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Summary record of the 689th meeting

Topic:
Law of Treaties

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74. Mr. BRIGGS said he entirely agreed with Mr. Bartoš. A treaty could certainly remain in force for a very long time; indeed, during the second world war, the United Kingdom Government had invoked a fourteenth century treaty with Portugal in order to enable the United States to establish military bases in Portuguese island territories in preparation for the landings in North Africa, but the concept of perpetuity was offensive to the legal mind. Perhaps the Commission could pass on to article 17 and then decide whether in fact the point dealt with in article 16 needed to be covered.

75. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that all he had sought to do in article 16 was to indicate what rules applied to treaties of indefinite duration.

76. Mr. VERDROSS said he thought that article 16 should be deleted. In the absence of a specific clause on termination in the treaty itself, or of other provisions adopted by the parties, the treaty remained in force unless its termination ensued from some rule of international law. That was made abundantly clear by the other articles, whose provisions article 16 merely repeated *a contrario*.

77. Furthermore, even if it might be thought that perpetual treaties existed, such treaties could nevertheless become obsolete, so that no useful purpose would be served by declaring them to be perpetual.

78. Mr. AGO said he agreed that the word " perpetual " had somewhat startling implications, but clearly the Special Rapporteur's intention had only been to draft an article on treaties of indefinite duration. However that might be, he himself did not think the article necessary. It met a logical requirement in the system established by the Special Rapporteur, having regard to the form given to article 15; but if the Drafting Committee decided to amend article 15 in the manner he had proposed — namely, by mentioning only the circumstances in which a treaty came to an end — article 16 would become unnecessary.

79. Mr. ROSENNE said that for purposes of codification, the substance of article 16, whether incorporated in a separate article or not, should be retained. He shared Mr. Ago's objections to the word " perpetual " which should be replaced by the word " indefinite ".

80. Mr. de LUNA said that the words " perpetual " and " perpetually ", used in the heading and in the text of article 16, were not very felicitous. The perpetuity of a treaty was a pious hope, not a historical reality. To speak of the " perpetual " duration of a treaty would be a misuse of the term.

81. Mr. CASTRÉN said he favoured the retention of article 16 provided it was reworded in such a way as to replace the idea of perpetuity by a more acceptable idea, such as that of indefinite duration.

82. As to the substance, article 16 was not unnecessary because articles 18 and 22 embodied reservations. Moreover, article 17 went so far that it was important to retain article 16 in order to restrict the scope of article 17.

83. Mr. LACHS said that he had doubts about both the content and the form of article 16: no treaties were eternal. If anything at all needed to be said on the subject, it could be said in the next article.

84. Mr. YASSEEN said he was not greatly embarrassed by the word " perpetual ", which was in common use, though he agreed that the alleged " perpetual " duration might come to an end. However, he agreed with Mr. Verdross and Mr. Ago that, since the conclusions of article 16 followed logically from the other articles, there was no need for a special article in which to state them.

85. Sir Humphrey WALDOCK, Special Rapporteur, said he did not altogether share the view that the rule he had tried to state in article 16 could be held to follow from other provisions in the draft; he believed it would be necessary to devote a special provision to treaties intended to be of indefinite duration. He did not insist on the term " perpetual ", but merely wished to exclude such treaties from the somewhat broad scope of the provisions concerning the right of denunciation contained in article 17. In the latter, as readers of his commentary would be aware, he might have gone rather far in admitting an implied right of denunciation; for after studying existing state practice, he had reached a conclusion as to the general intentions of States in regard to the duration of various types of treaty which he himself had not altogether expected.

86. Perhaps the Drafting Committee could be asked to consider article 16 in the light of the conclusions reached on article 17.

87. The CHAIRMAN suggested that further consideration of article 16 should be deferred. The Commission would be better placed to judge whether article 16 could be deferred to the Drafting Committee for redrafting in the form of an exception to article 17 after the latter had been discussed.

It was so agreed.

The meeting rose at 12.55 p.m.

689th MEETING

Wednesday, 29 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 17 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 17 (TREATIES CONTAINING NO PROVISIONS REGARDING THEIR DURATION OR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 17 raised important issues, and the way in

which they were handled would have a direct bearing on, for example, articles 20 and 22. He hoped the Commission would bend its main efforts to reaching a clear consensus of opinion on paragraphs 3 and 4, which were the key provisions in article 17.

3. The major issue of principle to be decided was whether or not to accept the thesis that there was an implicit right of denunciation when treaties were silent about their duration or termination. Some eminent authorities had taken the view that there was no such right unless expressly provided for by the parties. Others, including the previous special rapporteur, Sir Gerald Fitzmaurice, had taken a more moderate line admitting that in certain instances an implied right of denunciation existed. Giraud in a recent study had advanced the opinion that, in the absence of provisions regarding denunciation, any general multilateral treaty could be denounced at any moment.[1]

4. At the outset he had been disinclined to allow extensive rights of denunciation, but on examining state practice he had been impressed by the frequency with which clauses concerning termination of one kind or another had been inserted in treaties in recent times. Admittedly, as the matter was fundamentally one of interpreting the intention of the parties when the treaty was silent, the case could be argued either way, but he had come round to the view that for purposes of codification the better course would be to allow a right of denunciation unless the treaty was clearly intended to be of indefinite duration or was of such a nature that such an intention must be presumed. Except in treaties of that nature the absence of a provision concerning denunciation was almost certainly the result of the parties' inadvertence and did not reflect an intention to keep the treaty in force indefinitely. A carefully regulated implied right of denunciation governed by proper procedural requirements would make for stability and for respect for treaties and international law. He had set out in considerable detail in the commentary the reasons that had induced him to take up that position.

5. Paragraph 2, the drafting of which could perhaps be improved, was intended to deal with the fairly wide category of treaties which had a finite object and the parties to which must be assumed to have intended the treaty to continue in force until that object was achieved. In the case of those treaties there could be no implied right of denunciation.

6. Mr. CASTRÉN said that although he generally shared the views of the Special Rapporteur, he had serious doubts about the article under discussion, on account both of its underlying principle and of the special rules proposed in it. True, the Special Rapporteur proposed, as a residuary rule, that a treaty should be terminable only by subsequent agreement between the parties, but he stated in paragraph 23 of the commentary that he had done so more from respect for the authorities than from any deep conviction; and that residuary rule lost much of its value through the fact that the Special Rapporteur provided for the termination of treaties of several categories by unilateral denunciation or withdrawal.

7. The Special Rapporteur had manifestly been influenced by Giraud, of whose views he rejected only the most radical; yet Giraud's report on the amendment and termination of collective treaties [2] had been criticized by many jurists. Although it was true that the Special Rapporteur could invoke the authority of so eminent a jurist as Oppenheim, he had proposed four categories of treaties that were subject to denunciation, whereas his predecessor had proposed only two, Lord McNair recognized only one, and the majority of writers, including Rousseau, admitted no exception to the principal rule, a view likewise adopted in the Harvard Research Draft.[3]

8. The attitude of States on that point was not clear and could be interpreted in two ways. For the Special Rapporteur, the fact that most of the treaties in the four categories he mentioned contained a denunciation clause or had been concluded for a short period of time proved that where the treaty contained no relevant provision, the intention of the parties was that it could be denounced. He himself believed that the absence of a relevant provision in a treaty should be interpreted to mean that the possibility of denunciation had been deliberately excluded. Some forty years ago, Finland had concluded several trade treaties and a number of treaties on social, cultural and scientific co-operation which were still in force and several of which contained no denunciation clause. In his view, the present system, supported by the authorities and based on the *pacta sunt servanda* rule, was the best and should be retained.

9. The Special Rapporteur stressed several times in his commentary that the rules in article 17 concerning denunciation and withdrawal merely established presumptions. Yet paragraph 3 was formulated as an absolute rule.

10. The rule stated in paragraph 2 was correct, but the final restriction, " until devoid of purpose ", was unnecessary and perhaps even theoretically incorrect, as it might be considered that even in such a case the treaty remained formally in force.

11. Paragraph 3 (*a*) should be deleted for the general reasons he had already explained.

12. Paragraph 3 (*a*) (ii) seemed to contradict paragraph 4 (*c*). In contemporary international law, a treaty of alliance or of military co-operation could not be other than defensive and have the maintenance of peace as its object; a treaty of an aggressive nature would be contrary to the United Nations Charter and to international law in general. Paragraph 3 (*a*) (iii) was rendered excessively broad and vague by the use of the words " or any other such matters ". With regard to paragraph 3 (*a*) (iv), it would be regrettable if treaties of arbitration, conciliation or judicial settlement could be terminated by a unilateral act not provided for in the treaty itself, as the Special Rapporteur seemed to acknowledge in paragraph 18 of his commentary.

[1] Giraud, E., " Modification et Terminaison des Traités collectifs ", Annuaire de l'Institut de droit international, 1961, Vol. I, p. 73.

[2] Giraud, E., *op. cit.*

[3] American Journal of International Law, 1935, Vol. 29, Supplement, Part III, p. 1173.

13. Paragraph 3 (*c*) would no longer be needed if article 15 were reworded in the way he had proposed at the previous meeting (para. 9).

14. It was not certain that the enumeration, in paragraph 4, of treaties which continued in force indefinitely in the absence of provision in the treaty for denunciation or withdrawal, was complete. The residuary rule stated in the following paragraph was insufficient to make good any possible omission, because it was subject to interpretation. Moreover, it might be advisable to delete the last three lines of paragraph 4, since the first of the two conditions laid down was clearly established in section II of the draft and the second followed from paragraph 2.

15. The Commission should redraft article 17, taking the rule stated in paragraph 5 as its starting point, deleting paragraph 3 (*a*), and possibly incorporating in the commentary, as examples of treaties which could not be denounced, the five classes of treaty mentioned in paragraph 4. Paragraph 1 and paragraph 3 (*b*) could be retained.

16. Mr. TSURUOKA said he had little to add to Mr. Castrén's remarks. He agreed that denunciation of a treaty should not be allowed unless the parties had expressly or tacitly agreed otherwise, and it was a substantial concession to allow the agreement to be tacit. That was the predominant view of the authorities and the one which prevailed in the practice of governments. Japan had had experience of it about forty years earlier, when it had wished to denounce unilaterally several restricted multilateral treaties concerning China; the announcement of that intention had raised a storm of protest from the eight other parties to the treaties.

17. Mr. de LUNA said he had grave doubts about article 17, which raised a general problem of law. Law demanded security, sometimes even placing it above absolute justice. The essential point in international society was that States — like individuals under municipal law — should be able to calculate the consequences of their acts. On that score he was opposed to article 17. On the other hand, experience of international life showed that States sometimes suffered restrictions on their freedom without being able to rely on the grounds for invalidation set out in section II of the draft, and were unable to secure the inclusion of denunciation clauses in a treaty. Out of sympathy for the weaker party, he would therefore be inclined to leave the door ajar for certain possibilities of denunciation, as the Special Rapporteur proposed. But on the whole he preferred the position taken by Mr. Castrén and Mr. Tsuruoka.

18. A denunciation clause was found in many treaties; did its absence then mean that the parties had tacitly accepted the possibility of denunciation or that they had wished to exclude it ? In his view, every treaty was a particular case and should be interpreted separately. Moreover, it was clear from international practice that States did not hesitate to invoke Giraud's argument or the contrary one, as their interest dictated. Consequently, neither the fact that certain clauses appeared in many treaties nor the practice of States justified the conclusion that the principle *pacta sunt servanda* should be attacked. The problem should be solved by interpretation of the will of the parties, and if no such interpretation was possible, a treaty could be terminated only by mutual consent of the parties. That rule afforded the maximum security.

19. As to the problem of extinction of a treaty through the disappearance of its object, a distinction should be drawn between complete fulfilment and actual disappearance of the object; but he would not press that point.

20. Lastly, denunciation could be accepted in the case of treaties setting up an international organization, but in addition to compliance with the prescribed periods, a State should be required to have fulfilled all its obligations to its former partners.

21. Mr. AMADO said he feared that article 17 might carry the Commission beyond the limits imposed by the rules of law.

22. With regard to the problem of denunciation, some writers held that treaties which did not contain a denunciation clause could nonetheless be denounced where the *mutuus consensus* implied a *mutuus dissensus*. In such cases, it might be held that the States concerned had tacitly granted each other a right of denunciation. That intention might be presumed in the case of treaties having successive effect which were not expressly concluded for a specified duration, and when there was reason to believe that the contracting parties had not wished to establish a permanent state of affairs. That applied, in particular, to technical treaties, under which the rights and obligations of the parties were identical and the withdrawal of one party would gravely impair the value of the instrument for the other contracting parties.

23. On that problem, however, he shared the views of Mr. Castrén and Mr. Tsuruoka; it would be very dangerous to accept the proposition that the whole structure of a treaty could be demolished. He was particularly opposed to the rule contained in paragraph 3 (*a*) (iv). The problem involved was a very important one; if the Commission did not reach agreement, he would ask for a vote, if need be.

24. Mr. VERDROSS said that, although he had often supported the Special Rapporteur against the majority of the Commission, he was radically opposed to article 17. Not only *de lege lata*, but also *de lege ferenda*, he found it impossible, for reasons of security, to accept a rule which would completely destroy the principle *pacta sunt servanda*. Apart from cases in which the *rebus sic stantibus* clause applied, to which he would revert later, a treaty could only be denounced in two cases: first, when denunciation was permitted by an express clause in the treaty itself or where the records of the negotiations made it sufficiently plain that the parties had wished to permit denunciation, and secondly, when one of the parties broke the treaty.

25. In drafting paragraph 3 (*a*) (iv) the Special Rapporteur had perhaps had in mind the withdrawal by France and Great Britain, during the second World War, of their recognition of the compulsory jurisdiction of the International Court. That was not a case of denunciation,

but of application of the *rebus sic stantibus* clause; for when they had accepted the Court's compulsory jurisdiction, France and Great Britain could not have foreseen that it would one day become a prize court. A treaty of arbitration or conciliation could not normally be denounced unless it contained a specific denunciation clause or unless the records showed that the parties had agreed to permit denunciation.

26. Mr. PAL said he would confine his remarks to the right of denunciation provided for in paragraph 3. It was a matter of common knowledge how the Declaration of London of 1871 [4] had been repeatedly disregarded by many States, and if their conduct was at all relevant to the issue under discussion there was much to be said in favour of the thesis developed by the Special Rapporteur. If the duty to comply with a norm was thus disregarded by statesmen whose sense of obligation was otherwise active and awake, it was most likely that they felt that duty to be in conflict with the obligation to act in accordance with reality and with a view to the practical consequences of their acts, which would affect the millions under their care. He preferred to assume that normally contracting States would behave in that way only when their practical sense came in conflict with their legal conscience and they believed the practical ends to be of superior value. Their duty to respect international law would thus sometimes be subordinated to political considerations concerning the consequences of certain courses of action. It seemed to him that the rule proposed by the Special Rapporteur would help to reconcile political and legal requirements and assist governments to abide by their legal obligations without having to disregard their practical responsibilities. It would certainly be advisable to keep the front door open a little, in order to avoid clandestine entry by the back door.

27. International law could not depend for its efficacy on prescribing imperative abstract rules; it must rely on the power of persuasion and therefore avoid undue rigidity. The Special Rapporteur's proposal, which he supported, was well calculated to further the aim, proclaimed in the preamble to the United Nations Charter, of establishing conditions under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained. Without demanding any rigid final equilibrium it would help towards an approximate correction of the situation.

28. Mr. BARTOŠ said that generally speaking he shared the views expressed by Mr. Castrén, Mr. Tsuruoka, Mr. Amado and Mr. Verdross; as he did not wish to repeat these views, he would confine himself to a comment on the application of paragraph 3 (*a*) (iv).

29. It was possible to imagine, for example, the case of a trade treaty of specified duration concluded in the knowledge that its application was the subject of a treaty of arbitration or judicial settlement by which a certain regime had been established between the parties. If that treaty of arbitration — allegedly accessory, but in fact regulating the stability of relations between the parties — were denounced, the regime it had established would be abolished; it could be said that at that moment the very basis for application of the trade treaty vanished, that new circumstances were created, and that the initial treaty itself must be revised in order to restore secure relations, or be regarded as terminated by virtue of the *rebus sic stantibus* clause. That example showed how dangerous it would be to accept the situation that article 17 would establish. The stability of the international order was at stake. And if the treaty in question was not an economic, but a political one, concerning the security of States and the maintenance of peace, it would be still more serious if the possibility of unilateral denunciation were recognized.

30. Mr. YASSEEN said that, although the principle *pacta sunt servanda* was a corner-stone of international order, all possibility of adaptation by means of certain correctives and exceptions must not be ruled out. It was accordingly necessary to allow the parties to a treaty to review their positions in certain cases. But such revision would be difficult if it were always subject to the agreement of the parties. A treaty involving the vital interests of a State should be terminable at the instance of one of the parties, even if it was silent on the question of its duration. That would perhaps make it possible to amend the old treaty or to conclude a new one more in keeping with the new circumstances.

31. He was thinking mainly of political treaties, such as treaties of alliance, which were not always freely consented to, yet could not readily be avoided by reason of defective consent. The Special Rapporteur had been right to place such treaties in the category of treaties which could be denounced even though they did not contain an express denunciation clause. That applied especially where such a treaty was concluded by a government not incontestably enjoying the people's support. It would accordingly be well to consider the possibility of making the principle *pacta sunt servanda* more flexible, though with caution, in order to adapt it to the requirements of international life.

32. Mr. BRIGGS said that the reason why he had put forward an alternative article on the denunciation of treaties to replace articles 15, 16 and 17 in the Special Rapporteur's report (previous meeting, paras. 9 and 24), was largely that he had not been satisfied with the provisions of article 17. His proposal would fit in with the general introductory article to section III proposed by Mr. Verdross and, as he had already indicated at the previous meeting, further articles dealing with termination other than by denunciation would be needed. His own text differed radically from that of the Special Rapporteur because, in his opinion, international law did not permit denunciation, except in accordance with the provisions of the treaty or with the consent of all the other parties.

33. In paragraphs 2 and 3 of his text he had dealt with the legal effects of denunciation; paragraph 3 did not indicate whether a multilateral treaty would survive after being denounced by one of the parties and so might possibly need modification.

[4] British and Foreign State Papers, Vol. 61, p. 1198.

34. Analysing the structure of article 17, he said that paragraph 2 would certainly need redrafting: the qualification " by their nature " was dangerously vague. Presumably the provision was designed to deal with the case of treaties which continued in force unless there had been failure to fulfil the purpose intended, for example, when a party to an arbitration treaty refused to implement it after it had entered into force.

35. He could find no instances in practice to support the rule proposed in paragraph 3, which appeared to have been inspired by a doctrine upheld by English writers. The German, Italian and United States authorities he had had time to consult did not subscribe to the theory that, in the absence of an express provision regarding termination in any of the types of treaty listed in that paragraph, an implicit right of denunciation was to be presumed. The arguments adduced by the Special Rapporteur in paragraph 11 of the commentary could with the same force be used to prove the opposite contention, that if treaties were silent about termination, the parties had deliberately intended to exclude denunciation. Intention had to be interpreted from what was expressed in the treaty itself or probably, in certain cases, from the *travaux préparatoires*, but if there was no evidence as to what the intention of the parties had been, then a rule of the kind being proposed by the Special Rapporteur would conflict with the principle *pacta sunt servanda*.

36. The provision in paragraph 3 (*b*) seemed to be intended to provide a way of circumventing the procedures for amending the United Nations Charter, so as to permit of unilateral withdrawal in certain cases. He had never been convinced that a right of withdrawal did in fact exist.

37. Mr. ROSENNE said that article 17 was one of the most important in the draft. Any member of the Commission who had ever been called upon to give a legal opinion concerning the right of denunciation would be acutely aware of the delicate and difficult problems created by a denunciation or purported denunciation of a treaty. He fully subscribed to the bold and correct approach adopted by the Special Rapporteur and supported his proposal, which would become clearer if firmly drafted in terms of a residual rule. That would also bring out the importance of articles 15 and 16.

38. There was a great deal of doubt and confusion about what the law was on the matter and neither state practice nor doctrine offered much clear guidance, so it must be frankly admitted that the Commission was engaged in framing a rule *de lege ferenda*.

39. Since what was involved was a residual rule, the dominant factor was the interpretation of the intention of the parties, not merely as expressed in the treaty itself, but, as the Commission had realized at the previous session, as ascertained from all the circumstances attending the conclusion of the treaty.

40. Generally speaking, he accepted as a point of departure the proposition that treaty obligations could only be dissolved by mutual consent. Doctrine and state practice had both placed reliance on the Declaration of London of 1871, though it was more ambiguous than was sometimes realized, and if the reference to that Declaration were retained in the commentary, then some mention should also be made of the resolution adopted by the Council of the League of Nations on 17 April 1935,[5] which largely reaffirmed the principles underlying the Declaration; both those statements brought out the serious political implications of a situation that caused a State to denounce a treaty, as well as the grave effects of such action, and illustrated what Mr. Pal had wisely described as the problem of reconciling political and legal requirements.

41. The Special Rapporteur's proposal for a regulated right of denunciation for certain types of treaty would meet a serious need and lead to greater stability in international relations. He emphatically contested the assertion that it would destroy the principle *pacta sunt servanda*, particularly if it were coupled with assertion of the rule that, in general, denunciation was not legally permissible, and it would go far towards minimising the kind of political difficulties which could arise with the denunciation of important treaties. On that last point he had been impressed by some of the considerations advanced in the passage from Giraud's study, quoted in paragraph 8 of the commentary. Such a rule would also be of assistance to those responsible for drafting treaties and should result in a clearer expression of intention by the parties, whether in the treaty itself or in the related documents which often provided the source for interpreting intention.

42. In paragraph 9 of the commentary the Special Rapporteur had mentioned the kind of difficulties that had arisen over denunciation clauses during the discussions at the Conference on the Law of the Sea.[6] If a clear residual rule had existed at that time, the task of government representatives and legal advisers in deciding how to vote would have been greatly simplified. Such a rule would automatically provide the means for ascertaining the intention of the parties, which in the present confused state of doctrine and practice was not available.

43. With regard to drafting, the article should begin with a statement of the general principle, and the exceptions should follow. Perhaps it was unnecessary to include examples in the text; but if they were omitted, they should appear in the commentary. If paragraph 2 were retained, perhaps it would be better expressed if the words " until the purpose of the treaty is discharged " were substituted for the words " until devoid of purpose ".

44. While it might be a matter of regret that treaties of arbitration, conciliation or judicial settlement had been included in paragraph 3 (*a*), he had no serious difficulty in accepting that category as one for which a regulated right of denunciation ought to be recognized; but if sub-paragraph (iv) were retained and the commentary was accepted more or less in its present form, reference to declarations accepting the optional clause ought to be removed from the latter, because such instruments were not of quite the same character as arbitration treaties.

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[5] League of Nations, *Official Journal*, May 1935, No. 5, pp. 551-552.

[6] United Nations Conference on the Law of the Sea, 1958, *Official Records*, Vol. II, pp. 19, 56 and 58.

45. He found it difficult to accept paragraph 3 (*b*) because he did not consider — and the commentary seemed to bear out his view — that the constituent instruments of an international organization came within the scope of a residual rule or that the right to withdraw from them should be regulated in a general code on the law of treaties.

46. He supported Mr. Castrén's suggestion that the proviso at the end of paragraph 4 should be deleted. Sometimes treaties were denominated a *modus vivendi* for purely diplomatic reasons, but were in fact intended to have an indefinite duration.

47. One important issue which was not touched upon in the article was the effects of denunciation — a matter that would certainly have to be discussed, because whether lawful or not, denunciation created a new situation and the effects could be entirely different from those following upon the expiry of a treaty; the question could perhaps be taken up in conjunction with Mr. Verdross's proposal for an introductory article.

48. Mr. AGO said that the Special Rapporteur's method of listing examples and categories made it more difficult for the Commission to reach unanimity, because some of the members might attach particular importance to one or other of the categories. Article 17 was far too detailed and the form in which it was drafted could certainly not be final. Some of the points it contained should be placed in the commentary and others could be omitted.

49. Undeniably, however, the problem existed and a rule was needed. The essential principle was that when a treaty contained no provisions regarding its duration or the right of the parties to denounce it or to withdraw, it was necessary to ascertain what the will of the parties had in fact been. That will might be deduced from the nature of the treaty, from its object or from the circumstances of its conclusion. Hence the basic principle was that stated in paragraph 5. Although he agreed with the Special Rapporteur on the substance of that paragraph, he thought it would be better to refer specifically to the problem of denunciation and withdrawal rather than to the duration of the treaty. It should be stated that the problem was one of interpretation, and that the nature of the treaty or the circumstances of its conclusion would show whether denunciation or withdrawal were permissible or not. For even if a treaty could be denounced, that did not necessarily imply that it was of a temporary nature, especially if it was a multilateral treaty. That however, was simply a matter of drafting.

50. For cases in which interpretation did not clearly bring out the will of the parties, a rule would have to be stated, if only to remind the parties of the need for a clear statement of their intention. Such a rule should, however, be as strict as possible and provide adequate safeguards. The Special Rapporteur himself held that view, since he had listed various types of treaty in regard to which there could be no question of denunciation.

51. On the other hand, the Special Rapporteur had listed several cases in which there could be a presumption in favour of denunciation or withdrawal. It would be more appropriate to mention those examples in the commentary. The greatest caution should be exercised in recognizing the possibility of a State's withdrawal. It might perhaps be recognized in the case of trade agreements, which nearly always contained clauses on duration or denunciation, since they were concluded to meet a given situation. In other kinds of treaty, States usually endeavoured to limit the obligations of the parties. The possibility of an oversight must, of course, always be taken into account, but as a rule, if States omitted to include a specific clause on the subject, it was because they did not wish to permit denunciation. To do so would therefore run counter to the true intention of the parties.

52. On the whole article 17 was undoubtedly necessary, for the fact that such a rule was stated was even more important than the content of the statement. The article should therefore be redrafted in more condensed form and the various categories of treaty listed in the commentary.

53. Mr. LACHS commended the Special Rapporteur on the great effort he had made to find a solution to a very difficult problem; his excellent commentary illustrated the difficulties involved and the conflicting views on the issues under discussion. Personally, he could not subscribe to the extreme view put forward by Giraud, that general multilateral conventions constituted a kind of prison for the contracting parties.[7] Nor could he subscribe to the other extreme view in favour of the right to denounce treaties.

54. Treaties generally provided for balanced reciprocal advantages for the parties. In some cases, one of the parties would benefit from the terms of the treaty immediately, but the other would have to wait a long time before deriving some advantage, meanwhile faithfully carrying out its obligations under the treaty. If it were open to the former party to denounce the treaty at any time, that would be tantamount to permitting it to derive the full benefit from the terms of the treaty and then to terminate it when the time came, so to speak, to pay for what it had received.

55. Sometimes, because of the nature of the treaty, it could be assumed that the parties had intended to leave open the possibility of denunciation or termination after a period of time. An important point to remember was that the absence of a specific provision on the subject of denunciation or termination could be due to a mere oversight on the part of the negotiators; in fact, he had come across two cases in which an agreement had been concluded without any stipulation as to the date of its entry into force or of its expiry.

56. That being so, the question arose under what conditions the provisions of article 17 would come into operation. Those conditions should not be confused with conditions arising from a fundamental change of circumstances and in their determination, both objective and subjective elements should be taken into account, bearing in mind always the intention of the parties.

57. There was a case for a provision along the lines of article 17, but a formula must be found which steered

[7] See Commentary, para. 8.

a middle course between the two extreme views he had mentioned. That applied particularly to the list of types of treaty given in the article. Some of the examples needed careful consideration while others entered dangerous fields. In particular, he agreed with Mr. Briggs that the example relating to withdrawal from an international organization should be dropped. He did not find the example in paragraph 2 of the commentary on withdrawal from the World Health Organization at all convincing; he had had serious doubts at the time regarding the correctness of the procedure adopted. Moreover, the question of usage would inevitably arise in connexion with international organizations. Some were so recent that no usage existed, while even for some of the older ones there might not yet be any experience of the problem of withdrawal.

58. With regard to the examples in paragraph 4 (*a*), he had doubts regarding the case of a treaty which granted " right in or over territory ". There was a considerable difference of opinion among writers as to whether international law recognized the existence of permanent rights over foreign soil. It was doubtful whether the concept of an easement in perpetuity existed in international law.

59. He also had doubts about the example in paragraph 4 (*b*) of a treaty establishing " a special international régime ". An obvious example was the trusteeship system which, at the time of the signing of the United Nations Charter, had been widely believed to be an institution of a permanent character; by 1963, however, it had become clear that the institution was dying out.

60. As to the examples in paragraph 3 (*a*), some of the treaties mentioned could have a temporary character. The treaties of alliance or of military co-operation mentioned in sub-paragraph (ii) could be considered as merely temporary, until an effective system of collective security was worked out.

61. Those remarks, however, did not affect his general view that it was desirable to have an article along the lines proposed by the Special Rapporteur. It should take the form of a residuary rule and the Drafting Committee and the Special Rapporteur should be asked to submit an alternative draft in the light of the discussion.

62. Mr. TUNKIN said that the discussion had revealed a cleavage of opinion among members. Some felt that acceptance of the Special Rapporteur's draft would endanger the very principle of *pacta sunt servanda* and that, where a treaty was silent on the subject of denunciation or termination, it could only be denounced with the consent of all the parties. Others, while supporting that principle, were prepared to recognize exceptions to it, dictated by the realities of life.

63. The general problem involved was connected with the relationship between rules of customary international law and rules of conventional or treaty law. Giraud's views had clearly been influenced by the old theory that general international law consisted solely of customary international law and that conventional law was only a particular international law.

64. His own view was that, in international relations, conventional norms of international law were on exactly the same level as customary norms. Customary norms were not subject to any condition regarding their duration. The position was the same with regard to treaty law: when a treaty was silent on the subject of its duration, the principle was that it could only be dissolved by the consent, express or tacit, of the parties.

65. The thesis proposed by Giraud was not only mistaken but dangerous, because it would detract from the principle *pacta sunt servanda*. He could not accept the assumption that because a State was under no obligation to enter into a treaty, it could therefore dissolve the treaty at any moment. It was the essence of an agreement that it should bind the parties.

66. He therefore accepted the principle that, if the treaty were silent, it could only be dissolved with the consent of the parties. He also believed that some specific situations called for exceptions to that rule. It was necessary to balance the need to preserve the rule with the need to take certain facts into consideration, and it was precisely that balance which the Special Rapporteur had succeeded in achieving.

67. While he thus agreed with the principles on which article 17 was based, with regard to its formulation he inclined to the views put forward by Mr. Rosenne and, as he had understood them, by Mr. Ago. The article should be redrafted so as to state, first, the principle that a treaty could be dissolved only with the consent of the parties, after which the exceptions would follow. That would involve deleting paragraphs 4 and 5, because their content would be covered by the general rule to which he had referred.

68. With regard to the examples given in paragraph 3, he did not think that " a commercial or trading treaty " should be included. He would retain treaties of alliance or military co-operation and treaties for technical co-operation in economic, social, cultural, scientific, communications or other such matters, but he was doubtful about treaties of arbitration, conciliation or judicial settlement.

69. With regard to paragraph 3 (*b*), he shared the view that it was not desirable to try to solve the particular problem of the constituent instrument of an international organization in a draft on the law of treaties.

70. Mr. GROS said that although he had made a careful study of the Special Rapporteur's very full commentary, he could not endorse his argument. The problem could be approached from another angle. The argument put forward by some members of the Commission, the basis of which he accepted — namely, that the actual facts required a specific situation in law to be treated more flexibly in certain circumstances — led to the conclusion that a regulated right of denunciation was needed. But where were the rules to be found ? Certainly not in the text of article 17, since the members of the Commission did not agree about the various categories of treaty to be considered and the classification of treaties according to their nature was contested.

71. A general definition would therefore have to be adopted. A State could not be permitted to denounce

a treaty merely because it no longer appeared sufficiently advantageous. There were other cases, such as impossibility of executing the treaty or a change in the circumstances, which the Commission would consider. But when did a State really need a right of denunciation governed by rules other than the general rules of international law which applied to the cases he had mentioned ? It was certainly possible to put forward hypothetical cases, but it was no use reasoning from anomalies.

72. If a State had concluded a treaty of indefinite duration and wished to amend it for legitimate reasons, its first step would surely be to approach the other party. It must therefore at least be presumed that the other party or parties had refused to negotiate. The most reasonable procedure would be to state that in treaties of indefinite duration, there was a tacit *pactum de negotiando*. It could then be recognized that if a State refused to negotiate the amendment of such a treaty without valid grounds, it violated an obligation implicit in the treaty.

73. He would revert to the substance of article 17 later.

74. The CHAIRMAN, speaking as a member of the Commission, said that for the first time he found himself not fully in agreement with the substance of a rule proposed by the Special Rapporteur. Article 17 was too timid in proclaiming the residuary rule and at the same time too bold in enumerating exceptions. The previous special rapporteur had been more assertive in expressing the rule and less generous in the matter of exceptions.

75. With regard to the various provisions of the article, paragraph 2 related to a different mode of termination of a treaty, namely, fulfilment of its intended purpose; the provision should be retained, but should form a separate article.

76. The enumeration in paragraph 3 (*a*) was unduly long. He could not agree with the inclusion of commercial or trading treaties. Practically all the establishment treaties between Latin-American and European countries had been concluded in the form of commercial treaties and would be placed in jeopardy if it were possible to denounce them in the manner set out in paragraph 3 (*a*). Nor was he certain that the examples given in the other sub-paragraphs were entirely valid, particularly the example in sub-paragraph (iv) of a treaty of arbitration, conciliation or judicial settlement.

77. In fact, it was not so much the nature or the subject matter of a treaty which made it open to denunciation, but the will of the parties or the circumstances of the conclusion of each treaty which showed whether it was intended to be permanent or not.

78. He agreed with those members who had urged the deletion of paragraph 3 (*b*), while paragraph 4 would be logically unnecessary if the residuary rule in paragraph 5 were expressed as such.

79. Consequently, although he could not support the Special Rapporteur's text, he was equally unable to support Mr. Briggs's alternative which went to the opposite extreme and would allow practically no right of denunciation unless permitted under the terms of the treaty itself. Mr. Briggs himself, in his statement, appeared to have yielded a little from that extreme position when he had admitted that the right of denunciation might be deduced from the *travaux préparatoires* or inferred from the nature of the treaty or the circumstances attending its conclusion.

80. His views were very close to those of Mr. Ago, in that he favoured an article on simple lines, expressing the general rule that, where a treaty contained no provision on denunciation or termination, the right of denunciation would exist only where it could be inferred from the *travaux préparatoires* or from the circumstances attending the conclusion of the treaty. In all other cases, the consent of the parties would be necessary. The Commentary could give a list of examples including, with the necessary qualifications and reservations, some of the instances referred to in paragraph 3 (*a*).

81. Sir Humphrey WALDOCK, Special Rapporteur, said the majority of members appeared to be opposed to his approach to article 17. Other members, on the other hand, desired to retain, in a simplified article, the general concept that, in certain classes of treaty, a regulated right of denunciation was implicit; those members, like himself, favoured a carefully regulated right of denunciation, not a right of denunciation without notice.

82. Although article 17 appeared radical at first sight, it should be remembered that paragraph 3, the controversial paragraph, constituted a residuary rule. Most treaties were covered by the provisions of article 15 and their denunciation or termination was governed by the provisions of the treaties themselves. Article 16 dealt with the case where the intention of the parties was to conclude a treaty of indefinite duration. Article 17 stated the principle that a treaty could only be terminated in accordance with its own terms or by agreement of the parties.

83. His policy had been accurately described by Mr. Ago. He realized the difficulties which would arise from the examples he had given, but it was necessary to list the examples given in paragraphs 3 and 4 in order to be able to discuss them. Of course, if the Commission were to adopt the course of stating the principle that the termination of a treaty could only take place in accordance with its own terms or by agreement between the parties, the examples given in paragraph 4 would become unnecessary; exceptions would naturally have to be specified and they would be those of the list in paragraph 3 (*a*) which the Commission would agree on. Unfortunately, it was clear that it would be a very difficult task to draw up an agreed list of exceptions, and the Commission might have to fall back on the course suggested by Mr. Ago of adopting a general formula allowing for certain exceptions based on the nature of the treaty or the circumstances of its conclusion.

84. He fully agreed with Mr. Ago that it was essential to have some provision on the subject in order to give clear guidance to States and encourage them to include provisions on denunciation or termination in their treaties. A general formula would be of little help in that respect.

85. It had been suggested that the intention to permit denunciation could be inferred from the *travaux préparatoires*. But it was a rule that, where the text of a treaty was clear, it was not permissible to refer to the *travaux préparatoires*. And, where a treaty contained no clause on the subject of denunciation or termination, it could be urged that the text of the treaty was clear and that it did not provide for the right to denounce. The difficulty could perhaps be resolved by a provision stating that reference could be made to the *travaux préparatoires* for the purpose, with due regard to the nature of the treaty.

86. With regard to the proposals that paragraph 3 (*b*) should be deleted, his purpose in including that provision had been to exclude from the operation of the rule embodied in article 17 treaties which were constituent instruments of international organizations. When adopting the various articles of Part I at the previous session, the Commission had usually made an exception for such treaties or referred to the constitutional practice of international organizations.

87. With regard to Mr. Gros' suggestion, the idea of re-negotiation was very interesting, but he felt that cases which came under that heading would hardly present any real difficulty. The purpose of article 17 was to deal with cases in which no agreement had been reached by the parties and it was necessary to determine whether a right to denounce the treaty existed. If such a right were granted, it would have the important effect of persuading the other party to re-negotiate; the absence of such a right could leave one of the parties at the mercy of the other. The absence of a specific provision on the subject of denunciation or termination of a treaty was often due to mere oversight, especially in the case of treaties in simplified form.

88. His views had not been influenced in any way by those of Giraud or indeed of any other writer, although he had drawn inspiration from certain writers, mainly English, in the selection of examples. Essentially, the provisions of article 17 were based on state practice. Since, in the great majority of cases, treaties contained provisions on the subject of denunciation or termination, it was reasonable to assume that States normally regarded it as important that treaties should have a limited duration.

89. He suggested that he should undertake the re-formulation of articles 15, 16 and 17 in the light of the discussion; in the case of article 17, he would endeavour to formulate the rule first and to make the exceptions follow. The Drafting Committee could consider and finalize the new texts, which would then be submitted to the Commission for its consideration.

90. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur.

It was so agreed.

The meeting rose at 1.5 p.m.

690th MEETING

Thursday, 30 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 18 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 18 (TERMINATION OF A TREATY BY SUBSEQUENT AGREEMENT

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing the article, said he had prepared a somewhat lengthy text because he considered it necessary to formulate a number of problems that arose in connexion with the termination of a treaty by subsequent agreement in order to give members an opportunity to express their views on those problems.

3. Paragraph 1 dealt essentially with the question of the unanimity necessary for the termination of a treaty. Its provisions followed from the position adopted by the Commission regarding the articles in Part I of the draft on the participation of new States in a multilateral treaty.

4. Some members might perhaps feel that the provisions of paragraph 1 (*a*) were unnecessarily complicated. Basically, like those of paragraph 1 (*c*), they embodied the rule that the unanimous agreement of the parties to a treaty was necessary for its termination. Paragraph 1 (*a*), however, took into account an additional point: the interest of other States which might have a right to accede to the treaty. It would be for the Commission to consider whether article 18 should specify that the consent of those States would also be required, at least for a certain period after the conclusion of the treaty.

5. Paragraph 1 (*b*) dealt with a somewhat exceptional case and its provisions were analogous to the corresponding ones in Part I on the subject of participation in a treaty. Some members might wish to omit that paragraph, but he thought the point should be covered in article 18.

6. Paragraph 2 was based on the logic of applying to the question of termination the provisions contained in the treaty itself concerning the procedure for its amendment or revision. It could, of course, be argued that the parties were masters of their own procedure and it might therefore be necessary to insert at the beginning of the paragraph the proviso " Unless the parties otherwise decide ".

7. Paragraph 3, although it related to the form of the agreement, in fact dealt with certain points of substance. It was not at all uncommon for a treaty to be terminated by drawing up a new treaty to replace it. The