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Summary record of the 833rd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(1)

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.

3. The question of the underlying reasons for non-fulfilment of a State's obligations and the responsibility which resulted from that non-fulfilment was a separate one and belonged to the topic of State responsibility. And for State responsibility to arise from a treaty, there must be a valid treaty in operation. In the circumstances contemplated in paragraphs 1 and 2, the treaty was suspended or terminated because of the impossibility of performance; there was therefore no treaty in operation. The purpose of paragraph 3 was therefore to make it clear that a State which was in a position of factual impossibility of performance as a result of its own actions continued to be bound by the treaty despite that impossibility.

4. Mr. de LUNA said that the legal principle on which his statement at the previous meeting had been based could be more simply expressed as the common-sense rule that it was desirable to obtain the maximum effect with a minimum of effort.

5. After listening to the discussion, he realized that article 43 involved greater complexities than he had at first thought. That was not a matter for surprise: the problem of the validity of legal instruments was not an easy one in municipal law; it was even more difficult in international law, into which, because of its special character, it was not possible without more ado simply to inject concepts which municipal law had painfully worked out over the centuries. Those concepts included the distinction between non-existence at law and nullity, between absolute and relative nullity, between acts that were void and acts that were voidable, between grounds of nullity which could be invoked by a judge as a matter of course and grounds which could be invoked only by a party, between total and partial nullity, between nullity that could be remedied, and irreparable nullity and lastly, with regard to the effects of nullity, between instruments that were void *ex nunc* and those that were void *ex tunc*.

6. In the search for the *ratio juris* of article 43, it was appropriate to compare it with article 45 on the emergence of a new peremptory norm of general international law. Article 45 dealt with legal impossibility of performance and article 43 with factual impossibility of performance. Since the object of a treaty was one of its essential elements, the disappearance or destruction of that object suspended or terminated the treaty, as set forth in paragraphs 1 and 2 of article 43.

7. The impossibility of performance covered by article 43 was not there at the time of the conclusion of the treaty, but had supervened later. Pufendorf had long ago drawn a distinction between the case of a State which had subscribed an undertaking in the belief that it could carry it out while unaware of the existence of circumstances which rendered performance impossible, and the case contemplated in article 43, where performance had been possible at the time of the conclusion of the treaty, but had later become impossible. In the first case, the legal instrument was non-existent because of the lack of an essential ingredient; it therefore gave rise to no obligations. The State which had subscribed the undertaking had neither an obligation to perform it nor the duty to repair the injury. In the second case, that of supervening impossibility of performance, it was necessary to investigate whether there had been bad faith; that was the problem to which the new paragraph 3 was directed.

8. Article 43 dealt with supervening factual impossibility of performance of an absolute character. The obligations arising from the treaty could in no case be performed because of the disappearance or destruction of the object of the treaty.

9. The question, however, arose whether provision should not also be made for practical or relative impossibility of performance. That matter had been discussed by a former Special Rapporteur, Sir Gerald Fitzmaurice, in his second report.[2] The subject was a delicate one because of the perils which it involved for the stability of treaties. Nevertheless, consideration should be given to the possibility of covering the cases envisaged by such doctrines as the continental notion of state of necessity and the common-law concept of self-preservation. The question deserved consideration because there were some judicial precedents in the matter, in particular, the ruling of the Permanent Court of Arbitration in its 1912 award in the Case concerning Turkish War Reparations, "*Pour peu d'ailleurs que la responsabilité mette en péril l'existence de l'Etat, elle constituerait un cas de force majeure qui pourrait être invoqué en droit international public aussi bien que par un débiteur privé*",[3] where the Court had found that Turkey had not established the existence of a state of necessity.

10. International treaties, particularly those of an economic character, often included provisions for relative impossibility of performance. Examples were article 19 of the Convention on the Régime of Navigable Waterways of International Concern, signed at Barcelona on 20 April 1921;[4] articles 7 and 16 of the Convention on the International Régime of Maritime Ports, signed at Geneva on 9 December 1923,[5] and article 89 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944.[6]

11. In his view, the question was not covered by article 44, on fundamental change of circumstances. That article did not deal with impossibility of performance, whether absolute or relative, but with the case where the treaty had lost all meaning. It was immaterial from that point of view whether the *rebus sic stantibus* rule was construed subjectively, as based on the interpretation of the will of the parties, or objectively, as a question of the effect of the passage of time on a treaty of unlimited duration. It was not a case of applying the doctrine of frustration or the *théorie de l'imprévision*: the purposes of the treaty were not frustrated in any way, nor was there any question of *imprévision*. The cases which he had in mind were cases where performance, without being totally impossible, had been rendered extremely difficult by supervening circumstances. For example, Switzerland, as a neutral country during the Second World War, was only allowed by the belligerents to receive extremely small quantities of raw materials; consequently there had existed a relative impossibility of

[2] *Yearbook of the International Law Commission, 1957*, Vol. II, pp. 47 *et seq.*

[3] J. B. Scott, *Cases of International Law* (1922), Vol. I, p. 545.

[4] League of Nations, *Treaty Series*, Vol. VII, p. 35.

[5] *Ibid.*, Vol. LVIII, p. 285.

[6] United Nations *Treaty Series*, Vol. 15, p. 295.

performance with respect to treaties by which Switzerland had undertaken to supply certain manufactured goods.

12. The new paragraph 3 should be deleted because the problem to which it related was purely one of State responsibility.

13. Mr. AGO said that, if the impossibility of performance was the consequence of the fault of a party which had specific obligations either under the treaty or under a general rule, that party was responsible not only for the breach of those specific obligations but also for the non-performance of the treaty generally. To drop the provision contained in the new paragraph 3 might cause the second of those two forms of responsibility to disappear, for with the disappearance of the treaty, the obligation to carry it into effect would cease to exist. Accordingly, it was desirable to lay down the rule that, if the impossibility of performance was due to the breach of the treaty by one party, that party would be debarred from pleading the impossibility as a reason for terminating or suspending the operation of the treaty. In the absence of such a rule, it would be too easy for the parties to divest themselves of the primary obligation to give effect to the treaty.

14. Mr. RUDA said he supported the Special Rapporteur's suggestion to reverse the original order of paragraphs 1 and 2. In the new paragraph 1, he found the expression " the subject-matter of the rights and obligations contained in a treaty " unnecessarily cumbersome; the word " object " should be sufficient.

15. In the new paragraph 2, the opening words " If it is clear that such impossibility" introduced an element of obscurity; the phrase could be conveniently shortened to read simply " If such impossibility ". That change would have the additional advantage of bringing the wording of paragraphs 1 and 2 closer into line.

16. With regard to the proposed new paragraph 3, he had been convinced by Mr. Ago that it would be useful to retain such a provision.

17. It seemed equally important to retain the new paragraph 4, but article 43 was not perhaps the right place for the idea it contained, which was equally applicable to article 44. He therefore suggested that it be made the subject of a separate article, the provisions of which would apply to both articles 43 and 44.

18. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph 1 raised a problem of language. The Commission had chosen the wording " the subject-matter of the rights and obligations contained in a treaty " deliberately; it differed intentionally from that of article 69 as adopted in 1964, where the expression used was " the objects and purposes of the treaty ". Unfortunately, in the French and Spanish versions of article 43, the term " subject-matter " was rendered by " *objet* " in French and by " *objeto* " in Spanish, the same word in each case as was used in the French and Spanish versions of article 69 to render the term " objects " in the phrase " objects and purposes ". That double use created some misunderstanding as to the meaning of paragraph 3 of article 43 and raised a problem which the Drafting Committee should consider.

19. Mr. YASSEEN said that Mr. Ago had drawn an ingenious distinction between two forms of responsibility. It was true that there was one kind of responsibility for breach and another for non-performance of the treaty. But in all cases the responsibility might be based in the last resort on a rule of international law. Consequently, even if the treaty were terminated owing to absolute impossibility of performance, the responsibility for non-performance would not disappear on that account; but the article was not the right context for dealing with the question of responsibility.

20. Mr. AGO, replying to Mr. Yasseen, said that according to the first two paragraphs of the article, the State could invoke impossibility of performance as a ground for terminating or suspending the operation of the treaty, which meant terminating the obligations laid down by the treaty. If it was admitted that there was responsibility for non-performance, the State could not at the same time he heard to say that the treaty had ceased to exist, for with the disappearance of the treaty the obligation to carry it into effect would likewise cease.

21. Mr. de LUNA, referring to the example he had given at the previous meeting of an extradition treaty relating to a specific person, said that he still failed to see how it would be possible to insist on the application of the treaty if that person were dead, even if his death was due to the fault of the State which, under the treaty had had the duty to deliver the person in question to the other State. In such a case, a question of responsibility undoubtedly arose, but it was totally irrelevant to article 43.

22. The CHAIRMAN, speaking as a member of the Commission, said that he could discern a distinction between the responsibility deriving from the treaty—analogous to liability *ex contractu* in private law—and the responsibility which arose in certain cases outside the treaty. If the Commission wished to cover both types of responsibility, it could say that there was always a responsibility for certain forms of conduct, independently of the obligations under the treaty. In consequence of the recent development of public international law, and more particularly of the law of treaties, the duty to make reparation and the duty to be vigilant were becoming generalized. In that respect, he disagreed with Mr. Yasseen.

23. Sir Humphrey WALDOCK, Special Rapporteur, replying to the point raised by Mr. de Luna on the subject of the general concept and effects of article 43, said that the provisions of the article were confined to cases of actual impossibility of performance, permanent or temporary. The Commission had not altogether overlooked the question of *force majeure*, which he himself had examined in his second report, in paragraph 7 of his commentary on what was then article 21, Dissolution of a treaty in consequence of a supervening impossibility or illegality of performance. In that paragraph he had explained that cases where a substantial doubt existed as to whether the impossibility of performance would be permanent " might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance". He had added, however, " But where there is a continuing impossibility of

performance of continuing obligations it seems better to recognize that the treaty may be suspended. It should perhaps be added that one obvious case of impossibility, namely, the impossibility resulting from the outbreak of hostilities . . . is not covered by the present article. The effect of war on treaties raises special issues and is not covered by the present report. "[7]

24. The Commission, following its discussion of that article in 1963, had arrived at the conclusion that the question of *force majeure* could be safely left to be dealt with as part of the topic of State responsibility, and that the article on supervening impossibility of performance should deal only with the suspension or termination resulting from that impossibility. In the interests of the stability of treaties, the provisions on the subject had been couched in narrow terms. However, the Drafting Committee and the Commission itself should perhaps consider whether, in the draft articles as a whole and not merely in article 43, there was a gap which needed to be filled with regard to *force majeure*.

25. With regard to the wording of paragraph 1, the phrase " the subject-matter of the rights and obligations contained in a treaty " was based on the terminology commonly used by common law lawyers in relation to frustration of contract. The phrase might perhaps carry a nuance somewhat different from the concept of " the object of the treaty ". It referred to the matters to which the rights and obligations of the treaty related. Even that phrase might prove too narrow: there could well be cases where the impossibility arose from the disappearance of certain physical facts that were essential to performance, and not from the destruction of things to which the rights and obligations related. The whole question would have to be considered by the Drafting Committee, together with the use of the words " disappearance " and "destruction ".

26. He noted that the Commission as a whole supported his rearrangement of the order of the first two paragraphs, the purpose of which was to stress that suspension should be the natural result, and termination only a last resort. It was precisely for that purpose that the opening words " If it is clear that " had been used in paragraph 2: in all cases where the permanent character of the impossibility of performance was not obvious to all, the normal rule stated in paragraph 1 would apply and the treaty would be merely suspended, not terminated.

27. He had included the new paragraphs 3 and 4 in order to provide the Commission with an opportunity of discussing the two questions involved. It had been his intention to raise those questions also in article 44, because they could equally well arise in connexion with the provisions of that article, and in due course he would invite the Commission to consider the inclusion of similar paragraphs in article 44.

28. After listening to Mr. Yasseen's remarks at the previous meeting, he now felt that paragraph 3 was necessary, not only in article 43 but perhaps also in article 44, although it simply stated the general principle of law, and of international law, that no one could benefit from his own wrongdoing. Paragraphs 1 and 2 established in general terms a right of suspension or termination for the benefit of any party to the treaty. It was therefore desirable to retain the new paragraph 3, the purpose of which was to exclude the possibility of a State invoking article 43 to limit its responsibility arising from its own wrongdoing. If the paragraph were not included, a wrongdoing party might invoke article 43 and claim that the treaty was terminated, so that its obligations under the treaty had ceased. He did not therefore agree with Mr. Yasseen that the matter could be left entirely for treatment in the law of State responsibility.

29. With regard to the new paragraph 4, he agreed that the idea embodied in it, if included, should be placed elsewhere in the draft, since it applied not only to article 43 but also to article 44. However, he could not agree with the suggestion that it should be made to cover an even wider field.

30. It should be remembered that paragraph 1 of article 52, on the legal consequences of the nullity of a treaty, specified that the nullity of a treaty did not affect the legality of acts performed in good faith by a party in reliance on the void instrument before nullity was invoked, and went on to state that " The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed ".

31. The position was quite different in the circumstances envisaged in articles 43 and 44, which related to a valid treaty. The new paragraph 4 was intended to cover the case where a party had partly performed its obligations under a treaty and where a certain inequality arose upon its termination because of the greater benefits derived by the other parties. The proposed new paragraph dealt with the difficult problem of trying to restore the balance between the parties concerned. As such, its contents had a connexion with the provisions of article 53, on the legal consequences of the termination of a treaty.

32. However, the rule stated in the new paragraph 4 was not one of general application. It clearly did not apply to cases of termination by agreement, where the consequences of termination were a matter to be decided by the parties by agreement. Nor did it apply to the case of breach, which gave rise to its own problems. Its field of application was confined to the cases of termination brought about independently of the action of the parties and dealt with in article 43, on supervening impossibility of performance, and article 44, on fundamental change of circumstances.

33. It was his impression that the Commission as a whole considered that paragraph 4 deserved further examination, although most members wished to reserve their final position until the Drafting Committee had given a more concrete expression to the rule embodied in that paragraph and had expressed its views thereon.

34. The Drafting Committee should also perhaps consider whether article 43 ought not to include a provision on the lines of paragraph 1 (*c*) of his redraft of article 44, which ruled out the possibility of a party invoking a change of circumstances which had been

[7] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 79.

foreseen in the treaty and the consequences of which were provided for therein (A/CN.4/183/Add.3, p. 20). In the case envisaged in article 43, it was less likely that the parties would foresee circumstances which might cause the supervening impossibility of performance. Since, however, it had been suggested that certain treaties concerned with hydro-electric power made provision for drought and other natural disasters that might prevent electricity supplies from being available, the Drafting Committee should examine in general terms whether a provision of that type might be useful in article 43 as well.

35. Mr. de LUNA said he had never disputed that the new paragraph 3 covered a real problem of State responsibility. What he had urged was that it would be absurd to suggest that a treaty which had been terminated because of the total destruction of its object could possibly be revived.

36. Since the intention of the new paragraph 3 was to cover a question of State responsibility, the Commission should state that fact clearly in the text. The paragraph could be redrafted so as to state that the provisions of paragraphs 1 and 2 did not exonerate a State from the responsibility which it might have incurred if the impossibility of performance was due to a breach of the treaty by that State.

37. The same problem of State responsibility also arose in connexion with a number of other articles, particularly those dealing with fraud and coercion.

38. Mr. YASSEEN said he had the impression that his earlier remarks had been misunderstood. He had not intended to say that the party which invoked an impossibility of performance caused by itself in breach of the treaty could be exonerated from all responsibility. What he had intended to say was that article 43 should apply to all the parties without distinction, including the defaulting party. Where performance became impossible, the impossibility was absolute, and there was no reason why even the State through whose fault performance had become impossible should not have the right to plead the inability to discharge an obligation.

39. In that respect his view coincided with Mr. de Luna's. Their opinion differed from that of other members of the Commission, not so much regarding the substance as regarding the drafting. Perhaps a proviso could be added to the article indicating that it did not deal with the question of responsibility consequential upon the situation described. He still believed that even the responsibility for the breach of the treaty had its origin in a rule of international law.

40. The CHAIRMAN, speaking as a member of the Commission, said he realized that the Commission could legitimately choose between two points of view: according to one, which was derived from the law of obligations, the contract lapsed with the disappearance of its subject-matter; according to the other, based on the notion of delinquency, the party responsible for the delinquency had the obligation, if not to restore the *status quo*—which was often impossible, at least to restore a certain situation in the light of the duties under the treaty.

41. He personally had chosen to support the point of view expressed by Mr. Tunkin and Mr. Ago, because he thought it more conducive to the security of the international order. It offered a better assurance that the obligations under the branch of international law which concerned treaties would not be evaded.

42. Mr. AGO said that the physical impossibility of carrying out a treaty did not necessarily mean that the legal obligation created by the treaty ceased to exist. Where such an impossibility supervened without any fault on its part, the State might not only find it factually impossible to carry out the treaty, it might also declare that it was no longer legally bound to carry it out. If, on the other hand, the impossibility of performance was the result of a fault on its part, the State might find it impossible to execute the treaty, but it could not declare that it was not bound to carry it out. That was the true meaning of article 43.

43. Mr. JIMÉNEZ de ARÉCHAGA said that all members were in basic agreement on the practical solution to be adopted in the case envisaged in the new paragraph 3; the treaty was terminated and the State guilty of a breach was responsible. They were divided only on the doctrinal question of the basis of State responsibility in that case. Some felt that responsibility was based on the treaty itself and was a liability *ex contractu*, Mr. Yasseen regarded it as a liability by operation of law, or *ex lege*, other members thought that it arose from a violation of international law, or *ex delicto*. As was often the case in the Commission, such doctrinal differences must not be allowed to stand in the way of agreement on a concrete provision.

44. Many members felt that the provisions of the new paragraphs 1 and 2 might be invoked by a defaulting State to exonerate itself from responsibility where its breach had resulted in an impossibility of performance. That problem could be solved either by means of a provision such as the Special Rapporteur's new paragraph 3, or by amending paragraph 1 so that it did not contain the implication to which he had referred. In any event, the Drafting Committee should be asked to find appropriate language to express a practical solution with regard to which there was no disagreement in the Commission.

45. Mr. TUNKIN said that, in connexion with the questions of doctrine involved, it was worth considering the so-called " doctrine of effectiveness " about which a good deal had been written recently.[8] The doctrine stated that, whatever the circumstances of its conclusion, any treaty was legally valid if it was made effective, even by force, and that a validly concluded treaty should be regarded as legally terminated simply because it has been rendered ineffective by the use of force. Such a doctrine sanctioned the use of force in international relations.

46. The Drafting Committee should be requested to confine the provisions of paragraph 3 to a statement of the rule that a State could not invoke the impossibility of performance which resulted from its own wrongdoing as a ground for terminating a treaty of for suspending

[8] See particularly Jean Touscoz, *Le principe d'effectivité dans l'ordre international*, Paris, 1964.

its operation. The questions of State responsibility which might arise from that situation should be left to be dealt with by the Special Rapporteur on State responsibility.

47. Mr. YASSEEN said that he had not the slightest desire to invoke the doctrine of effectiveness to explain his attitude. He was quite content with a realistic approach, and it would be unrealistic to contend that a party could be obliged to do something impossible.

48. Sir Humphrey WALDOCK, Special Rapporteur, proposed that article 43 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed [9]

ARTICLE 44 (Fundamental change of circumstances)

Article 44

Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as grounds for terminating or withdrawing from a treaty under the conditions set out in the present article.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(*a*) The existence of the fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(*b*) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(*a*) To a treaty fixing a boundary; or

(*b*) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above related to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only. (A/CN.4/L.107, p. 40)

49. The CHAIRMAN invited the Commission to consider article 44, for which the Special Rapporteur, in his fifth report (A/CN.4/183/Add.3, p. 20), had suggested a revised text reading:

1. A fundamental change which has occurred with regard to a fact or state of facts existing at the time when a treaty was entered into may be invoked by a party as a ground for terminating or withdrawing from the treaty only if:

(*a*) The existence of that fact or state of facts constituted an essential basis of the consent of the parties to be bound by the treaty;

(*b*) The effect of the change is to transform in an essential respect the character of continuing obligations undertaken in the treaty; and

(*c*) The change has not been foreseen by the parties and its consequences provided for in the treaty.

2. A fundamental change may not be invoked as a ground for terminating or withdrawing from a treaty provision fixing a boundary or affecting a transfer of territory.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that for the time being he had not included a provision on separability in article 44 as the whole problem was to be considered at a later stage.

51. When reconsidering the 1963 text of the article, he had come to the conclusion that paragraph 1, which was really in the nature of an introduction, was unnecessary and repeated paragraph 2, so he had decided to drop it.

52. In the Drafting Committee, a marked preference had been shown for framing the articles on termination and suspension in the negative and he expected that the Drafting Committee would wish to do the same in his new text of paragraph 1, which would then have to be modified by the insertion of the words " not be " before the word " invoked " and by the substitution of the word " unless " for the words " only if ". Personally he did not altogether favour stating in the negative rules of law admitting rights to invoke grounds of invalidity or termination, but the Drafting Committee desired to lay stress on the stability of treaties and to bring out the fact that grounds for invoking termination should be regarded as exceptions.

53. In paragraph 2, he had taken account of the Israel Government's suggestion to bring the wording into line with that of article 34 and to refer to a " state of facts ". But in article 34, that expression had now been replaced by the word " situation " by the Drafting Committee, and if that change were endorsed by the Commission he would withdraw his suggestion.

54. He had found the Australian Government's proposal to insert in sub-paragraph (*b*) the word " continuing " before the word " obligations " acceptable, because that would make it plain that the obligations in question were those which had not yet been executed. By an oversight the word " undertaken " appeared in paragraph 1 (*b*); as indicated in his observations in his report, it should be replaced by the words " to be performed ", so as to bring out the same point.

55. When examining the 1963 text of paragraph 3, he had decided that the two exceptions laid down were of a very different kind and that it would be more logical to transfer the second to the new paragraph 1, because it was closely linked with the conditions for the operation of the rule contained in article 44. If that arrangement did not find favour, the exception could form part of a separate paragraph.

56. It would be remembered that, in his original proposal, the first exception had covered a broader category of treaties than those fixing a boundary,[10] but the Commission had decided to narrow down the provision. The matter would probably need to be reconsidered, particularly as the Australian Government had proposed a rather more general formula to cover determinations

[9] For resumption of discussion, see 842nd meeting, paras. 33-37.

[10] *Yearbook of the International Law Commission, 1963*. Vol. II, p. 80.

of territorial sovereignty. As a matter of drafting, the expression " stipulations of a treaty " fixing a boundary, which was used by the Netherlands Government in its comments, might perhaps be better than the expression " a treaty fixing a boundary ".

57. As he had indicated in paragraph 8 of his comments, the Canadian Government had pointed out that the Commission had perhaps overlooked the case of a boundary fixed by a thalweg which might be altered by a natural disaster such as a flood. In his opinion the point did not need to be taken into account because such a case would merely involve the interpretation of the treaty in the light of a change of fact.

58. The Commission would need to consider whether article 44 was comprehensive enough to cover cases of a change of circumstances provoked by a breach which entirely altered the character of the treaty. It would also need to decide whether provisions should be included concerning " breach " and " equitable compensation " in cases where a fundamental change of circumstances supervened.

59. Mr. VERDROSS said he congratulated the Special Rapporteur on his revised version of article 44. Never before had the three conditions which had to be fulfilled for terminating a treaty in reliance on the *clausula rebus sic stantibus* been so clearly stated.

60. The opening clause of paragraph 1 seemed, however, too weak. According to Anzilotti and other leading jurists, a State could not plead the *clausula rebus sic stantibus* for the purpose of being released from a treaty unless it had first endeavoured to negotiate an amicable arrangement through the diplomatic channel, an idea reflected in the Declaration of London, 1871,[11] adopted by the Great Powers. It was true that in principle a distinction should be drawn between rules of substance and rules of procedure, but there were cases where compliance with a certain procedure was the condition precedent to the assertion of a right. Just as local remedies must have been exhausted before a diplomatic claim could be brought, so it might be necessary to exhaust the diplomatic procedure before pleading the *clausula rebus sic stantibus*. It was such a serious step to terminate a treaty in reliance on that clause that it should be stipulated that endeavours to work out an amicable settlement must precede such action. The formula he had in mind differed from those suggested by some governments, which considered that provision should be made for an application to the International Court or for submission to an arbitral tribunal; such proceedings required a special agreement between the parties, whereas representations through the diplomatic channel were admissible under general international law. He suggested that the Drafting Committee consider adding a passage reflecting that idea in the opening clause of paragraph 1.

61. He could support the rule laid down in paragraph 2, which concerned treaties fixing a boundary or effecting a transfer of territory. The rule was not a special rule, but simply the application of a more general rule to the effect that the *clausula rebus sic stantibus* was not applicable to a treaty which had already been fully executed, for reliance on that clause always presupposed the continued existence of obligations flowing from the treaty. Where a treaty had been fully executed, it ceased to produce any obligation and the clause was inoperative. If State A ceded a territory to State B, the ownership of the territory in question was vested in State B and the treaty was fully executed. Similarly, if a State committed itself to pay a certain indemnity in annual instalments, then, upon the payment of the last annual instalment, the treaty would have been fully executed and the *clausula rebus sic stantibus* could no longer be invoked.

62. It might, therefore, be better to state in paragraph 2 the general rule that the *clausula rebus sic stantibus* was not applicable to a treaty which had been fully executed; examples could be given in the commentary.

63. Mr. CASTRÉN said that most of the changes made by the Special Rapporteur in the 1963 text were purely drafting changes. Some were improvements although even the revised text could be further improved. The Special Rapporteur had been right to amalgamate paragraph 1 and the opening passage of paragraph 2 of the 1963 text. As a consequence, the redraft was more concise, although even in the redraft the opening phrase of paragraph 1 and paragraph 1 (*a*) were repetitive.

64. A more serious criticism was that, since the redraft referred only to " fundamental " changes, it could be cunningly argued that, in the case of other, less important changes, that state of affairs could always be invoked as a ground for terminating the treaty. In order to remove the ambiguity and the remaining repetitions, the word " fundamental " should be omitted from the opening words of paragraph 1, and in paragraph 1 (*a*) the words " the existence of that fact or state of facts constituted " should be replaced by the words " the change is a fundamental one affecting ". In addition, the words " fundamental change " in paragraph 2 should be replaced by the words " change of circumstances ".

65. He doubted whether the word " continuing " was necessary in paragraph 1 (*b*), although he would not object to it.

66. Paragraph 1 (*c*) was also ambiguous and, in its new context, open to the absurd inference that it would not be permissible to invoke a provision in the treaty which provided for the consequences of a change of circumstances. That provision should be moved to a separate paragraph, as in the 1963 text.

67. In paragraph 2, the Special Rapporteur had perhaps gone too far in extending the scope of the paragraph to cover treaties effecting a transfer of territory. In 1963, the Commission had deliberately refrained from mentioning such treaties, but the reference had been restored in the Special Rapporteur's redraft in a slightly different form. The importance of the exception concerning territorial treaties was stressed by the fact that they and boundary treaties were dealt with in a separate paragraph. The Commission should revert to the structure of the 1963 text and the question of such treaties should be dealt with in the paragraph concerning changes of circumstances foreseen by the parties and provided for in the treaty itself, subject to the reversal of the order

[11] *British and Foreign State Papers*, Vol. LXI, p. 1198.

of the two paragraphs in question. Equally, Mr. Verdross's proposal might offer a satisfactory solution.

68. In reply to Mr. Verdross, who had expressed anxiety lest the article be invoked without good cause, he would say that the case was covered at least in part by article 51, which dealt with procedure and with the duty to negotiate with the other party before a treaty was declared void or inapplicable.

69. Mr. de LUNA said that the Special Rapporteur's redraft of article 44 was a definite improvement, apart from some minor points. The three conditions which had to be fulfilled were set out in logical order and clearly stated. At the same time, it might not be a bad idea to specify that the conditions were cumulative, even though that was self-evident.

70. The addition of the word " continuing" in paragraph 1 (*b*) was an improvement although it was not strictly necessary, because if the treaty had already been executed, there were no longer any obligations to be performed.

71. He agreed with Mr. Verdross's remarks concerning paragraph 2. He did not object to the extension of the scope of the provision to treaties effecting a transfer of territory, for a transfer of that nature was always a concrete transaction; it was impossible to transfer an unspecified and undemarcated territory. The provision did not therefore do any harm.

72. While it was true, as Mr. Verdross had said, that throughout the history of the *clausula rebus sic stantibus* it had always been held that the parties could not be confronted with the *fait accompli* of a unilateral denunciation without their being consulted, he still doubted whether it would be very useful—apart from the case of the special procedure provided for in article 51—to lay down the condition that there had to be negotiations. In the case-law of the Court, that condition had been found to be a mere formality; in other words, the parties had fulfilled it once they had stated their position, even if they had not negotiated from good faith. On the other hand, the paragraph could hardly lay down a condition *de contrahendo*.

73. He could accept the redraft. The Special Rapporteur, in commenting both on article 43 and on article 44, had said that the Commission should consider whether a general clause should be added which would apply to several articles and which would cover the question of good faith or, as it was known, the doctrine of " clean hands ". The fundamental change of circumstances might be spontaneous, outside the control of any of the parties, or it might be the indirect consequence of their actions, or it might be attributable to the fault of a State which had unlawfully altered the fundamental circumstances. Articles 43 and 44 were probably the right context for a provision on those lines. An alternative solution would be to set forth the principle in a separate general article, with cross-references to all the cases in which it would apply to the behaviour of a State which so conducted itself that circumstances changed and the performance of the treaty became impossible.

74. Mr. BRIGGS said that, as would be seen from his comments at the 695th and 710th meeting,[12] he had found it difficult to accept article 44 and had abstained from the vote on it. He had indicated at that time that the article did not set out a rule of international law but a doctrine which, though it had been invoked by States, had never been upheld by any international court.[13]

75. As indicated in paragraph (3) of the 1963 commentary to article 44, municipal courts had always ended by rejecting the application of the principle of *rebus sic stantibus* in the particular circumstances of any case before them. The Governments of Colombia, Italy, Turkey and the United States had referred to the controversial nature of the principle, and the observations of many others fell far short of endorsing the Commission's conclusions in paragraphs (1) and (2) of the commentary that international law recognized that treaties might cease to be binding upon the parties through a fundamental change of circumstances, and that there was considerable evidence that the principle was recognized as a rule of customary law. Thirteen governments had referred to *rebus sic stantibus* as a doctrine, one as a concept, one as a notion and one as a clause. Eight regarded it as a principle, only three had called it a rule.

76. In reality, what the Commission was proposing in article 44 was the progressive development of international law on a subject concerning which practice was not sufficiently developed, and therefore the greatest caution was needed in the drafting of the article.

77. He agreed that, in the interests of consistency, the negative form would have to be used. The phrase " state of facts " in the new text should be replaced by " situation ".

78. The essence of paragraphs 1 (*a*) and (*b*) must be retained and the parties must be referred to in the plural, so as to include them all. The Special Rapporteur's changes in paragraph 1 (*b*) were acceptable, as was the use in both sub-paragraphs of the word " essential ".

79. The reference in paragraph 2 to terminating or withdrawing from a " provision " seemed to conflict with the Special Rapporteur's contention that the question of separability had been set aside, and that was a point that should be borne in mind by the Drafting Committee. The exception itself as stated in paragraph 2 was sound and should be retained.

80. The question whether provisions analogous to those in the new text of article 43, paragraphs 3 and 4, should be added, ought to be left over until the Commission came to consider article 53.

81. As it stood, article 44 was not adequate. First, because something on the lines of the provision contained in the original text of what used to be article 22, paragraph 1 (*a*), in the Special Rapporteur's second report, was needed. That provision read: " A change in the circumstances which existed at the time when a treaty was entered into does not, as such, affect the continued validity of the treaty ".[14] He had suggested the addition at the end of that text, of the words " or entitle a party thereto to terminate or withdraw from a treaty ".

[12] *Yearbook of the International Law Commission, 1963*, Vol. I.

[13] *Ibid.*, p. 146, para. 29.

[14] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 79.

82. With regard to Mr. Castrén's proposal about the word " fundamental ", the article was concerned only with a fundamental change in circumstances. In his opinion it should be made plain that no mere change of circumstances entitled a party to terminate or withdraw from a treaty.

83. The second reason why the text was inadequate was that it contained no provision for adjudication, a gap on which seven governments had commented. When he had drawn attention to a similar gap in other articles, he had been told that the Commission was engaged in drafting substantive rules and not with their procedural application or institutional development. But he agreed with Mr. Verdross that procedure could in some cases be a condition of formulating the rule itself, and judicial determination could become a part of the substantive rule. In the present instance, a rule that would allow States to invoke a fundamental change of circumstances must contain an integral provision requiring them to try to seek a settlement first, and he could not agree with Mr. Castrén that, for that purpose, article 51 would suffice.

84. For those reasons he considered that even the Special Rapporteur's new version was dangerously vague and difficult to accept, unless considerably modified. An example of the kind of danger he had in mind was provided by the fact that certain elements of the 1963 draft, although it was known to be provisional, had been invoked by Panama against the United States without any reference whatever to the procedural devices set out in article 51.

The meeting rose at 12.40 p.m.

834th MEETING

Wednesday, 19 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 44 (Fundamental change of circumstances) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 44.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been reminded of a proposal by the Pakistan Government that a provision should be incorporated in article 44 stipulating that a party which had substantially contributed to the change of circumstances could not invoke that fact as a ground for termination or withdrawal from the treaty. That proposal might be examined in conjunction with his proposal that the Commission consider the inclusion in the article of an additional paragraph concerning breach.

3. Mr. RUDA said he agreed with those who, in 1963, had doubted whether the principle *rebus sic stantibus* was recognized as a rule of modern international law. Furthermore, to adopt the principle in the draft would jeopardize the security of treaties. The draft should therefore specify the conditions in which it was applicable and provide appropriate safeguards.

4. Paragraphs 1 and 2 of the 1963 text had stated much the same idea, and the Special Rapporteur had had the choice of dropping either the one or the other. And yet there had been a shade of difference between those two paragraphs, as Mr. Briggs had noted. The original paragraph 1 had stressed, more categorically than paragraph 1 of the latest redraft, the exceptional character of the principle *rebus sic stantibus*. In the course of successive revisions, the principle had become diluted. The Commission should either stress in paragraph 2 of the latest redraft the exceptional character of the principle, or restore paragraph 1 of the 1963 text as the opening passage of article 44.

5. He noted that in the latest redraft the words " a fact or state of facts " had replaced the expression used in the 1963 text, " fact or situation ". The Special Rapporteur had explained the connexion between that provision and article 34 concerning error, but in his (Mr. Ruda's) opinion, the expression used in the 1963 text, and in particular the word " situation ", at any rate in the Spanish version, was preferable.

6. He approved of the addition of the word " continuing " in paragraph 1 (*b*), which made it clear that the principle did not apply to obligations already discharged by both parties.

7. He had been interested to hear Mr. de Luna say that paragraph 1 should state clearly that the conditions laid down in sub-paragraphs (*a*), (*b*) and (*c*) were cumulative.

8. With regard to paragraph 2, he agreed with Mr. Verdross that it could not apply to a treaty which had already been executed. That was logical and correct in theory, but since the paragraph dealt with frontier problems, a subject on which States were very sensitive, the reference to treaties fixing boundaries should be allowed to stand. States would certainly be favourably impressed by a provision which emphasized still further the exceptional nature of the principle and declared that it was not applicable to the politically very delicate subject of frontiers. He did not, however, understand the reference to provisions effecting a transfer of territory. Since any such transfer necessarily presupposed the fixing of a boundary, it should suffice if only the latter idea were mentioned.

[1] See 833rd meeting, after para. 48, and para. 49.