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Summary record of the 706th meeting

Topic:
Law of Treaties

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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 contemplated 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

what extent, a treaty could be regarded as severable. In that connexion, it would have to be decided whether severability must be traced to the original intention of the parties, to be ascertained by interpretation of the terms of the treaty and the relevant circumstances, or would be determinable by means of an objective rule of law. In some systems of municipal law, for analogous purposes, severability of a contract was dependent on the express or implied intention of the parties.

12. The Special Rapporteur's draft contained a number of substantive principles: that a treaty was in principle indivisible unless there were express provisions as to its separability, in which case they prevailed; that part of a treaty might be severable if its provisions were self-contained and wholly independent of the remainder and provided that acceptance of it had not been made an express condition of the acceptance of other parts, either by a term in the treaty itself or during the negotiations; and that a provision in respect of which it was permissible to make reservations under article 18, paragraph 1, of Part I, was severable. Certainly that last condition was a valid test, for if clauses were made open to reservations it was a legitimate inference that the parties regarded them as severable.

13. The Commission had to consider not only severability, but also the question whether only part of the treaty was affected by the vitiating factor. The whole question of severability depended on the extent of the operation of the vitiating factors, as accepted by the Commission. It would be preferable to frame an objective rule of law to determine severability, in particular, in order to obviate the danger of the doctrine being transformed from a legal principle into a political weapon. Similar risks had been discussed in connexion with the doctrine of *rebus sic stantibus*. He was not in favour of introducing any pseudo-legal principle based on the "implied intention" of the parties.

14. In some municipal systems it was a generally accepted principle that only the injured party had the right to apply for the severance of certain clauses in a contract. Formerly, common law had allowed severance; but statute law had been stringent in the matter. More recently the distinction had disappeared, and the position now was that if legal clauses could be separated from illegal clauses the latter could be rejected separately. But if any part of the consideration was illegal then all the promises supported by it failed. Those rules, however, had always been found difficult to apply.

15. With regard to the articles, as at present drafted, under which the question of severance might arise, fraud under article 7 would vitiate the whole treaty; so would error under the new article 8 and coercion under the new articles 11 and 12; so that in none of those cases would the question of severance arise. Again, there could be no severance of treaties conflicting with a peremptory norm of general international law; under the new article 13, such treaties would be void *in toto*.

16. He would not comment on the possible applicability of article 16 to articles 21 and 22, as the revised

texts of those articles had not yet been submitted by the Drafting Committee.

17. In his opinion the right to demand the severance of treaty provisions could only belong to the injured party and that would have to be laid down in the article. It would be better to have a single article than to include provisions on severance in several articles, which would be unduly repetitive.

18. No final decision on article 26 could be reached until the Commission had before it the Drafting Committee's texts of all the articles in sections II and III.

19. Mr. ROSENNE said that the article presented considerable difficulties and at the present stage the Commission would do better to avoid making any pronouncement covering the whole problem of severance. It should confine itself to what was necessary for the purposes of the section dealing with validity and termination, and to dovetailing its conclusions with the decisions on Part I reached at the previous session. The questions of severance and severability could arise in connexion not only with the validity and termination, but also with the application and interpretation of treaties; they were discussed in the later context in much of the case law and legal writings. While the principle of severance was broadly accepted in both case law and doctrine, there were fundamental disagreements as to its scope and manner of application. Although there was admittedly a strong trend of opinion in favour of the thesis put forward by the Special Rapporteur, particularly the principle of paragraph 3 (a) (ii), nevertheless many authorities had pointed to the problems it could create. He had been particularly struck by a passage in which Rousseau drew attention to the almost insurmountable difficulties of assessing the relative importance of different provisions for different parties to a treaty.¹

20. Other difficulties to which the doctrine of severability gave rise were rather similar to those encountered by the Commission when discussing article 5. If the Special Rapporteur's thesis were accepted, it would be necessary to determine not only what had been expressed by the parties on the international plane to be essential, but also what had been material in forming the will of the State on the domestic plane, since legislatures often ratified unpopular treaties because of some particular provision they contained. That point had been emphasized by Sir Hersch Lauterpacht in the *Interhandel* case when he had warned against the impropriety of being "influenced by any speculation as to differing attitudes of the legislative and executive branches of the Government of the United States" concerning the Connally amendment, and had stressed that the written text alone must be regarded as representing the United States position.² He himself subscribed to that view and believed that any approach to the problem of severance would have to be based on the assumption that it was not possible to distinguish objec-

¹ Rousseau, C., *Principes généraux du droit international public*, Paris, 1944, livre 1^{er}, Les Traités, p. 540.

² *I.C.J. Reports*, 1959, p. 111.

tively between important and unimportant provisions of a treaty.

21. In considering article 26, the Commission should confine itself to the international aspects, without going into the domestic significance of the provisions of a treaty. Two new texts had recently been advanced in the *South West Africa* cases. The first had been put forward by Judge Jessup in his separate opinion in the passage reading:

“... the question which, if any, of the provisions of the Mandate did not survive cannot be tested by an inquiry whether this or that provision was ‘essential’ to the operation of the Mandate, or whether it was merely ‘important’ or ‘useful’ or, indeed, ‘inconsequential’; there is no objective standard which can be used to make such an appraisal. The question which can be answered is whether some provision or part of a provision became inoperable and if so whether that inoperable portion was so essential to the operation of the provision in question that the whole provision falls.”³

22. The second test was to be found in the joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, in the passages reading:

“... there is in fact no principle of international law which requires that because an instrument or institution survives or continues in existence, it must necessarily do so with respect to *all* its parts on a completely non-severable basis.

“... If an inspection of a particular clause shows that, although an instrument or institution survives as such, the clause concerned is no longer possible of performance, or can no longer be applied according to its terms (as is the case with Articles 6 and 7 of the Mandate) then the *prima facie* conclusion must be that although the instrument or institution otherwise remains intact, that particular clause is at an end.

“The only circumstances in which it might be possible to maintain the contrary, would be where the provision concerned was of so fundamental and essential a character that the instrument or institution could not function without it.”⁴

23. It was interesting to note that the judges, while accepting the principle of severability, had drawn precisely the opposite conclusions from it when applying it to the case in question. The Court, however, had not taken any firm position of principle on the issue of severance, and indeed had not needed to, because of the manner in which the case had been pleaded.

24. The Commission was not in a position, nor was it called upon, to choose between different theories of the doctrine of severability or the method of applying it, or to try to find a compromise between them; but it should perhaps be guided by the proposition, on which there was general agreement, that the application

of the doctrine in any given case must be the outcome of a full and possibly even minute consideration of all the relevant facts. Naturally severance implied some degree — perhaps a considerable degree — of revision, but that was essentially a political, not a judicial matter, as Rousseau had brought out in his instructive section on revision.⁵ Municipal concepts and practice relating to the severance of contract clauses could be of little real assistance.

25. As far as integration of article 26 with the provisions of Part I was concerned, he considered that its wording should follow as closely as possible that adopted for article 15, paragraph 1 (b). That would also be consistent with the approach adopted by Sir Gerald Fitzmaurice in article 26, paragraphs 7 and 8, and in paragraph 194 of the commentary in his second report.⁶ He had been impressed by the warning given in the latter paragraph against the possibility of effecting disguised unilateral reservations by partial termination, and would therefore answer in the negative the question put by the present Special Rapporteur, when introducing article 26 at the previous meeting (paras. 91-96) whether it should be made obligatory for the party seeking to exercise its rights under article 26 to sever the impugned provision.

26. In principle, all notices under articles 24 and 25 must be subject to the terms of the treaty itself and apply to the whole of it; but in the present context the expression “terms of the treaty itself” might be understood as referring both to the provisions regarding termination and to those regarding the extent of initial participation in the treaty under article 15, paragraph 1 (b), of Part I, but not to the provisions regarding reservations, which were dealt with in other articles of that part.

27. In his opinion the notices contemplated in articles 24 and 25 were essentially reasoned demands to negotiate and the sanction of causing the treaty to lapse only came into operation if the negotiations failed. The notice could be limited to one particular provision and consequential matters. The sanction applied in the event of complete failure of the negotiations must, in principle, result in the complete termination of the whole treaty or at any rate of a clearly defined part of the treaty, and not simply in the severance of a clause.

28. In regard to the question of a treaty being composed of separate parts, he had been disturbed by the reference to such a complex instrument as the Treaty of Versailles, parts of which might subsequently have been denounced, but which had surely not been regarded as severable when drawn up.

29. There were three exceptions to the general argument he had advanced. First, it seemed to be accepted that in the case of a breach, the injured State could invoke its rights in respect of the breached treaty in whole or in part, which was a particular application

⁵ *Op. cit.*, p. 615.

⁶ *Yearbook of the International Law Commission, 1957*, Vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), pp. 34 and 66.

³ *I.C.J. Reports*, 1962, p. 408.

⁴ *Ibid.*, pp. 517 and 518.

of the law of retaliation, retorsion or self-help. That situation ought to be covered in the provisions concerning breach.

30. The second exception was when a part of a treaty initially completely valid became invalid as a result of the subsequent emergence of a rule of *jus cogens*. In view of the great complexity of intertemporal law and of the way in which the character of treaties could change in the course of their execution, it might be desirable to consider recognizing the principle of severability *a priori* rather more freely in such cases; that would probably make for greater stability of treaties. Moreover, only a small number of treaties were likely to be tainted with that form of invalidity.

31. The third exception was the rare but possible case of a single clause having been introduced as a result of improper pressure on the representative of one of the parties; that situation was not covered by article 11, and it might be proper to allow severance of such a provision if the injured State so desired.

32. He suggested that the title of the article was too broad and gave promise of more than the contents would warrant: attention should be focused on the contents of the instruments effecting the termination and not on the broad principle implied by severance.

33. Paragraphs 1 and 2, subject to drafting changes, and if brought into line with article 15 of Part I, would be acceptable and useful.

34. Paragraphs 3 and 4 went a great deal too far if they were to apply equally to all the processes mentioned in article 25. However, the Commission should perhaps consider something a little more liberal in cases of temporary suspension, since that process seemed to be of a different character from those which put an end to a treaty or to a State's participation in a treaty.

35. If his views on the three exceptions were generally accepted, some cross-reference should be made to the questions of breach, subsequent invalidity as a result of a new *jus cogens* rule, and improper pressure upon an individual representative negotiating a treaty.

36. A general provision should also be inserted allowing the injured State some choice as to what action it wished to take in cases in which termination was envisaged in the draft articles; the possibility of suspension, including partial suspension, could be retained as an alternative to total termination.

37. It should also be made clear that the article would not apply to treaties falling under the provisions of articles 12 and 13, which were void *ab initio*.

38. Mr. BRIGGS said that article 26 would need some re-drafting and the Commission might not be able to reach a final decision until it had seen the new texts of the articles containing provisions on which article 26 would have a bearing.

39. There was enough practice to warrant an article following for the severance of treaty provisions, provided proper safeguards were included.

40. He was inclined to think that paragraphs 1 and 2, which could probably be combined, were too restrictive and that the opening phrase should be modified to read: "Unless the notice itself otherwise provides"; that would establish a presumption that a notice of termination, withdrawal or suspension, given under article 24 or 25, applied to the treaty as a whole.

41. On the other hand, a notice of termination of certain provisions only, under paragraphs 3 and 4, must be subject to the proviso "unless the treaty otherwise provides". But that right of termination could only be invoked in respect of separate provisions that were clearly independent of other provisions in the treaty, as had been provided in the Harvard Research Draft.⁷

42. It would be necessary for the Commission to discuss the scope of the application of article 26.

43. With regard to the commentary, commencing with paragraph 6, much of the Special Rapporteur's discussion of declarations of acceptance of the compulsory jurisdiction of the International Court did not seem entirely pertinent to the question of severability of treaty provisions.

44. Mr. de LUNA congratulated the Special Rapporteur on the choice he had made among the various schools of thought on the problem of the severability of treaties. Some writers had attached little weight to the judgements of the Permanent Court of International Justice in the *Free Zones* and *Wimbledon* cases, the Court's two advisory opinions relating to the International Labour Organisation, and the judgements of the International Court of Justice in the cases of the *Norwegian Loans*, *Interhandel* and *Reservations to the Genocide Convention*. As the Special Rapporteur had noted in paragraph 4 of his commentary, those pronouncements had been cited "as evidence of a general concept in international law of the separability of treaty provisions"; and he had added that a rule which, as in the Harvard Research Draft, would allow the severance of any "separate provision of a treaty if such provision is clearly independent of other provisions in the treaty" might be too broadly stated.

45. He (Mr. de Luna) would merely remind the Commission that the Permanent Court had stated in the *Wimbledon* case that: "The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany . . . they would lose their *raison d'être*. . . ." ⁸

46. The new principle of the severability of international treaty obligations, especially in law-making treaties, must therefore be accepted, and it was a matter for satisfaction that the trend towards an international community law had prevailed over the liberal, individualistic and selfish international law of the nineteenth century. On the other hand, the opposite extreme represented by the Harvard Research Draft should be avoided.

⁷ *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, p. 663, article 30.

⁸ *P.C.I.J.*, Series A, No. 1, pp. 23-24.

47. In his arbitral award of 1888, in the dispute between Costa Rica and Nicaragua,⁹ President Cleveland had held that the 1858 treaty between those two States remained valid despite the non-performance of the guarantee clause by a third State, El Salvador, because that clause did not affect the essence of the treaty. In other words, the concept of the "essential provision" of a treaty had been invoked as support for severance.

48. He was in agreement with the Special Rapporteur on all the ideas embodied in article 26, though that did not mean that the drafting could not be improved. First, it would be better to begin by stating the general principle, which was that stated in paragraph 2, as the Special Rapporteur recognized in paragraph 12 of his commentary; the order of paragraphs 1 and 2 should accordingly be reversed. Secondly, it would be preferable to deal with the whole question of severance in a special article, rather than insert clauses relating to it in several articles. Thirdly, the Drafting Committee should simplify the article and eliminate the repetitions in paragraphs 3 and 4, which dealt with quite different cases, but settled them in the same way.

49. Finally, he agreed with Mr. Cadieux and Mr. Briggs that only presumptions of exceptions should be stated so that the parties would have a chance to rebut the presumption.

50. Mr. ELIAS said that the principle embodied in article 26 was acceptable, but as the discussion proceeded he was becoming increasingly convinced that the article belonged in the Special Rapporteur's third report, which was to be devoted to the application and interpretation of treaties.

51. Whatever decision was taken on the position of the article, it would certainly need to be greatly simplified and rearranged. It should first state the fundamental rule that normally a treaty was indivisible, and then indicate, by way of exception, the conditions under which severance was permissible. A provision of that kind would be extremely helpful to the International Court in cases where a treaty was either imprecise or did not make express provision for severance. As Lord McNair had maintained in his *Law of Treaties*, the severance of distinct and separate parts of a treaty was possible in certain circumstances.¹⁰ The problem became more difficult when provisions could not simply be cancelled by striking them out.

52. Perhaps an analogy could be found with the kind of situation that arose in Federal States when the respective fields of competence of the Federal Government and the constituent States had to be determined under the provisions of a certain statute. But, of course, where treaties were concerned, the problems were far more intractable.

53. The Commission might not find it possible to reach a final conclusion on article 26 until it had had an opportunity of examining the Drafting Committee's revised texts of articles 24 and 25.

54. Mr. TABIBI said that the Commission was called upon to decide between adherence to the principle of the indivisibility of treaties and recognition of the severability of treaty provisions. The three main needs were to protect the injured party, to safeguard the stability of treaties, and to impose sanctions on the party committing a breach. In the light of those needs, all of which were important for the law of treaties, he could not support article 26, which afforded no protection to the injured party, did not safeguard the stability of treaties and did not provide any sanction against the offending party.

55. It was significant that such a leading authority on the contemporary law of treaties as Lord McNair was particularly guarded on the subject of severability. In consequence of the different views expressed by the various authorities, it would be very difficult to adopt any rule on the subject. He urged the Commission to uphold the principle of the unity of treaties and not to adopt the rule proposed in article 26.

56. The provisions of article 26 would have the additional disadvantage of opening the way for breach of treaties, particularly bilateral treaties; a party would, in certain circumstances, be able to invoke the principle of severance in order to terminate part of a treaty which it found onerous or inconvenient.

57. The pronouncements of the Permanent Court of International Justice, particularly in the *Free Zones* case, and the separate opinions of some of the judges of the International Court of Justice in the recent *South West Africa* cases could not really serve as a basis for the rule which it was proposed to embody in paragraphs 1 and 2 of article 26. The Treaty of Versailles was a special case; it was not a normal treaty and consisted of a number of different parts, each of which had a different purpose and in a sense constituted a separate treaty.

58. The Commission should not try to reconcile the principle of the indivisibility of treaties with severability, as was done in article 26; any such attempt could only lead to confusion.

59. Mr. AGO said he did not question the need to recognize that a treaty might not be voided or denounced *in toto*, especially if it was one that could be divided into different parts, or the need to recognize that a particular provision of a treaty might have lapsed. His doubts were prompted by a number of problems which should cause the Commission to weigh carefully all the consequences of the article it was about to adopt, and he would accordingly like some clarification on a number of points.

60. First, while the provisions of paragraph 3 (a), sub-paragraphs (i) and (ii), might be appropriate in the case of a multilateral treaty, they were perhaps questionable in the case of a bilateral treaty or a treaty concluded by a small number of countries, for it would be too easy for one of the parties to such a treaty simply to denounce a part or a clause of it which was inconvenient. In such a case, its partners would surely be entitled to claim — even if the condition were not an

⁹ Moore, J. B., *History and Digest of International Arbitrations*, Vol. II, pp. 1945 ff.

¹⁰ *Op. cit.*, chapter 28.

express one within the meaning of paragraph 3 (a) (ii) — that the treaty so amputated no longer interested them and to denounce its other provisions. To allow a State to release itself from certain parts of a treaty without the other signatories being able to intervene would certainly be giving it rather too much latitude.

61. Secondly, there was the question of the reference to article 18 of Part I, to which Mr. Rosenne had already alluded. In that article the Commission had indeed specified when reservations to a particular provision might appropriately be made. But would not the provisions of paragraph 4 amount to recognizing that reservations could be made in another form at any time, and would they not conflict with article 18 ?

62. Lastly, with regard to the question of a notice invoking a ground which related exclusively to one provision of a treaty, generally speaking the difficulties which the Commission was encountering seemed to be due to the fact that several different cases were dealt with in a single article on the severance of treaties. A provision of a treaty might have lapsed because its object had ceased to exist, or because it had become impossible to execute. That could happen, for example, to a clause referring to the jurisdiction of the Permanent Court of International Justice in a treaty of arbitration and judicial settlement between two States. If the two States concerned were not Members of the United Nations, and if, consequently, the jurisdiction of the Permanent Court of International Justice could not be held to have been transferred to the International Court of Justice, the clause in question would have lapsed because the Permanent Court no longer existed. In such a case, would it be necessary to provide that a notice must be addressed by one State to the other before the clause could lapse, or would it lapse automatically ? It might be asked whether, generally speaking, the question of giving notice to terminate a clause of a treaty should not arise only in cases of denunciation which really called for action on the part of the State concerned, and not in certain cases in which a clause was no longer applicable because of a material impossibility.

63. He would speak again at a later stage of the discussion on article 26.

64. Mr. YASSEEN said that the principle underlying article 26 was perfectly logical; moreover, it was confirmed by international practice. The drafting could certainly be improved, however.

65. The question of severability depended on the treaty itself. It was not possible to lay down an objective general rule that was applicable to all cases *in abstracto*. The treaty itself must be examined first. Of course, the decision rested with the parties to the treaty; since they were free to stipulate its indivisibility, they could also declare that it was severable.

66. The safeguards provided by the Special Rapporteur were satisfactory. First, he had referred to the express clauses of the treaty. Secondly, he had made the severability or indivisibility of the treaty depend on the admissibility or non-admissibility of reservations. That was a most ingenious idea; for once States allowed

reservations to an article, it could be held that the treaty could exist without that article, which was equivalent to recognizing that so far as that article was concerned the treaty was severable.

67. He was somewhat reluctant to accept the provision in paragraph 3 (a) (ii), however, because it put an express condition in the treaty itself on the same footing as a statement made during the negotiations. That raised a question relating to the method of interpretation. Would it always be possible to refer to the negotiations, even if statements made during those negotiations were not reflected in the text of the treaty ? That was a general question of interpretation; it was doubtful whether a statement made during the negotiations could be placed on the same footing as an express condition in the treaty. He himself could not accept that proposition. A treaty was a solemn instrument which had to be in writing; could it be supplemented or qualified by statements of which no trace appeared in the treaty ? He did not wish to go into the general question of *travaux préparatoires* as an aid to the interpretation of treaties, but he asked the Special Rapporteur to clarify that point.

68. Moreover, he could not see why the Special Rapporteur had not mentioned that paragraph 4 (b) also applied to a part of a treaty. A treaty could contain parts, complete in themselves, to which reservations were permitted. For example, in the case of the Commission's draft on Consular Intercourse and Immunities,¹¹ if had been held that the whole of the part relating to honorary consuls could be accepted or rejected. It might perhaps be possible to combine paragraphs 3 and 4, so as to provide the same safeguard in both cases.

69. A further drafting point was that in order to avoid ambiguity it would be better not to use the French word "*partie*", which could mean both a party to a treaty and a part of a treaty.

70. Mr. LACHS said the discussion had shown that the Commission was faced with a very serious problem, involving the basic dilemma of the severability or indivisibility of treaties.

71. The Special Rapporteur's approach to article 26 and his commentary were extremely illuminating; he had thrown light on recent trends and developments, which not so long ago would not have been discernible. And unless the general approach was to endeavour to discern the real historical trends of recent times, there would be no possibility of reaching a solution.

72. As he saw it, the idea underlying those trends was to try to save the treaty and to make it live longer than it would have done under the old rule of indivisibility; that would be a contribution to the development of peaceful relations and international co-operation. At the same time, however, it should not be made easy for a State to evade clauses of a treaty which it found too onerous, but which were essential to the treaty as a whole. Consequently, although he did not accept

¹¹ *Official Records of the General Assembly, Sixteenth Session, Supplement No. 9*, pp. 5 ff.

Mr. Tabibi's conclusion, he agreed with him that the Commission was faced with an exceedingly difficult problem.

73. In view of the clear contemporary tendency to try to avoid dissolution of the whole of a treaty, he accepted the principle embodied in the article. With regard to its formulation, however, he shared Mr. Ago's fear that the proposed provisions might enable States to continue making reservations throughout the life of the treaty. The rule stated in the article should be made subject to a number of conditions.

74. First, it should be conditioned by the rules of *jus cogens*, especially *jus cogens superveniens*. Secondly, it should be conditioned by the intention of the parties, which could be either expressed or presumed. Thirdly, it should be conditioned by the subject-matter of the treaty. And fourthly, the nature of the treaty should play a part: certain treaties, including the constituent instruments of international organizations and peace treaties, should never be severable. He doubted whether the Treaty of Versailles really provided an example of severability.

75. With regard to the position of the article, he had doubts about Mr. Elias' suggestion. Article 26 dealt with termination of a treaty in part and therefore logically followed the articles dealing with the termination of a treaty *in toto*.

76. With regard to the specific provisions of the article, he supported the suggestion that it should be re-drafted so as to state first the general principle of the indivisibility of treaties and then those exceptional cases in which severance of treaty provisions was possible.

77. With regard to the criteria for severability, he was not altogether satisfied with the formulation proposed in paragraph 3. In particular, the requirement in paragraph 3 (a) (i) that the provisions should be "self-contained and wholly independent of the remainder of the treaty" seemed too formal a criterion. It would be necessary to specify more clearly the circumstances in which severance was permissible.

78. The provisions of paragraph 4 should be on the same lines as those of paragraph 3 and reduce severability to its proper proportions.

79. Lastly, there was some merit in Mr. Rosenne's observation that the suspension of treaties could be viewed in a different light from their termination.

80. Mr. EL-ERIAN said he found the provisions of article 26 generally acceptable and the commentary excellent.

81. Like Mr. Briggs, he thought there should be no great difficulty in accepting the principle of severability. At the previous session, when considering the comparable problem of reservations, the Commission had found it possible to reconcile the principle of indivisibility of treaties with the practical considerations which militated in favour of their divisibility subject to certain safeguards.

82. He accepted the Special Rapporteur's general approach, which conceded the need for severance of trea-

ties in certain circumstances, and approved of his embodying in the article the generally accepted presumption that termination applied to the whole of a treaty.

83. One question that arose was what was meant by a "provision" of a treaty. His own view was that the term covered any part, any single article, any clause, any section or any paragraph which was independent of the rest of the treaty.

84. He noted that in paragraph 3 (a) the Special Rapporteur had adopted a twofold criterion of severability: first that the provisions of the severable part should be "self-contained and wholly independent of the remainder of the treaty"; and secondly, that acceptance of that part should not have been made "an express condition of the acceptance of other parts" of the treaty. The second criterion was very important because it showed that international law had moved away from the view of the very early writers, from Grotius onwards, who had regarded each article of a treaty as having the force of a condition, the non fulfilment of which would render the whole treaty void.

85. With regard to the first criterion proposed by the Special Rapporteur, it seemed an unduly rigid requirement that the severable part of the treaty should be "wholly independent" of the remainder. In the corresponding provision of the Harvard draft — article 30 — the expression used was "clearly independent". An alternative criterion could be derived from the Special Rapporteur's commentary, in which a provision of a treaty was regarded as independent if, by reason of its nature, purpose or origin, it could be separated, or from the idea suggested by the Harvard Research group of a provision which could be "terminated or suspended without necessarily disturbing the balance of rights and obligations established by the other provisions of the treaty".¹² He suggested that those ideas should be considered by the Drafting Committee with a view to elaborating on the concept of independence of a treaty provision.

86. The principle of severability had received some recognition. For instance, the Declaration of the London Naval Conference of 26 February 1909 contained an article 65, which stated that the provisions of the London Declaration "must be treated as a whole and cannot be separated",¹³ so that no signatory could ratify certain articles while rejecting others. Thus, as early as 1909, it had been found necessary to emphasize that a particular multilateral instrument was indivisible. Again, in *Karnuth v. United States* (1929),¹⁴ the Supreme Court of the United States of America had held that article III of the Jay Treaty of 1794 between Great Britain and the United States had been terminated by the outbreak of war between the two countries in 1812, but that article IX had not been terminated. The court had emphasized the different nature and purpose of the two articles.

¹² *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, pp. 1138-9.

¹³ Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements, Supplement, 1913 (Charles)*, Vol. III, p. 280.

¹⁴ 279 U.S. 231.

It was precisely that concept of the nature and purpose of the provision of a treaty which he suggested the Drafting Committee should take into consideration for the purpose of establishing criteria of severability.

87. Mr. LIU said that he upheld the principle of the integrity of treaties. Treaties were usually concluded as a result of mutual concessions by the parties, often after protracted negotiations; it was therefore difficult to imagine that a part of a treaty could be terminated separately without affecting the balance of the instrument as a whole. It would be prejudicial to the stability of treaties to allow States to denounce part of a treaty too freely.

88. He would not go so far as to say that all treaties were indivisible, but if article 26 were to be retained, it should first state the principle of indivisibility and then present the cases of severability as exceptions.

89. The CHAIRMAN, speaking as a member of the Commission, said that the question of the integrity of treaties as such related more to the application and the interpretation of treaties. The issue before the Commission was how the rule of the integrity of treaties was affected by the rules on termination and invalidity which the Commission had adopted, and to what extent partial invalidity and partial termination should be recognized.

90. He agreed with Mr. Ago that the difficulties which the Commission was encountering in connexion with article 26 might well arise from the fact that it was attempting to cover all, or almost all, the grounds for termination and invalidity by means of a single general provision. In fact an examination of the various articles would show that the principle of severability did not apply in all cases, and that where it did apply, it did not apply in the same way in all cases.

91. He would illustrate his remarks by briefly examining the various articles on termination and invalidity. The first was article 5, which dealt with the case in which a treaty violated the internal law of a State governing the procedure for entering into treaties; it seemed clear that article 5 would apply to the whole treaty and not to particular provisions. The same was true of articles 7, 8 and 11, which referred to the treaty-making process as such: fraud, error or coercion would vitiate the whole of the treaty.

92. Next, with regard to article 13 concerning rules of *jus cogens*, the principle of severability applied both to the termination of a treaty by a new rule of *jus cogens* and to the invalidity of a treaty by reason of violation of an existing rule of *jus cogens*. The principle applicable was part of international law and had effects similar to those of unconstitutionality in internal law. Only those provisions which conflicted with a rule of *jus cogens* were terminated or invalidated; those which were compatible with the *jus cogens* rule remained valid. Accordingly, he suggested that a specific provision on the subject should be included either in the articles dealing with *jus cogens* in both sections, or immediately after them.

93. With regard to article 15, which dealt with treaty provisions on termination by denunciation, he agreed with Mr. Ago that if a State attempted to denounce a part of the treaty where a right of partial denunciation was not specified in the treaty itself, the consent of the other party or parties should be required. The case would therefore be one of subsequent agreement and article 26 would not apply. Nor, in his opinion, would it apply in the cases specified in articles 18 and 19.

94. Article 30 dealt with the termination or suspension of a treaty following upon its breach and there, as suggested by the Special Rapporteur himself, a special provision on severability would be necessary.

95. Article 21, which dealt with the dissolution of a treaty owing to impossibility of performance, was not relevant to the issue; in the event of such impossibility, the question raised by article 21 was whether the treaty as a whole was extinguished or not.

96. Lastly, the provisions of article 26 would probably not be applicable to the case contemplated in article 22, which dealt with the doctrine of *rebus sic stantibus*.

97. He suggested that the approach should be changed. Instead of a general approach, the Commission should adopt the piecemeal method of dealing specifically with each of the various grounds of invalidity or termination in connexion with which the question of severance might arise.

98. Mr. TUNKIN said he preferred the general approach adopted by the Special Rapporteur, but thought that the article should state the principle of the indivisibility of treaties before proceeding to state the exceptions to that principle.

99. There were two possible approaches to the problem of severance: one was to make separate provision for severance in the various articles which were intended to be covered by the provisions of article 26; the other was to cover all eventualities by means of a general provision, which was the Special Rapporteur's approach.

100. Though he believed that it was possible to formulate a general provision, the various particular cases would have to be examined in order to see what the consequences of severance would be. He agreed with the Chairman that the position was not the same in regard to the different articles which article 26 was intended to cover. It might also be true that in some of the instances mentioned in the various articles, severance should not be permitted. However, he had doubts regarding some of the examples that had been given.

101. To take the case of violation of the provisions of internal law contemplated in article 5, if one of the clauses of a treaty conflicted with a provision of the internal law of a contracting State, the question would arise whether the clause in question was "self-contained and wholly independent of the remainder of the treaty", and whether its acceptance had not been made "an express condition of the acceptance of other parts". Could the State concerned abrogate the whole of the treaty or not?

707th MEETING

Tuesday, 25 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 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. TSURUOKA said that the object of article 26 was to safeguard the existence of certain treaties through various vicissitudes; that was a legitimate object, even though the idea might be rather novel in international law. Nevertheless, he wondered whether article 26, as drafted, really achieved that object; and he rather doubted whether the principle of severability of treaties was yet sufficiently well established to be suitably formulated in the draft. The affirmation of an ill-defined principle might lead to confusion and abuses, for States might use it as a pretext for evading their obligations.

3. He shared the opinion of those who thought that article 26 raised questions relating to the application and interpretation of the treaty, rather than to its essential validity or termination. He hoped, therefore, that the Commission would defer consideration of severability until it could discuss the question in connexion with the application and interpretation of treaties.

4. Many members of the Commission would prefer, however, to retain article 26 in an improved form. If that point of view prevailed, he hoped that the Commission would adopt a very clear formula stating the presumption of indivisibility of the treaty and stipulating that the terms of the treaty itself prevailed over all other rules on that question. The exceptions should be set out in detail in the commentary, where it would be sufficient to refer to the practice of States and to the decisions of international tribunals, rather than in the article itself.

5. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that some members held that article 26 should be taken up at the next session, because it related to the subject of his third report — the application and interpretation of treaties. Admittedly, any acceptable theory of severance must have some regard for the intention of the parties, so that it would call for some degree of interpretation and might need to be considered in connexion with certain provisions in his next report; but he had inserted article 26 in its present place because it was closely connected with the substance of a number of articles in sections II and III.

6. For example, the Commission had found it impossible to consider the provisions concerning breach without some reference to the possibility of severance. It was

102. Some members had referred to the question of reservations. His own view was that reservations were a different matter altogether. A treaty could contain a clause prohibiting or allowing reservations either to the whole of the treaty or to certain clauses. A clause which allowed reservations constituted a consent to the making of reservations, given in advance by all the parties to the treaty. Where no such consent had been given in advance, the other parties could object to a reservation; by virtue of the principle of the sovereign equality of States, a reservation could not be imposed on another State. The position in the case contemplated in article 26 was totally different. If a State acquired, under that article, a right to abrogate a part of a treaty, the other State had no option but to accept the consequences; there was no action which it could take in the matter.

103. The position in the case contemplated in article 6 — lack of authority to bind the State — was similar to that considered in article 5.

104. In the case of fraud, dealt with in article 7, severance might in theory be considered as a sort of sanction: the clause obtained by fraud would be invalidated and the remainder of the treaty would be imposed upon the offending party. That approach, however, would be rather mechanical.

105. The position in the case of error, dealt with in the new article 8, was that the part of the treaty to which the error related might be self-contained and that its acceptance might not have been made an express condition of the acceptance of other parts of the treaty. But the elimination of one part of the treaty could still lead to a situation in which the balance of the treaty as a whole was upset.

106. The examples he had given did not show that it was impossible to sever part of a treaty from the remainder; they merely showed the inadequacy of the criteria set out in article 26, particularly paragraph 3(a)(ii). The acceptance of the part of the treaty to be severed might not have been made an express condition of the acceptance of other parts, and yet the very nature of the treaty might indicate that its various parts were closely linked; thus the whole balance of the treaty might be destroyed if part of it were removed. Some additional criteria should be introduced in the form of a reference to evident and very close connexions between the various parts of the treaty.

107. With regard to the drafting of the article, his views were broadly similar to those of Mr. Lachs: a statement of the principle of indivisibility should be followed by a statement of the exceptions to it. He also supported Mr. Brigg's suggestion that paragraphs 1 and 2 should be combined, and would himself suggest that the Drafting Committee should endeavour to combine paragraphs 3 and 4.

The meeting rose at 5.50 p.m.