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Summary record of the 832nd meeting

Topic:

Law of Treaties

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the right of the parties to regard the mistaken application of the Convention as a general violation entitling them to escape from the obligations of the entire convention. There was, of course, a shade of difference between the two cases, but the fundamental idea was the same: to disturb as little as possible the international legal order in cases where it was undoubtedly in the general interest to uphold the established order.

78. If it followed the solution proposed, the Commission would be endorsing André Weiss's theory of " circles " in the application of one and the same convention. Weiss had said that, in time of war, the operation of multilateral treaties and of so-called universal conventions was suspended between the belligerents: there was one circle comprising neutrals, another circle comprising neutrals and belligerents on both sides, and a third circle comprising the belligerents on one side or the other and neutrals. The question had had a practical interest for the purpose of dealing with problems of infringements of trade-marks, patents and artistic and literary rights; it had been introduced into the Treaty of Versailles and other related treaties.

79. In view of the increase in the number of multilateral treaties of general interest, Mr. Tunkin's statement was very pertinent. The Commission should endeavour to work out a solution which would have the effect of mitigating as far as possible the consequences even of a material breach. If the breach was purely bilateral, it was easier to determine at what point reprisals stopped, but the reactions between the two States might prejudice the stability of inter-State relations throughout the world. Consequently, in drafting a convention on the law of treaties which it regarded as a source of general rules, the Commission should endeavour to forestall any possible malpractice and should not admit anything that would allow of a broader interpretation than it intended.

80. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer to sum up the discussion on article 42 at the next meeting, as a number of interesting points had been raised and it would be useful to have further time for reflection.

The meeting rose at 1 p.m.

832nd MEETING

Monday, 17 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, 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 42 (Termination or suspension of the operation of a treaty as a consequence of its breach) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 42.

2. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that on paragraph 1, which dealt with the comparatively simple problem of the material breach of a bilateral treaty, the only point raised had been the suggestion by Mr. Verdross that the words " to invoke the breach as a ground for terminating " be replaced by the words " to terminate ". Like many members of the Commission, he felt it preferable to retain the wording which had been deliberately chosen in 1963.

3. The important provisions of paragraph 3, which defined the term " material breach ", had not attracted much comment. Mr. Verdross had suggested the deletion of the world " unfounded " before " repudiation of the treaty ", but the general feeling had been that a qualification of that kind was necessary because, under the draft articles, there could well be some cases of perfectly legitimate repudiation. The Drafting Committee might consider replacing the adjective " unfounded " by some such formula as " not justified by any of the provisions of the present articles ".

4. It was paragraph 2 that had attracted the bulk of government comments. The Netherlands and United States Governments had suggested that the words " Any other party " be qualified so as to specify that only a party whose rights or obligations were adversely affected by the breach could invoke it as a ground for suspending the operation of the treaty. In order to give the Commission an opportunity of discussing the problem raised by those two governments, he had introduced into his redraft of paragraph 2 (*a*) the more general wording " whose interests are affected by the breach ", after the words " Any other party ". The discussion had shown that many members of the Commission felt that all parties to a multilateral treaty had a general interest in its observance by every other party. At the same time, others considered that parties might have different degrees of interest in a breach committed by a party.

5. On that same paragraph, Mr. Tunkin had raised an important question of substance when he had suggested that, for certain general multilateral treaties, especially such codifying treaties as the two Vienna Conventions of 1961 and 1963, the suspension should relate only to that part of the treaty which had been the subject of the material breach. He hesitated to support that suggestion, although he appreciated the reason which had inspired it. When a State committed a material breach of one of the clauses of a general multilateral treaty, it might be totally unconcerned at the possible suspension

[1] See 831st meeting, after para. 15, and para. 16.

of that particular clause by the other parties. In fact, the only effective remedy that might in many cases be open to the other parties was to suspend, as a sort of reprisal or sanction, the operation of other clauses of the treaty. The defaulting State might have clearly shown that it attached little importance to the clause which it had broken, but the threat to suspend the other clauses might induce it to reconsider its attitude. Article 41 of the Vienna Convention on Diplomatic Relations, for example, laid down the rule that it was the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the receiving State. In the event of a breach of that rule, the injured State would have no desire that its diplomats should break the laws of the other State by way of reprisal: for it to suspend the operation of article 41 in its relations with the defaulting State would be no reaction at all. The only effective action would be to suspend other clauses of the Convention to which the defaulting State might attach more importance.

6. Another point had been raised in connexion with paragraph 2, but it affected more generally all the provisions of article 42: it was the question whether provocation should be taken into account. Personally he doubted whether, if there were any provocation on the part of another party, a material breach could properly be said to exist at all. The Drafting Committee should perhaps be asked to consider, in general terms, the question of the complainant State's having by its conduct contributed to bringing about a cause for termination. The problem had already been envisaged by the Commission in article 34, on error, paragraph 2 of which stated that the rule laid down in paragraph 1 of that article did not apply where the complainant State had, by its own conduct, contributed to the error. The Drafting Committee should perhaps examine whether such articles as the present article 42, on supervening impossibility, and article 44, on fundamental change of circumstances, should not also contain a clause to deal with the case where the conduct of the complainant State might have been partly the cause of the ground of termination.

7. In paragraph 2 (*b*), his redraft was intended to cover a gap in the 1963 text. It had not seemed to him logical, in the sphere of unanimous agreement, to limit the right of action to suspension. In most cases the other parties would probably only wish to suspend the treaty in the relations between themselves and the defaulting State, but in the case of a persistent treaty-breaker they might wish to go further and expel the defaulting State from the treaty. He had therefore introduced the possibility of termination as well as suspension. Mr. Rosenne had suggested that the words " suspension or termination " should be reversed. That would undoubtedly be the normal order, but he had reversed it deliberately because, in the case in point, it was hoped that the reaction would be suspension: it was therefore desirable to mention termination as the last resort.

8. On the important point of substance raised by paragraph 2 (*bis*), opinion in the Commission had been divided; there appeared to be some support for including a provision to cover such treaties as disarmament treaties, in which the rights and obligations were so intimately connected that if one State violated an obligation, the breach would immediately affect all the others. He suggested that the proposed paragraph be referred to the Drafting Committee for reconsideration in the light of the discussion, in particular the suggestion by Mr. Yasseen that it was sufficient to allow an injured party to suspend the operation of the treaty, and that it was unnecessary to provide for a right of termination.

9. Mr. TUNKIN said that at the previous meeting he had raised the question of the application of article 42 to a new type of treaty, namely, general multilateral treaties such as the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations, none of which contained any provision for withdrawal, though they did contain provisions for revision. Treaties of that type were intended to become universal, and it was for that reason that no withdrawal clause had been included in them, although multilateral treaties as a rule contained such a clause. If the provisions of article 42 were made applicable to such treaties, the very purpose not only of the conferences of plenipotentiaries which had adopted them, but also of the Commission itself which had drafted them, would be hampered.

10. Mr. ROSENNE said that he was in general agreement with the Special Rapporteur's conclusions, though his remarks on paragraph 2 (*b*) had not fully covered the point which he (Mr. Rosenne) had raised at the previous meeting. In 1963, the Commission had been careful to use the wording " to suspend the operation of a treaty " and equally careful to avoid any reference to " terminating " the operation of a treaty. He suggested that the Drafting Committee be asked to reword the passage in question accordingly.

11. With regard to general multilateral treaties, as he had indicated in 1963,[2] a convincing case had been made by Mr. Tunkin for special treatment in the draft articles. The point had, however, since been partly covered by the provisions of article 62, which the Commission had adopted in 1964. The principle therein stated to be applicable to articles 58 to 60 corresponded exactly to Mr. Tunkin's idea; article 62 should perhaps be reworded in broader terms so that its operation was not confined to those three articles.

12. With regard to the order of the paragraphs, it might be more elegant to place paragraph 3 at the commencement of the article, since it defined the term " material breach ".

13. Sir Humphrey WALDOCK, Special Rapporteur, said that the point now raised again by Mr. Tunkin had been very largely taken into account by the Commission in 1963. It was precisely for that reason that paragraph 2 (*a*) limited the right of suspension to the relations between the party invoking the breach and the defaulting State, and that the rule in paragraph 2 (*b*) was more restrictive than that generally understood by lawyers: it stated that termination and denunciation would require the common agreement of all the parties.

14. With regard to paragraph 2 (*bis*), it was intended to meet the very special case of certain treaties for which

[2] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 126, para. 59.

paragraph 2 (*b*) would not provide a proper safeguard. Because of the need to obtain the consent of all the other parties, an injured State might, if only one State objected, find itself defenceless in face of the breach committed by the defaulting State, since it could not legally suspend the operation of the treaty in relation to itself.

15. Mr. JIMÉNEZ de ARÉCHAGA said he fully supported the changes proposed by the Special Rapporteur.

16. With regard to paragraph 2 (*bis*), its provisions were a welcome improvement to the text and would serve to deal with certain exceptional cases.

17. The dangers to which Mr. Tunkin had drawn attention were minimized by the fact that the provisions of paragraph 2 (*b*) required the unanimous agreement of all the parties for the termination of the treaty. It was better to lay down a distinction between the treaties covered by paragraph 2 (*bis*) and other multilateral treaties rather than attempt the difficult definition of " general " multilateral treaties.

18. Mr. AGO said that the provision in paragraph 2 (*b*) of the Special Rapporteur's redraft of article 42 differed from that in article 40 in that, under the former, the agreement of the parties not guilty of the breach was sufficient for the purpose of the suspension of the operation of the treaty or its termination. In other words, the State responsible for the breach could not, as was indeed logical, veto the suspension or termination.

19. In the case covered by paragraph 2 (*bis*), the unanimous agreement of the parties not guilty of the breach was not required, because in such a situation any party must be able to suspend the operation of the treaty in relation to itself or to withdraw from the treaty.

20. The reason for the difference of opinion between Mr. Tunkin and the Special Rapporteur was probably that article 42 dealt simultaneously with two classes of general multilateral treaties which were in fact very different from each other. There were, first, treaties like disarmament treaties or nuclear test-ban treaties, of which the Special Rapporteur had spoken; in the event of a material breach of such a treaty by any of the parties, the other parties should be able to relieve themselves of their obligations or at least to suspend them. Secondly, there were codifying treaties, which constituted the law of the international community; even if one of the parties to a treaty of that class broke the treaty, the law still remained the law, as Mr. Tunkin had said. Perhaps the problem mentioned by Mr. Tunkin lay outside the scope of article 42. The treaties in question formed such a special class of treaty, and it was so important that they should not be the subject of controversy, that the Commission ought probably to deal with them in separate provisions in its draft.

21. Apart from the proviso in paragraph 4 concerning clauses in the treaty that dealt with cases of breach, the Commission should add, either in the article itself or in the commentary, a proviso concerning the possible consequences of the breach of the treaty as they affected the defaulting State's responsibility. As drafted, the article might give the impression that, in the event of a material breach of a treaty by one of the parties, the only remedy open to the other parties would be to suspend the operation of the treaty or to terminate it.

22. The CHAIRMAN, speaking as a member of the Commission, said that certain multilateral treaties—the so-called *traités-lois*—had the force of international custom. Article 42 was perhaps too liberal to be applicable to treaties of that kind and it did not take into account the evolution of international law as embodied in the judgments of the Nuremberg International Military Tribunal. The humanitarian conventions, for example, formed part of the legal conscience of nations; it was inconceivable that a State should be free to suspend the application of such conventions just because another State had ceased to apply them. A very serious question was involved, and the substance should prevail over the form.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that the humanitarian conventions referred to provided another example of the difficulties of the problem. Clearly, it would not serve any good purpose for the injured State to suspend the operation of a particular clause of a humanitarian convention with respect to nationals of the defaulting State; the effects of the illegality would then be visited on innocent persons. Probably, in those cases, the only effective remedy would lie in other forms of reprisal or counter-action outside the treaty itself. Even so, it might be going too far to forbid the injured State to suspend the operation of the treaty *vis-à-vis* the defaulting State.

24. Any attempt to introduce generally into article 42 the idea suggested by Mr. Tunkin might even endanger the stability of treaties. One of the great weaknesses of international law was the helplessness of an individual injured State in the face of the breach of a treaty, and article 42 was intended to give such a State one possibility of effective reaction. It was also necessary to remember the safeguard in article 53, paragraph 4.

25. He suggested that article 42 be referred to the Drafting Committee for consideration in the light of the discussion.

26. Mr. de LUNA said he wished to explain that, at the previous meeting, he had mentioned multilateral humanitarian conventions mainly in order to satisfy his own conscience and not in order to express disagreement with the Special Rapporteur. Nor, for that matter, had he suggested any change in the proposed redraft. If, as paragraph 2 (*bis*) said, the violation " frustrates the object and purpose of the treaty generally ", the parties could hardly be bound to apply the treaty. The treaty as such disappeared, but customary international law, whence the treaty derived, continued to exist without the treaty, as indeed it had existed before the treaty. Consequently he supported the text proposed by the Special Rapporteur, and did not think that the article duplicated article 40. It was quite evident that, when the Commission stopped speculating and looked at concrete problems, it had little difficulty in reaching an agreed solution.

27. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to

refer article 42 to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[3]

ARTICLE 43 (Supervening impossibility of performance)

Article 43

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

3. Under the conditions specified in article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only. (A/CN.4/L.107, p. 39)

28. The CHAIRMAN invited the Commission to consider article 43, for which the Special Rapporteur in his fifth report (A/CN.4/183/Add.3, p. 6) had proposed a new text which read:

1. If the total disappearance or destruction of the subject-matter of the rights and obligations contained in a treaty renders its performance temporarily impossible, such impossibility of performance may be invoked as a ground for suspending the operation of the treaty.

2. If it is clear that such impossibility of performance will be permanent, it may be invoked as a ground for terminating or withdrawing from the treaty.

3. Paragraphs 1 and 2 shall not apply when the impossibility of performance is the result of a breach of the treaty by the party invoking such impossibility.

4. If part of the treaty has already been executed, a party which has received benefits under the executed provisions may be required to give equitable compensation to the other party or parties in respect of such benefits.

29. Sir Humphrey WALDOCK, Special Rapporteur, said that his redraft of article 43 omitted the former paragraph 3, which dealt with the question of separability. That question would be left aside, as had been done in the case of other articles, and the Commission would deal with it when it came to consider article 46.

30. The order of the former paragraphs 1 and 2 had been reversed. The 1963 text dealt first with the case of termination and then, in paragraph 2, with the suspension of the operation of the treaty as a qualification of paragraph 1. He was not very satisfied with that presentation, because it seemed preferable to contemplate that the effect of supervening impossibility should normally be only a temporary suspension of the operation of the treaty. His new paragraph 1 stated that, where the impossibility of performance was only temporary, it could be invoked as a ground for suspending the operation of the treaty; paragraph 2 went on to state that, where the impossibility of performance became permanent, it could be invoked as a ground for termination.

[3] For resumption of discussion, see 842nd meeting, paras. 2-31.

31. His new paragraph 3 stated that the rules in paragraphs 1 and 2 would not apply when the impossibility of performance was " the result of a breach of the treaty by the party invoking such impossibility ". That language was based on a suggestion by the Government of Israel, but it would also meet the point raised by the Pakistan delegation that the impossibility of performance might result from circumstances deliberately created by the complainant State. The Commission would now have an opportunity of discussing the points raised by those two governments.

32. He had introduced the new paragraph 4 in order to provide a basis for the discussion of the difficult problem of a treaty which had already been executed in part and where a party to the treaty had received benefits under the executed provisions. He had not fully made up his mind on the question of substance involved, but felt that the Commission should deal with a problem to which attention had been drawn by certain governments.

33. Mr. YASSEEN said that, so far as the form was concerned, he could support the redraft proposed by the Special Rapporteur. It was better to mention temporary impossibility of performance, which led to a suspension of the operation of the treaty, before permanent impossibility of performance, which could be invoked as a ground for terminating the treaty. The two rules were of equal force, and the former was not an exception to the latter.

34. So far as substance was concerned, however, the 1963 text was preferable. Neither the article itself nor the draft as a whole seemed to be the right context for the two new paragraphs proposed by the Special Rapporteur.

35. The qualifying provision in paragraph 3 was hardly justified. Since the article dealt with impossibility of performance, there was no reason why any party should not have the right to invoke such impossibility, in other words, to secure recognition of a *de facto* situation. What good could a treaty do that was maintained in force by virtue of that paragraph?

36. It seemed to him that the governments whose comments had given rise to the Special Rapporteur's proposed paragraph 3 had been concerned mainly with the effect of the termination of a treaty owing to impossibility of performance; in other words, they had touched on the question of State responsibility. Yet the other articles dealing with the termination of treaties said nothing about State responsibility and did not specify the extent to which the responsibility of the parties was involved. The question should not be singled out for special mention in the article concerning the termination of a treaty owing to the impossibility of its performance. The entire problem of the responsibility of States in the event of the termination of a treaty should be left in abeyance.

37. Paragraph 4 dealt with the case where part of the treaty had already been executed at the time of its termination or of the suspension of its operation. But that problem arose also in connexion with the termination of a treaty for any other reason—error, fraud, or other—or even on grounds of absolute nullity in virtue of the principle of unjust enrichment. The question of the

compensation due in respect of benefits derived from the partial execution of a treaty should be dealt with in a separate article relating to the consequences of the termination of treaties for various reasons.

38. Mr. CASTRÉN said that, apart from the question of separability, which was held over, the Special Rapporteur's redraft did not change the substance of the 1963 text of article 43. So far as form was concerned, the reversal of the order of the first two paragraphs was an improvement.

39. He could accept paragraph 1 of the redraft, though it might be simplified by replacing the words " such impossibility of performance " by the words " this fact ".

40. In paragraph 2, the Special Rapporteur had been right to add the words " or withdrawing from ", for it was conceivable that the performance of a multilateral treaty might become impossible for one or a few of the parties, whereas the other parties could continue to apply the treaty *inter se*.

41. Paragraph 3 also was acceptable, for it was consistent with a general rule of law applied among the members of the international community. An analogous principle was stated in article 52, paragraph 2, of the draft. Like the Special Rapporteur, he preferred the formula suggested by the Government of Israel to that suggested by the Government of Pakistan, which was rather too elaborate. Both were based on the same idea, namely, that the treaty should be carried out in good faith. The provision was probably of moral rather than practical importance, since in the event of the supervening impossibility of performance there was no remedy, and generally it was the aggrieved party which brought a claim for responsibility on account of the violation of the treaty. The proposed provision would, however, act as a bar to the plea of impossibility of performance.

42. He doubted whether paragraph 4 was desirable. Although a comparable rule existed in municipal law, it was arguable whether one should also be adopted in international law. An attempt in that direction had been made by introducing the idea of unjust enrichment in the field of State succession, but the principle was not accepted without qualification by all authors and was even less generally admitted in the practice of States.

43. Both from the point of view of substance and from that of procedure the problem was very complex, for it was very difficult to evaluate the advantages derived from the partial execution of a treaty and to determine the nature and the amount of the compensation. In the absence of an international jurisdiction, it would probably be wiser and more practical to leave the parties concerned to settle such questions themselves by negotiation. Besides, would the proposed provision be applicable also in the event of temporary impossibility of performance within the meaning of paragraph 1? Another point was that the innocent party could claim what was its due under paragraph 3, but there the Commission would be touching on problems of international responsibility which it should not attempt to settle in its draft. He proposed that paragraph 4 be omitted, though he would not object if the question was mentioned in the commentary.

44. Mr. AGO said that the drafting of article 43 was particularly difficult. He did not like the word " subject-matter " in the English text or the word " *objet* " in the French, but was unable for the moment to propose anything better. In general the rights and obligations dealt with in the Commission's texts were not rights and obligations *in rem* but contractual. The subject-matter of such rights and obligations was not a *res*, but a service of another kind, even if bound up with the use of something. Where a river ran through a frontier region, it was quite usual for the two neighbouring States to enter into an agreement under which State A acknowledged the right of State B to build a dam and a power station on condition that State B supplied to State A a specified share of the power generated by the station. What, in such a case, would be the " subject-matter " of the right? It was surely neither the dam nor the power station but the service, in other words, the supply of a certain quantity of power. If the dam was destroyed by an avalanche, what was destroyed was not the subject-matter of the treaty. Some other formula should therefore be used; perhaps the provision should speak of a disastrous event rendering the performance of the treaty impossible.

45. In other respects, there was no great difference between the 1963 text and that proposed by the Special Rapporteur. In the new text the emphasis was placed on a different aspect, but the substance remained unchanged and on the whole the new approach seemed preferable.

46. He hoped, however, that both the Drafting Committee and the Commission would think carefully before adopting paragraph 4; it might appear to be only secondary, but if any mistake were made in its drafting, the consequences could be very serious.

47. Mr. ROSENNE said that paragraphs 1, 2 and 3 of the Special Rapporteur's new draft were acceptable, subject to review by the Drafting Committee. Mr. Ago had rightly pointed out that the actual wording would need careful consideration.

48. He had tried without success to formulate an alternative text for paragraph 4, which as it stood was vague. For example, it was not clear what was meant by the words " if part of the treaty has already been executed " or by the words " may be required ". He was also uncertain of the purport of the words " equitable compensation ", though some guidance on that point could be found in Mr. Jiménez de Aréchaga's paper concerning State responsibility,[4] where reference was made to the concept of unjust enrichment. He strongly doubted whether a provision on the matter rightly belonged in article 43. If it were included at all, it should be either considered in conjunction with article 53 or dealt with in the introduction to the commentary, where mention would be made of certain general topics not covered in the draft.

49. Mr. de LUNA said he could support the revised order of the paragraphs. The Special Rapporteur had quite rightly distinguished between suspension, in para-

[4] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 243.

graph 1, and termination, in paragraph 2. As Mr. Ago had said, the Commission should choose the terminology with great care. The article was concerned not with rights *in rem* but with subjective rights derived from an international obligation.

50. With regard to paragraph 3, Mr. Ago's suggestion that there should be an express reference to a disastrous event would not cover all possible situations. An event might occur which would render the execution of the treaty impossible, but would not be a disaster although it might be an event of *force majeure*. For example, if the treaty was an extradition treaty under which State A committed itself to deliver to State B a person or a ship, the person might die or the ship might be burnt, but there would not be a disaster. Mr. Yasseen had been right in saying that the paragraph was unnecessary. If the person to be extradited to State B died in consequence of some culpable negligence on the part of State A, then, if State A had a certain duty to protect the personal safety of aliens in its territory, the fact that there had been culpable negligence on its part would not bring the deceased back to life and the State in question, being unable to deliver the person to the other State, was in fact unable to carry out the terms of the extradition treaty.

51. With regard to paragraph 4, he agreed with Mr. Yasseen. The Special Rapporteur had done right to raise the question, even though article 43 was not the right context. The problem of unjust enrichment owing to the non-application, in various situations, of certain provisions of the treaty should be considered by the Commission and either admitted or dismissed. His personal inclination would be to admit it subject to the necessary safeguards, though he fully realized that an article covering the case would be difficult to formulate. Unlike Mr. Rosenne, he did not think that the responsibility of the State would be engaged. The underlying idea was that of unjust enrichment: a State had benefited from a performance, which should be requited by a counter-performance by the other party, but for reasons of *force majeure* the counter-performance had become impossible. In such circumstances the principle of unjust enrichment had to enter into operation in one way or another, and the Commission should consider all the cases in which paragraph 4 might apply. It could perhaps deal with them in a separate article covering the possible consequences of the continued application of a treaty in various situations, with or without the responsibility of the State.

52. Mr. JIMÉNEZ de ARÉCHAGA said that the 1963 draft of paragraphs 1 and 2 was preferable to the new one suggested by the Special Rapporteur because it started by referring to impossibility of performance as a ground for the termination of a treaty. Also it was better in that case to deal first with the termination of a treaty rather than with its suspension, because impossibility of performance would normally lead to the extinction of the treaty, and only in exceptional circumstances to its suspension.

53. Paragraph 3 could be dropped, because its content could be inferred from general rules of law and its omission would not in any way affect the rights of States.

54. If the content of the new paragraph 4 suggested by the Special Rapporteur were retained, it ought to form the subject of a separate article or perhaps be incorporated in article 53, paragraph 4. The new paragraph 4 had been drafted by the Special Rapporteur in wider terms than those suggested by the United States and Pakistan Governments because it granted also to a party which was not invoking impossibility of performance the right to claim equitable compensation in the circumstances envisaged in that paragraph.

55. Mr. TUNKIN said that the wording of the new paragraphs 1 and 2 did not differ in substance from that of the 1963 text, but the latter was clearer and was preferable because it gave more prominence to the central idea, which was the impossibility of performance. He also preferred the original order of the first two paragraphs, because termination was the logical result of impossibility of performance and should be mentioned first.

56. With regard to paragraph 3, there could be cases of impossibility of performance without any breach having taken place. Perhaps paragraph 3 could be omitted altogether and the point covered in some kind of general provision.

57. Paragraph 4 was concerned with a wider problem than that covered by article 43 and had some relevance to article 34, as for example when an error in a treaty was discovered after some of its provisions had been executed. The Commission would need to give careful thought to the way in which that problem should be dealt with, if at all.

58. Mr. AGO said he wished to consider first the connexion between paragraphs 1 and 2 of the redraft and paragraphs 1 and 2 of the 1963 text. With regard to the question whether termination or suspension should be mentioned first, he agreed with the Special Rapporteur that suspension should be the rule in the case under consideration. By a treaty of 1945, Italy had ceded to France a piece of territory on which lay the Lake of Mont Cenis, on condition that France supplied to Italy a certain proportion of the power to be generated by the power station on the site. If the power station were destroyed by some event it would be too easy to say that the treaty was terminated. The first thing France should do would be to rebuild the power station; and the treaty would be suspended pending the reconstruction. Consequently, only where it was physically impossible to make good the consequences of an event could *force majeure* be pleaded for the purpose of terminating a treaty. In all other cases the treaty was only suspended.

59. With regard to paragraph 3, he thought Mr. Tunkin's remarks were justified. Two situations were conceivable. The first was where the conduct of the State owing the obligation was the violation not of a clause of the treaty, but of a different rule; the second was where its conduct was incompatible with respect for the treaty itself. If, for example, under the treaty he had mentioned, the State owning the power station had a duty to inspect and maintain a dam, but owing to its negligence the dam burst, the problem would arise of knowing whether the guilty State could invoke an event of that kind as grounds for claiming that the

treaty, and consequently its obligation, was terminated or suspended. Before deciding to omit the paragraph, the Commission should reflect carefully and remember that the case where the event occurred owing to the fault of a State was different from the case of *force majeure.*

60. The provision which was most difficult to draft was paragraph 4; as it stood the paragraph was not acceptable to him. The situation contemplated in the paragraph could only be that of a treaty where there was truly *do ut des* but where only one of the parties managed to derive the intended benefit from the treaty. But there were other situations where the application of paragraph 4 would lead to absurd results. To continue with the example of the neighbouring State which for some time received the power to which it was entitled, it would be inconceivable if, after the event interrupting the execution of the treaty, the State which no longer derived any benefit under the treaty should still have to pay compensation to the other for the benefit which it had received previously.

61. In any case, it was doubtful whether paragraph 4 was in its right place in the draft. He would take the case of a treaty which provided benefits for both parties but which at a particular moment ceased to be capable of execution and consequently was suspended or terminated. In that situation the problem of compensation, because one party had and the other had not derived benefits from the treaty, might be governed either by a general rule of international law—other than a rule of the law of treaties—or by a rule of equity which did not form part of the existing law. Perhaps the Commission should drop the paragraph, since it dealt with a question so remote from the subject being considered.

62. Mr. BRIGGS said he approved of the change in the order of paragraphs 1 and 2 suggested by the Special Rapporteur because it was more logical to deal with suspension before termination; perhaps, however, they could be drafted in such a way as to refer first to a party being able to invoke an impossibility of performance, instead of employing the rather difficult language with which the Special Rapporteur's new text opened and for which he had not been able to find a satisfactory alternative.

63. He had no strong views about paragraph 3, but wondered whether it was strictly necessary. It did not deal with the question of whether a State could invoke an impossibility of performance created by itself as a defence for non-performance, but stipulated that a State which had caused the impossibility through breach could not invoke it as grounds for suspension or termination.

64. While he understood the reasons for the suggestion put forward by the United States Government, he considered that paragraph 4 should be transferred to a separate article, or perhaps the point could be dealt with in the commentary.

65. Mr. ROSENNE said that some of the criticism levelled against paragraph 3 was perhaps well-founded where bilateral treaties were concerned, but not multilateral treaties. Since the rule was that normally multilateral treaties would continue in force, the idea contained in paragraph 3 should find expression in the draft.

66. Mr. YASSEEN said he wished to explain his earlier remarks on paragraph 3. Impossibility of performance could be invoked by any party, for in invoking it the party was simply asking for the recognition of a *de facto* situation, and a treaty which was incapable of performance should not be maintained in being. According to the principle recognized by the Permanent Court of International Justice, a party could not benefit from its own wrong. But if a party invoked the impossibility of performance, even if that was the consequence of its own wrong, it would only be benefiting from that wrong if it disclaimed responsibility. But, there was surely a difference between a declaration terminating a treaty and a declaration disclaiming responsibility for a wrong, since a declaration terminating a treaty did not prejudge the question of responsibility. Subject to that remark, he considered that paragraph 3 was unnecessary.

The meeting rose at 6 p.m.

833rd MEETING

Tuesday, 18 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, 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 43 (Supervening impossibility of performance) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 43.

2. Mr. TUNKIN said that, in the discussion on the implications of the new paragraph 3, there had been some confusion of the problem of suspension or termination with that of State responsibility. Paragraph 3 concerned only the question of suspension, termination, or withdrawal. It dealt with the case where a State, by its own actions, had created a situation that made it impossible to fulfil the obligations placed upon it by the treaty, and laid down the rule that such State could not invoke that impossibility as a ground for withdrawing from the treaty but continued to be bound by its obligations under the treaty.

[1] See 832nd meeting, after para. 27, and para. 28.