invited the observer for the European Committee on Legal Co-operation to address the Commission.
2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Council of Europe had two organs—the Consultative Assembly and the Ministerial Committee—and a Secretary-General. Under its rules, member States were required to give specific undertakings with regard to the recognition and protection of human rights and to the rule of law.
3. The Council's achievements in legal matters were embodied, not in statutory or quasi-statutory instruments, like those of the International Labour Organisation, for instance, but in inter-State treaties, which were prepared within the Council and then concluded between the States members. In no case so far had the States members been required to accede to conventions prepared by the Council, but they were required, within one year of signing a treaty, to initiate the procedure for approval of the treaty by the appropriate national bodies.
4. Some sixty agreements had been prepared by the Council of Europe; they covered a wide range of subjects and included the European Convention on Human Rights, agreements on medical, cultural and social matters and other topics of private international law or criminal law, as well as on questions of public international law. Among the instruments in the last-mentioned category were the European Convention for the Peaceful Settlement of Disputes (1957), the Convention on Extradition (1957), the Convention on Multiple Nationality (1963) and the European Agreement on the Suppression of Radio Broadcasts by Stations outside National Territories (1964). He would be happy to provide each member of the Commission with a list of those Conventions and with a complete collection of the agreements concluded within the Council of Europe.
5. The preparation of multilateral instruments on such a wide range of subjects by expert committees naturally raised delicate questions of treaty law, more especially as, pending the completion of the International Law Commission's work on the subject, there were no general rules governing the conclusion of inter-State treaties. That was one of the reasons why the Ministerial Committee of the Council of Europe, by its resolution (63) 29, had set up in 1964 the European Committee on Legal Cooperation, which had become responsible for the preliminary work on nearly all the legal problems considered by the Council.
6. The Committee on Legal Cooperation, whose present Chairman was Professor Monaco, an Italian jurist, welcomed observers from non-member States and international legal bodies; he hoped that in future the International Law Commission would also give its assistance on matters of common interest and send an observer to the Committee's meetings. He would submit the matter to the next meeting of the European Committee.
7. Several of the matters being studied by the Committee might, he thought, be of particular interest to the Commission. The Committee had almost completed a convention on consular functions, which was expected to be open for signature before the end of 1966. The convention, which was concerned with consular functions and not with consular relations, supplemented the Vienna Convention, as was explained in its preamble. Article 1 reproduced the basic definitions set out in the Vienna Convention, and the new instrument expressly provided that questions that it left unsettled would continue to be governed by customary international law.
8. Another topic under discussion was the problem of immunity of States, which the International Law Commission seemed to have dropped for the time being. The Council of Europe had no intention of setting itself up as a substitute for the Commission; all that it wished to do was to codify the practice to be observed by member States in their relations with one another. Such a code might perhaps be of use to the Commission when it took up the topic again.
9. The Committee had also begun a study of special missions, but had deferred it until the results of the International Law Commission's work were available. It had also decided that, as soon as the Commission's report on the law of treaties was available, it would consider the question of reservations to multilateral treaties. Some years previously the Council of Europe had instituted a system of what were called "negotiated reservations" in connexion with its own treaties, but the problem was extremely complicated. The Council therefore wished to take advantage of the Commission's knowledge and experience, not only where the Council's own treaties were concerned but also in connexion with multilateral treaties drawn up within the United Nations or elsewhere.
10. In 1966 the European Committee on Legal Co-operation proposed to take up two other problems of public international law: the question of the peaceful settlement of disputes, with a view to supplementing and improving the 1957 Convention, and the question of the uniform interpretation of treaties, specifically the interpretation of treaty provisions which were likely to be applied by national courts.
11. The Council's work on treaties was thus not only inspired by the work of the International Law Commission, but was also complementary to it. The same was true of the Council's efforts to ensure that its member States acceded to conventions prepared within the United Nations. The Consultative Assembly had on several occasions adopted recommendations on the subject, and the European Committee on Legal Co-operation regularly reviewed the status of signatures and ratifications of such conventions as the Conventions on the Law of the Sea and the Conventions on Diplomatic and Consular Relations.
12. As in its legal activities the Council of Europe was concerned essentially with the conclusion of treaties, it followed with particular attention the Commission's

work on the codification of the law of treaties. The two meetings which he had attended had shown him how an organization such as the Council of Europe, whose experience in treaty law was not unimportant, could profit by the conclusions reached by the Commission, not only in the drafting of provisions but also on their application. Admittedly, a problem such as that raised by article 40, paragraph 2, had not yet occurred in the practice of the Council of Europe; but there were other rules in the draft articles which were of great practical importance to his Committee, and more particularly to the Secretary-General of the Council of Europe as depositary. Indeed, all the Council of Europe's treaties could be covered by the draft articles, for although they had been drawn up within an international organization, they were "concluded between States" within the meaning of article 1 of the Commission's draft. That remark did not of course apply to the agreements concluded by the Council with other international organizations or with States.

13. The draft articles constituted a most useful guide for the Committee on Legal Co-operation, notably the rules concerning reservations, the application of a treaty in point of time, the correction of errors, the functions of the Secretary-General as depositary, provisional entry into force, the modification of treaties—articles 66 and 67—suspension, accession, obligations for third States, and State succession.

14. The Council's experience had often vindicated the solutions recommended by the Commission on all those points. That was also true of the decision, taken at the first part of the session, to delete article 5 on the negotiation and drawing up of a treaty. In his view, that was a sound decision, since that article would not have covered all the forms used in the Council of Europe for preparing treaties. The Consultative Assembly, a parliamentary and therefore not a governmental body, played an important part in the drawing up of treaties, an arrangement which was not without value when doubts arose later regarding the interpretation of some ambiguous provision. It was therefore a special case which might be borne in mind in connexion with interpretation; indeed, the Commission had made provision for it in draft article 70.

15. He could assure the Commission that, in carrying out its duties in connexion with the codification and progressive development of public international law, which were of world-wide significance, it could always rely on the interest and support of the Council of Europe, which, like the United Nations, had been set up to prevent the recurrence of painful events and to establish the rule of law.

16. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his statement and for his promise of co-operation. He said the Commission's programme of work was a somewhat ambitious one; the fact that some particular topic was on the programme should not prevent the Council of Europe from tackling forthwith some subject which the Commission would be taking up later, for in that way the Council could gather material that would be useful to the Commission, which had taken all the legal ideas throughout the world into account.

17. Mr. AGO said that he had been struck by a passage in Mr. Golsong's interesting statement which seemed to have particular relevance to the Commission's work—namely, his reference to the efforts of the European Committee on Legal Cooperation to encourage accession to general conventions prepared within the United Nations. The work which the Commission began and which was continued at diplomatic conferences was fruitless unless it resulted in accession and ratification. He hoped, therefore, that the Commission would recommend all regional legal bodies co-operating with it to adopt an attitude similar to that of the Council of Europe.

18. Mr. ROSENNE said he hoped the European Committee on Legal Co-operation would furnish any material relating to the law of treaties as early as possible so that it could be taken into account by the Commission, which was due to complete its work on the subject in the summer.

19. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said he thought that the experience of the Committee in matters of treaty law, and also that of the Secretary-General of the Council of Europe as depositary, might be of interest to the Commission. He would let the Commission have a note on the subject at a very early date.

20. The CHAIRMAN asked Mr. Golsong to be good enough to send a general memorandum to the Secretariat, with enough copies for all the members of the Commission.

21. Sir Humphrey WALDOCK, Special Rapporteur, said he had not yet written his report on part III of the draft, and so would be glad to have an advance copy of any material from the European Committee on Legal Co-operation which might have a bearing on the subject.

22. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

23. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee), replying first to Mr. Ago, said the juridical bodies of the Organization of American States would most certainly urge their member governments to ratify the international conventions which had resulted from the work of the International Law Commission.

24. 1965 had been a year of intense activity for the juridical bodies of the Organization of American States. The Inter-American Council of Jurists had met at San Salvador in February, the Inter-American Juridical Committee at Rio de Janeiro in July, August and September, and the Extraordinary General Conference at Rio de Janeiro in November.

25. The Inter-American Council of Jurists consisted of representatives of all the member governments of the Organization of American States. The Inter-American Juridical Committee, on the other hand, represented the Organization as a whole; its nine members, who held office for six years, acted in their individual capacities and not as representatives of their governments.

26. At its San Salvador meeting the Council had,

among other things, adopted the rules formulated by the Inter-American Juridical Committee on the subject of State responsibility as the expression of Latin American law, and had decided that a statement of North American legal doctrine in the matter should be included in the Committee's report.

27. The Inter-American Juridical Committee had had a particularly fruitful session. It had completed its work on the breadth of the territorial sea, the international responsibility of States, the use of the waters of international rivers and lakes for industry and agriculture, and the differences between intervention and collective action.

28. With regard to the territorial sea, the Committee had put forward a draft convention for adoption by American States, laying down a twelve-mile limit. The Colombian member of the Committee had claimed that the draft convention ought to have mentioned the right of a State, or group of States, to prescribe a zone 200 miles wide for the protection of the living resources of the sea, as had been done by the Pacific Coast States in the Santiago declaration. The Argentine member of the Committee had expressed his agreement with the Colombian member.

29. On the subject of State responsibility, the Committee had drawn attention to the existence of two different positions: that of the Latin American States and that of the North American States. The Latin American States had a tendency to restrict State responsibility and proclaimed the principle of equality of treatment of nationals and aliens, thereby rejecting the privilege of diplomatic protection of aliens; they confined the concept of denial of justice to cases where an alien was refused access to the local judicial authorities, and rejected the notion that mistaken or unjust judgments could constitute a denial of justice; and they both refused to admit the use of force for the recovery of State debts and accepted the validity of the so-called "Calvo clause". The doctrine prevailing in the United States generally diverged from these principles and upheld the right of protection of nationals abroad. The 1965 report of the Committee set out both points of view, with the reasons given in support of each. The Committee's report would be officially transmitted in March 1966 to the International Law Commission by the Secretary-General of the Organization of American States.

30. The Latin American doctrine had emerged from the need of countries of that area to defend their sovereignty and independence against diplomatic claims and armed interventions on the part of European powers and the United States. In the course of the nineteenth century and the early twentieth century, some twenty interventions of that type had taken place, even against countries like Mexico, Argentina and Brazil.

31. The Inter-American Juridical Committee had prepared a draft convention on the use of the waters of international rivers and lakes for industrial and agricultural purposes, which would be considered by an inter-American diplomatic conference in 1966. The matter was of great practical importance, because of the frequent disputes among American States in con-

nexion with the use of international waters. The draft convention defined such controversial terms as "international river", "international lake" and "industrial use". It specified that a State wishing to carry out works connected with the use of water had a duty to notify the other State concerned and to supply plans to that State, in order to obtain its consent. It also provided for the setting up of a joint commission to deal with disputes between States; any dispute which the Commission was unable to solve would be settled by the peaceful means laid down in the Inter-American system, namely, conciliation commissions, inter-American arbitration, or the International Court of Justice where legal disputes were concerned.

32. The report of the Committee on the difference between intervention and collective action was particularly significant at the present time. It upheld non-intervention as a basic principle of the Organization of American States, which arose out of the principle of the juridical equality of States. Without the principle of non-intervention, the regional American organization would lose its meaning and the Committee therefore urged the retention of article 15 of the Bogota Charter,<sup>1</sup> which laid down that no State had the right to intervene, for any reason whatever, in the internal or external affairs of any other State.

33. The Committee agreed that collective action by the Organization itself was legitimate, although in America only one treaty provided for such action, namely the Inter-American Treaty of Reciprocal Assistance,<sup>2</sup> signed at Rio de Janeiro on 2 September 1947 and since ratified by all the States members of the Organization of American States. That treaty specified that inter-American collective action could take place in three cases: first, in the event of an armed attack against an American State; secondly, in the event of aggression otherwise than by armed attack; thirdly, where collective action had been first endorsed by a two-thirds majority at a meeting of Ministers for Foreign Affairs. The Committee's views had received the support of several Ministers for Foreign Affairs at the Extraordinary Inter-American Conference, which had decided to include, in the so-called Act of Rio de Janeiro, a solemn declaration to the effect that the first part of the Bogota Charter would not be revised. That declaration was to be commended, for the first part of the Bogota Charter set out the very philosophy of the Organization of American States and embodied the main principles which inspired the inter-American juridical community, namely, non-intervention, self-determination, juridical equality of states and peaceful settlement of disputes.

34. The Inter-American Juridical Committee was due to meet in April 1966 to consider whether to submit to the Buenos Aires Conference, to be held in July 1966, a proposal, sponsored by two governments, for the setting up of an Inter-American Peace Council. The proposed Council would consist of Ministers for Foreign Affairs and would be competent to deal with all disputes between American States; it would have authority to prescribe

<sup>1</sup> United Nations *Treaty Series*, Vol. 119, p. 56.

<sup>2</sup> United Nations *Treaty Series*, Vol. 21, p. 93.

the method to be used for the settlement of a dispute and also power to settle the dispute itself if no positive solution were reached by the means available to the parties. There was as yet no agreement on that proposal, which was only an item for consideration.

35. Mr. de LUNA, after congratulating the observer for the Inter-American Juridical Committee on his interesting statement, asked that all members of the Commission should receive the documents of the juridical bodies of the Organization of American States. It was not enough to send a single copy addressed to the Commission itself, because that would simply remain in the library at Headquarters.

36. Mr. AMADO, also congratulating Mr. Caicedo Castilla on his statement, said he had learned with interest of the results achieved in solving the problem of the utilization of international rivers for the production of electric power. At the great Inter-American Conferences held at Havana in 1928 and at Montevideo in 1933, there had been serious differences of opinion between the representatives of Brazil and of Argentina. He was glad to hear that the efforts of eminent Latin American jurists had at long last been crowned with success.

37. Mr. AGO, speaking as Special Rapporteur on the topic of State responsibility, said he hoped that the Inter-American Juridical Committee would send him advance copies of any documents it might have relating to its work on the topic.

38. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee) said he regarded the exchange of documents as an essential part of co-operation between the Commission and inter-American juridical bodies. He would make the necessary arrangements to ensure that important documents of the Committee should reach each member of the Commission, and particularly that documents concerning State responsibility should be supplied to Mr. Ago.

39. The CHAIRMAN, on the Commission's behalf, thanked the observer for the Inter-American Juridical Committee for both his statement and his promise.

### Law of Treaties

(A/CN.4/183 and Add.2, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 41 (Termination implied from entering into a subsequent treaty)

#### Article 41

##### *Termination implied from entering into a subsequent treaty*

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

(a) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

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

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty. (A/CN.4/L.107, p. 37)

40. The CHAIRMAN invited the Commission to consider article 41, for which the Special Rapporteur had proposed a new title and text which read :

##### *Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty*

1. A treaty shall be considered as terminated if all the parties to it enter into a further treaty relating to the same subject-matter and :

(a) it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended that the matter should thenceforth be governed exclusively by the later treaty; or

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

2. However, the earlier treaty shall be considered as only suspended in operation if it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that such was the intention of the parties when concluding the later treaty.

3. Under the conditions set out in paragraphs 1 and 2, if the provisions of the later treaty relate only to a part of the earlier treaty and the two treaties are otherwise capable of being applied at the same time, that part alone shall be considered as terminated or suspended in operation. (A/CN.4/183/Add.2, p. 15)

41. Sir Humphrey WALDOCK, Special Rapporteur, said that article 41 was not an easy one to draft. That article and article 63 dealt with the two sides of the same problem. Not many comments had been received from governments. The Israel Government considered that the article contained an inherent contradiction, but the Swedish and United States Governments had found it helpful.

42. In his observations, he had set out the points at issue and had stressed the importance of achieving an exact correlation between the article and article 63.

43. It could be argued that article 41 was concerned with a form of termination by implied agreement, but the case was a special one because the implication arose from the conclusion of a subsequent treaty incompatible with the earlier treaty.

44. In his proposed new text for the article, reference was made both in paragraph 1 (a) and in paragraph 2 to preparatory work. The Commission might prefer it to be dropped, at any rate for the time being, since it was clear that all cases of implied intention in the draft articles would have to be reviewed so as to co-ordinate the provisions in question with articles 69 and 70.

45. Mr. de LUNA said that article 41 dealt essentially with the case where all the parties to a treaty concluded another treaty, the provisions of which conflicted in whole or in part with the provisions of the earlier treaty. In the literature, the problem was covered by the maxim *lex posterior derogat priori*.

46. The Special Rapporteur had said quite rightly that, although a replacement of one treaty by another was the consequence of the exercise of the will of the parties, it raised a special problem which should be dealt with by a separate provision. The Commission should not exaggerate the logical and systematic approach; its principal object should be to propose rules which would work in practice. In that sense, the Special Rapporteur had resolved the problem satisfactorily, and his redraft of article 41 was acceptable, apart from minor drafting changes.

47. Paragraph 1, in particular sub-paragraph (a), laid down a rule which was correct and necessary. But, as Mr. Yasseen has said in connexion with another article, the provisions of that paragraph and of paragraph 2 should be brought into line with the rules concerning interpretation, which would form part of the draft.

48. For paragraph 2, he preferred the 1963 text, which said the same thing in clearer language.

49. Paragraph 3 contained an idea which was correct, but it was badly expressed in the French text, which should be revised.

50. Mr. ROSENNE said that, from the beginning, article 41 had caused him considerable concern, as would be seen from his remarks at the fifteenth session,<sup>3</sup> when he had abstained from voting on the article, then numbered 19. At the sixteenth session<sup>4</sup> he had maintained that reservation when speaking on article 63, then numbered 65. He was now obliged to state his position on the article in the light of the draft as a whole.

51. In the first place it was repetitive, because paragraph 1 stated what had already been clearly laid down in article 40, and as the Special Rapporteur had indicated at the 829th meeting (paras. 63 and 64), the form of termination was immaterial. Article 41 also duplicated article 63, as was apparent from paragraph (1) of the commentary on that article in the form approved at the sixteenth session<sup>5</sup>: from the practical point of view article 63 was adequate. The difficulty of co-ordinating article 41 with article 63 was due to the excessive subtlety underlying the former and he was impressed by the fact that, when discussing article 63 at the sixteenth session, the necessity to amend article 41 had been recognized, whereas now, when re-examining article 41, it was proposed to revise article 63. That indicated the deep confusion that had arisen on the matter.

52. Even if there were a technical difference between the two, it would be desirable, for reasons of legal policy, to omit the former, because it was inappropriate to include in the section on termination an article based exclusively and by definition on an implication derived

from an interpretation to be placed on a series of transactions. That interpretation, moreover, would have to rely in part on the preparatory work and would therefore constitute another exception, as far as the use of that material was concerned. Such a complicated and theoretical ground for termination was unjustifiable and would not contribute to the stability of international relations and the maintenance of peace.

53. Those elements which appeared in article 41 and ought to be retained and were not covered by the new article 40 should be transferred to article 63. He was therefore opposed to retaining article 41, which should not be referred to the Drafting Committee. Alternatively the consideration of article 41 could be postponed until the Commission had reached a conclusion about article 63. He was aware that his view differed from that of his Government which, in its comment in part III, not yet before the Commission, had suggested that suspension should not be dealt with in article 41, but transferred to article 63.

54. The repeated juxtaposition of termination and suspension caused him considerable concern, because the latter created far more complex legal relations between the parties than termination, and to mention them together might cause difficulties by implying that they were alternatives. The Commission should examine far more closely the circumstances in which suspension operated and, if necessary, should formulate a special article on the matter and on its legal consequences.

55. Mr. AGO said that he had been struck by some of Mr. Rosenne's comments. Article 41 covered two possible cases. One was the case where the parties to a treaty concluded another treaty and stated it as their intention that the new treaty should cover the whole subject matter of the earlier treaty; that situation was manifestly identical with that dealt with in article 40. It was immaterial whether the agreement to terminate a treaty was an independent one or was expressed in connexion with the conclusion of another treaty on the same subject.

56. The second case was where the parties had not expressed any intention concerning the termination of the earlier treaty, but where termination was the consequence of the fact that the provisions of the later agreement were incompatible with those of the earlier one. That being so, the question was how the provisions of article 41 were to be coordinated with those of article 63, for it was unnecessary to say the same thing twice over, particularly with regard to the commoner case of partial incompatibility.

57. The Commission should therefore ponder Mr. Rosenne's proposal, review the whole of articles 40, 41 and 63, and try to simplify them and eliminate repetitious matter.

58. So far as the drafting was concerned, the French text of paragraph 2 should be rectified.

59. Mr. VERDROSS said he agreed with the opinion expressed by Mr. Rosenne and Mr. Ago. He would add only, in contrast with the Special Rapporteur's view, that the passages concerning the consultation of preparatory work raised more than a drafting problem; they raised a problem of substance. Preparatory work

<sup>3</sup> *Yearbook of the International Law Commission*, 1963, Vol. I, 691st meeting, para. 8, and 709th meeting, para. 74.

<sup>4</sup> *Ibid.* 1964, Vol. I, 742nd meeting, para. 66, and 755th meeting, para. 20.

<sup>5</sup> *Ibid.* 1964, Vol. II, p. 185.

could be used only to explain or confirm the meaning of a text; in no case could it make it possible to read into a text something that was not there. The text should at least give some indication in order to justify the consultation of preparatory work. The references to preparatory work in paragraph 1 (a) and paragraph 2 should therefore be omitted.

60. Mr. BRIGGS said that, if article 63 did not adequately cover the matter of suspension, in whole or in part, it could be suitably modified. He was in favour of the deletion of article 41 because he doubted whether there was any need to provide for termination in such cases. The real issue was, which treaty prevailed in a case of conflict, and that issue was fully covered in article 63.

61. Mr. TUNKIN said that cases of the kind contemplated in article 41 were not infrequent and could give rise to difficulties. If there were no express agreement between the parties to abrogate a treaty when a later treaty was concluded that was incompatible with it, the inference was that they had intended to abrogate it. There seemed to be some justification for retaining a separate article on the matter, which was not the same as that dealt with in article 63.

62. Mr. CADIEUX said he agreed with Mr. Tunkin. Article 41 dealt with a delicate problem and proposed a rule that was different from those embodied in article 40 and article 63. Under article 40, the will of the parties operated to terminate the treaty; under article 41, the parties, by stipulating a new rule, expressed the will to terminate a treaty; and under article 63, one treaty was replaced by another without any conscious intention by the parties to terminate the earlier one.

63. Consequently, the rule laid down in paragraph 1 was necessary. No doubt it could be included either in article 40 or in article 63, but it was better to set it out in a separate article because it dealt with a case which was distinct from the others.

64. From the drafting point of view, the Special Rapporteur's reformulation was a great improvement.

65. Mr. CASTRÉN said that, as the Special Rapporteur had remarked, the article had given a great deal of trouble to the Commission, particularly its placing in the draft and its connexion with other articles. His personal opinion was that it was now in its right place.

66. In reformulating article 41, the Special Rapporteur had tried to bring out more clearly in what way the article differed from article 63. The reformulation was satisfactory; though perhaps a little too long, it would be difficult to devise a shorter wording that would be acceptable as to substance.

67. He agreed with Mr. Tunkin that article 41 should be retained and referred to the Drafting Committee.

68. Mr. AGO said he wished to explain that when, in his earlier statement, he had questioned whether it was desirable to keep article 41 as a separate article, he had in no way meant to deny that the situation covered by the article was a very real one. The crux of the matter was whether there really was any difference between the situation covered by article 40 and that covered by article 41. In his opinion there was not. In either case, what

invariably happened—as Mr. Tunkin himself had said—was that one agreement was replaced by another. The new agreement might take any one of three forms; it might either be an autonomous agreement expressly terminating the earlier treaty, or it might be an agreement embodied in another treaty dealing with the same subject-matter, or it might be an implied agreement evidenced precisely by the fact of the conclusion of the new treaty and by its contents. Surely all those three cases could be dealt with in one and the same article.

69. He agreed with those who considered that the article should avoid any reference to problems which were merely problems of interpretation. For the purpose of determining whether the implied agreement had or had not materialized, all the means of interpretation indicated in the articles concerning interpretation would necessarily have to be employed. It was quite unnecessary to indicate in article 41 any special means of interpretation.

70. He agreed with the idea that all matters concerning the suspension of the operation of a treaty should be dealt with separately.

71. In his opinion paragraph 3 was definitely connected with the subject matter of article 63.

72. Mr. de LUNA said he did not object to the idea that the substance of article 41 should be included in another article, but hoped that it would not be included in article 40, particularly if paragraph 1 (a) of article 41 was dropped. Under article 40, the will of the parties—a subjective criterion—entered into operation, whereas paragraph 1 (b) of article 41 relied on an objective criterion—the fact that the two treaties were not capable of being applied at the same time. In article 63 the impossibility of applying two instruments simultaneously was not stated in absolute terms, and paragraph 3 of that article laid down an exception to article 41. It was bad practice to mention the exception in a context so remote from the rule.

73. It remained true, nevertheless, that article 41 laid down a rule for a very real case, that where all the parties to an earlier treaty were parties to a later treaty which was absolutely incompatible with the earlier one. In such an event, the rule was that the second treaty superseded the first.

74. Like Mr. Ago, he was convinced that the article would become clearer if it omitted all reference to the interpretation of the intention of the parties.

75. Mr. TUNKIN said that there seemed to be more or less general agreement on the substance of article 41, and that a provision on the lines proposed by the Special Rapporteur was necessary. The decision as to whether it was preferable to retain a separate article or to combine the content of article 41 with another could be left to the Drafting Committee.

76. He agreed with Mr. de Luna and Mr. Ago that it would be wise to make no mention of interpretation in article 41.

77. At the fifteenth session he had objected to the use of the word “exclusively” to qualify the word “governed” in paragraph 1 (a)<sup>6</sup> because it might suggest that

<sup>6</sup> *Yearbook of the International Law Commission, 1963, Vol. I, p. 244, para. 80.*

the provisions of a new treaty excluded the application of a rule of general international law.

78. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin and Mr. Cadieux. The provisions of article 41 were necessary because they dealt with a separate situation. Consequently, the Commission should hesitate to drop the article without careful reflection and without being sure that all the necessary provisions could be embodied in other articles. Articles 40 and 41 expressed different ideas which could not be grouped together in one and the same article.

79. Furthermore, as he had explained in his remarks concerning another article, he thought it would be dangerous to look into the preparatory work of multi-lateral treaties for the purpose of determining the intention of the parties to those treaties.

80. Mr. YASSEEN said that, if article 41 dealt only with the termination or the suspension of the operation of a treaty by a special tacit or express agreement, the article would not be necessary; its provisions could be incorporated in article 40, which dealt with the termination or suspension of a treaty by subsequent agreement.

81. In fact, however, as Mr. de Luna had said, article 41 dealt also with another problem, that of the objective incompatibility of two treaties. Such incompatibility deserved to form the subject of a separate article, largely because the point could not be covered in article 63, which dealt not with the termination of treaties but with the question which of two treaties prevailed. It would therefore be better to keep article 41 as a separate provision.

82. Mr. AGO said he had some doubt concerning the so-called objective reason for the termination of a treaty. In order to decide whether the provisions of a treaty were incompatible with those of another, both treaties had to be interpreted to enable the intention of the parties to be discussed; in other words, the criterion was still subjective.

83. The CHAIRMAN said it sometimes happened that, without any intention by the parties to terminate the earlier treaty, the actual object of the second treaty conflicted with that of the first. If a conflict of objects appeared in one and the same instrument, that instrument would be void; but if the conflict appeared between successive instruments, it was the later instrument which prevailed, just as in private law the testator's last will prevailed.

84. It was true that, where there were two treaties, both had always to be compared and interpreted for the purpose of determining whether there had been any change in the intention of the parties.

85. Sir Humphrey WALDOCK, Special Rapporteur, suggested that article 41 be referred to the Drafting Committee for general examination in the light of the discussion. His own position was much the same as that of Mr. Tunkin. A close study of articles 41 and 63 would reveal that article 63 did not come into play until it was decided that the treaty had not been terminated under article 41. He doubted whether it would be advisable to amalgamate articles 41 and 40.

86. He subscribed to the view that it would be better not to deal with the application of rules of interpretation, and that it would suffice to refer to the intention of the parties. The circumstances of each case would determine whether a reference to the preparatory work was admissible under articles 69 and 70.

87. He agreed with Mr. Tunkin that the word "exclusively" should be dropped.

88. Mr. ROSENNE said that he would have no objection to the article being referred to the Drafting Committee on the terms proposed by the Special Rapporteur.

89. The CHAIRMAN suggested that article 41 be accordingly referred to the Drafting Committee.

*It was so agreed.<sup>7</sup>*

The meeting rose at 1 p.m.

<sup>7</sup> For resumption of discussion, see 841st meeting, paras. 91-100.

## 831st MEETING

*Friday, 14 January 1966, at 10 a.m.*

*Chairman:* Mr. Milan BARTOŠ

*Present:* 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.

### Other Business: Organization of Future Seminars on International Law

[Item 8 of the agenda]

1. The CHAIRMAN said that, during the first part of the Commission's seventeenth session, the European Office of the United Nations had, as an experiment, organized a seminar on international law. During the debates in the Sixth Committee of the General Assembly, several representatives had approved that action and had thanked the members of the Commission for their contribution. The General Assembly had expressed the hope that further seminars would be organized in connexion with the Commission's sessions and, if possible, would be attended by more participants, including a reasonable number of nationals of developing countries. He invited the representative of the Director-General of the United Nations Office at Geneva to make a statement.

2. Mr. RATON (Secretariat), speaking on behalf of the Director-General of the United Nations Office at Geneva, said that the first seminar had been organized on