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Summary record of the 717th meeting

Topic:
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the Special Rapporteur had made him hesitate. The expression in question referred to a faculty reserved to the State, which it would exercise after weighing the pros and cons.

36. Mr. AGO said that, if he had correctly understood the meaning of the words " if it thinks fit ", as explained by the Special Rapporteur, in order to bring out the discretionary element the French text should be amended to read " *à sa discrétion* " instead of " *s'il le juge bon* ".

37. Sir Humphrey WALDOCK, Special Rapporteur, explained that there was a shade of difference between the provisions of paragraph 2 of article 7, on fraud, and those of paragraph 3 of article 8, on error. In the case of fraud, there was always an injured party, but in the case of error, there was generally no injured party; injury would only be conceivable where the error had been induced by misrepresentation by one of the State concerned.

38. In view of the difference between the two situations, there was perhaps some advantage in emphasizing the discretionary element in the case of fraud. That explained why the words " if it thinks fit " were used in article 7, but not in article 8. But since those words had raised some difficulty, he would be quite prepared to omit them.

39. The CHAIRMAN put article 7 to the vote with the deletion of the words " if it thinks fit " and the substitution of the word " clauses " for " provisions ".

Article 7, thus amended, was adopted by 19 votes to none, with 1 abstention.

The meeting rose at 5.50 p.m.

717th MEETING

Tuesday, 9 July 1963 at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

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

Articles submitted by the Drafting Committee

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

ARTICLE 8 (ERROR)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new text for article 8, which read:

" 1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

" 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

" 3. Under the conditions specified in article [3], an error which relates only to particular clauses of a treaty may also be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

" 4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and Articles 26 and 27 of Part I then apply."

3. Paragraphs 1, 2 and 4 reproduced paragraphs 1, 2 and 3 of the text adopted by the Commission at its 705th meeting (paras. 1-18); paragraph 3 was new and dealt with the question of separability.

4. Mr. YASSEEN suggested that in paragraph 3 the word " also " should be dropped, as it was unnecessary.

5. Sir Humphrey WALDOCK, Special Rapporteur, accepted that suggestion.

6. Mr. PAREDES suggested that, in the Spanish text of paragraph 1, the word " *suponía* " should be replaced by the word " *aceptaba* ". Since the State concerned felt certain that the fact or state of facts actually existed, in other words, acknowledged their existence, what was involved was not a supposition, but a certainty.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the change was one of substance and would involve amending the English and French texts as well; the word " assumed " would have to be replaced by " acknowledged ". He must oppose that change because it would not reflect the intended meaning.

8. The CHAIRMAN said that there was no support for Mr. Paredes' suggestion. If there were no objection, he would put article 8 to the vote as amended by the deletion of the word " also " in paragraph 3.

Article 8, thus amended, was adopted by 13 votes to none with 1 abstention.

ARTICLE 11 (PERSONAL COERCION OF REPRESENTATIVES OF STATES)

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new text for article 11, which read:

" 1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

" 2. Under the conditions specified in article [3], the States whose representative has been coerced may, if it thinks fit, invoke the coercion as invalidating its

consent only with respect to the particular provisions of the treaty to which the coercion relates."

10. Paragraph 1 reproduced the text adopted by the Commission at its 705th meeting (paras. 19-30); paragraph 2 was new and dealt with the question of separability.

11. The Drafting Committee had carefully considered whether separability was admissible where a treaty was vitiated because consent had been procured by personal coercion of the negotiating representatives. It had taken into account the Commission's view that personal coercion was a very grave matter, and came close to coercion of the State. However, there was a possibility, though a rather remote one, that coercion might take the form of blackmail or corruption and be connected with the acceptance of a particular part of the treaty. In such a case, the injured State might perhaps be penalized if it were not allowed to maintain the rest of the treaty, which was not affected by the coercion of its representative.

12. Mr. VERDROSS thought it might be desirable to insert the words " or against members of their families " after the words " in their personal capacities " in paragraph 1, since threats against a representative's family might have the same consequences as threats against the representative himself.

13. Mr. CASTRÉN pointed out that the word " provisions " was used in the English text of paragraph 2; it had been decided at the previous meeting to replace it by the word " clauses " (716th meeting, para. 39).

14. Mr. TSURUOKA noted that the word " *également* " used in the French text of paragraph 2, had no equivalent in the English text. The Commission had decided to delete the word from article 8, and it should also be deleted from article 11.

15. Mr. CADIEUX, referring to the point raised by Mr. Verdross, said that a threat against a member of a representative's family constituted, in a sense, pressure exerted on the representative in his personal capacity. Any attempt to specify exactly how far that kind of coercion extended would lengthen the article considerably; it might be sufficient to mention the point in the commentary.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that the matter was already fully explained in the commentary. The Commission had always understood that the expression " acts or threats directed against them in their personal capacities " would include indirect coercion by means of threats against the family.

17. The CHAIRMAN suggested that the difficulty might arise from the fact that the French word " *personnellement* " could be understood as excluding the family; the English text seemed clearer.

18. Mr. GROS said he fully endorsed the Special Rapporteur's interpretation. The intention was to cover all forms of threat against a representative, no matter which members of his family were affected. He thought the word " *personnellement* " did render that idea, for what was meant was a personal threat, which was not the same as a threat against the person. He did not think the present text was ambiguous but he saw no objection to amending it.

19. The CHAIRMAN said that, if there were no objection, he would put article 11 to the vote as amended by the deletion of the word " *également* " from the French text of paragraph 2.

Article 11, thus amended, was adopted by 13 votes to 1.

ARTICLE 13 (TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (*jus cogens*))

20. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the title of article 13 as adopted by the Commission at its 705th meeting (paras. 53-89), had been shortened by the Drafting Committee. The proposed text read:

" Article 13: Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

" A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

21. The Drafting Committee had reached the conclusion that severance should not be allowed in the cases covered by article 13. It was possible that the conflict with a rule of *jus cogens* might only affect certain clauses of the treaty, but the Committee had considered that, in view of the nature of *jus cogens*, it would be inappropriate to recognize separability. If the parties entered into a treaty which conflicted with an existing rule of *jus cogens*, they should take the consequences; the treaty would be invalidated and all that the parties could do would be to re-negotiate the treaty, and formulate it in accordance with international law.

22. The wording of the article had been slightly amended in order to meet a point raised by Mr. Yasseen (705th meeting, para. 63).

23. Mr. YASSEEN said that the phrase " from which no derogation is permitted " was rather vague, for to derogate unilaterally was not permitted, even from a rule which did not have the character of *jus cogens*. It might be more accurate to say: " A treaty is void if it conflicts with a general norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character ".

24. Mr. TUNKIN said that the change proposed by Mr. Yasseen would weaken the text. He was fully aware of the problem involved, and had himself spoken on it during the earlier discussion of the article (705th meeting, paras. 75-77). The intended meaning was that States could not contract out, and the expression " from which no derogation is permitted " should be construed

in that sense; if it were taken to mean that no breach was permitted, there would be confusion between rules of *jus cogens* and other rules of international law, since no breach of any rule of international law was permitted.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that the present text meant precisely that States could not contract out of the rules in question. However, the meaning could, if necessary, be made still clearer by adding, after the word " permitted ", some such words as " even by agreement between States ".

26. Mr. BRIGGS supported the Special Rapporteur's view.

27. The CHAIRMAN, speaking as a member of the Commission, said that while he agreed that the additional words were not logically necessary, they would help to make the meaning clearer to anyone who was not familiar with the Commission's discussions.

28. Mr. ROSENNE said it was quite clear that the term " derogation " meant something entirely different from " breach ". As now drafted, the article stated categorically that States were not permitted to contract out of the *jus cogens* rules in question.

29. Mr. TSURUOKA said he preferred the original wording because, in general, a new rule of that character could be created only by agreement between the majority of States. If the expression " even by agreement between States " were used, it might perhaps be held to exclude the possibility of creating a new rule, which was not the intention.

30. Mr. GROS said that, from the point of view of drafting and clarity, the text seemed preferable without the addition of the words " even by agreement between States ". As Mr. Rosenne and Mr. Tunkin had observed, the present text was very firm and quite unequivocal. There could be no derogation except by agreement between States. The text proposed by the Drafting Committee had, moreover, been suggested precisely by the criticisms made by Mr. Yasseen. For his part, he hoped it would be retained.

31. Mr. YASSEEN said that, for the sake of greater clarity and precision, he would have preferred the addition of the words proposed by the Special Rapporteur and supported by the Chairman; for a unilateral derogation might conceivably occur, for example, if a constitutional rule were adopted which derogated from a rule of *jus cogens*. In that case there would not be a breach, but a derogation from a rule of general international law by a rule of internal law.

32. What might make the present wording acceptable was the final phrase: " which can be modified only by a subsequent norm of general international law having the same character ".

33. Mr. CADIEUX said he favoured the existing text. The difficulty arose from the fact that two meanings could be attached to the word " derogation ". It could be understood to mean either a breach — and that case was covered by the expression " peremptory norm " — or an exception to the rule by virtue of unilateral or internal measures or of a treaty, which seemed to be covered by the last part of the text. For greater precision it would be necessary to state that the parties to a treaty likewise could not derogate from a peremptory norm by measures of internal law or by any act performed without notice, and that would greatly complicate the wording of the article. It would probably be sufficient to go into that point in the commentary.

34. Mr. VERDROSS said he could accept the text proposed by the Drafting Committee or that suggested by Mr. Yasseen, but certainly not the words: " *even* by agreement between States ". If a clear distinction was made between a breach and a derogation, it was not possible to derogate from a rule of international law otherwise than by another rule of international law. The words " *even* by agreement between States " implied that a derogation was possible not only by agreement between States, but also otherwise, which in reality it was not.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not formally proposed the addition of the wording criticised by Mr. Verdross. He himself considered that the text as it stood fully expressed the intended meaning. He had merely endeavoured to assist the Commission by suggesting a form of words which, although not strictly necessary, might make the meaning clearer; perhaps a better wording would be " whether by agreement or otherwise ".

36. Mr. TUNKIN said that, although he considered the text satisfactory as it stood, he could accept the last form of words suggested by the Special Rapporteur. It should be remembered that the text had still to be submitted to governments; when their comments were known, the Commission would have to reconsider it.

37. The CHAIRMAN put to the wote the amendment suggested by the Special Rapporteur, adding the words " whether by agreement or otherwise ", after the word " permitted ".

The amendment was rejected by 5 votes to 5, with 5 abstentions.

38. Mr. ROSENNE said that he had abstained from voting on the amendment.

39. The CHAIRMAN put article 13 to the vote as submitted by the Drafting Committee.

Article 13 was adopted unanimously.

ARTICLE 15 (TERMINATION OF TREATIES THROUGH THE OPERATION OF THEIR OWN PROVISIONS)

40. Sir Humphrey WALDOCK, Special Rapporteur, said that, since the 708th meeting, the Drafting Committee had further amended the title of article 15 to read " Termination of treaties through the operation of their own provisions " and had redrafted the text to read:

" 1. A treaty terminates through the operation of one of its provisions:

" (*a*) on such date or on the expiry of such period as may be fixed in the treaty;

" (*b*) on the taking effect of a resolutory condition laid down in the treaty;

" (*c*) on the occurrence of any other event specified in the treaty as bringing it to an end.

" 2. When a party had denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

" 3. (*a*) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.

" (*b*) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force."

41. Though some members of the Commission had considered paragraph 1 unnecessary, the majority had seemed to be of the opinion that it had its place in a codifying instrument. No substantial changes had been introduced in the revised text and the Drafting Committee had thought it unnecessary to insert a cross-reference to the articles providing for termination in other ways, as suggested by Mr. Castrén.

42. Mr. CASTRÉN said he was willing to vote for the Drafting Committee's text, but must point out that, in paragraph 3 (*a*) the French words " *a cessé d'y être partie* " did not exactly correspond to the English word " withdrawn ". It would be better to use the verb " *se retirer* ", as in other articles.

43. Mr. GROS said that that was just a matter of language, but it was nevertheless more correct to say " *a cessé d'être partie* ". The verb " *se retirer* " expressed the act whose consequence was that the State concerned ceased to be a party to the treaty. Of course one could say " *s'est retirée* ", but although the noun " *retrait* " was good French, the verb was not equally apt. It was just a question of style, for as far as substance was concerned, the two ways of expressing the idea were exactly equivalent.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that " withdraw " was the proper term in English and was used in treaty clauses concerning termination.

45. The CHAIRMAN said he questioned whether the expression used in the French text was the exact equivalent.

46. Sir Humphrey WALDOCK, Special Rapporteur, said he wondered whether the expression used in the French text would be appropriate for the other articles in section III. Paragraph 3 (*a*) was concerned with the voluntary exercise of the right of withdrawal. He would have no objection to amending the English text by substituting the words " or exercised its right to withdraw " for the words " or withdrawn ".

47. Mr. GROS said that in French it would then be necessary to say " *a exercé son droit de retrait* ", but that was not exactly equivalent to the English word " withdrawn ".

48. Mr. AGO thought that the expression " *a exercé son droit de retrait* " would be preferable, if an equivalent phrase could be found in English. What was really meant was two successive acts: first, the exercise of the right to withdraw and then the result, which was that the treaty no longer applied to the party in question.

49. Mr. TSURUOKA suggested the words " *ou s'en est retirée* ".

50. Mr. GROS said that that was correct, even if not perhaps the best legal drafting.

51. Mr. CADIEUX suggested that the form of words used in article 16 (para. 57 below) might be taken as a model. Whatever decision the Commission took would have to be uniformly applied to the other articles.

52. Mr. GROS said that the case contemplated in article 16 was rather different, for it was stated there that a party could denounce or withdraw from the treaty, whereas in article 15 it was stated that a legal act — denunciation or the exercise of the right of withdrawal — had been performed in conformity with the terms of the treaty. Technically, it would therefore be more correct to say " *a exercé son droit de retrait* " in article 15, and that would not involve any inconsistency between the two articles. The concording of the texts of the articles would, as usual, be carried out by the Drafting Committee at its last meeting.

53. Mr. TUNKIN said that if the Special Rapporteur's suggestion were adopted, it would mean substituting the words " exercised its right to denounce " for the word " denounced "; personally, he preferred the text as it stood and did not think there was any discrepancy between the English and French versions.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that in fact no change was necessary in the English text; the words " in conformity with " made it sufficiently clear that the act of denunciation or withdrawal had been performed in the exercise of a right.

55. Mr. GROS said he accepted the wording proposed by Mr. Tsuruoka.

56. The CHAIRMAN put article 15 to the vote as amended by the substitution, in the French text of paragraph 3 (*a*), of the words " *s'en est retirée* " for the words " *a cessé d'y être partie* ".

Article 15 was adopted by 17 votes to none.

ARTICLE 16 (TREATIES CONTAINING NO PROVISIONS REGARDING THEIR TERMINATION)

57. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's decision

at its 709th meeting (paras. 7 and 40), the Drafting Committee had expressed the proviso in the first sentence of article 16 in positive instead of negative form. The text proposed read:

" A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depositary not less than twelve months' notice that effect."

58. Mr. TABIBI said he could vote in favour of article 16 on the understanding that the right of denunciation in accordance with the principle of self-determination was provided for in other articles.

59. The CHAIRMAN put article 16 to the vote.

Article 16 was adopted by 14 votes to 2.

ARTICLE 20 (TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH)

60. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had made small drafting changes in paragraphs 1 and 2 (*b*) of the text adopted by the Commission at the 709th meeting (paras. 92-128); the article now read:

" 1. A material breach of a bilateral treaty by one party 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*) any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting States;

" (*b*) the other parties by common agreement either:

" (i) to apply to the defaulting State the suspension provided for in sub-paragraph (*a*): or

" (ii) to terminate the treaty or to suspend its operation in whole or in part.

" 3. For the purposes of the present article a material breach of a treaty by one of the parties consists in:

" (*a*) the unfounded repudiation of the treaty; or

" (*b*) the violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

" 4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach."

61. After careful consideration, the Drafting Committee had come to the conclusion that the right of partial termination or suspension on the ground of breach should be subject to the conditions laid down in the new article 3 concerning separability. He accordingly proposed that a new paragraph 4 should be added reading: " The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2, is subject to the conditions specified in article [3]." The existing paragraph 4 would be re-numbered paragraph 5.

62. Mr. VERDROSS said that if he understood paragraph 2 correctly, it covered two cases: that of a State party to a multilateral treaty which violated that treaty with respect to only one of the other parties, and that of a State which violated a multilateral treaty with respect to all the other parties. That distinction had not been brought out plainly; sub-paragraph (*a*) should be amended to read " any other party injured by the breach to invoke the breach . . ." and sub-paragraph (*b*) to read " the other parties injured by the breach by common agreement . . .".

63. Mr. ROSENNE said there seemed to be some inconsistency between paragraph 1 and paragraph 2 (*b*) (ii), in that paragraph 1 contained a comma after the words " terminating the treaty "; that suggested that termination would apply to the whole treaty, whereas suspension could be partial.

64. Sir Humphrey WALDOCK, Special Rapporteur, said the intention was to give the injured party the option of not terminating or suspending the whole treaty, provided the conditions laid down in new article 3 were fulfilled.

65. Mr. AGO said that a question of substance was involved. The Drafting Committee had in fact considered that provision should be made for the possibility of terminating part of a treaty; that was why there had been some question of adding a reference to article 3 *ad abundantiam*. Article 3 contained a reference to article 20, and that meant that it already provided for the possibility of terminating only part of a treaty in the circumstances contemplated in article 20, which was quite logical.

66. Mr. TUNKIN endorsed the Drafting Committee's conclusion that the right of severance in the case of a material breach must be made subject to the provisions of the new article 3. He was not fully satisfied with the new text of article 20, however, and felt some concern about the consequences it might have for general multilateral treaties.

67. Mr. VERDROSS asked whether the wording of paragraph 2 meant that if a State violated the rights of only one other State, the other parties to the treaty could avail themselves of the right conferred by paragraph 2 (*b*).

68. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had not intended to make the kind of distinction between sub-paragraphs (*a*)

and (*b*) of paragraph 2 contemplated by Mr. Verdross, because it took the view that a material breach would be of concern to all the parties to a multilateral treaty.

69. The CHAIRMAN, speaking as a member of the Commission, said he would have no objection to a provision allowing for the partial termination or suspension of a treaty on the ground of a material breach, if it were made subject to the conditions laid down in the new article 3.

70. Mr. de LUNA said that the re-draft of paragraph 2 was a great improvement on the original draft, under which a breach of a bilateral or multilateral treaty gave the other parties the right to denounce it. The solution proposed by the Special Rapporteur was acceptable; it would hardly be possible to go further towards safeguarding multilateral treaties.

71. The CHAIRMAN put article 20 to the vote with the addition of the new paragraph 4 proposed by the Special Rapporteur.

Article 20, thus amended, was adopted by 18 votes to none with 1 abstention.

72. Mr. ROSENNE said that although he shared Mr. Thunkin's concern about its possible effects on general multilateral treaties, he had voted in favour of article 20.

Article 21 *bis* (Supervening impossibility of performance)

73. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a revised text for article 21 *bis* which read:

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

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

" 3. Under the conditions specified in article [3], if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only."

74. The Drafting Committee had come to the conclusion that, provided the conditions specified in the new article 3 were complied with, the principle of severance could be applied in cases of impossibility of performance.

75. Mr. PAREDES said that the new draft failed to take into account the possibility of the subject-matter of a treaty no longer serving the purpose which the parties had intended — a point he had already brought up earlier (710th meeting, paras. 8-9). Unless it were amended to remedy that defect, he would have to vote against the draft article.

Article 21 bis was adopted by 17 votes to 1.

Article 22 (Fundamental change of circumstances)

76. Sir Humphrey WALDOCK, Special Rapporteur, said that in the light of the discussion of its previous text at the 710th meeting, the Drafting Committee proposed that article 22 should read:

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

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

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

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

" 3. Paragraph 2 does not apply:

" (*a*) to a treaty fixing a boundary, or

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

" 4. Under the conditions specified in article [3], if the change of circumstances referred to in paragraph 2 relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only."

77. The Drafting Committee had decided that the retention of the word " fundamental " in paragraph 2 made it unnecessary to keep the word " wholly " in paragraph 2 (*b*) of its first text (710th meeting, para. 27).

78. A new paragraph 4 had been added allowing for severance under the conditions laid down in the new article 3.

79. Mr. YASSEEN said that paragraph 2 (*b*) was excellent and very precisely drafted; he would now vote for the article.

80. The CHAIRMAN put article 22 to the vote.

Article 22 was adopted by 15 votes to none with 1 abstention.

Article 22 *bis* (Emergence of a new peremptory norm of general international law)

81. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that a new paragraph 2 be added to article 22 *bis* allowing severance, under the conditions laid down in the new article 3, where a new peremptory norm of international

law came into being, with which only certain clauses of the treaty conflicted. The article would read:

" 1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in article 13 is established and the treaty conflicts with that norm.

" 2. Under the conditions specified in article [3], if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void."

82. The Drafting Committee had substituted the word " when " for the word " if " in paragraph 1 of its first text (711th meeting, para. 27) and had reworded the title to read: " Emergence of a new peremptory norm of general international law ".

83. Mr. CASTRÉN said he approved of the substance of the article, but wished to propose a purely formal amendment. It was rather abrupt to say that a treaty — which might have been in force for a very long time — suddenly became " void ". It would be better to say that a treaty terminated " *eo ipso* " if it conflicted with a new peremptory norm of general international law having the character of *jus cogens*.

84. The CHAIRMAN said that when that question had been brought up during Mr. Castrén's absence, the majority of the Commission had decided, after discussion, to maintain the wording " becomes void and terminates ".

85. Mr. CASTRÉN said he would not press his amendment.

86. The CHAIRMAN put article 22 *bis* to the vote.

Article 22 bis was adopted by 16 votes to none.

ARTICLE 23 (AUTHORITY TO DENOUNCE, TERMINATE OR WITHDRAW FROM A TREATY OR SUSPEND ITS OPERATION)

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had made a drafting change in the text of article 23 as submitted at the 714th meeting (para. 2), in order to bring it into line with article 4 of Part I by making express reference to " evidence " of authority. The text proposed read:

" The rules contained in article 4 of Part I relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation."

88. The CHAIRMAN put article 23 to the vote.

Article 23 was adopted unanimously.

ARTICLE 24 (PROCEDURE UNDER A RIGHT PROVIDED FOR IN THE TREATY)

89. Sir Humphrey WALDOCK, Special Rapporteur, said that both the title and paragraph 1 of article 24 as submitted at the 714th meeting (para. 9) had been slightly modified; the article now read:

" ARTICLE 24 : PROCEDURE UNDER A RIGHT PROVIDED FOR IN THE TREATY

" 1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty, must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

" 2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect."

The CHAIRMAN put article 24 to the vote.

Article 24 was adopted unanimously.

ARTICLE 29 (LEGAL CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY)

90. Sir Humphrey WALDOCK, Special Rapporteur, said that some drafting changes had been made in the text of article 29 as submitted by the Drafting Committee at the 714th meeting (para. 88). A new sub-paragraph (*c*) had been added to paragraph 1 to meet the point made by Mr. Lachs that the provision contained in article 28, paragraph 3 (*c*), should also apply in the case of suspension. The new text of the article read:

" 1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

" (*a*) shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

" (*b*) shall not otherwise affect the legal relations between the parties established by the treaty;

" (*c*) in particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

" 2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible."

91. The CHAIRMAN put article 29 to the vote.

Article 29 was adopted by 17 votes to none.

ARTICLE 2 (PRESUMPTION AS TO THE VALIDITY, CONTINUANCE IN FORCE AND OPERATION OF A TREATY)

92. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title of the article be changed to " Presumption as to the validity, continuance in force and operation of a treaty " and that the text should read:

" Every treaty concluded and brought into force in accordance with the provisions of Part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or the suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the provisions of the present articles."

93. His original article 2 (A/CN.4/156), which he had placed among the general provisions, had sought to establish a primary rule of validity, but had been regarded by some members as unnecessary.

94. If, as seemed probable, his original article 1, containing definitions, disappeared, article 2 in its new form would be useful in the context of what followed in sections II and III. Perhaps when all the articles in the draft were combined in a single report, article 2 would need to be moved elsewhere.

95. The article had now been worded in neutral terms because it had been decided that the procedures for establishing nullity and effecting termination should be governed by the general law on the settlement of disputes and the provisions of the United Nations Charter.

96. Mr. AGO said he had consulted Mr. Gros about the French text of article 2, and he proposed that the words " *ne résulte de l'application* " should be substituted for the words " *ne découle des dispositions* " at the end of the article. It could hardly be said that the suspension of the operation of a treaty or the withdrawal of a particular party " *découle* " (derives) from the provisions of an article.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that in the English text the expression " results from " seemed broad enough for the purpose.

98. The CHAIRMAN said that Mr. Ago's point could be met by substituting the word " application " for the word " provisions " in the English text and the word " *résulte* " for the word " *découle* " in the French. He put the article, thus amended, to the vote.

Article 2, thus amended, was adopted by 16 votes to none, with 1 abstention.

Relations between States and inter-governmental organizations (A/CN.4/161)

[Item 6 of the agenda]

99. The CHAIRMAN invited the Commission to consider item 6 of the agenda — Relations between States and inter-governmental organizations — on which Mr. El-Erian, the Special Rapporteur, had submitted a first report.

100. Mr. EL-ERIAN, Special Rapporteur, introducing his report (A/CN.4/161) explained that it was not a definitive study of the subject, the scope of which had not been defined either by the Sixth Committee or by the Commission itself. In resolution 1289 (XIII) the General Assembly had invited the Commission to give further consideration to the question after the study of diplomatic intercourse and immunities, consular intercourse and immunities, and *ad hoc* diplomacy had been completed, in the light of the results of that study and of the discussions in the General Assembly. That resolution had been based on a proposal by the French delegation in the Sixth Committee; at the suggestion of the Greek delegation it had also been decided to specify that the international organizations in question were inter-governmental.

101. In the introduction to his report he had touched on the discussions in the Sixth Committee. Chapter II was devoted to the evolution of the concept of an international organization and traced the historical development of the conference system and the international administrative unions established during the second half of the nineteenth century, and their final transformation into general international organizations of a universal character with political, economic, social and technical functions. In his classification of international organizations, he had excluded *ad hoc* conferences and non-governmental organizations.

102. Chapter III contained a review of the attempts to codify the international law relating to the legal status of international organizations and dealt with the external relations of their members, but not with constitutional problems within the organizations themselves. In addition to the Convention on the Privileges and Immunities of the United Nations,[1] which had served as a prototype for similar conventions concluded between specialized agencies or regional organizations and States, he had discussed earlier attempts to codify the legal status of international organizations, made by the League of Nations Committee of Experts for the Progressive Codification of International Law and by the 34th Conference of the International Law Association in 1926. He had also mentioned the work of the group of experts convened under General Assembly resolution 1105 (XI) to prepare recommendations concerning the method of work and procedure for the first Conference on the Law of the Sea. Their report[2] had served as a basis for the rules of procedures for both conferences on the Law of the Sea, as well as for the Conference on Diplomatic Intercourse and Immunities and the Conference on Consular Relations.

103. The subject of relations between States and intergovernmental organizations had not been included in the Commission's provisional list of fourteen topics to be given priority, but had come up in connexion with its work on the law of treaties. The first three special rapporteurs on the law of treaties had included certain provisions concerning inter-governmental organizations in their drafts and the present Special Rapporteur had intimated at the previous session that he intended to devote part of his report to that subject, but the Commission had decided to defer consideration of it. Again, although Mr. Ago, in the working paper he had submitted to the Sub-Committee on State Responsibility (A/CN.4/SC.1/WP.6) had referred to the responsibility of other subjects of international law, the Sub-Committee had decided that the matter should be left aside. The Sub-Committee on State Succession had decided only to deal with succession in respect of membership in international organizations and not with succession between international organizations, which was discussed in Mr. Lachs' working paper (A/CN.4/SC.2/WP.7).

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[1] United Nations Treaty Series, Vol. I, pp. 16 ff.

[2] *United Nations Conference on the Law of the Sea, Official Records*, Vol. I (United Nations publication, Sales No.: 58.V.4, Vol. I), pp. 172-175.

104. Chapter IV of his report contained a preliminary survey of the scope of the subject of the legal status of international organizations, with a section on their international personality. An important landmark had been the advisory opinion of 1949 of the International Court of Justice on Reparation for Injuries Suffered in the Service of the United Nations; the Court had come to the unanimous conclusion that the United Nations was a subject of international law capable of possessing international rights and duties.[3] Some consideration was given in the following sections to the legal and treaty-making capacity of international organizations and to their capacity to bring international claims. The Court had been divided on the question whether the United Nations had the capacity to bring international claims on behalf of its officials, because of the possibility of conflict with the diplomatic protection exercised by the States of which the officials were nationals.[4] A section was also devoted to the privileges and immunities of international organizations and the institution of legation, and to the question whether they should be standardized, which was a matter of great practical importance to all national authorities because of the variations in the privileges and immunities of different organizations in the same country and in those of offices of the same organization in different countries.

105. In the last section of his report he had dealt with the responsibility of international organizations and with the problem of their recognition, which arose primarily in respect of regional organizations. In that connexion he drew attention to the passage from the Court's Advisory Opinion quoted in paragraph 174 of his report. Finally, he had touched upon the question of sucession between international organizations.

106. The conclusion he had reached was that the subject could be divided into three groups of questions. The first comprised the general principles of international personality and would include legal capacity, treaty-making capacity and capacity to bring international claims. The second comprised international privileges and immunities and would include three subjects: first, the privileges and immunities of international organizations themselves; second, the application of the institution of legation to international organizations; and third, diplomatic conferences, regarding which very valuable experience had been gained at the two Geneva Conferences on the Law of the Sea, the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and the 1963 Vienna Conference on Consular Relations. The third group comprised special questions, which included: first, the law of treaties with respect to international organizations; second, the responsibility of international organizations; and third, succession between international organizations.

107. Of the special questions, perhaps the responsibility of international organizations had the greatest practical importance. It would arise, for example, with regard to the activities of the International Atomic Energy Agency. There was also the very interesting case of a territory administered by an international organization itself. That situation had arisen for the League of Nations in the case of the Saar Basin; but for the United Nations, the first case had been that of West Irian. Under the Agreement between the Netherlands and Indonesia, which had received the unanimous approval of the General Assembly, the United Nations itself had been placed for a limited period in charge of the actual administration of West Irian. Consequently, there was a possibility of international responsibility on a territorial basis. So far, the case of West Irian was the only practical example, because the provisions regarding the administrations of the territories of Trieste and Jerusalem had not come into effect.

108. Outside the three groups, there were some other questions which might perhaps constitute a fourth group, but they were not of major importance. One was the right of international organizations to fly their flag on vessels operated by them. On that question, a working paper had been submitted to the Commission by the late Professor François, the Rapporteur on the regime of the high seas and the regime of the territorial sea. His paper had raised a number of problems, however, and the Commission had not reached a decision. The first United Nations Conference on the Law of the Sea, held at Geneva in 1958, had adopted a Convention on the High Seas, which included an article 7 reading:

> "The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an intergovernmental organization flying the flag of the organization."[5]

There had thus been no positive pronouncement on the question at the time, and a further attempt to deal with it at the 1961 Brussels Conference on nuclear-powered ships, had been similarly inconclusive.

109. With regard to the scope of the draft articles, the Commission should concentrate first on international organizations of a universal character, and then examine whether the draft articles could be applied to regional organizations without change or not. The study of regional organizations raised a number of problems, such as recognition by, and relationship with, non-member States, which would call for the formulation of special rules for those organizations.

110. In determining an order of priorities, he had followed a process of elimination. A distinction had to be made between the juridical personality and privileges and immunities of international organizations and the other aspects of relations between States and international organizations. Consideration of topics such as the law of treaties with respect to international organizations, the responsibility of international organizations, and succession between international organizations should be deferred until the Commission had completed its work on the same topics as applied to States. The Commission should also consider whether those topics could

[3] *I.C.J. Reports*, 1949, p. 179.

[4] *Ibid.*, pp. 185 ff and 188.

[5] See *United Nations Conference on the Law of the Sea, Official Records*, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 136.

be taken up more appropriately in connexion with its work on the law of treaties, State responsibility and succession of States.

111. Once the order of priorities was settled, he could concentrate on the juridical personality and the privileges and immunities of international organizations, which could be examined separately. The general principles of juridical personality would include legal capacity, treaty-making capacity, and capacity to bring international claims. With regard to the treaty-making capacity, he wished to make it clear that he did not propose to deal with all the ramifications of the question. He would not examine the whole of the law of treaties in relation to international organizations, but only the question of treaty-making capacity as such. For many writers, the capacity to make treaties was the criterion of international personality. The privileges and immunities of international organizations included those which the organizations themselves enjoyed as bodies corporate, as well as those of officials and representatives of international organizations; they also covered the related question of the institution of legation with respect to those organizations. The experience of the last fifteen years had shown a certain diversity in the modalities of application of those privileges and immunities.

112. With regard to the form of the draft articles, his aim was to prepare a set of articles that could provide the basis for a draft convention. At the same time, however, further consideration must be given to the question whether the draft articles on the juridical personality of international organizations could not be more appropriately framed as an expository code than as a draft convention.

113. With regard to terminology, he had already observed that the adjective " intergovernmental " had been introduced before the words " international organizations " in resolution 1289 (XIII) at the request of a delegation. He himself considered that it was sufficient to refer to " international organizations ", the term used in the Charter; he would therefore adhere to the traditional terminology which the Commission itself had used in its work on the law of treaties and dispense with the unnecessary adjective " intergovernmental ".

114. Finally, as to the designation of the topic, three titles had been used by writers. The first was " The law of international organizations ", which was not suitable because it usually referred to the constitutional law of international organizations, their functions and structure; the second was " The law of relations between States and international organizations "; and the third was " The legal status of international organizations ". He proposed to use either the second or the third of those titles.

115. Mr. CADIEUX said that the Special Rapporteur was to be congratulated on his excellent report. He had undertaken a great deal of research and the documentation he had compiled was presented methodically and clearly; it was evidence of his professional ability and constituted in itself a valuable source of reference material.

116. At that stage, the Commission should merely take a decision on the recommendation in paragraph 179 of the report. He believed that the first recommendation was a wise one and willingly accepted it. So long as the Commission had not made more progress with its other work, the Special Rapporteur would be right to refrain from going too far ahead. It would be better for him to work first on the general principles, as he himself proposed, and then to determine what rules already existed in the fields connected with his subject: privileges and immunities and the right of legation. He would thus be reducing the danger of duplication and the problems of co-ordination to a minimum.

117. The second recommendation — that the Commission should concentrate first on international organizations of universal character, and in particular on the United Nations system — was likewise acceptable; for it was right to begin with the essentials of the subject, even though the rules drawn up might have to be adjusted later to fit particular cases. That was the method which the Commission itself had followed in its work on diplomatic missions: it had begun with permanent missions and then gone on to consider special missions. He was fully prepared to agree to Mr. El-Erian's very logical approach.

118. Mr. TUNKIN, congratulating Mr. El-Erian on his comprehensive study, which fully met the Commission's expectations, said that the objective at that stage should be to give the Special Rapporteur instructions on the scope of the topic and the approach to its study.

119. With regard to the scope of the topic, the difficulties were probably greater than in the case of State responsibility and State succession, because the question of international organizations was one on which there had been many recent developments in international law; the rules were continually evolving. It was therefore difficult to determine which questions properly pertained to the topic and which should be left aside. Nevertheless, an attempt should be made to limit the scope of the study, with a view to deciding which questions should be taken up first.

120. He had listened carefully to the Special Rapporteur's views on the scope of the topic, and had some doubts as to whether the treaty-making capacity of international organizations, the law of treaties in respect of international organizations, the responsibility of international organizations and succession between international organizations properly belonged to it. He would not express any definite views on the question at that stage, but thought that it should be carefully considered.

121. A more important matter was the choice of subjects for immediate study, and it was unfortunate that the Commission had not enough time at its disposal to make a thorough study of priorities; that being so, he would confine himself to a few preliminary remarks on the matter.

122. He had his doubts about the group of questions relating to international personality. The legal personality

of an organization was determined by its constitution. There were rules of general international law on the subject of the international personality of States, but none on the international personality of international organizations. There was therefore a great difference between States and international organizations in that respect. The rules on the personality of an international organization, which resulted from its constitution, were only binding on member States of the organization and on any States which freely accepted that international personality.

123. There were considerable differences in status between the various international organizations. That was true even of international organizations of a general character, such as the specialized agencies of the United Nations. It would therefore be necessary to examine the relationship between the draft articles to be prepared and the constitutions of the specialized agencies. In fact, that problem would arise in regard to the United Nations Charter itself.

124. In regard to privileges and immunities and the institution of legation, the discussion was on much firmer ground. There was the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly on 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly on 21 November 1947. The relationship between those Conventions and the draft articles to be prepared by the Special Rapporteur would also have to be examined.

125. As to diplomatic conferences, the law of international conferences was in process of development and the question arose whether that subject should be considered together with relations between States and intergovernmental organizations or treated separately.

The meeting rose at 1 p.m.

718th MEETING

Wesdnesday, 10 July 1963, at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Relations between States and intergovernmental organizations (A/CN.4/161)

[Item 6 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of the first report by the Special Rapporteur on relations between States and intergovernmental organizations (A/CN.4/161).

2. He reminded the Commission that it was not attempting at its present session to reach a decision on the general directives to be given to the Special Rapporteur concerning the scope of the topic or those parts of it to which priority should be given. It had already decided, when approving the programme of work for 1964, that general directives would be given to the Special Rapporteur at the winter session in January 1964 (716th meeting, paras. 1-3). The sole purpose of the present discussion was to give members who already had a settled opinion on the matter an opportunity of stating their views. There would be a further opportunity of doing so at the winter session and the Special Rapporteur would then sum up the discussion. Any opinions expressed at the present session, however, would be useful to the Special Rapporteur for his work in the intervening months.

3. Mr. ROSENNE, after congratulating the Special Rapporteur on his report, said he would confine himself to a few general observations of a preliminary character.

4. The topic of relations between States and intergovernmental organizations had emerged from the discussion of the articles on diplomatic relations. In view of that fact, and of the title of the topic, he had been struck by the reference in paragraphs 11 and 82 of the report to " the external relations of international organizations ". International organizations were essentially part of the machinery by which States conducted their relations. The emphasis should therefore be on the relations of States with international organizations, rather than on the external relations of the organizations. The point was not a purely academic one. The report mentioned, for example, such matters as the espousal of claims by international organizations and the institution of legation in respect of international organizations. Unless the proper emphasis were placed on relations between States and international organizations, a study of those subjects could be misleading. Admittedly there had been instances of the espousal of claims by international organizations, but a question of equal if not greater importance was that of international organizations appearing as respondents in international claims. Similarly, the institution of legation was a matter for States between themselves and it would be misleading to suggest that an international organization had a right of legation.

5. With regard to international legal personality and treaty-making capacity, those notions were convenient academic expressions for conveying certain ideas; they should be regarded as points of arrival after a great deal of experience rather than as points of departure for the analysis of legal principles. In its advisory opinion of 11 April 1949 on Reparation for Injuries suffered in the Service of the United Nations, the International Court of Justice had referred to international personality as " a doctrinal expression, which has sometimes given rise to controversy ", and had arrived at the pragmatic conclusion that if the United Nations were recognized as having that personality, it was " an entity capable of availing itself of obligations incumbent upon its Members ".[1] In the light of that guarded approach, any attempt to formulate the notion of international personality could lead to difficulties.

6. On the general question of the privileges and immunities of international organizations, he had been interested by the plea for uniform standards in paragraph 170

[1] *I.C.J. Reports*, 1949, p. 178.