

Document:-  
**A/CN.4/SR.842**

**Summary record of the 842nd meeting**

Topic:  
**<multiple topics>**

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

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

ARTICLE 41 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty)<sup>10</sup>

91. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 41 be amended to read:

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

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

(a) it appears that the parties intended that the matter should thenceforth be governed by the later treaty; or

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

2. However, the earlier treaty shall be considered as only suspended in operation if it appears that such was the intention of the parties when concluding the later treaty.

92. There had been a proposal to combine articles 40 and 41, but the Drafting Committee had decided to keep the provisions of the two articles separate.

93. Much of the discussion in the Commission at the present session had centred on the provisions of paragraph 1 (b). Those provisions had to be considered in relation to those of article 63, which laid down the rule that, where two treaties had incompatible provisions, those of the later treaty superseded those of the earlier one. The purpose of paragraph 1 (b) was to state that the earlier treaty would be terminated if the provisions of the later treaty were so far incompatible with those of the earlier one that the two treaties were not capable of being applied at the same time.

94. Mr. VERDROSS proposed the deletion of the word "However" at the beginning of paragraph 2. The paragraph did not state an exception: it dealt with a different situation.

95. Mr. ROSENNE said that he still considered the whole article to be unnecessary and asked that a separate vote be taken on paragraph 1 (b). In practice, the situation envisaged in that sub-paragraph was covered by the provisions of article 63. He would therefore vote against paragraph 1 (b) because he regarded it as otiose, and if it were adopted, he would abstain on the article as a whole.

96. Mr. CASTRÉN asked why the Drafting Committee had deleted the paragraph on separability, which had appeared in the text submitted by the Special Rapporteur at the 830th meeting.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that it seemed an unnecessary complication to cover in article 41 the question of partial suspension. Article 63 stated the rule that where the provisions of two treaties were incompatible, those of the later treaty prevailed. The fact that the provisions of the later treaty were applied meant that those of the older treaty were suspended.

98. Mr. LACHS said he supported Mr. Verdross's amendment to delete the opening word, "However", of paragraph 2.

99. Sir Humphrey WALDOCK, Special Rapporteur, said that he had no objection to that proposal.

*Mr. Verdross's amendment was adopted unanimously.*

100. The CHAIRMAN put to the vote paragraph 1 (a), and paragraph 2 as amended.

*Paragraph 1 (a), and paragraph 2 as amended, were adopted by 16 votes to none, with 2 abstentions.*

*Paragraph 1 (b) was adopted by 15 votes to 1, with 2 abstentions.*

*Article 41 as a whole, as amended, was adopted by 15 votes to none, with 2 abstentions.*

The meeting rose at 1 p.m.

## 842nd MEETING

Thursday, 27 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

*Present:* Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cast-rén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

### Law of Treaties

[Item 2 of the agenda]

(continued)

#### ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the articles submitted by the Drafting Committee.

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach)<sup>1</sup>

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 42:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either (i) in the relations between themselves and the defaulting State or (ii) as between all the parties;

<sup>10</sup> For earlier discussion, see 830th meeting, paras. 40-89.

<sup>1</sup> For earlier discussion, see 831st meeting, paras. 16-80, and 832nd meeting, paras. 1-27.

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) Any other party to suspend the operation of the treaty with respect to itself or to withdraw from the treaty if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article consists in:

(a) An unfounded repudiation of the treaty; or

(b) The violation of a provision essential to the accomplishment of any of the objects or purposes of the treaty.

4. The foregoing paragraphs are without prejudice to any provisions in the treaty applicable in the event of a breach.

3. No change had been made in paragraph 1, but the order of sub-paragraphs (a) and (b) in paragraph 2 had been reversed in order to emphasize the different degrees of interest that parties might have in the observance of a treaty.

4. Sub-paragraph (c) was new and dealt with a special category of treaties, such as disarmament agreements, where a breach might upset the whole basis of the treaty for all the parties. The action that they could take in such a situation was confined to suspension or withdrawal.

5. Some discussion had taken place in the Drafting Committee concerning paragraph 3 (a), and the conclusion had been that the point would be adequately expressed by the word "unfounded".

6. Paragraph 4 was slightly different from the former paragraph 5, which had been regarded as too wide in scope; it had been decided to restrict the paragraph to cases when a treaty contained provisions which would automatically regulate the situation if a breach occurred.

7. Mr. ROSENNE said that, during the discussion on article 42, he had objected<sup>2</sup> to the reference in the Special Rapporteur's new text (A/CN.4/183/Add.2, p. 26) to the interests of a party being affected by a breach, but he found the Drafting Committee's text of paragraph 2 (b) satisfactory.

8. The purpose of paragraph 5 in the 1963 text had been not to limit the application of the article to the provisions of any given treaty, lest that prejudice the provisions of any independent instruments, such as an acceptance of compulsory jurisdiction or a treaty for arbitration or judicial settlement, which might be in force between the parties and which would become applicable in the case of breach. That safeguard must be preserved and he was uncertain whether the new text would achieve that aim.

9. Mr. CASTRÉN said that, on the whole, he was satisfied with the new text. Paragraph 2 (c), however, differed greatly from the former text, especially in the French version. It referred to a material breach of the provisions of the treaty which radically changed the position of every party with respect to the further

performance of "its obligations" under the treaty, whereas the Special Rapporteur's previous text had referred to conduct which frustrated the objects and purposes of the treaty. There seemed to him to be a danger that, under the new text, a party would lose its rights but would retain its obligations. Would that party still be bound by the treaty or would it have the right to withdraw from it?

10. With regard to Mr. Rosenne's comments on paragraph 4, he noted that the latter part of the Special Rapporteur's text of that paragraph had been omitted and he wondered why.

11. Mr. AGO, pointing out that the English and French texts of article 42 as given in Conference Room Document No. 24, the document now before the Commission, were defective, said that, in order to restore the text adopted by the Drafting Committee, it would be sufficient, so far as the English version was concerned, to restore paragraph 4. In the French version, however, paragraph 3 would have to become paragraph 1 and paragraph 2 would have to become paragraph 3.

12. Furthermore, in the French text of paragraph 2 (a)(i) the word "*eux*" should read "*elles-mêmes*". In paragraph 2 (c) of the French text, the word "*telle*" in the second line should be deleted; in paragraph 4 of the French text, the words "*ne préjudicient pas*" should be replaced by the words "*ne portent pas atteinte*".

13. Mr. YASSEEN, referring to paragraph 2 (c), said that, in his view, although suspension was fully justified, it was going too far to allow a State to withdraw from the treaty, even in the circumstances described. Suspension should be sufficient to enable a State to protect its vital interests. He therefore proposed that the words "or to withdraw from the treaty" be deleted.

14. Mr. VERDROSS said that the reference in paragraph 3 (a) to "an unfounded repudiation" was too vague; there could be reasons which were not of a legal nature. It would be better to say "a repudiation not permitted by the provisions of this convention".

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he had proposed to the Drafting Committee a text very much on the lines of the old paragraph 5 in article 42, but had come round to the view that the change introduced by the Committee was justified and would not endanger treaties concerning arbitration or the compulsory settlement of disputes. Article 42 dealt with the substantive consequences of breach, and the question of independent adjudication was a separate one. The procedural aspects of breach were covered in article 51 and the provisions of article 42 could only be brought into operation by the application of the regular procedures laid down in that article. Consequently, it was with reference to article 51, rather than to the present article, that instruments for the acceptance of compulsory jurisdiction had their importance.

16. As far as Mr. Verdross's amendment was concerned, he had suggested rather similar wording to the Drafting Committee but it had been rejected on the ground that the wording of paragraph 3 (a) made it clear that the repudiation was unfounded in law.

17. He was prepared to accept Mr. Yasseen's amendment to delete the words "or to withdraw from the

<sup>2</sup> See 831st meeting, paras. 24-32.

treaty” in paragraph 2 (c), since the right of any individual State would be sufficiently protected by allowing it to suspend the operation of the treaty.

18. Regarding the point made by Mr. Castrén concerning paragraph 2 (c), he said that the Drafting Committee had been of the opinion that the wording he had proposed in his fifth report, namely, “is of such a character that its violation by one party frustrates the object and purpose of the treaty”, was not correct. The point that had to be brought out was that the breach would fundamentally alter the position of every party in regard to the treaty.

19. Mr. ROSENNE said he thanked the Special Rapporteur for his explanation concerning the new paragraph 4, but reserved his right to raise the matter again in connexion with article 51, paragraph 4.

20. Mr. BRIGGS said he supported Mr. Yasseen’s amendment, because the text would still provide sufficient safeguard without the words “or to withdraw from the treaty”.

21. Mr. CASTRÉN said that he was not in a position to propose a new text for paragraph 2 (c). He had thought of suggesting that the passage beginning “radically changes . . .” be replaced by the words “destroys one of the fundamental bases of the treaty”, but that situation might come under the heading of “change of circumstances”, already dealt with in article 44. What he had in mind was the case of a treaty of demilitarization and neutrality that was accompanied by an international guarantee; if the guarantee ceased to exist because the guarantors had not complied with their obligations, was the territorial State still under an obligation to comply with the demilitarization clauses?

22. Mr. de LUNA said that in the Spanish text, the words “*a invocar*” in paragraph 1 should read “*para invocar*” while the word “*modifique*” in paragraph 2 (c) should read “*modifica*”.

23. Mr. VERDROSS said it still seemed to him that the words “an unfounded repudiation” opened the door to excuses of a non-legal character, since there might be reasons of an economic, political or moral nature. It would be better to say “a repudiation not permitted by a provision of the convention”.

24. The CHAIRMAN, speaking as a member of the Commission, said he did not agree with Mr. Verdross that repudiation had to be based on the provisions of the treaty: it could be based on some other peremptory rule of international law.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be prepared to insert something in the commentary on the point made by Mr. Verdross.

26. Mr. AGO said that Mr. Verdross had raised a very interesting point. It was quite true that, especially in the French text, the expression “an unfounded repudiation” might be interpreted to mean that a repudiation accompanied by any kind of justification would be sufficient. In the draft articles, however, the Commission had been careful to say that repudiation could be brought about either because a peremptory norm of international law had come into being or because the treaty itself so provided. Accordingly, if the passage

read “a repudiation not authorized by the present articles”, all possible situations would be covered and a useful safeguard would have been introduced.

27. Mr. VERDROSS said he accepted Mr. Ago’s suggestion.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 3 (a) could be redrafted to read “a repudiation of the treaty not sanctioned by the present articles”, as he had in fact suggested to the Drafting Committee.

*It was so agreed.*

29. The CHAIRMAN put to the vote Mr. Yasseen’s amendment to delete the words “or to withdraw from the treaty” in paragraph 2 (c).

*Mr. Yasseen’s amendment was adopted by 12 votes to 1.*

30. The CHAIRMAN put article 42, as amended, to the vote.

*Article 42, as amended, was adopted by 14 votes to none.*

31. Mr. CASTRÉN said that the fact that he had voted against part of the article had not prevented him from voting in favour of the article as a whole, since he was prepared to accept the majority view.

*New article on termination or denunciation of multilateral treaties embodying general rules of international law<sup>3</sup>*

32. Sir Humphrey WALDOCK, Special Rapporteur, said that he had prepared for the Drafting Committee a new article to take account of the concern expressed by Mr. Tunkin and other members of the Commission that the termination or suspension of general multilateral treaties should not impair the duty of any party to fulfil any obligation embodied in the treaty to which it was also subjected under any other rule of international law. A provision on that matter had been included in article 53 but not in articles 52 or 54. The new article would have to be placed close to article 30.

ARTICLE 43 (Supervening impossibility of performance)<sup>4</sup>

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 43:

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

34. The article had been considerably abbreviated. Exception had been taken to the phrase “the subject-matter of the rights and obligations contained in a treaty”, used in his fifth report, on the ground that the impossibility of performance might be due to the destruction of some ancillary element.

35. Mr. de LUNA said that, although he approved the text of the article, he was not very satisfied with the word “*Superveniencia*” in the Spanish version of the

<sup>3</sup> See paras. 71-78 below.

<sup>4</sup> For earlier discussion, see 832nd meeting, paras. 28-66 and 833rd meeting, paras. 1-48.

title. In his view, the idea would be conveyed equally well by the expression “*Nueva situación que hace imposible la ejecución*”.

36. The CHAIRMAN put article 43 to the vote.

*Article 43 was adopted by 13 votes to none, with 1 abstention.*

37. The CHAIRMAN, speaking as a member of the Commission, said that he had abstained from voting because, in his view, impossibility did not result solely from the disappearance or destruction of an object indispensable for the performance of the treaty; there might be other cases of impossibility that did not involve any fundamental change of circumstances.

#### ARTICLE 44 (Fundamental change of circumstances)<sup>5</sup>

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 44:

1. A fundamental change which has occurred with regard to a circumstance existing at the time of the conclusion of a treaty and which was not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of that circumstance constitutes an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(a) as a ground for terminating or withdrawing from a treaty establishing a boundary;

(b) if the fundamental change is the result of a breach by the party invoking it either of the treaty or of another international obligation owed to the parties to the treaty.

39. The drafting changes in paragraph 1 did not affect the substance. The phrase “fact or situation” had been dropped in favour of the words “a circumstance”.

40. The content of paragraph 3 (b) of the 1963 text had been transferred to paragraph 1.

41. The wording of paragraph 1 (b) had caused some difficulties and the French-speaking members of the Drafting Committee were probably more satisfied with the French version than the English-speaking members were with the English.

42. The earlier drafts had referred to a treaty fixing a boundary, a term which he had criticized as being too narrow. The Drafting Committee had accordingly substituted the word “establishing” for the word “fixing” so as to cover a delimitation or a cession of territory. The phrase seemed sufficiently general for the purpose.

43. The Drafting Committee had thought it useful to include a provision concerning a fundamental change resulting from a breach by the party invoking it.

44. Mr. AGO pointed out that, both in the title and in the body of the article, the French text should read

“*changement fondamental de circonstances*” instead of “*des circonstances*”.

45. Secondly, he suggested that it was inappropriate to use the phrase “a circumstance” in paragraph 1, since it might cover an event of very minor importance, whereas what the Commission had in mind was a real change of circumstances. It would therefore be better if the paragraph opened with the words “a fundamental change of circumstances which has occurred in relation to those which existed at the time . . .”. The words “that circumstance” in paragraph 1 (a) would then have to be replaced by “those circumstances”.

46. The closing words of paragraph 2 (b) should read “owed to the other parties to the treaty”; the words “another international obligation” should thus be altered to read “a different international obligation”.

47. Mr. CASTRÉN said that, in his view, the new text was an improvement on the old. He had, however, suggested that the word “fundamental” in the first line of paragraph 1 should be deleted, since it was clear from sub-paragraphs (a) and (b) that the reference was purely to fundamental changes. The word “fundamental” was redundant and might even lead to misunderstanding. So far as the rest of the article was concerned, he supported Mr. Ago’s suggestions.

48. The CHAIRMAN pointed out that Mr. Tunkin had advocated the insertion of the word “fundamental” as a safeguard against the invoking of changes that were not of a fundamental character.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the drafting changes suggested by Mr. Ago were acceptable.

50. He was not sure whether it would be wise to delete the word “fundamental” at the beginning of the article, as suggested by Mr. Castrén, because the intention had been to stress the exceptional character of the article.

51. Mr. CASTRÉN said that if the majority of members were in favour of retaining the word “fundamental”, he would not oppose it.

52. The CHAIRMAN put Mr. Ago’s amendments to the vote.

*Mr. Ago’s amendments were adopted.*

53. The CHAIRMAN put to the vote article 44, as amended.

*Article 44, as amended, was adopted by 13 votes to 1, with 1 abstention.*

54. The CHAIRMAN, speaking as a member of the Commission, said that he had voted for the article, although he agreed with the Special Rapporteur that the expression used in paragraph 2 (a) was too restrictive.

55. Mr. RUDA said that he had voted against the article for the reasons of substance he had given at the 834th meeting.

56. Mr. VERDROSS said that, although he had voted for the Drafting Committee’s text, he wished to point out that there were other treaties to which that text did not apply—namely, treaties which had been completely executed.

<sup>5</sup> For earlier discussion, see 833rd meeting, paras. 49-84, 834th meeting, paras. 1-81 and 835th meeting, paras. 1-21

57. Mr. BRIGGS said that he had abstained from voting on article 44 for the reasons he had given at the 833rd meeting.

ARTICLE 45 (Establishment of a new peremptory norm of general international law)<sup>6</sup>

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 45:

*Establishment of a new peremptory norm of general international law*

If a new peremptory norm of general international law of the kind referred to in article 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates.

59. The new formulation of article 45 was substantially the same as that of 1963, but the order of the sentence had been reversed to avoid the use of the word "when", which was ambiguous in English and might suggest that the emergence of a new norm of general international law occurred frequently. The Drafting Committee had decided that it was preferable to use the words "incompatible with" rather than "conflicts with".

60. Mr. VERDROSS said that the expression "becomes void and terminates" was tautological. It would be sufficient to say "becomes void".

61. Mr. CASTRÉN said that, at the 835th meeting, he had proposed the deletion of the words "becomes void and". He realized, however, that that was a minority view and he would accept the text submitted by the Drafting Committee.

62. Mr. ROSENNE said he considered that the amendments proposed by Mr. Verdross and the one proposed earlier in the session by Mr. Castrén were dangerous and raised a question of substance. If the words "and terminates" were eliminated, the application of article 45 would be governed by article 52, but if the words "becomes void and" were eliminated, it would be governed by article 53.

63. Mr. BRIGGS said that he would abstain from voting on article 45, for the same reasons as had compelled him to abstain on article 37.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that if either of the amendments proposed were accepted he would be unable to vote for the article, because the observations of governments showed that there was much misunderstanding about the effects of a treaty becoming void. The greatest precision was needed in the text.

65. Mr. VERDROSS said that he would not press his amendment.

66. The CHAIRMAN said that the expression "becomes void and terminates", although it might be repetitious, had the advantage of making it quite clear that the treaty was void *ex nunc*.

67. Mr. RUDA said that the words "a new peremptory norm of general international law of the kind referred to in article 37" might give the impression that there

were other peremptory norms which were not of the kind referred to in article 37.

68. Sir Humphrey WALDOCK, Special Rapporteur, replied that so far as the English text was concerned, the expression "a new peremptory norm" was not self-explanatory and had to be qualified in such a manner as to make it clear that it was a rule from which no derogation was permitted. If it were not so qualified, a cross-reference to article 37 was essential. Such a cross-reference was probably preferable, as it would bring out the link between the two articles, which dealt with a particularly delicate matter, and would also call attention to the fact that the earlier article was concerned with invalidity and the later one with termination.

69. Mr. RUDA suggested that, in the Spanish text, the word "clase" be replaced by the word "naturaleza".

*It was so agreed.*

70. The CHAIRMAN put article 45 to the vote.

*Article 45 was adopted by 13 votes to none, with 2 abstentions.*

ARTICLE 30 (*bis*) [formerly paragraph 4 of article 53] (Obligations of parties under other rules of international law)<sup>7</sup>

71. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new article 30 (*bis*), reading:

*Obligations of parties under other rules of international law*

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the terms of the treaty, shall not in any way impair the duty of any party to a treaty to fulfil any obligation embodied in the treaty to which it is subjected under any other rule of international law.

72. That new provision was partly inspired by paragraph 4 of article 53 but expressed the rule in general terms so as to cover not only cases of termination but also cases of invalidity, withdrawal and suspension.

73. Mr. AGO suggested that it was necessary to restore the word "also" before the word "subjected". The word "also" was used in paragraph 4 of article 53 but had been deleted from article 30 (*bis*) by the Drafting Committee, with the result that the text had become ambiguous.

74. Mr. LACHS said that the word "also" had been deleted on his proposal because it confused the source of the obligation. As he had pointed out in 1963, a treaty could well be declaratory, so that the real source of the obligation would be found in customary international law.<sup>8</sup>

75. Sir Humphrey WALDOCK, Special Rapporteur, said that the point had been discussed at length in 1963, when the Drafting Committee had decided that the word "also" was necessary before "subjected". He could therefore agree to its reintroduction.

<sup>7</sup> See para. 32 above.

<sup>8</sup> *Yearbook of the International Law Commission, 1963, Vol. I, p. 235, para. 32.*

<sup>6</sup> For earlier discussion, see 835th meeting, paras. 22-80.

76. The CHAIRMAN put article 30 (*bis*) to the vote, as amended by the inclusion of the word "also".

*Article 30 (bis), as amended, was adopted by 13 votes to 1, with 1 abstention.*

77. Mr. LACHS explained that he had voted against article 30 (*bis*) because, for the reasons he had given, he was opposed to the retention of the word "also".

78. Mr. RUDA explained that he had abstained from voting for the reason given by Mr. Lachs.

#### ARTICLE 46 (Separability of treaty provisions)<sup>9</sup>

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 46 be amended to read:

##### *Separability of treaty provisions*

1. A right of a party under a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty may only be invoked with respect to the whole treaty except as provided in the present articles.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application; and

(b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. In cases falling under article 33, the State entitled to invoke the fraud may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 35, 36 and 37, no separation of the provisions of the treaty is permitted.

80. The article, as redrafted, had two governing provisions: paragraph 1 related to the right of a party under a treaty provision to denounce, withdraw from or suspend the operation of a treaty; paragraph 2 related to the invoking of a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty otherwise than under its own provisions.

81. Slight changes had been made in the wording of paragraph 3, which corresponded to the former paragraph 2. In particular, the expression "essential basis" was used instead of "essential condition" in subparagraph (b).

82. Paragraph 4 set forth the option in cases of fraud, which had formerly been covered by paragraph 2 of his redraft of article 46.

83. In paragraph 5, the Drafting Committee had listed cases falling under articles 35, 36 and 37 as those in which no separation was permitted, so as to enable the Commission to take a decision on whether to include article 35 in that list or not.

84. Mr. AMADO said it was unfortunate that the English word "separability" should have to be translated in French by the word "*divisibilité*".

85. Mr. ROSENNE said that although he still had some doubts regarding the text of article 46, he was prepared to vote in favour of it, while reserving the right to change his position at a later stage.

86. Mr. CASTRÉN said that the new text was somewhat complicated and there were a few points he wished to clarify.

87. First, should not paragraph 1 contain a proviso in respect of paragraphs 3 and 4?

88. Secondly, did the words, "in the present articles", in paragraph 2, refer to paragraphs 3 and 4 of article 46 or to the draft articles as a whole?

89. Paragraph 5 was perhaps unnecessary, since its subject-matter could be said to be covered by the new wording of paragraph 1.

90. The CHAIRMAN said that paragraph 5 embodied the Commission's view that articles 35, 36 and 37 should be excluded from the scope of article 46.

91. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 1 dealt with a right exercised under the treaty itself and was therefore quite different from the rest of the article; in the cases covered by that paragraph, the treaty itself would indicate the scope of separability.

92. The Drafting Committee had considered the possibility of using the words "in the following paragraphs" instead of "in the present articles", at the end of paragraph 2. There were, however, certain other provisions, such as those on breach, which might result in the suspension of the treaty in whole or in part. The Committee had therefore chosen the wider reference.

93. In his view, both paragraph 4 and paragraph 5 were essential and should be retained.

94. Mr. AGO said he thought that the wording of paragraph 2 should make it clear that the paragraph referred to cases where a treaty contained no provision concerning termination, withdrawal or suspension of operation.

95. In reply to a question by Mr. CASTRÉN, Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions on separability formerly contained in a number of articles would be eliminated.

96. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Ago that paragraph 2 should be amended to bring out the fact that its provisions applied only to cases arising otherwise than under the treaty.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that, at the next meeting, he would propose a redraft of article 46 in which paragraph 2 would be reworded to make it clear that the grounds covered by that paragraph were those arising from the various provisions of article 46 and from article 42. It would be necessary to consider whether any other articles should be mentioned.<sup>10</sup>

<sup>9</sup> For earlier discussion, see 836th meeting, paras. 2-20, and 837th meeting, paras. 1-79.

<sup>10</sup> For resumption of discussion, see 843rd meeting, paras. 1-13.

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty)<sup>11</sup>

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 47 be amended to read :

*Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 34 inclusive or articles 42 to 44 inclusive if, after becoming aware of the facts :

(a) it shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

99. The main rule was that contained in sub-paragraph (b). It would be noted that the term "acquiesced" had been used in deference to the wishes of those members who did not favour placing the provision on the basis of consent.

100. Mr. de LUNA suggested that the words "as the case may be" in paragraphs (a) and (b) were unnecessary.

101. Mr. AGO said that those words were essential to make it clear that paragraphs (a) and (b) applied to a series of different situations.

102. Mr. YASSEEN said that he agreed with Mr. Ago. The words "as the case may be" were necessary in paragraph (a) to make it clear that a State could no longer invoke a ground for invalidating a treaty if it had agreed that the treaty was valid, could no longer invoke a ground for terminating or withdrawing from a treaty if it had agreed that the treaty remained in force, and could no longer invoke a ground for suspending the operation of a treaty if it had agreed that the treaty continued in operation. The words "as the case may be" had a similar import in paragraph (b).

103. Mr. de LUNA said that he would not press his suggestion.

104. Mr. CASTRÉN pointed out that the words "*de l'application du traité*" should be inserted in the French text of the title in order to bring it into line with the English text.

105. Sir Humphrey WALDOCK, Special Rapporteur, said that in the English title the words "the operation of" were used after "suspending". He would have no objection to the French title being brought into line with the English.

106. The CHAIRMAN put article 47 to the vote.

*Article 47 was adopted by 15 votes to none.*

<sup>11</sup> For earlier discussion, see 836th meeting, paras. 21-51, 837th meeting, paras. 80-95, and 838th meeting, paras. 1-38.

## Report of the Chairman of the Drafting Committee on Articles 49 and 50

107. Mr. JIMÉNEZ de ARÉCHAGA, Chairman of the Drafting Committee, said that the Drafting Committee had decided to report to the Commission on articles 49<sup>12</sup> and 50<sup>13</sup> at the 1966 summer session; those articles were closely connected with article 51, which the Commission had been unable to consider at the present session.

### Draft Resolution submitted by Mr. Amado

(A/CN.4/L.114)

108. Mr. AMADO, submitting the draft resolution in document A/CN.4/L.114, said that it expressed in very restrained terms the Commission's gratitude to H.S.H. Prince Rainier III of Monaco and his Government for their hospitality and for the attentions it had been shown. Thanks to the welcome it had received, to the beauty of the scenery and to the mildness of the climate, the Commission had been able to do fruitful work.

*The draft resolution was adopted by acclamation.*

The meeting rose at 5.30 p.m.

<sup>12</sup> For earlier discussion, see 838th meeting, paras. 39-67 and 839th meeting, paras. 1-58.

<sup>13</sup> For earlier discussion, see 836th meeting, paras. 52-91.

## 843rd MEETING

*Friday, 28 January 1966, at 9 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. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock, Mr. Yasseen.*

### Law of Treaties

[Item 2 of the agenda]

*(continued)*

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE  
*(continued)*

ARTICLE 46 (Separability of treaty provisions) *(continued)*<sup>1</sup>

1. The CHAIRMAN invited the Commission to resume its consideration of article 46.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, following the discussion at the previous meeting, he had prepared a redraft of paragraph 2 of article 46, reading :

<sup>1</sup> For earlier discussions, see 836th meeting, paras. 2-20, 837th meeting, paras. 1-79, and 842nd meeting, paras. 79-97.