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Summary record of the 707th meeting

Topic:
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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.

more than a mere matter of interpretation to determine whether an error in a particular part of a treaty would only affect that part, or whether it would bring down the whole treaty. The point could be illustrated by the *Temple* case,¹ in which it had been alleged that an error had been made in a particular section of a boundary settlement. If the Court had held the error to have been established, could it have been bound also to hold that the error brought the whole treaty to nothing — an important treaty which affected a territorial situation, the exercise of jurisdiction and, perhaps, peace along the whole boundary? Was the whole treaty to be regarded as void and the parties put back to the original position in which they had been at the outset of the negotiations?

7. Article 26, though not essentially procedural, was connected with some of the procedural aspects of giving notice of termination, suspension or withdrawal, and that was another reason for his having placed it in section IV. Possibly that was not the happiest solution and it might be argued that a better place for it would be in section V, which was concerned with the legal effects of the nullity, avoidance or termination of a treaty. He had an open mind on the position of the article, which might be considered by the Drafting Committee.

8. Originally, he had inserted provisions concerning severance in a number of different articles dealing with essential validity and termination, but had finally abandoned that method in favour of a general article. In that connexion, the Chairman had pointed out that the principle of severability as a principle of the law was not applicable at all to article 15, nor perhaps to provisions concerning termination by subsequent agreement between the parties (previous meeting, para. 93). In fact, a distinction was made in article 26 between the various cases in which the right of severance might arise. Paragraph 1 was concerned with the case in which there could be no severance: where the right to terminate, withdraw from, or suspend the provisions of a treaty derived expressly or impliedly from the treaty itself and the parties had clearly contemplated that it would apply to the treaty as a whole. The case of termination by subsequent agreement where there was a clear intention to dissolve the treaty as a whole could also be covered in paragraph 1.

9. Where termination, withdrawal from, or suspension of treaty provisions was a consequence of a legal rule, as in cases of breach, fraud or coercion of an individual representative, in all of which one of the parties would have sustained injury in the sense of having been the victim of an illegal act, it might be necessary to allow a permissive right to sever at the election of the injured party. A similar approach had been adopted by the Drafting Committee in the provisions it was to submit concerning termination on breach.

10. The situation in the case of fraud was analogous: it was undesirable to face a party which had been deliberately deceived in regard to a certain clause with only

two possibilities: either to maintain or to denounce as a whole a treaty the general content of which it regarded as having value. The same kind of permissive right might be allowed when a particular provision had been inserted as the result of coercion of an individual agent, but the coercion had not substantially affected the negotiation of the rest of the treaty. Mr. Rosenne had mentioned that possibility though, of course, it was unlikely to be a common one.

11. He could not accept as justified the view put forward by some members, including Mr. Ago, that to allow such a permissive right of severance would be tantamount to admitting something like a right of reservation after the entry into force of a treaty, because it would give a party a general option to reject certain provisions by a subsequent act. In fact, the right was only contemplated if the other party had been responsible for fraud, breach or personal coercion of a representative.

12. In the case of what he might describe as the more accidental reasons for invalidity or termination, such as error, subsequent impossibility of performance, conflict with *jus cogens* and application of the doctrine of *rebus sic stantibus*, the problem would be to decide whether severance was to be obligatory or permissive. He had referred to that problem in the commentary because it had given him some trouble when drafting the article. If the right were made permissive in such cases and not conditional on agreement being reached between the parties, that might confer on one of them, perhaps the one which had failed to comply with its own constitutional provisions, a certain freedom of choice that came close to the right of making reservations. A carefully drafted article on severance would contribute to the stability of treaties, but he was inclined to believe that in cases of error, conflict with *jus cogens* and application of the doctrine of *rebus sic stantibus*, severance under certain conditions must be obligatory and not permissive, or else must be brought about by agreement between the parties; otherwise one party might be in a position to change the structure of a treaty without taking account of the other's interests.

13. The distinctions drawn in the article between the application of provisions concerning severance to different types of situation must be carried further. For instance special provisions were needed to cover termination by subsequent agreement and termination on breach or on the ground of fraud, which could be treated on more or less the same footing.

14. Paragraphs 3 and 4 should perhaps be confined to provisions dealing with error, subsequent impossibility of performance, conflict with *jus cogens* and the doctrine of *rebus sic stantibus*. Some members had suggested that, even as between that last group, different principles should apply. In his opinion the Commission should not be too hasty in excluding the possibility of severance when certain separate provisions of a treaty came into conflict with a new rule of *jus cogens*. Again, severance should also be permitted when the performance of certain obligations might become impossible as a result of a change in circumstances which did not materially affect the rest of the treaty.

¹ *I.C.J. Reports*, 1962, pp. 6 ff.

15. The fusion of paragraphs 3 and 4 had been suggested, but there might be a difference between severing part of a treaty and severing a single clause.

16. Something on the lines of paragraph 3, where he had sought to set out the conditions under which severance could be permitted, was necessary and perhaps some of the points raised during the discussion could be met by changes in its drafting.

17. The expression "self-contained" in paragraph 3(a)(i) had been criticized as being too formal, yet it seemed to convey the idea that the parties regarded part of a treaty as separate. That fact by itself was not enough to permit of its severance without the other conditions laid down in paragraph 3 being met.

18. The primary rule that must be stated was the integrity of treaties, for it was not to be easily assumed that consent was divisible. On the other hand, the grounds for invoking invalidity or for giving notice of termination might often relate only to a small portion of the treaty and it would then seem to be undesirable that the whole should be terminated.

19. Mr. BRIGGS asked the Special Rapporteur for further classification of the contemplated rule for obligatory severance of provisions in a treaty, for example, provisions vitiated by error according to the conditions set out in the Drafting Committee's text of article 8, paragraph 1. He asked that question because in a number of articles, the Commission had contemplated termination of the whole treaty in certain circumstances.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that severance on the ground of error might be permissible, subject to the conditions laid down in paragraph 3 of article 26, if the error did not undermine the consent of the parties to the whole treaty. The right of severance would then be limited to the part affected by error.

21. Mr. LACHS said that the Special Rapporteur's summing up had elucidated a number of points. There were many cases which illustrated the problems involved. He himself wished to draw attention to a situation that deserved careful consideration: that in which compulsory severance might ensue as a result of a new rule of *jus cogens*. He had in mind the Regulations annexed to the Hague Convention of 1907 on the Laws and Customs of War on Land.² Article 36 of those Regulations laid down that if the duration of an armistice was not defined, the belligerent parties could resume operations at any time, provided always that the enemy had been warned in accordance with the terms of the armistice. Articles 40 and 41 dealt with the consequences of violation of an armistice agreement. There was a difference between the decisions taken at the Hague Conference of 1899 and those taken at the Conference of 1907. The two Conventions adopted were still in force, but they had been concluded before war had been outlawed, so that the provisions he had mentioned, being contrary

to *jus cogens*, should be considered in the light of the law as it stood today.

22. Mr. ROSENNE said that the question put by Mr. Briggs prompted him to stress the importance of examining more closely the possible applicability of provisions on severance to different articles in the draft.

23. Mr. Lachs had given an extremely pertinent example, which had influenced the drafting of armistice agreements since the entry into force of the United Nations Charter.

24. He would welcome a further explanation from the Special Rapporteur as to whether, when speaking of compulsory severance, he was thinking of revision imposed by law, in the sense of a certain clause being struck out of a treaty, rather than of renewed negotiation between the parties — a view which it would be difficult to accept.

25. Mr. AGO agreed that it was sometimes useful to be able to terminate certain clauses of a treaty and retain the rest; but he thought it difficult to adopt a single provision on severance. It would be better to study the question in relation to each ground for nullity, for the problem differed greatly according whether certain grounds such as fraud or error were considered, or others such as incompatibility with a rule of *jus cogens* or the operation of the *rebus sic stantibus* clause.

26. He therefore suggested that the Commission should ask the Special Rapporteur to submit a fresh draft containing a series of articles treating the question separately for each of the different subjects, for it did not appear that the Commission could refer article 26 to the Drafting Committee at the present stage of the discussion.

27. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had drawn a distinction between two different cases. The first was that in which there could be said to be an offending party and the second was that in which none of the parties could be said to be either offending or injured. The position taken by the Special Rapporteur was that, in the first case, the injured party had an option with regard to severance. That might be acceptable in regard to termination on grounds of a breach committed by the offending party; for it was appropriate that in that case, the injured party should have the right, if it so desired, to demand partial termination of the treaty rather than complete termination.

28. He had some doubts, however, as to how the rule would apply where the treaty was rendered void by the coercion of individual negotiators or by fraud. For example, if two States entered into a treaty under which they exchanged certain possessions and consent to that treaty had been obtained by fraud, it was difficult to see how the injured party could refuse performance and at the same time demand the other party's compliance. The maxim *fraus omnia corrumpit* should apply and there should be no question of severance. The whole treaty was vitiated by fraud.

29. He agreed with the position taken by the Special Rapporteur regarding conflict with a rule of *jus cogens*,

² Scott, J. B., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, pp. 107 ff.

but in his opinion it was not the theory of severance that applied. The real question was which particular provisions of the treaty came into conflict with the rule of *jus cogens*. The position was the same whether the treaty was void by reason of conflict with an existing rule of *jus cogens*, or was terminated because of a supervening rule of *jus cogens*. The rule was similar to that which applied in municipal law where a later law amended an earlier one, or where certain provisions of a law were unconstitutional: only those provisions which actually conflicted with the earlier ones, or which contravened the constitution, were terminated or invalidated.

30. With regard to the question of error, he agreed with Mr. Briggs. The provisions of article 8, as adopted by the Commission, related to substantial error; under the provisions of that article a treaty would be invalidated because of an error relating to the essential basis of consent. It was difficult to see how provisions of that kind could possibly be reconciled with the notion of severance; a substantial error would vitiate the whole of the treaty. As in municipal law, where the error was not a substantial one, it was merely rectified without affecting the validity of the treaty.

31. He had been interested to hear the Special Rapporteur's views on the distinction to be made between the various articles covered by the provisions of article 26, and his comment that it should be carried further.

32. He supported Mr. Ago's proposal that the Special Rapporteur should explore the question of severance with reference to each of the substantive articles and submit to the Commission one or more texts covering that question.

33. Mr. TSURUOKA said that the continuation of the discussion had confirmed his view that article 26 raised questions of application.

34. Paragraph 3, which permitted exceptions to the rule stated in the preceding paragraphs, was well drafted on the whole; but while sub-paragraph (a) (i) was not open to objection, that was not true of sub-paragraph (a) (ii). In international practice, where a non-essential part of the treaty was concerned, the matter would in most cases be settled without any difficulty, for instance, by revision of the treaty agreed between the parties. The Commission could not regulate the matter in every detail, and the case contemplated in paragraph 3 (a) (ii) would in fact occur so seldom that the omission of a rule dealing with it could not jeopardize the security of international relations.

35. Mr. YASSEEN said he agreed that the application of the principle of severance might differ with different cases of avoidance or termination of treaties; he therefore agreed with Mr. Ago that article 26 required further study.

36. Of course, article 26 was intended to make severance mandatory. If the parties agreed to delete a provision or group of provisions of the treaty, there was clearly no difficulty, since they could revise their treaty by agreement at any time. But the Chairman had asked whether severance could be compulsory when it benefited only one of the parties. He (Mr. Yasseen) believed that the

purpose of article 26 was to save whatever could be saved of a treaty by virtue of the treaty's own terms. If one party claimed that the whole treaty should be avoided, the other party should be able to oppose it by invoking article 26 and ask for severance, provided, of course, that severance was possible on a reasonable interpretation of the treaty itself.

37. Mr. de LUNA agreed with the Special Rapporteur that provision for severance, if properly formulated, would not be a danger, but would contribute to the stability of treaties.

38. As to the method to be adopted, he agreed with Mr. Tsuruoka that the Commission should not go into too much detail. It should, however, consider all the cases in which severance might apply, and he accordingly supported Mr. Ago's suggestion. When the Commission had the Special Rapporteur's fresh draft before it, it would be able to follow Mr. Tsuruoka's practical advice and eliminate certain cases.

39. Mr. PAL suggested that, before giving the Special Rapporteur the additional task proposed by Mr. Ago, the Commission should await the outcome of the Drafting Committee's work on all the articles from 5 to 22, in order to see which of them the provisions on severance would apply to. He would even go further and suggest that the articles should be examined by each member of the Commission individually.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not altogether agree with the Chairman's views. If there was an element of deceit in the presentation of a part of a treaty concerned with the settlement of certain major issues, it should be possible to cancel only the tainted part.

41. In applying the principle of severability to provisions of a treaty infringing a rule of *jus cogens*, special care would have to be taken to determine the relationship between those provisions and the rest of the treaty.

42. He was prepared to comply with Mr. Ago's request, provided there was a reasonably firm consensus of opinion that the problem of severance should be dealt with in his present report. One advantage of that course would be that it would elicit comments from governments.

43. There were arguments both for and against including provisions on severance in individual articles at the risk of some repetition; the same applied to their incorporation in a general article containing separate paragraphs dealing with the different situations to be covered. It might possibly be found appropriate to devote a separate section to severance, to follow section III. Another possibility would be to draft an article dealing with notice of termination, suspension or withdrawal from a treaty, stipulating that severance was not permissible unless the treaty itself so provided.

44. Mr. AGO, thanking the Special Rapporteur for accepting the additional task he had suggested, said that all members were convinced that the problem of severance was a delicate and important one and that it must be solved. Personally, he was still convinced that rather

than try to solve the problem in a single article or group of articles, the Commission should review the articles already considered, one by one, to see whether the whole question of severance could not be dealt with by slight amendments, to each of the articles in which it arose. The article on error (new article 8), for example, would certainly be improved if, instead of dealing only with error as a ground for invalidating the treaty as a whole, it also dealt with cases in which consent was vitiated with respect to only one part or one provision of the treaty. The Special Rapporteur would certainly be able to find the most satisfactory method.

45. The CHAIRMAN, thanking the Special Rapporteur for his willingness to undertake the proposed task, said it should be understood that he had complete discretion as to the manner in which he carried it out; the Commission as a whole favoured the inclusion of some provision on the important question of severance. If there were no objection, he would consider that Mr. Ago's suggestion was adopted, and that members reserved their individual positions.

It was so agreed.

SECTION V (LEGAL EFFECTS OF THE NULLITY, AVOIDANCE OR TERMINATION OF TREATY)

ARTICLE 27 (LEGAL EFFECTS OF THE NULLITY OR AVOIDANCE OF A TREATY)

46. Sir Humphrey WALDOCK, Special Rapporteur, said that section V dealt with the legal effects of the nullity, avoidance or termination of a treaty. It should be noted that no provision had been made for the legal effects of suspension. In fact, it might be difficult to state those legal effects except in terms of the obvious, but he would re-examine the point. It had been suggested to him by Mr. Rosenne that one possibility would be to include a definition of suspension in article 1, thereby obviating the need to deal with its legal effects.

47. Section V comprised two articles: article 27 on the legal effects of the nullity or avoidance of a treaty, and article 28 on the legal effect of the termination of a treaty. Both had been drafted before the Commission had considered the substantive articles and some re-drafting would be necessary in order to allow for the decisions taken on those articles.

48. With regard to article 27, if the exception stated in paragraph 2 (b) were accepted, it might be necessary to include other examples, such as that of a treaty vitiated by coercion.

49. Paragraph 3 embodied a logical provision, but one which could rarely be applied, because the situation contemplated was very unlikely to arise in the case of multilateral treaties.

50. Mr. CASTRÉN said he shared the Special Rapporteur's views on the substance of the article and would comment only on the form.

51. First, since according to paragraph 3 the provisions of article 27 were to apply *mutatis mutandis* to multi-

lateral treaties, paragraphs 1 and 2 should refer only to bilateral treaties.

52. Secondly, paragraph 2 (a), which stated an obvious truth, could be omitted. On the other hand, in paragraph 2 (b) it should perhaps be added that the article was without prejudice to the innocent party's right to claim for loss or damage arising out of fraudulent conduct, especially where it was not possible to restore that party to its previous position. It was true that, as the Special Rapporteur said in paragraph 1 of his commentary, article 27 did not deal with questions of responsibility, but that proviso was necessary in the article because it dealt with the legal effects of the nullity or avoidance of a treaty.

53. Mr. LACHS said he noted from the language of paragraphs 1 and 2 (b), particularly from the reference to restoration "as far as possible", that the Special Rapporteur conceded that it was not always possible to restore the *status quo ante*. Since redress and State responsibility were outside the scope of the subject, the question of the legal effects of nullity or avoidance of a treaty in those respects was not under discussion. However, it must be remembered that certain rights acquired and obligations assumed under the treaty might already have been honoured. He suggested that the words "shall cease to have any force or effect" in paragraph 2 should be amended to state that the acts performed would be treated in the same manner as if the treaty did not exist.

54. In paragraph 2 (b), he was not satisfied with the wording "in which case it may be required." The offending party in a case of fraud was under a duty to restore the other party as far as possible to its previous position. The need to include the proviso "as far as possible" already weakened the provision and he suggested that the words "may be required" should be replaced by "shall be required". On that point, he agreed broadly with Mr. Castrén, but pursued the idea to its logical conclusion.

55. Mr. VERDROSS said that, in principle, he approved of the text proposed by the Special Rapporteur; but if questions of reparation were not to be covered, the last part of paragraph 1, beginning with the words "and the States concerned", should be deleted.

56. Mr. YASSEEN said he had some difficulty in accepting certain expressions which rather mitigated the effects of nullity. For example, the phrase "as far as possible" in paragraph 1 should be deleted, for that condition was understood. If it was impossible to restore the previous position — and no one could be bound to do the impossible — other general theories, such as the theory of responsibility, would come into operation.

57. For the same reason he hesitated to accept paragraph 2 (b). The idea in that provision should be expressed in more categorical terms, the words "as far as possible" being deleted there also.

58. On the other hand, the expression "fraudulent acts", in the same paragraph, was much more appropriate than "fraudulent conduct", for fraud might be the result of a single act, not necessarily of conduct.

59. The CHAIRMAN, speaking as a member of the Commission, said that as the Commission had already adopted the articles on essential validity on second reading, it could now consider how the provisions of article 27 would apply to the cases contemplated in articles 5 to 13.

60. Paragraph 1, which referred to treaties void *ab initio*, covered the cases dealt with in article 12 on coercion of a State, and article 13 on violations of *jus cogens*. Some re-drafting would be needed to cover also the case contemplated in article 11 on personal coercion of representatives of States.

61. He had some doubts regarding the rule in paragraph 2. It was difficult to see how in such cases as the violation of a constitutional provision and substantial error, "any acts performed and any rights acquired pursuant to the treaty prior to its avoidance" could "retain their full force and effect". If, for example, a substantial error had been committed in determining a frontier, he failed to see how rights which had been granted in error could endure.

62. Mr. BARTOŠ said he wished to make certain reservations on the text of article 27, on practical rather than theoretical grounds.

63. First, it was very difficult, for practical purposes, to be categorical about the validity of acts performed in pursuance of a void or avoided treaty, even though according to the theoretical conceptions of nullity the answer was very simple: all such acts were without legal effect. Indeed, it was hardly possible to maintain that such acts should retain their legal force and effect, or to take the contrary view, for it could happen in practice that an act was more important than its legal basis.

64. Paragraph 2 stated that acts performed prior to the treaty's avoidance retained their full force and effect unless the parties otherwise agreed, though if the parties were not in dispute and if an amicable agreement could be expected, it might be supposed that such agreement could be reached fairly easily so long as there had been no breach of a *jus cogens* rule. But on the other hand it was very difficult to state categorically that the treaty remained in force. It would be necessary to examine whether the acts performed before the avoidance could be held to have been affected by it or not. The problem was rather similar to that of *bona fide* possession in private law, though in making that comparison he wished to rule out any analogy with private law, for relations between sovereign States raised problems different from those of private law.

65. Nor did he favour a radical solution in the opposite direction, making all situations created between the time of the treaty's conclusion and that of its avoidance null and void, for some situations might already have been consummated, or their consequences might be beyond repair. For if a very categorical position was to be taken, first the act — i.e. the treaty — should be avoided, then the consequences of the act, and lastly the situation created by the execution of the treaty. It might be asked whether a theoretically correct solution would contribute to the real needs of international life.

66. While he had no theoretical objection to the solution proposed by the Special Rapporteur, he was not certain that it was justified in practical life in all the situations that might result from the avoidance of a treaty.

67. With regard to treaties avoided as from a date subsequent to their entry into force, he was also somewhat hesitant. Some situations might have been created before the treaty was avoided, but their consequences might materialize afterwards. His reservation on that point was based on the idea that too radical a solution in either direction should be avoided.

68. In paragraph 1, the wording might be improved, but the idea expressed was correct. However, the idea of restoration was perhaps broader than that of a mere *restitutio in integrum*. The idea expressed by the words "restored as far as possible to their previous positions" was correct, for there were cases in which *restitutio in integrum* was not possible or not even useful. But the formula was dangerous, because States might use it as a pretext for claiming that it was impossible to make reparation. Accordingly, it should be strongly emphasized in the commentary, and also in the text of the article itself.

69. Restoration should be direct or indirect; in other words, in principle there should be restoration to the previous position, but where that was not possible there should be reparation, or replacement.

70. Mr. AGO said that article 27 dealt with a particularly delicate question, as it involved very important legal concepts. The terms used in stating the rule should therefore be carefully weighed.

71. Paragraph 1 dealt with the case of a treaty void *ab initio* and stated that any acts done in reliance upon the void instrument had no legal force or effect. But the treaty might have been executed at least in part. Acts might have been performed by a State which had — wrongly — believed itself bound to perform them under the treaty, though that was not really the case. If the treaty had been valid, such an act by the State — for example, the surrender of an object or a transfer of territory — would have been required for the performance of a legal duty of the State which had believed itself bound by the treaty. But once the treaty had been recognized as void, the act performed by that State became a purely gratuitous act. In that case, the State concerned could, in the example he had given, claim restoration of the object or territory transferred. Could it be said, even so, that the act performed as such, had had no legal effect? It could probably produce legal effects, even though they were of a different kind. Hence the term "legal effect" should be carefully considered.

72. The problem appeared in a different light if one considered an act performed by a State believing itself to have a right under the treaty. For example, if the treaty granted a right of passage, or of stationing troops, and the State had exercised that right, that would have been a perfectly lawful act if the treaty had been valid; it would have been the exercise of a subjective right. But in the event of nullity of the treaty, the act automatically

became unlawful. Thus the act had a legal effect, even though it was not of the same kind as it would have been if the treaty had been valid.

73. It was right to say that provision should be made for restoration of the position which would have existed if the treaty had not been concluded. It was equally right to say that, in certain cases, such restoration might be required in consequence of a responsibility. That was so if an act which would have been lawful if the treaty had been valid, had to be regarded as unlawful because the treaty was void. That raised a question of international responsibility, and the restoration was most certainly the consequence of a responsibility.

74. Conversely, when a State had believed itself bound to perform an act pursuant to the treaty it could claim *restitutio in integrum*, but no question of responsibility arose in that case, since there had been no unlawful act. The Special Rapporteur was therefore probably right in saying that a provision was needed to cover such cases.

75. Paragraph 2 dealt with the case of a treaty avoided as from a date subsequent to its entry into force and stated the rule that the rights and obligations of the parties ceased to have any force or effect after that date. There, too, the correctness of the terminology should be verified, for the rights and obligations of the parties ceased to exist. Another point to be considered was whether acts performed in the exercise of those rights or in fulfilment of those obligations had no legal effect. The same question arose as in the case of paragraph 1.

76. But there was a more important question, namely, whether such cases were really cases of avoidance as stated in the text. In certain cases considered previously, the nullity of the treaty followed automatically from the application of a general rule, for example, in the event of coercion of a State or breach of a *jus cogens* rule. That was not avoidance. In other cases, where there had been fraud or error, for example, nullity of the treaty could be claimed by the injured party. The party could plead that the fraud or error had vitiated consent. Even in that case, however, he did not think one could speak of avoidance; it was a ground of nullity that the injured party would plead, but when it did so successfully the nullity applied *ab initio*. That was the most interesting case contemplated by the Special Rapporteur, for it involved a beginning of execution of the treaty, which was later declared void.

77. To sum up, even in that case, it was not a matter of avoidance, but of nullity which was a nullity *ab initio*, even if it was not recognized until later. The Commission should therefore be careful not to confuse such nullity, which was recognized on the application of one of the parties, with avoidance, which would only produce its effect at a later date and which, generally speaking, was not easy to accept in international law.

78. Mr. TUNKIN said that Mr. Ago had drawn an important distinction, with regard to paragraph 1, between cases in which the duty to make restoration resulted from the nullity of the treaty and cases in which it resulted not from the nullity of the treaty, but from the illegal act itself.

79. The main difficulty, as far as he was concerned, arose in regard to paragraph 2, which was the most important provision of the article, although it might not appear so at first sight. He found the second sentence: "Any acts performed and any rights acquired pursuant to the treaty prior to its avoidance shall retain their full force and effect," altogether unacceptable. For example, if a treaty became void because it had come into conflict with a new rule of *jus cogens*, it could not be said that any rights acquired pursuant to it retained their full force and effect. The situations created under the treaty could themselves be of such a nature that the same rules of *jus cogens* which had invalidated the treaty, or perhaps other rules, would put an end to them. The position was that such rights might or might not be invalidated. The most that could be said was that the invalidity of the treaty did not automatically invalidate all the rights acquired pursuant to it.

80. A good example was provided by the situations created in former colonial countries that were contrary to contemporary international law. It was not possible to recognize that the treaties in question were now void and at the same time to maintain the full legal force of the situations created by those treaties; that would be going much too far. The situations in question might sometimes perhaps retain their legal force, but it was equally possible that they would be invalidated.

81. Mr. ROSENNE said that the purpose of article 27 was to give expression to two ideas which should not be very controversial. The first was that, in the case of a treaty which was void *ab initio*, any acts done in reliance upon it had no legal effect. Those acts had, of course, factual effects and the law should provide as far as possible that those effects should be undone. The purpose of paragraph 1 was, precisely, to state that idea.

82. The second idea, embodied in paragraph 2, related to a treaty avoided as from a date subsequent to its entry into force; from that date onward, the treaty could not produce new legal effects, but provision had to be made for legal effects lawfully produced by it prior to its avoidance.

83. The Special Rapporteur and Mr. Tunkin were probably agreed on the substance and the difficulty was largely one of drafting. The problem of what happened to a legal and factual situation after its legal basis had been altered was a very real one. To take one example, following the 1960 judgment of the International Court of Justice in the case between *Honduras and Nicaragua*,³ the Organization of American States had been faced with the problem of executing the judgment, and had had to make special arrangements for undoing the legal situation which had previously existed in the territory to be returned to Honduras. Those arrangements had been made partly by agreement between the parties and partly with outside assistance.

84. With regard to paragraph 2 (b), he could not support Mr. Lachs' suggestion that the words "may be required" should be replaced by "shall be required". The expression "may be required" corresponded to

³ *I.C.J. Reports*, 1960, pp. 192 ff.

the wording of article 7 on fraud, which provided that, where a State had been induced to enter into a treaty by the fraudulent conduct of another contracting State, "it may invoke the fraud as invalidating its consent to be bound by the treaty". The position was that fraud did not automatically end the treaty; it was open to the injured party to invoke the fraud as a ground for invalidity.

85. Paragraph 2 (b) also raised the question who would "require" the offending party to restore the other party to its previous position. An additional provision should be inserted giving the necessary powers to the organ having powers of decision under article 25. Unless such a provision were inserted, the organ in question might not be authorized to deal fully with that matter.

86. Articles 27 and 28 could only be accepted on the understanding that when the Commission came to consider, at its next session, the effects of treaties on third States, it would examine the position of third States with reference to the legal effects of the nullity, avoidance and termination of treaties.

87. Mr. YASSEEN thought that the main question raised by paragraph 2 was the fate of the acts performed and the situations created pursuant to the treaty before its avoidance; in other words, whether the avoidance operated retrospectively or as from its date.

88. He believed that a distinction could be made according to the grounds for avoidance, or more particularly, according to whether those grounds were concomitant with, or subsequent to, the conclusion of the treaty.

89. Where the grounds for avoidance were concomitant with the conclusion of the treaty, it could be held that the acts performed in pursuance of the treaty should not have been performed. Where the grounds for avoidance were subsequent, it could rightly be maintained that it had been possible to perform the treaty properly for a certain time; consequently, it was logical that acts performed before the subsequent grounds for avoidance had existed should remain valid. That was the case when there was a fundamental change of circumstances or a new rule of *jus cogens* supervened, which was incompatible with the treaty. On the basis of that criterion it was possible to say that in some cases avoidance took effect as from its date and in others retrospectively.

90. But then a further question arose: nullity declared for reasons subsequent to the treaty's conclusion might not only mean nullity of the treaty itself, but also preclude continuation of a situation created by the treaty. That would be an immediate effect, not only with respect to the treaty itself, but also with respect to the situation, which would have to cease as soon as the treaty was avoided.

91. Mr. VERDROSS observed that paragraph 2 referred to the avoidance, not the nullity of the treaty. A treaty could only be avoided by the agreement of the parties or by the decision of an organ whose competence had been recognized by those parties. Hence the avoidance could not be presumed to be retrospective. Everything depended on the terms of the instrument by which the treaty was avoided.

92. The CHAIRMAN, speaking as a member of the Commission, said that his doubts regarding paragraph 2 had been confirmed by the discussion.

93. Doubts had now arisen in his mind regarding paragraph 1. To take the example of a transfer of territory on the basis of a treaty which had been obtained by coercion, the treaty being void, any acts done in reliance upon it would, under paragraph 1, have no legal force or effect. But that solution would run counter to the recognized principle of international law that the *de facto* authorities of a territory could, for instance, levy taxes; for if paragraph 1 were applied as it stood, the State which recovered the territory would be entitled to levy the same taxes a second time.

94. Mr. BARTOŠ said that avoidance must be applied for, even if the grounds for it were *ex nunc*, not *ex tunc*. It was necessary to distinguish between the effect of the grounds for avoidance and the award in which the grounds invoked by the party wishing to invalidate the treaty were declared admissible.

95. Mr. AGO agreed with Mr. Verdross; the word "annulation" (avoidance) should not be used in paragraph 2, which dealt with cases of nullity, not of avoidance. The case he had referred to was one of real nullity *ab initio*, even if the nullity was established only later.

96. In international law avoidance, strictly speaking, could only result from agreement between the parties or an arbitral award; otherwise, it was not a case of avoidance, but of delayed nullity, which was precisely what occurred when a new rule of *jus cogens* supervened or performance became impossible owing to the disappearance of the object of the treaty, which made the treaty a nullity from that moment. That was not avoidance in the true sense of the term.

97. In deciding what formula to adopt, the Commission might perhaps be guided by Mr. Tunkin's proposal.

The meeting rose at 12.55 p.m.

708th MEETING

Wednesday, 26 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 27 in section V of the Special Rapporteur's second report (A/CN.4/156/Add.3).

ARTICLE 27 (LEGAL EFFECTS OF THE NULLITY OR AVOIDANCE OF A TREATY) (continued)

2. Mr. BARTOŠ said that a distinction should be made between instruments considered to be void *ab initio* and voidable instruments.