

Document:-  
**A/CN.4/SR.846**

**Summary record of the 846th meeting**

Topic:  
**Law of Treaties**

Extract from the Yearbook of the International Law Commission:-  
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78. With regard to article 45, it might be desirable to combine article 52, paragraph 2 (c), with the relevant paragraph of article 53 and make them into a separate provision. He did not wish to reopen the discussion on article 45, which had already been adopted, but he would raise that point when the Commission took up article 53.

79. Mr. CASTRÉN observed that the Special Rapporteur's new text did not differ greatly from the text adopted by the Commission in 1963;<sup>10</sup> the changes made to the earlier text were only drafting amendments. He approved the replacement of the expression "the nullity of a treaty" by "the invalidity of a treaty". The addition of two new sub-paragraphs in paragraph 2, and the inclusion in paragraph 2 (a) of a specific reference to articles 33, 35 and 36 were also improvements.

80. He noted that the Special Rapporteur, in his observations, had dealt almost exclusively with the comments of the Government of Israel and had left aside those of other governments, such as El Salvador, Sweden and the United Kingdom. The latter two Governments had pointed out that the article dealt with problems of great complexity and that the operation of some of its provisions might be difficult in practice, which appeared to be the case.

81. The relationship between paragraphs 1 (a) and 1 (b) should be studied more thoroughly and more clearly defined, as there seemed to be a contradiction between them. In any case, paragraph 1 (b), particularly in the very weak terms in which it was now couched in the French text, had no practical value as a legal rule. Was it necessary to specify, in a legal document, that one party to a treaty "*peut demander*" (may request) the others to establish as far as possible the position that had existed earlier without referring to the obligation, in certain conditions, to comply with such a request? Requests were always permissible. In that respect, the 1963 French text was slightly more satisfactory since, instead of saying "*une partie peut demander*", it provided that the parties might be "*tenués*" (required) to establish the previous position.

82. He therefore proposed that paragraph 1 (b) be amended to read: "However, at the request of a party to the void instrument, any other party shall be required to establish, provided it can be done without causing undue difficulty for these parties, the position that would have existed between them if the acts had not been performed".

83. Sir Humphrey WALDOCK, Special Rapporteur, said it was not correct to say that he had omitted to take account of the comments of the Governments of El Salvador and the United Kingdom. In fact they had prompted him to change the wording of paragraph 1 (b).

84. Mr. BARTOŠ asked whether the reference to "undue difficulty" in Mr. Castrén's proposal should be taken to mean that if a party was grossly guilty it would be placed in a very favourable position because the harm caused by its guilty action would place it in danger of "undue difficulty", whereas the position of the party which had acted in good faith would be

very unfavourable if it was to lose the right to compensation.

85. Mr. BRIGGS said that, in principle, paragraphs 1 and 2 of the new text were acceptable, subject to some drafting changes. The word "void" in paragraph 1 (a) was unnecessary and should be dropped. Perhaps the meaning would be clear if the words "in relation to another State party" were inserted after the words "the legality of acts" in the same paragraph.

86. It would be well to make clear that the acts referred to in paragraph 1 (a) were acts in international law, otherwise they might be understood to include acts in municipal law.

87. Mr. AMADO said that the Drafting Committee should carefully examine the expression "*caractère légitime*", used in the French text to render the English word "legality"; he had serious doubts about it.

88. Sir Humphrey WALDOCK, Special Rapporteur, said that article 52, like articles 53 and 54, was much more intricate than appeared at first sight and would probably require further discussion at the next meeting.

#### *Appointment of a drafting committee*

89. The CHAIRMAN said it had been agreed by the officers of the Commission that a drafting committee of eleven should be appointed.

90. Mr. BRIGGS, First Vice-Chairman, said it was proposed that the Drafting Committee should consist of the two Vice-Chairmen, the General Rapporteur, the Special Rapporteur and the following members of the Commission: Mr. Ago, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Reuter, Mr. Rosenne and Mr. Tunkin.

*It was so agreed.*

The meeting rose at 5.55 p.m.

### 846th MEETING

*Friday, 6 May 1966, at 10 a.m.*

*Chairman: Mr. Mustafa Kamil YASSEEN*

*Present: Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.*

#### **Law of Treaties**

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(*continued*)

[Item 1 of the agenda]

ARTICLE 52 (Legal consequences of the nullity of a treaty) (*continued*)<sup>1</sup>

<sup>10</sup> *Yearbook of the International Law Commission, 1963*, vol. II, p. 216.

<sup>1</sup> See 845th meeting, preceding para. 66.

1. The CHAIRMAN invited the Commission to continue consideration of article 52.

2. Mr. JIMÉNEZ de ARÉCHAGA said that the provisions embodied in paragraph 1 (a) of article 52 constituted a specific application of the legal maxim *tempus regit actum*. If a State exercised a right conferred by a treaty—for instance, the right to fish in the territorial sea of another State—and it subsequently transpired that the treaty granting that right was invalid because of a substantial error or manifest violation of municipal law, that invalidity would not affect the legality of acts performed or of rights exercised before it was invoked. It was only after the beneficiary State had been put on notice of the fact that the other's consent was vitiated that its good faith disappeared. If, after the invalidity had been invoked, the beneficiary State continued to exercise the treaty rights, the legality of its acts would be open to question; the treaty as such would no longer be a title to justify its conduct. That rule was properly stated in article 52 and the introduction of the words "by itself" improved the text: it showed that the provision did not prejudice other possible grounds of legality or illegality of the conduct of the State in question.

3. He did not think it necessary to insert the words "in relation to another State party" in paragraph 1 (a) as suggested by Mr. Briggs;<sup>2</sup> all the provisions of the draft articles referred to the conduct of States under international law. Article 52 referred to acts performed by a party to a treaty and, by virtue of the definition in article 1, a "party" meant a State bound by a treaty, so that paragraph 1 (a) could not be understood as referring to the legality of acts under municipal law.

4. Paragraph 1 (b) introduced a necessary limitation to the rule embodied in paragraph 1 (a). A party might already have performed an act under a treaty, such as the performance of a treaty obligation, and such performance could unbalance the position of the parties, so that one of them derived a benefit or an enrichment. It was natural then that the party which had benefited from partial execution should be called upon to restore the *status quo ante*. Personally he would like to see that provision made more imperative and precise, providing for an obligation to restore the balance between the parties instead of re-establishing the previously existing situation in every respect. A rewording along those lines might perhaps solve the difficulties experienced by the United Kingdom and a number of other governments.

5. Paragraph 2 governed the cases in which the rules set out in paragraph 1 could not apply because, by definition, there would be no good faith. The expression "A party may not invoke" should perhaps be replaced by a more direct formula, such as "The provisions of paragraph 1 do not apply when . . .". A party could always invoke certain provisions, but in the particular case referred to its invocation would be without legal effect. That change of wording might help to remove the drafting difficulties created by the use, in the two paragraphs, of the same verb "to invoke" with two different meanings: a lawful invocation and an unlawful invocation.

<sup>2</sup> *Ibid.*, para. 85.

6. With regard to the Special Rapporteur's proposed new paragraph 2 (c), he agreed with many of the remarks made by Mr. Reuter. The Special Rapporteur himself also agreed with Mr. Reuter on the substance of the matter, since he stated in paragraph 3 of his observations on article 53 that "it would be inadmissible to regard the emergence of the new rule of *jus cogens* as retroactively rendering void acts done at a previous time when they were not contrary to international law" (A/CN.4/186). He therefore suggested that paragraph 2 (c) be deleted. The Special Rapporteur had only included it in article 52 as a cross-reference to article 53. In fact, the position was made sufficiently clear by the provision in paragraph 2 of article 53, with its explicit reference to article 45. The emergence of a new rule of *jus cogens* was a case of termination and the proper place for a specific provision on the effects of termination under article 45 was article 53, not article 52.

7. Mr. VERDROSS said he thought paragraph 1 (a) was ambiguous. Mainly because of the expression "legality", it could be interpreted as meaning either that acts performed in good faith by a party, in reliance on the instrument, before the invalidity of the instrument had been invoked, were valid, not void; or that those acts did not engage the responsibility of the State which had performed them. If the Commission chose the first interpretation, he proposed that the word "legality" be replaced by the word "validity"; but if it chose the second, then paragraph 1 (a) was unnecessary, since an act performed in good faith could not be contrary to international law. An act could only be contrary to international law itself if the State which performed it had been at fault, that was to say, if it had had some reprehensible intention (*dolus*) or if it had been negligent (*culpa*). If the Commission chose the second interpretation, it should therefore delete paragraph 1 (a) and explain in the commentary why there was no need to state such a rule in the article.

8. Mr. PAREDES said that the doubts and objections expressed by governments could be partly met by avoiding the use of the expression "invalidity of a treaty"; the term "invalidity" was more general than "nullity".

9. Both in legal doctrine and in practice, a clear distinction was made between nullity and voidability. An instrument was a nullity when it lacked from the start one of the elements essential to the valid expression of the will and intention of the parties. Thus, fraud or coercion vitiated consent from the outset: there was no meeting of the wills of the parties and the treaty was void *ab initio*. By contrast with a void instrument, which had never been legally in existence, a voidable treaty was one whose invalidity resulted from a subsequent event, such as a fundamental change in the circumstances existing at the time when it was entered into. A distinction should therefore be made in article 52 between treaties that were void and treaties that were merely voidable. The first category could not give rise to any legal relationship, and any performance—whether in good or in bad faith—was incapable of having legal effect. Since there was no basis on which to establish a relationship between the States concerned, nothing that had been done within the context of the treaty could possibly have any legal force. The position was different in cases of voidability.

In those cases, acts performed in good faith should be deemed valid and have effect until the treaty was declared void.

10. In view of the statement in paragraph 1 (a) that the acts referred to therein were deemed lawful, he could not accept the proposition in paragraph 1 (b) that the parties to the treaty could be required "to establish as far as possible the position that would have existed between them if the acts had not been performed". If, as was stated in paragraph 1 (a), those acts had been performed within the framework of a legally existing situation, there could be no question of *restitutio in integrum*.

11. The two situations contemplated in article 52 did not represent a rule and an exception to that rule, but two different categories. Those categories should be kept apart, possibly by having two separate articles, one dealing with void instruments and another with voidable instruments.

12. Mr. LACHS said the Special Rapporteur was to be commended for his excellent analysis of government comments.

13. He supported the Special Rapporteur's suggestion that the term "nullity" be replaced by the clearer term "invalidity", but was troubled by the reference in paragraph 1 (a) to the "legality of acts". An act might well be legal and yet be devoid of effect in relation to the other party to the treaty. In fact, the expression "legal consequences" used in the title of section VI and in the various articles in that section was not altogether appropriate. There was undoubtedly an inherent conflict between paragraphs 1 (a) and 1 (b), and the Commission should try to minimize the complications arising from that conflict, perhaps by adopting a form of words which avoided the use of the term "legality".

14. He supported Mr. Jiménez de Aréchaga's suggestion for strengthening the provisions of paragraph 1 (b), and making them more imperative than was suggested by the words "may require".

15. The Special Rapporteur's new wording for paragraph 2 was a great improvement on the previous text, in that it made a clear distinction between subjective and objective elements. The subjective elements resulted from acts of the parties themselves; the objective elements were independent of the parties and were outside the operation of the treaty.

16. He could accept paragraphs 2 (a) and 2 (b), though with regard to paragraph 2 (a) he shared Mr. Reuter's doubts on the question of retroactivity. A new peremptory norm of international law could, and indeed should, in some cases, have retroactive effect. However, the processes by which it came into operation differed from one another; some rules might emerge suddenly, but others would grow slowly, maturing gradually and inconspicuously. That was the rich pattern of law-making. For the purposes of article 52, the time-factor was of the utmost importance, since it was essential to determine when the new rule entered into force. At the time of the conclusion of the treaty the rule might still be relatively inchoate, but it could subsequently become fully operative while the treaty was in the course of performance. He did not, however, support Mr. Jiménez de Aréchaga's

radical suggestion that paragraph 2(c) should be deleted, since some of the cases it envisaged could be more than a matter of termination. He would prefer paragraph 2 (c) to be retained, but efforts should be made to improve its wording in order to meet the various objections raised.

17. Mr. BRIGGS, referring to the words "the legality of acts performed in good faith" in paragraph 1 (a), said that if such acts did not result in the establishment of rights or obligations, they would be of no concern in the present context. He therefore suggested that paragraph 1 (a) be reworded to read:

"The invalidity of a treaty shall not of itself affect any rights acquired or any obligations incurred in relation to another State in reliance on the instrument before its invalidity was invoked".

18. Unlike Mr. Jiménez de Aréchaga, he thought it was necessary to make it clear, by including the words "in relation to another State", that the provision under discussion concerned the position in international law, not in municipal law. He agreed with Mr. Jiménez de Aréchaga, however, that paragraph 2 (c) could be deleted.

19. Mr. de LUNA said he agreed with the general approach of article 52, which was in keeping with the present state of international law. Until 1900, adherence to the principle of the efficacy of international law and the desire to protect the security of international relations had led to solutions very different from those embodied in article 52. Since that date, writers like de Lapradelle and Politis had begun to recognize that a declaration of the invalidity of a treaty could operate *ex tunc*.

20. It would of course be convenient if it were possible to adopt, in the draft articles, the distinction between non-existence, nullity and voidability, which was so familiar to continental lawyers; but he realized that English common law concepts must also play a part in the development of international law. Moreover, the draft had now reached a stage when it was desirable not to alter it too radically. Hence he would not press for a change in the terminology used, which was essentially drawn from English law.

21. He was not altogether satisfied with the term "legality"; in other similar contexts he had pressed for the use of the term "*licito*" (lawful) in the Spanish version. That was a drafting problem, but it was relevant to the relationship between paragraphs 1 (a) and 1 (b); an act could be lawful, but have no legal effect.

22. He could not support the proposal to delete paragraph 2 (c), but was inclined to agree with Mr. Reuter that it should be clarified. The problem was one of inter-temporal law and arose in municipal law in connexion with the effects of newly enacted legislation. He was in favour of transferring the provisions of paragraph 2 (c) to article 53, which dealt with cases of termination in which acts performed while the treaty was valid remained lawful.

23. Lastly, he did not like the expression "as far as possible" in paragraph 1 (b). If it was impossible to re-establish the position existing before the treaty was invalidated, then clearly the provisions of paragraph 1 (b) could not be applied. The elastic qualification "as

far as possible" would be dangerous, however, and he would prefer it to be dropped.

24. The CHAIRMAN, speaking as a member of the Commission, said that, from the logical point of view, any act performed in reliance on an instrument which was void *ab initio*, would itself also be void. But, from the practical point of view and to safeguard treaty relations, there was every justification for the exception provided for in paragraph 1, particularly in the case of acts performed in good faith. Nevertheless, although the consequences of such acts could be tolerated, it would probably be going too far to say that they were lawful; he hoped the Commission would be able to find a form of words which would mitigate that difficulty and at the same time meet practical requirements.

25. Paragraph 2 (c) did not really refer to the consequences of the nullity of a treaty, since the case in question was one in which the treaty was not void *ab initio* but became void subsequently, so that acts performed in reliance on the treaty were valid. It might happen, however, that situations which had developed gradually on the basis of the treaty were affected by the new peremptory norm of international law. The question which would then arise was not what were the consequences of the nullity of the treaty, but what were the scope, the binding force and the effect of the new norm—whether the situation was or was not compatible with the new norm. Consequently, paragraph 2 (c) had no place in article 52.

26. Mr. BARTOŠ said he too wished to emphasize that article 52 dealt with two very different cases: the case in which a treaty was void *ab initio* and the case in which a treaty became void as a result of the emergence of a new rule of *jus cogens*. Those two cases should be the subject of two parallel, but not identical rules.

27. The second case raised the question of the consequences of acts performed on the basis of a treaty which had been valid before the emergence of the new rule of *jus cogens*. The answer to that question depended on whether *jus cogens* was regarded as a purely normative institution or as a body of rules of public order whose legal force extended to already established situations. For instance, if a treaty on the slave trade had been concluded before the abolition of slavery, would rights acquired under that treaty have to be taken into account, or would it be considered that the change in public order necessitated the revision of acts performed before the emergence of the new rule, which would be equivalent to denying the rights acquired? Quite recently, after the rules embodied in the United Nations Charter had come into force, it had still been argued by some that established rights must be maintained, despite the change in the international public order. It was thus an extremely important matter, since it was a question not only of the validity of treaties, but possibly of the validity of situations created under a treaty that had lapsed, even though it had not been void *ab initio*. The Drafting Committee and the Special Rapporteur would have to try to find the best solution of that delicate problem.

28. As to the point dealt with in paragraph 1 (b), namely, *restitutio in integrum*, the use of the expression "as far as possible" was well-advised. Logic might

perhaps require that it be dropped, but formal and abstract logic was far removed from the realities of everyday life. He appreciated the concern for equity which lay behind Mr. Castrén's proposal<sup>3</sup> and was himself in principle opposed to any confusion of the legal and practical aspects of a question, but he thought that, in the case in point, it was essential to consider the objective possibility of taking certain action.

29. Mr. TUNKIN said that he had serious doubts about the advisability of the purely pragmatic approach adopted in article 52. As the article was drafted, paragraph 1 stated a general proposition and paragraph 2 stated the exceptions. But the cases covered by the exceptions were more numerous than those governed by the rule; and furthermore, the exceptions related to the most important cases of invalidity, namely, those arising under the provisions of articles 35, 36, 37 and 45. There was a logical inconsistency in that presentation.

30. It was also difficult to see what was the basis for the validity of the acts envisaged in paragraph 1 (a). An invalid treaty was void *ab initio*. There being no treaty in existence, it was difficult to see the foundation on which the validity of the acts in question rested. The provisions of article 52 shed no light on that point.

31. For those reasons, he suggested that the order of paragraphs 1 and 2 be reversed and their contents treated not as a rule and a set of exceptions, but as two separate categories of cases.

32. With regard to paragraph 2, he supported Mr. Jiménez de Aréchaga's suggestion that it should be strengthened.

33. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin that the exceptions were too important and too numerous to remain exceptions, and should become the rule; the exception should be the maintenance of situations created on the basis of a treaty subsequently found to be void. He had not mentioned that point when he had spoken earlier, because he had not wished to raise it during the last stages of the Commission's work, but he was in favour of the change proposed by Mr. Tunkin.

34. Mr. REUTER observed that the Commission had the choice between an empirical and a theoretical approach; it was not merely a drafting problem. Whatever his personal preferences might be, he would support the empirical system adopted by the Special Rapporteur, for at the present stage as little change as possible should be made in what had already been adopted.

35. Article 52 attempted to answer three specific questions. First, who could invoke the invalidity of a treaty? Secondly, was it possible to ignore that invalidity and refrain from invoking it? Thirdly, what were the effects of the invalidity? In his opinion, article 52 should deal more clearly with the first two questions—particularly the second, which in the present text was almost entirely obscured—and everything relating to the effects of invalidity should be transferred to article 53.

36. Two kinds of cases could arise: those in which all the parties could invoke the invalidity of the treaty,

<sup>3</sup> *Ibid.*, para. 82.

and those in which all the parties but one had that right. The members of the Commission would probably agree that, in cases of the first kind, it was also permissible not to invoke the invalidity of the treaty; but some members were opposed to allowing the option not to invoke the invalidity in cases of the second kind, especially where the treaty became void as a result of the emergence of a new rule of *jus cogens*. Personally, he thought that such an attitude could even be contrary to the interests of a State which had been the victim of fraud or coercion; for after the conclusion of the treaty the situation sometimes changed in favour of the injured State. The text would certainly gain in clarity if it answered those questions very simply, while keeping to the line laid down by the Special Rapporteur.

37. Mr. JIMÉNEZ de ARÉCHAGA said he could not support Mr. Tunkin's suggestion that the order of paragraphs 1 and 2 be reversed. It was true that the cases covered by paragraph 2 were more numerous than those governed by paragraph 1, but that was not sufficient reason for changing the presentation of the article. It was essential to bear in mind that paragraph 2 (a) dealt only with the situation of a party guilty of fraud or coercion. The other party might well have already performed its obligations under the treaty; if the order of the paragraphs were reversed, the position of the party victim of fraud or coercion would be made more difficult. The victim should be able to recover what had been executed as provided in paragraph 1.

38. Mr. de LUNA said he agreed with the Chairman and Mr. Bartoš that, with respect to the inter-temporal law, a distinction should be drawn between vested or acquired rights and mere expectations.

39. Perhaps he could illustrate that distinction by taking as a hypothetical example the revision of the constitution of a country, whereby the age of eligibility for the Presidency was raised from 30 to 35. Persons between the ages of 30 and 35 were thereby deprived not of a vested or acquired right, but of a mere expectation. An example in international law was provided by the abolition of slavery and the slave trade; the slaves in bondage at the time of abolition had become free, but the sellers who had received payment for the slaves sold did not have to refund the money.

40. Mr. Tunkin's proposal was connected with a point which had been discussed by the Commission before. He (Mr. de Luna) had already stressed on a number of occasions how dangerous it would be to leave the way open for the validation of a void treaty through the consent—expressed or implied—of the victim of fraud or coercion. Any provision of that type would be an invitation to the stronger party—which was almost invariably the one responsible for the fraud or coercion—to bring pressure to bear on the victim to acquiesce in the treaty. It was in every respect preferable to make it clear that a treaty vitiated by fraud or coercion was an absolute nullity.

41. It was worth noting that the municipal law distinction between absolute nullity and relative nullity was not suited to international law. The main difference between the two types of nullity was that absolute nullity could be declared by a court of law on its own

initiative, while relative nullity could only be pronounced as a result of a claim by the injured party. In the absence of compulsory jurisdiction, no such distinction could be made in international law. The only safe way of protecting the victim of coercion or fraud was to proclaim the treaty null and void *ab initio* and to rule out any possibility of subsequent validation by the injured party.

42. Mr. EL-ERIAN said he had some difficulty in accepting article 52, although the Special Rapporteur's new text was a great improvement on the 1963 version; he would have to reserve his final position until the Drafting Committee had examined the wording.

43. He was uncertain whether it was desirable to reverse the order of paragraphs 1 and 2. In the interests of uniformity, the Special Rapporteur's substitution of the word "invalidity" for the word "nullity" should be accepted. One of the difficulties to which article 52 gave rise was due to its dealing both with invalidity *ab initio* and with other forms of invalidity.

44. In cases of absolute nullity, municipal law distinguished between the parties to a contract and third parties, and recognized that the latter had the right to rely upon the legal validity of acts performed under the contract if they were able to prove title and good faith. The main problem raised by article 52 was what should be the legal basis for recognizing the legal effect of acts performed by virtue of a treaty which had been void *ab initio* and had therefore never possessed any validity.

45. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. de Luna had misunderstood his remarks. He had never contended that the victim of fraud or coercion should be permitted to consent to the execution of the treaty thus procured. Such a treaty was absolutely invalid. The present structure of the article should be maintained, because it would enable the victim in such circumstances to recover what had been paid or executed.

46. Mr. AMADO said he found himself in the same difficulty as Mr. El-Erian. No doubt the layman would think that paragraph 1 of article 52 stated an undeniable truth; namely, that acts performed in good faith by a party in executing a treaty retained their legal force (*efficacité juridique*)—an expression which he would prefer to "legality" (*caractère légitime*)—so long as no party invoked the invalidity of the treaty. But the problem became more complicated when one considered the consequences of those acts and what should be done to solve the problem created in practice by the voidance of a treaty. Before taking any definite position, he would wait to hear what conclusions the Special Rapporteur would draw from the discussion.

47. Sir Humphrey WALDOCK, Special Rapporteur, said it would be impossible in a brief statement to elucidate all the points raised during the discussion and the Drafting Committee would have to give careful thought to the way in which article 52 might be revised.

48. For him, much of the difficulty arose from the fact that at its fifteenth session the Commission had accepted certain conceptions that belonged to continental rather than common law systems. In his own country the conception of a voidable contract was one under which everything done was valid until the voidance took place.

But as Special Rapporteur he was bound by the approach which the Commission had decided to adopt, and which he fully accepted, namely, that when a treaty was voided by an act of one of the parties having a right to invoke a ground of invalidity, then the legal result was voidance *ab initio*. Thus the treaty was apparently valid for a time and then suddenly was rendered void, but *ex tunc* not *ex nunc*.

49. Mr. JIMÉNEZ de ARÉCHAGA had rightly pointed out that the problem to which paragraph 1 gave rise related not only to articles 31, 32 and 34, but also to articles 33 and 35, and possibly even 36, because, owing to ignorance of the facts or for some other reason, there might be a period during which the treaty was apparently in force and being acted upon by the parties. Even the victim of a fraud might have carried out acts under the treaty which would be contrary to international law had they not been protected by the treaty clauses, in which case the victim might need the benefits of the rule set out in paragraph 1.

50. The way in which Mr. Tunkin had presented the problem, arguing that the Commission had stated the major principle in the form of an exception, was not altogether justified. It was true that the cases of conflict with rules of *jus cogens* invalidating a treaty were extremely important, but they were exceptional, and in paragraph 1 the Commission had sought to formulate a principle that applied in the more normal cases, in which a treaty that had apparently been in force for a time was suddenly found void *ab initio*; it was there that the problem of acts done in good faith might arise.

51. At its fifteenth session, the Commission had adopted a pragmatic approach in an attempt to avoid injustice, and that had been the underlying purpose of the article as drafted.<sup>4</sup> In drafting paragraph 1 the Commission had been confronted by the inherent contradiction between the two notions of acts being, as it were, valid, while the treaty itself became invalid as soon as the ground of its invalidity had been invoked. Possibly the Commission had not yet found the right way of expressing the idea that invalidating a treaty did not render illicit, or deprive of legal character, acts performed in good faith in reliance on the treaty, which was believed to be valid at the time they were performed. Perhaps the phrase "the legality of acts" was not well chosen; when he had been redrafting the text he had contemplated using the expression "licit character" instead of the word "legality", but had abandoned that idea because the word "licit" was not in common use in English legal parlance. The solution might lie in framing paragraph 1 in the negative and having recourse to some such phrase as "invalidity shall not render illicit the act...".

52. Paragraph 1 (b) contained a principle on which all members had agreed: that where a treaty was void *ab initio*, a party must have the right to call for, or legally oblige, the other party or parties to restore as far as possible the situation to what it would have been if the acts had not been performed. He was uncertain whether he could agree with the suggestion that

that clause should be made more imperative, because, at least as far as the English text was concerned, the wording was as strong as it should be. The clause could not be made obligatory, because both or all the parties might agree to allow certain effects of acts performed under the treaty to continue. Such a measure of option of the parties to determine their course of conduct in the light of developments as time went on, was necessary.

53. The phrase "as far as possible" had been discussed at some length at the fifteenth session and its weaknesses recognized, but the Commission had decided to keep it for realistic reasons. He agreed with Mr. Bartoš that it would be undesirable to impose an unrealistic obligation on the parties.

54. In the main, comments on paragraph 2 had centred on sub-paragraph (c), which he had only inserted for drafting reasons in order to avoid misinterpretation, but apparently he had not been very successful. The terminological difficulty was partly due to the Commission having chosen the forceful expression "a treaty becomes void" in article 45, and if it had used some such wording as "the development of a new rule of *jus cogens* renders illegal the further performance of the agreement and terminates the treaty..." it would have been easier to draft article 52. By dealing with the effects of the emergence of a new peremptory norm in terms of invalidity, the Commission had opened the way for the inference that such cases would fall under the provisions of article 52, and paragraph 2 (c) should make it clear that they would fall under the provisions of article 53, paragraph 3. However, a way might be found of adjusting the wording of article 52 so as to make that paragraph 2 (c) unnecessary, or else it could form a separate article. The comments on the substance of paragraph 2 (c) should be taken up in conjunction with article 53.

55. With regard to Mr. Briggs's suggestion at the previous meeting, a provision was to be inserted at the beginning of the draft excluding its application to municipal law. He would hesitate to mention the point expressly in article 52.

56. The Drafting Committee could consider the suggestion that the order of paragraphs 1 and 2 be reversed, though it would make the drafting of the article more difficult; the order adopted in the 1963 text was not very logical. However, he did not have a closed mind on the subject and would carefully examine all the suggestions made.

57. The CHAIRMAN suggested that article 52 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>5</sup>

ARTICLE 53 (Legal consequences of the termination of a treaty) [66]

[66]

*Article 53*

*Legal consequences of the termination of a treaty*

1. Subject to paragraph 2 below and unless the treaty otherwise provides, the lawful termination of a treaty:

<sup>4</sup> *Yearbook of the International Law Commission, 1963*, vol. II, p. 216.

<sup>5</sup> For resumption of discussion, see 864th meeting, paras. 83-95.

(a) Shall release the parties from any further application of the treaty;

(b) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

(a) That State shall be released from any further application of the treaty;

(b) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

(c) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 above shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law.

58. The CHAIRMAN invited the Commission to consider article 53, for which the Special Rapporteur, in his sixth report (A/CN.4/186), had proposed a new text reading:

“ 1. Subject to paragraph 3, and unless the treaty otherwise provides, the lawful termination of a treaty shall:

(a) release the parties from any obligation further to apply the treaty;

(b) not affect the legality of any act done in conformity with the treaty or that of a situation resulting from the application of the treaty;

(c) not affect any rights accrued or any obligations incurred prior to such termination, including any rights or obligations arising from a breach of the treaty.

“ 2. In the case of a particular State's denunciation of or withdrawal from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

“ 3. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty may be maintained in force only to the extent that its maintenance in force does not conflict with the norm of general international law the establishment of which has rendered the treaty void”.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that he had considerably rearranged the text of article 53, on which not many governments had commented. He had adopted the Swedish Government's proposal (A/CN.4/186) concerning paragraph 1 (a) as he agreed that it was preferable to speak of releasing the parties “ from any obligation further to apply a treaty ” than “ from any further application of the treaty ”.

60. The comment by the Government of Israel, in connexion with article 52, that insufficient account had been taken of rights accrued and obligations incurred before termination, was relevant to article 53, and he had tried to meet the point in paragraph 1 (c), so as to safeguard the legality of acts performed in execution of the treaty and to protect such rights and obligations.

61. There was force in the Netherlands Government's contention that there might be a time-lag between denunciation and withdrawal from a multilateral treaty and that the operative date for termination should be the moment when the notice took effect.

62. He had reversed the order of paragraphs 2 and 3 of the 1963 text, so as to deal with the more usual types of termination before the exceptional case of termination by reason of conflict with a new peremptory norm, now dealt with in paragraph 3. The old paragraph 4 had become unnecessary, as its subject-matter was now covered in the new article 30 (*bis*) adopted during the second part of the seventeenth session (A/CN.4/L.115).

63. Mr. JIMÉNEZ de ARÉCHAGA said that paragraphs 1 (a) and 1 (b) were acceptable and their content had received the assent of many governments. Those two provisions were all that was necessary and the Special Rapporteur's new wording was certainly an improvement. However, the phrase “ obligations still to be performed under the treaty ” now used in article 44, paragraph 1 (b) (A/CN.4/L.115) was preferable to the words “ from any obligation further to apply the treaty ”.

64. There was no need for the Special Rapporteur's paragraph 1 (c), as sub-paragraphs (a) and (b) were sufficiently explicit. Moreover, it introduced the new concepts of accrued rights and incurred obligations. The former was already controversial in municipal law, but was even more so in international law and nothing would be gained by mentioning it in the article, as it might be interpreted to refer to rights acquired by nationals or individuals. The notion of incurred obligations was even less acceptable and its meaning was not clear. So far, the draft had been restricted to obligations performed, or still to be performed, under the treaty and those two categories were sufficiently covered in paragraphs 1 (a) and 1 (b).

65. He presumed that what was meant by obligations incurred were those which had to be performed, but had not been performed in time, and would engage the State's international responsibility: that question did not belong in a codification of the law of treaties. When a State became responsible for failure to perform treaty obligations, the fact that the treaty terminated after such a violation did not extinguish the resulting international responsibility; on that point some cogent observations had been made by Lord McNair in his dissenting opinion in the *Ambatielos Case*, where he had said “ I do not see how the provisions of the Treaty of 1926 could prejudice claims ‘ based ’ on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them ”.<sup>6</sup>

<sup>6</sup> *ICJ Reports*, 1952, p. 63.

66. The proviso "subject to paragraph 3", in the introductory sentence of the article, might be misunderstood and indeed had been construed by two governments to mean that paragraph 1 would not apply to termination in the circumstances covered by article 45; that had not been the intention either of the Special Rapporteur or of the Commission. The provisions of paragraph 1 (a) and (b) would apply to termination resulting from the emergence of a new peremptory norm, and a situation resulting from the application of the treaty could only be maintained to the extent that it did not conflict with the new rule of *jus cogens*.

67. Some drafting changes would therefore be needed in the Special Rapporteur's new text of article 52 in order to avoid misinterpretation and it might be found desirable to reverse the order of paragraphs 2 and 3 or to incorporate the content of paragraph 3 in paragraph 1 (b).

68. Mr. REUTER said that the structure of the article was very clear, since it dealt in turn with two cases, that of ordinary law and that of *jus cogens*. With regard to the former, the Special Rapporteur had evidently sought to limit the retroactive effects of a new treaty, whence his paragraphs 1 (b) and 1 (c).

69. With regard to the case of *jus cogens*, the solution proposed was in fact correct, but the way it was expressed was surprising. For paragraph 3 stated the retroactive effects, which seemed more important than those stated in paragraph 1, but immediately set a limit to those effects by providing, in very vague wording, that they did not necessarily follow in every case. In other words, paragraph 3 simultaneously stated two conflicting rules—that there were, and that there were not, retroactive effects—the choice between which would depend on whether or not they conflicted with the peremptory norm. That simultaneous statement of two conflicting rules was less clear in the first part of the article, which related to the general case.

70. What could the Commission reasonably propose? In his opinion, it could not state all the rules applicable and should confine itself to indicating a very general line. To understand that view it was necessary to consider for a moment the situation in municipal law, where there was an all-powerful legislator, which was not yet the case in international law. In municipal law, the legislator was always faced with the question what would be the retroactive effect of a new rule he enacted. That was always an extremely complicated problem, and it could only be solved by recourse to terminology taken sometimes from statute law, often from case law, and more often from legal writers, which varied from country to country. He had little hope that the members of the Commission would be able to improvise in three languages, a wording they all understood and whose content was more or less clear.

71. But there was another, even more important point. In the vast works devoted to that problem in municipal law, it could be seen that the solutions put forward varied according to the object of the rules, not according to whether they applied to the present or the future, to whether they were procedural rules or substantive rules, rules affecting States or rules affecting

individuals, commercial rules or rules which were nowadays called humanitarian rules or rules of social law. Consequently, he thought the Commission could only give two general directives, which were complementary, but contradictory, so as to make it clear to States that it was a question which must be carefully regulated in the texts of treaties. If the solution was not given in the text of the Convention, it would be necessary to resort to directives for interpretation, which could only be suggested in the draft articles.

72. Those considerations had two consequences so far as the presentation of the article was concerned. The first, which members of the Commission would no doubt be able to accept quite easily, related to the general rule stated in paragraph 1. The Special Rapporteur had made a very praiseworthy effort. The method he had adopted to fix the difficult boundary between retroactive effects and future effects had been to use such terms as "act", "situation" and "rights accrued or obligations incurred prior to such termination". While that wording could perhaps be improved, it could certainly not be radically changed. It was mainly the use of the word "situation" that would call for some modification of the text of the draft articles. It would be necessary to distinguish between the creation and the effects of a situation, and probably also between situations having immediate effects and situations having successive effects. It was necessary to say, somehow or other, that a new treaty did not affect the creation of a situation, an act, the effects of an act or the effects of a situation. He would therefore propose stating a second and contrary rule, using the same terms, or at least referring to the same concepts, which would read approximately: "However, the treaty may have such effects if the object or the nature of the rule so requires". There were in fact cases in which everyone would agree that the treaty must have more retroactive effects than the present wording allowed.

73. The second consequence, which might surprise the Commission, was that there was no need for any special mention of *jus cogens*. He could understand the reasoning behind the view that if a rule had the character of *jus cogens*, it must have more far-reaching retroactive effects than any other rule because it had more force. But that reasoning was not always justified since, as he saw it, certain rules of *jus cogens* were not only based on justice, but must also take account of questions of stability.

74. He would give a few examples. Suppose there was a rule of *jus cogens* that annulled territorial changes obtained by force or by other means contrary to the Charter. Would that rule apply only to treaties concluded after its emergence, or could it also apply to earlier treaties, such as treaties establishing a colonial protectorate? It would be agreed that nullity of that kind could not be extended into the past *ad infinitum*.

75. Then there was the example of certain colonial treaties which would become void. Did such nullity entail *ipso facto* the nullity of a frontier treaty concluded by the protecting Power in virtue of the voided treaty? Consideration of that question of the validity of the treaties by which colonial frontiers had been established was enough to suggest that, even on that point, the

Commission probably did not wish to lay down a rule whose consequences would be so absolute.

76. A final example would illustrate the contrary case in which stability should be disregarded as far as possible and the retroactive effects should be the greatest. That was the case in which the rule—whether of *jus cogens* or not—related to questions of humanitarian or social law. For instance, there was not yet any rule of *jus cogens* imposing equality of the sexes, but supposing such a rule were one day to exist, a prior treaty relating to social questions or wages would not merely cease to have any effect in the future, but would reach far back into the past to ensure the application of those humanitarian rules. At the present time, when a new treaty concerning humanitarian questions, human rights or social rights was concluded, States always recognized that it had a strongly retroactive character.

77. That last example clearly showed that, as had already been suggested, the general rule stated in paragraph 1 must be relaxed to admit the possibility of a different solution. International jurisprudence already recognized that possibility, for instance, for interpreting the effects of treaties relating to social questions. In making that comment, he had no intention of contesting that, in fact, rules of *jus cogens*, being the expression of progressive law, would have retroactive effects more often than ordinary rules of law.

78. He hoped he had convinced the members of the Commission that there were many cases in which, even where *jus cogens* applied, the requirements of stability were important. He accordingly believed that the present formulation of paragraph 3 was quite right, but he was still convinced of the need for a paragraph 1 setting out the two complementary and contradictory statements he had arrived at. If the Commission accepted the idea that it was the nature or object of the rule which required its application to be extended into the past in certain cases, it would not be necessary to include a special provision for the case of *jus cogens*; it could be mentioned in the commentary that, obviously, where *jus cogens* was concerned, the requirements of justice would very often be more peremptory than in other spheres, without, however, necessarily excluding considerations of stability.

The meeting rose at 12.50 p.m.

### 847th MEETING

Monday, 9 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

### Second Seminar on International Law

1. The CHAIRMAN, on behalf of the Commission, welcomed the participants in the second Seminar on International Law, which was being held in connexion with the Commission's current session. At its twentieth session, the General Assembly had regretted the absence from the first seminar of participants from the developing countries, so it was with satisfaction that he noted that the developing countries were well represented on the present occasion.

#### Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 53 (Legal consequences of the termination of a treaty) (resumed from the previous meeting)<sup>1</sup>

2. The CHAIRMAN invited the Commission to resume consideration of article 53.

3. Mr. ROSENNE said he had some difficulties with article 53; in particular, he was not certain that its provisions really dealt with the consequences of termination. The one consequence of termination was that the treaty was no longer applicable as between the parties. The other questions dealt with in article 53 really related more to the effects of the lawful termination of a treaty. For that reason, he suggested that the Commission should examine the possibility of replacing the present title by that used for the corresponding article in the Special Rapporteur's second report: "Legal effect of the termination of a treaty".<sup>2</sup>

4. He did not believe that all causes of lawful termination necessarily had the same effect, either on the treaty situation itself or on acts done under the treaty and in reliance, or purported reliance, on the treaty. For example the cases of termination contemplated in article 39, in that part of article 40 which had not given rise to difficulties in the Commission at its last session, and in article 41, presupposed an express or implied agreement of the parties on the question of termination; and that agreement might deal not only with termination itself, but also with the effects of termination. He therefore suggested that, in the opening sentence of paragraph 1 as proposed by the Special Rapporteur, the words "unless the treaty otherwise provides" should be replaced by the words "unless otherwise agreed", and that the commentary should explain that such agreement could be made in the treaty which was being terminated or be implied therein, or could be found in some other agreement.

5. Termination resulting from the breach of a treaty, dealt with in article 42, could well give rise to State responsibility. Termination under article 43 or article 44 could give rise to legal questions relating to the adjustment of the situation created as a result of the termination of the treaty; the position was similar in the case

<sup>1</sup> See 846th meeting, preceding para. 58, and para. 58.

<sup>2</sup> Yearbook of the International Law Commission 1963, vol. II, p. 94, article 28.