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Summary record of the 705th meeting

Topic:

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93. Mr. BARTOŠ said he was not wholly satisfied with the condensed formula which the Drafting Committee had had to adopt in order to secure the approval of its members. That formula was not practical, because it was too vague and did not define anything. He thought it should be accepted provisionally, however, as it was the only possible solution at present. The Commission could revert to it, if necessary, at later sessions, taking the comments of governments into account.

94. Mr. CASTREN said he agreed with Mr. Yasseen that there was no true definition in the text. Mr. Amado's proposal would be preferable. He suggested the wording " If a State has been induced to enter into a treaty by the " *conduite dolosive* " (fraudulent conduct) of another contracting State, it may invoke that fact as invalidating its consent to be bound by the treaty."

95. Mr. ELIAS said that article 7 was acceptable, but he saw no reason for referring to " fraudulent conduct " instead of " fraud " which, as indicated by the title, was the subject of the article. If there were any need to define what was meant by fraud, that could be done in the commentary.

96. Mr. CADIEUX said he thought he could discern a difference in form and perhaps even in substance between the English and the French texts. The English seemed more consistent, whereas the French used first the term " *conduite frauduleuse* " and then the term " *dol* ". With regard to the substance, the article's title in English was " Fraud " and that word was repeated in the body of the article, whereas the grounds that might be invoked as invalidating consent were given in the French text, not as " *conduite frauduleuse* " but as " *dol* ", which had a wider connotation.

97. Mr. AGO said that the French translation of the Special Rapporteur's original draft had contained the expression " *manœuvres dolosives* ", but the Commission had preferred the adjective " *frauduleuses* " and the Drafting Committee had decided to retain it.

98. Some speakers had criticized the expression " *conduite frauduleuse* " and had maintained that it should be replaced by the expression " *conduite dolosive* ". But a careful examination of the text showed that it contained a sort of implicit definition of *dol* as fraudulent conduct designed to induce the other party to consent and without which its consent would not have been obtained. He urged the Commission to accept that the French text was the best that could be devised. To amend it might destroy the meaning, which it expressed satisfactorily.

99. Mr. ROSENNE said that in the Drafting Committee he had understood that the two texts were consistent, and he therefore feared that Mr. Castrén's amendment would throw them out of harmony. He had understood from the discussions in the Commission and the Drafting Committee that the connotation of the term " *dol* " by itself could be wider than " fraud ", and that the necessary precision was provided by the expression " *conduite frauduleuse* ".

100. Mr. GROS said he had already had occasion to state that he was against transferring concepts of private law into international law, because relations between States were quite different from relations between private persons. Article 7 was concerned with the conduct of the State, and for purely linguistic reasons he preferred the expression " *conduite frauduleuse* " to " *conduite dolosive* " in a context relating to States.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been assured by French-speaking members of the Commission that the texts prepared by the Drafting Committee in the two languages corresponded exactly.

102. On the general problem of terminology, he agreed with Mr. Gros that it would be unwise to assume that concepts applicable in private law would necessarily be relevant to international relations, though they would provide some broad indications of what was understood by " fraudulent conduct " and to that extent could be helpful. He did not see how the succinct text submitted by the Drafting Committee could be improved.

103. He did not share Mr. Elias' doubts about using the expression " fraudulent conduct " while referring elsewhere to " fraud ".

104. Mr. PESSOU said that it might perhaps be wiser to defer the vote and to try to find a formula which would both respect the spirit of the proposed text and satisfy all members.

105. Mr. GROS said it was regrettable that some members of the Commission appeared to cast doubt on the conscientiousness of the Drafting Committee's examination of the text. The Drafting Committee's formulation was the result of much hard work, and he doubted whether it could be improved.

106. Mr. AMADO explained that he had not made a formal proposal and was willing to accept the text prepared by the Drafting Committee, whose ability and good faith could not, of course, be questioned.

Article 7 was adopted by 19 votes to none with 2 abstentions.

The meeting rose at 12.45 p.m.

705th MEETING

Friday, 21 June 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 continue consideration of the articles proposed by the Drafting Committee for section II.

ARTICLE 8 (ERROR)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 8, 9 and 10 had been combined by the Drafting Committee in a single article 8, with the title " Error ", 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. 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 does not affect the validity of the treaty and articles 26 and 27 of Part I then apply."

3. It would be noted that the distinction between unilateral and mutual error, which had appeared in his original draft (A/CN.4/156), had been dropped. Paragraphs 1 and 2 dealt with the points covered in the original articles 8 and 9 and paragraph 1 had been drafted in broad terms without any attempt to provide a definition of error.

4. The rule formulated by the International Court of Justice in the *Temple of Preah Vihear* case [1] had been embodied in paragraph 2.

5. Although some members had been hesitant about including errors in the expression of an agreement, the Drafting Committee had come to the conclusion that they should be included and had accordingly added paragraph 3.

6. Mr. PAREDES, commenting on the Spanish text, said he found paragraph 1 rather ambiguous, or lacking in the necessary clarity. The Spanish word " presumía " (assumed) did not convey the idea of certainty, but of a hypothesis or unsubstantiated belief. To assume was not to know definitely; but what the authors of the article had in mind seemed to require the contracting parties to have full knowledge, whether correct or mistaken, as was shown by the wording of paragraph 2.

7. Paragraph 1 required a mere assumption which was a psychological criterion, even though it referred to facts, since it was based on a personal judgement; that judgement could be challenged in various ways according to the rules laid down in paragraph 2, which provided for three exceptions to the right to invoke an error.

8. The first exception was where the State injured by the error had contributed to the error by its own conduct. For example, a State might invite a neighbouring State to conclude a treaty allowing it to operate mines which it believed to be in its neighbour's territory, and then discover that they were in its own territory. Would it be debarred from invoking the error because it had contributed thereto ? The fact was that the vague formula " contributed by its own conduct to the error " left room for the most divers charges and allegations of every kind.

9. The second exception was where the State could have avoided the error. What error of fact could not be avoided by a detailed and exhaustive study of the situation ? Were States to be required to make a more exhaustive study of the facts and circumstances than anyone made for ordinary business transactions, however important they might be ? That would be an obstacle to active international life and vigorous decisions and would frustrate the Commission's own aim of facilitating negotiations between nations. Moreover, it provided a ready argument for those who were unwilling to recognize the rights of the injured party.

10. The third exception was where the circumstances were such as to put the State on notice of a possible error. That meant that it was to be penalized not only for not having exhausted all the possible means of investigating the facts, but if for any reason it had omitted to take precautions to avoid the possibility of an error; for instance, because it did not possess the necessary financial resources for such investigations.

11. In his opinion paragraph 2 made it impossible to invoke an error in any circumstances whatsoever. That being so, it would be clearer and more concise, besides being more elegant, to lay down that consent could not be vitiated by error, though he advanced that consideration only as an argument *ad adsurdum.*

12. He was therefore opposed to article 8 in its present form.

13. The CHAIRMAN said that the Spanish translation of the word "assumed" in paragraph 1 was obviously wrong; the Spanish text would be brought into line with the English.

14. Mr. ELIAS said that the new text of article 8 was generally acceptable, but he maintained the opinion he had expressed in the earlier discussion (678th and 680th meetings) and still considered paragraph 3 unnecessary; if it were retained, the words " shall not affect " should be substituted for the words " does not affect ", and the word " shall " should be inserted before the words " then apply ".

15. Sir Humphrey WALDOCK, Special Rapporteur, said that if the word " assumed " in paragraph 1 caused translation difficulties, the Drafting Committee might consider whether the word " believed " would be an acceptable and sufficiently precise alternative.

16. He would not have thought that article 8 was really open to the kind of objections raised by Mr. Paredes; moreover, broad agreement had been reached on certain procedural provisions which ought to provide a guarantee that the article would be applied in a reasonable way.

17. The amendments suggested by Mr. Elias were acceptable and could be referred to the Drafting Committee. The question whether or not paragraph 3 should be

[1] *I.C.J. Reports,* 1962, p. 26.

retained would have to be reconsidered during the discussion of articles 26 and 27.

18. The CHAIRMAN put article 8 to the vote, subject to the drafting changes proposed.

Article 8 was adopted by 18 votes to 1.

ARTICLE 11 (PERSONAL COERCION OF REPRESENTATIVES OF STATES)

19. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 11 read:

" 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."

20. Rather than lay down that the consequence of coercion of representatives would be that the treaty was voidable, the Commission had wished to express the rule in terms of the consent in such circumstances being without legal effect.

21. As Mr. Pal had objected to the word " expressed " in paragraph 1 of article 5 (previous meeting, paragraph 18), perhaps the word " expressing " should be replaced by the word " signifying ".

22. Mr. PAREDES said that, as he had stressed during the previous discussion on vitiation of consent by coercion of the negotiators of a treaty (681st meeting, paras. 8 and 9), it was not only threats or use of force in respect of his personal interests which could affect a negotiator; threats against the security of the State could also coerce his will. The Commission could not, and should not, consider a national of a State to be so selfish that he cared only for his own interests and not for those of the country he represented. If the cities of his country were in grave danger of destruction, because that had been threatened and he knew that the enemy had the means to destroy them, the negotiator would feel as much constraint as in the case of personal danger or perhaps even more, and would thus lose his freedom of action, which was the ground for nullity of the act. The majority of members of the Commission seemed to have supported that view during the previous discussion, but he noted that it was not reflected in the new text of the article.

23. He would therefore vote against article 11.

24. Mr. VERDROSS said he found the text proposed by the Drafting Committee entirely satisfactory if, as he believed, it referred not only to coercion employed against the organ that ratified the treaty, but also to coercion of the negotiating organ, and if, in the latter case, a treaty signed under duress could not be validated by subsequent ratification.

25. Mr. CASTREN said that in general he approved of the new text of article 11. However, it mentioned only coercion of individual representatives of a State, whereas the original draft had also mentioned coercion of members of a state organ. Had the Drafting Committee wished to assimilate that form of coercion to coercion of a State, which was dealt with in the next article ?

26. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that Mr. Paredes' comment raised the question which of the cases he had mentioned came under article 11 and which under article 12. Article 11 dealt with personal coercion of individuals by means of different kinds of threats, and article 12 with coercion of the State itself, which might, of course, take the form of coercion of representatives of state organs; there was thus some overlapping between the two articles.

27. On the point raised by Mr. Verdross, he thought that coercion of a ratifying organ should probably be regarded as coercion of the State, in the same way as coercion of a head of State for the purpose of inducing him to complete an instrument of ratification. That case could be mentioned in the commentary.

28. Mr. Castrén had raised what was essentially a drafting point. The Drafting Committee had not thought it necessary to include the reference to members of state organs which had appeared in the original title and text of article 11; it had reached the conclusion that the expression " representatives of a State " would cover both negotiating agents and members of state organs. The reason for that change could be explained in the commentary.

29. Mr. PAREDES, replying to the Special Rapporteur, said he fully appreciated the difference between the personal coercion of a representative dealt with in article 11 and the coercion of the State dealt with in article 12. What he had pointed out was that coercion of a representative by threatening to destroy the capital of his country could be just as effective as, or even more effective than, coercion by threats against his person, family or property.

30. The CHAIRMAN put article 11 to the vote, subject to the drafting change suggested by the Special Rapporteur.

Article 11 was adopted by 19 votes to 1.

ARTICLE 12 (COERCION OF A STATE BY THE ILLEGAL THREAT OR USE OF FORCE)

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 12 read:

" Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void."

The title had been amended to read " Coercion of a State by the illegal threat or use of force ".

32. There had been virtually unanimous agreement in the Commission on the need to include such a provision and to frame it in fairly broad terms. Opinion had been divided only on whether to restate explicity the

provisions of article 2, paragraph 4, of the Charter or whether merely to refer in general terms to the principles of the Charter; after some discussion the Drafting Committee had decided to follow the latter course.

33. Mr. YASSEEN said he had noted a difference between the scope of the new article 12 and that of the new article 11: whereas article 11 condemned coercion in general, article 12 dealt with specific manifestations of coercion, namely, the illegal threat or use of force. He wondered whether that difference was intentional.

34. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Yasseen seemed to wish to go beyond the provisions of article 2, paragraph 4, of the Charter into the realm of interpretation of that article; he himself had concluded that that was not the Commission's desire. The nature of the coercion exercised against an individual and that exercised against a State was necessailry different and forms of pressure could be put on persons that could hardly be effective against States. Moreover, there were forms of pressure — economic pressure, for example — which might not come within the definition of force. The wording used in the new draft of article 12 left open the question of interpretation of what was meant by the threat or use of force. Of course, as practice developed, the way in which the relevant provisions of the Charter were interpreted would naturally have a bearing on the application of the article.

35. Mr. YASSEEN thought that article 12 did not cover coercion entirely. It merely applied to the conclusion of treaties the consequences of the condemnation of the threat or use of force already pronounced in the United Nations Charter. But it was necessary to condemn coercion in all its forms, for it could be exercised by means other than the use of force.

36. With a view to the stability of treaties, it would be more effective to condemn coercion in whatever form it might be manifested, whether by the use of force or by any other internationally unlawful act capable of compelling a State to yield and to conclude the treaty.

37. Mr. de LUNA said that, although the title of the article was perfectly clear, it might be advisable to specify in the text that the coercion referred to was coercion of a State, for otherwise it might be wondered whether the condemnation also applied when it was the representatives of the State who were threatened. That could easily be explained in the commentary, however.

38. With regard to the problem raised by Mr. Yasseen, it was true that coercion employed against the representatives of a State was contemplated in a general way, and that coercion of the State itself meant more particularly recourse to war. Article 12 did not fully cover all cases of coercion; in particular, it disregarded economic coercion, which might be important.

39. Admittedly, it would be desirable to find a sufficiently clear formula which, without impairing the stability of treaties, prohibited both the use of force and the threat of measures calculated to starve an entire population, for example. But since the Commission had not yet succeeded in working out a formula meeting all those requirements, he was prepared to accept the text proposed by the Drafting Committee.

40. Mr. VERDROSS supported the Drafting Committee's text, the scope of which seemed to him very wide, since it referred not only to the use of force but also to threats, which covered all other cases.

41. He thought it very dangerous to depart from the text of the Charter, because the reader might wonder why the Commission had elected to do so. The article was intended to apply a principle of the Charter to the case of coercion employed to force a State to consent to the conclusion of a treaty. To state expressly that the principle derived from the Charter was in itself noteworthy, and if the Commission tried to go further, it might find itself on uncertain ground.

42. Mr. TABIBI said that article 12 was acceptable in its new form. It would hardly be practicable to enumerate all the different types of threat or use of force that could arise, including economic pressure and intensive propaganda, to which small countries were specially vulnerable. The wording adopted by the Drafting Committee was sufficiently comprehensive.

43. Mr. YASSEEN said that in his view the Commission's task was not to embody an article of the Charter in its draft convention, but to deal with coercion in general. It was all very well to refer to an article of the Charter on the use of force, but provision should also be made for the voiding of treaties obtained by forms of coercion other than the threat or use of force.

44. Mr. BARTOŠ approved of the content of the new text, but regretted that it was incomplete. He endorsed the comments made by Mr. Yasseen. He would not vote against the article, but would have to abstain.

45. Mr. YASSEEN suggested that in order to cover all cases of coercion completely, article 12 should be drafted in some such terms as the following, which he thought would obviate doubt and controversy:

> "Any treaty the conclusion of which was procured by the threat to commit an act contrary to international law or by the commission of such an act shall be void."

46. The article as it stood added nothing to a rule already laid down in the Charter; and with it the Commission had not exhausted the whole question of coercion, for there remained some cases of coercion which did not come within the scope of the article. He would vote for the Drafting Committee's text although he did not think it complete, but would reserve his position on the remainder of the question of coercion.

47. Mr. BRIGGS asked whether the procedural provisions of article 25 would cover such articles as article 12, or whether the statement that in certain circumstances a treaty would be void was purely declaratory.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs had raised a very pertinent point which he himself has hoped would be taken up in con-

nexion with article 25. Some discussion had taken place on the extent of the application of article 25, some members contending that it might not apply to all the articles and others maintaining that a dispute could arise as to the facts on almost any of the provisions in the draft. In the present instance, for example, the claim by one State that a treaty had been procured by force might be emphatically denied by another.

49. The CHAIRMAN pointed out that the Drafting Committee would be discussing the scope of article 25 when considering the text and would present its views on that matter to the Commission.

50. Mr. CASTREN agreed with Mr. Verdross that in article 12 the Commission should not depart from the wording of the Charter or give an interpretation of what was meant by force; it was only subject to that reservation that he could vote for the Drafting Committee's text.

51. Mr. GROS endorsed Mr. Castrén's remark.

52. Mr. PAREDES said he still maintained that there were other forms of coercion as serious as armed force or even more serious — forms of an economic or political nature which even if not expressly mentioned were understood to be covered by the new text of article 12, for it related to all moral or physical force or threat of its use, and made no exceptions. He would therefore vote for the article.

Article 12 was adopted by 19 votes to none with 1 abstention.

ARTICLE 13 (TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW FROM WHICH NO DEROGATION IS PERMITTED) (*jus cogens*)

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title of article 13 should be changed to " Treaties conflicting with a peremptory norm of general international law from which no derogation is permitted (*jus cogens*) " and that the text should read:

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

54. There had been some division of opinion in the Commission as to whether article 13 should contain some indication of what was meant by *jus cogens*. In his original draft he had given some examples of acts contrary to *jus cogens*, all of which were criminal under international law; but certain members, including Mr. Bartoš, had pointed out the danger of giving examples, even of the most obvious kind, because that might suggest that the article was concerned only with acts already recognized as criminal.

55. After deliberating on the matter, the Drafting Committee had come to the conclusion that it would be best to avoid detailed examples and to frame the article in general terms, especially as the concept of *jus cogens* would be subject to further interpretation and extension as time went on. The text now presented to the Commission was the outcome of careful thought and had been by no means easy to draft.

56. Mr. VERDROSS fully approved of the Drafting Committee's text. The only comment he wished to make was that the words " from which no State is permitted to derogate " seemed superfluous, since that was how a rule of *jus cogens* was defined. He would not oppose the retention of these words, however, and would vote for the article.

57. The CHAIRMAN pointed out that no reference was made to *jus cogens* in the text of the article itself.

58. Mr. CASTREN said the title of the article was too long. He proposed that it be shortened by deleting the words " from which no derogation is permitted ".

59. Mr. de LUNA said he approved of the text as it stood. In current usage, to say that a rule was peremptory meant that it was a rule of public order. But there were several kinds of peremptory norm; some peremptory norms bound the authorities responsible for applying penal laws and left them no discretion, whereas others allowed them some latitude. Peremptory norms from which no derogation was permitted were what was known as *jus cogens*. The specific qualification in the Drafting Committee's text was therefore necessary.

60. Mr. PESSOU said he agreed with Mr. de Luna. It might be considered that there were some rules of international public order which permitted of derogation. The phrase " from which no State is permitted to derogate " was not superfluous; it was needed to strengthen the idea expressed in the article and to remove all ambiguity.

61. Mr. ELIAS said that both the title and the text of the article should be accepted as they stood. If it were shortened, the title would be incomplete, and the discussion had shown only too well that the concept of *jus cogens* was by no means as clear as some members seemed to think. In order to bring out its imperative character, the words " A treaty is void ", at the beginning of the article, should be changed to " A treaty shall be void ".

62. Mr. YASSEEN said that the new text was too laconic, and several points still needed clearing up. Having been unable to define *jus cogens*, the Special Rapporteur had confined himself to giving a few examples, which was an excellent method. Some of the examples had been challenged, but that did not reduce the value of the method followed. The examples could be altered or a few others added; at all events, what was important was to show clearly what a rule of *jus cogens* was. The rule would thus be invested with great authority, and at the same time an application that justified it would be ensured.

63. He had difficulty in accepting the phrase " from which no State is permitted to derogate ". For rules of international law, even if not rules of *jus cogens*,

permitted of no derogation; they could not be broken by any State. The point was that States should not be permitted to depart from the rule by means of international agreements.

64. The text was also unduly laconic in that it omitted a very useful paragraph of the draft submitted by the Special Rapporteur, concerning general multilateral treaties, which could derogate from rules of *jus cogens* by means of new rules of *jus cogens*. The Drafting Committee's text merely touched on the question; the Special Rapporteur's draft was much clearer and strongly emphasized the positive nature of concept of *jus cogens*.

65. Mr. ROSENNE said that during the earlier discussion of article 13, he had wondered whether that article should not be in some other part of the draft. He had come round to the view that, as reformulated by the Drafting Committee, it was in its proper place.

66. Mr. EL-ERIAN said he agreed with the comments made by Mr. Elias. It was important to define *jus cogens*. When the draft convenants on human rights were being considered in the Third Committee of the General Assembly, a long discussion had developed on the question whether the French concept of *ordre public* corresponded to what was known to English and American lawyers as " public policy "; that question had led to endless difficulties, which showed how essential it was to define *jus cogens*.

67. He could not subscribe to the view that all norms of general international law were peremptory in the sense of *jus cogens*. Some rules of international law which were laid down in particular international conventions took precedence over those contained in general international conventions. as was indicated by Article 38, paragraph 1 (*a*), of the Statute of the International Court of Justice.

68. The concept of *jus cogens* had originated with universal crimes like piracy and the slave trade, whose prohibition had long been regarded as a peremptory rule from which States were not permitted to derogate.

69. He was in favour of retaining the term " *jus cogens* " in brackets at the end of the title.

70. Mr. BARTOŠ explained that the Drafting Committee had been compelled to refrain from giving any definition of *jus cogens* whatever, because two-thirds of the Commission had been opposed to each formula proposed. The present discussion merely illustrated the difficulty of the problem.

71. Referring to Mr. Castrén's comment on the excessive length of the title of the article, he explained that the Drafting Committee's intention had been to give an explanation, not in the commentary, but in the text itself, so as to elicit a response from governments. The Special Rapporteur had even been asked by the Drafting Committee to stress the matter in his commentary with a view to discovering the reaction of States to the concept of *jus cogens* in international law — a concept hitherto regarded as belonging to so-called rational law rather than to positive law — and their views on the nature of a peremptory norm.

72. The Drafting Committee had also meant to make it clear that the article was concerned with universal international law; that was why the title referred to general international law, to the exclusion of regional international law. Thus it had been intentionally that the long title had been made still longer.

73. He associated himself with Mr. Yasseen's comments on international public order, in other words, on peremptory norms and derogation from them. The Drafting Committee had considered the matter and wondered whether derogation from peremptory norms should be dealt with in article 13, or rather in section III on the termination of treaties. Everyone was agreed that such a clause was necessary, and it would be discussed in connexion with section III of the draft; the clause would deal with the effects of changes in the order of the peremptory norms of general international law on the existing state of the law. The Drafting Committee had not neglected the problem; perhaps Mr. Yasseen and he should reserve the right to revert to it later.

74. Mr. TABIBI said he was fully satisfied with the work of the Drafting Committee, which had prepared a text for article 13 and an explanatory title in accordance with the Commission's instructions.

75. Mr. TUNKIN said that, like Mr. Yasseen, he attached considerable importance to paragraph 4 of the original draft article 13; but the point was covered by the concluding words of the text proposed by the Drafting Committee: " which can be modified only by a subsequent norm of general international law having the same character." The idea there was that if the treaty which conflicted with a *jus cogens* rule itself contained a new *jus cogens* rule it would of course not be void; the new *jus cogens* rule would simply replace the old.

76. With regard to the second point raised by Mr. Yasseen, the words " from which no State is permitted to derogate " were intended to mean " from which States cannot contract out ". Perhaps the Drafting Committee should be asked to consider whether the term " to derogate from " could be construed as meaning " to violate "; if, as he believed, no such meaning could be read into the term, there would be no need to change it.

77. As to the title, he agreed that it could be shortened to read " Treaties conflicting with a peremptory norm of international law (*jus cogens*) ". The words " from which no derogation is permitted " were not indispensable.

78. Mr. CASTREN said that he would not dwell on the question of the title, as Mr. Tunkin had already accepted his proposal; in any case titles were of no great significance, it was the text that counted. Nevertheless, the title as it stood was not really complete. To achieve perfection, it would be necessary to add the rest of the article and refer to norms which could be modified only by a subsequent norm of general international law having the same character. That would put the whole article in the title.

79. Mr. VERDROSS said he supported Mr. Yasseen's proposal. It was necessary to specify that no derogation

from a *jus cogens* rule was permissible by bilateral or multilateral treaties; only a general rule itself having the character of *jus cogens* could derogate from a *jus cogens* rule. He therefore proposed that the Drafting Committee should replace the words " no State is permitted to derogate " by the words " States are not permitted to derogate by bilateral or multilateral treaties ", because one State could never derogate from a rule of international law.

80. Sir Humphrey WALDOCK said he agreed with Mr. Castrén and Mr. Tunkin on the shortening of the title.

81. He also agreed with Mr. Tunkin on the meaning of the expression " to derogate from ". He suggested that the Drafting Committee should be asked to reconsider the wording of the passage " from which no State is permitted to derogate " with a view to making the meaning absolutely clear.

82. There appeared to be general agreement with regard to the rule itself and the only question which might require a vote was whether it was desirable to include some examples.

83. The CHAIRMAN said that a vote could be taken on the article, on the understanding that the title would be shortened as suggested by Mr. Castrén, and that the drafting points raised by Mr. Elias and Mr. Yasseen would be dealt with by the Drafting Committee.

84. He agreed that the use of the singular in the phrase " from which no State is permitted to derogate " could lead to misunderstanding.

85. Mr. ROSENNE suggested that the vote on article 13 should be deferred until a new text had been submitted by the Drafting Committee.

86. Mr. TUNKIN said he saw no reason for deferring a decision. The points that would be referred to the Drafting Committee were mere questions of drafting which would not affect the substance of the article. The Commission was therefore in a position to take a decision.

87. Mr. de LUNA said he agreed with Mr. Tunkin. It was not necessary to consider the article again.

88. Mr. BARTOŠ was in favour of voting on the principle of the article at once. The Drafting Committee could be asked to take account of the suggestions accepted by the Special Rapporteur, but there should be no further amendment of the text before another reading. The vote could be taken either on the proposed text of the article, or in two steps: first, to request the Drafting Committee to revise the text; and second, to approve the principle of the article, from which the Drafting Committee must not depart.

89. Mr. ROSENNE said he would not press for postponement of the vote.

Article 13 was adopted unanimously.

90. The CHAIRMAN invited the Commission to resume its first reading of the draft articles and to consider article 26 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

ARTICLE 26 (SEVERANCE OF TREATIES)

91. Sir Humphrey WALDOCK, Special Rapporteur, said that article 26 raised some difficult problems; that was why he had appended a rather elaborate commentary. The article dealt with the question whether in certain cases it was permissible, or perhaps even obligatory, to sever part of a treaty from the remainder. The cases contemplated were those in which a treaty had been found invalid under any of the provisions of section II, such as those on error or fraud, or in which it was sought to terminate a treaty under one of the rules in section III. With regard to the latter, the case of the termination of a treaty following upon its breach by one of the parties, dealt with in article 20, might well prove to be a special case, since the violation of its rights under the treaty could entitle the injured party to invoke the principle *inadimplenti non est adimplendum* and also the doctrine of reprisals. He drew attention, however, to the fact that an element of severance was already present in the provisions of article 20, under which it was possible for the injured party to denounce only the clause of the treaty which had been broken.

92. The matter had not received much attention from writers, though a short section was devoted to it by Lord McNair in his book *The Law of Treaties.* Nor was there much judicial authority on the subject. The question of severance had been taken up in their separate opinions, discussed in paragraphs 6 to 8 of the commentary, by two judges in the *Norwegian Loans* [2] and *Interhandel* [3] cases, who, however, had not taken the same position.

93. A strong argument in favour of permitting the severance of treaty provisions was the desirability of saving the main provisions of the treaty as far as was legitimate; for example, an error, without being unsubstantial, might relate only to a particular section of a treaty. At the same time, the disappearance of a comparatively modest clause could affect the balance of the treaty as a whole.

94. Both Lord McNair and the authors of the Harvard Draft [4] favoured the principle of severance and found that it was implied in some pronouncements of the International Court. To his mind, the decisions invoked did not seem to go beyond the statement that one part of a treaty could be independent of another. Moreover, all the passages cited referred to the interpretation of treaties. He was more impressed by the argument, put forward both by Lord McNair and by the authors of the Harvard Draft, that a multilateral treaty often dealt with a number of different subjects, one part of the treaty having litle connexion with another. There again, however, it should be remembered that concessions made by a State in one part of the treaty might have been made in return for concessions made to that State in other parts.

[2] *I.C.J. Reports,* 1957, pp. 9 ff.

[3] *I.C.J. Reports,* 1959, pp. 6 ff.

[4] *American Journal of International Law, 1935,* Vol. 29, Supplement, Part III.

95. The main substance of article 26 was contained in paragraph 3. The provisions of paragraph 4 were especially relevant to the question whether the severance of a particular provision was permissive or obligatory.

96. Following the discussion on certain other provisions, he no longer favoured cross-reference to the articles on reservations. He therefore suggested that paragraph 4 (*b*) should be re-worded so as to omit the cross-reference; it would then be couched in direct terms and would refer to a provision which was not essential to the consent of the parties to the treaty.

97. Mr. CASTREN said that the article was based on a sound idea. The principle of the severability of treaties should be accepted within reasonable limits. He approved of the approach adopted and the proposals submitted by the Special Rapporteur, and would merely make a few comments on the form.

98. Paragraphs 1 and 2 might perhaps be made more specific by saying that a notice " must apply " or even " can apply only " to the treaty as a whole, instead of " shall apply " (*s'applique*); for a notice might relate to only one part or one provision of a treaty, which was precisely the case dealt with in paragraphs 3 and 4. Perhaps paragraphs 3 and 4 could be combined, since paragraph 3 dealt with a notice relating to part of a treaty and paragraph 4 with a notice relating to one particular provision; the difference was very small and often there was no difference. What was meant by " one part of a treaty "? Was it a chapter, a section or a sub-section? And did the word " provision " mean an article, a paragraph, a sub-paragraph or a sentence?

99. If paragraphs 3 and 4 were kept separate, it would be advisable to say " may be limited " instead of " shall be limited " in the opening words of paragraph 4. In any case, a single separate provision of a treaty might be so important that its breach by one of the parties gave the other party the right to denounce the whole treaty. But the latter party might merely denounce or suspend the provision in question.

100. Lastly, paragraph 4 (*b*) might be worded in the same way as paragraph 3 (*a*) (ii).

101. Mr. TUNKIN said that the wording of article 26 needed some adjustment if it was not to present the whole problem in a false light. For example, all four paragraphs spoke of " a notice framed " under either article 24 or article 25, which suggested that the problem was one of procedure. In fact, it was a problem of substance: it related not to the question of framing a notice, but to the right of a State to take certain action in the event of fraud or error, for example.

102. A comparison of the provisions of article 26 with those of article 24 showed that there was a good deal of repetition. He therefore suggested that consideration should be given to the possibility of combining the two articles and producing a more compact and elegant text.

103. Mr. ROSENNE said that as at present drafted, the provisions of article 26 referred to all the different processes in sections II and III, such as annulment on various grounds, denunciation, termination, withdrawal and suspension. Those processes, however, were not all on the same footing. He therefore asked whether, as a matter of principle, the concept of severability would apply in regard to suspension in the same way and to the same effect as it would apply to the termination of a treaty or of participation in a treaty. The reason why he asked that question was that, in the case of termination or suspension of a treaty following upon its breach, there was a difference between suspension, which could be partial, and termination; and the question arose of the possible right of an injured State to choose between termination of the whole treaty and suspension of the whole or part of the treaty. Provision for a similar choice might have to be made elsewhere.

104. The Special Rapporteur's answer to that question could help the Commission to decide what would be the best rule in the matter. That was particularly important, because the rule that emerged from the Commission's discussions would probably be *de lege ferenda* and not *de lege lata.*

105. Sir Humphrey WALDOCK, Special Rapporteur, said that he regarded breach as a special case, for which special provision would perhaps have to be made.

106. In general, the question whether the principle of severance applied would depend largely on the nature of the treaty. It was particularly important in the case of modern treaties with a very large number of clauses. A classic example was the Treaty of Versailles, which dealt with a great variety of entirely different matters.

107. The possibility of severance existed in connexion with any of the principles on the basis of which one of the acts referred to in paragraphs 1 and 2 could be performed. He had deliberately raised the question of severance in connexion with the violation of a *jus cogens* rule in paragraph 5 of his commentary on article 13 (A/CN.4/156, page 51), where he had written:

> " One point of view might be that any treaty having an illegal object should be totally void and lack all validity until reformed by the parties themselves in a way to cure it of the illegality. Having regard, however, to the relationships created by treaty and to the prejudice that might result from holding a treaty to be totally void by reason of a minor inconsistency with a *jus cogens* rule, it seems preferable to allow the severance of illegal provisions from a treaty in cases where they do not form part of the principal objects of the treaty and are clearly severable from the rest of its provisions."

Normally, the violation of a *jus cogens* rule would be on some secondary point; in the unlikely event of two or more States concluding a grossly illegal treaty, the instrument would probably never see the light of day.

108. With regard to the practice of the International Court, the *Norwegian Loans* and *Interhandel* cases, which were discussed in his commentary on article 26, were cases not of violation of *jus cogens* rules, but rather

of alleged conflict with the Statute of the International Court of Justice. However, the Court appeared to have regarded the provisions of the Statute as *jus cogens* for the parties to the case.

The meeting rose at 12.25 p.m.

706th MEETING

Monday, 24 June 1963, at 3 p.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 continue consideration of article 26 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

ARTICLE 26 (SEVERANCE OF TREATIES) (*continued*)

2. Mr. CADIEUX said there was no doubt that the principle of severability of treaties had received recognition in state practice case-law and doctrine. All that the Commission had to do, therefore, was to set the limits within which the principle should be applied; that was a matter of codification, but also of development of international law. It was clear, too, that the principle of severability touched on the essential validity of treaties, and that an article on the subject should be included in the draft.

3. The effect of the principle raised what was really a question of interpretation of the will of the contracting parties: it had to be determined whether one part or one provision of the treaty had been an essential motive for consent to be bound by the other parts or provisions. Severance could only be justified if the reply to that question was in the negative. That was the point of view that Sir Hersch Lauterpacht had adopted in the argument quoted by the Special Rapporteur in paragraph 6 of his commentary. If one part or one provision of a treaty was independent and self-contained, that was at least an indication that it might not have been an essential motive for consent. Similarly, if reservations to one part or one provision of a treaty were allowed, that was evidence that acceptance of that part or provision had not been essential.

4. That simple but fundamental principle was not perhaps expressed as clearly as it should be in the draft. He therefore suggested that paragraphs 3 and 4 of the article should be combined in a simplified form stressing the fundamental principle, which was to give effect to the intention of the contracting parties and to establish a presumption that, if one part or provision of a treaty was self-contained and independent of the rest of the treaty, it could be severed. If the contracting parties wished to bar that presumption, they could do so by appropriate provisions in the treaty.

5. Like the Special Rapporteur, he considered that severance should be accepted in the cases comtemplated in paragraphs 3 (*a*) (ii) and 4 (*b*), and also in paragraph 3 (*a*) (i) unless an express clause or some other conclusive evidence establishing the contrary intention of the contracting parties rebutted the presumption.

6. The idea expressed in paragraph 1 should be retained, but since it placed a restriction on the principle of severability, the principle itself should be stated first.

7. With regard to the application of the principle of severability in the event of breach of a treaty, he thought there could be no severance if the breach was material. Article 20 laid down that a material breach of a treaty resulted from the setting aside of any provision to which reservations could not be made or failure to perform which was not compatible with the fulfilment of the object of the treaty. That being so, it seemed incompatible with the will of the parties that the principle of severability should be applicable in that case, since the result would be to isolate a provision which had been an essential ground for concluding the treaty. Application of the principle of severability would then enable the injured party to implement a treaty from which a material provision had been severed. That would be abandoning the very principle on which any rule concerning severance should be based. The injured party had certain rights under article 20; but it would not be justifiable to give it, under article 26, the right to apply a treaty differing substantially from the original treaty.

8. On the other hand, in the case of a breach that was not material, the principle of severability should apply; it would be going too far to give the injured party the right to denounce the whole treaty. Article 20 settled part of the question; article 26 should complement and confirm article 20.

9. Article 26 should be linked to article 25, for a party wishing to apply the principle of severability could not do so unilaterally.

10. Mr. PAL said that, like Mr. Tunkin, he did not find article 26 altogether acceptable in its present form. It seemed to deal mainly with the procedure to be followed when treaties had become vitiated in certain ways, without adequately enquiring whether the vitiation was partial and without specifying when the question of severability arose.

11. The correct approach would be to examine the articles already adopted which dealt with the operation of the various vitiating factors, in order to determine whether, under any of them, any of the vitiating factors could be said to affect only a part of a treaty. If they could, but only if they could, the question of severability would arise, and it would be necessary to determine whether, and to what extent, the vitiated treaty consisted of distinct parts that could be separated from each other so as to salvage the unaffected part or parts. The point of departure must, of course, be the general proposition, implied but not stated in paragraph 1 of article 26, that a treaty was normally indivisible. Paragraphs 3 and 4 might have to be re-drafted so as to set out the circumstances in which, and to