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Summary record of the 847th meeting

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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)¹

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".²

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

¹ See 846th meeting, preceding para. 58, and para. 58.

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

of termination under article 45. Questions of State responsibility would not necessarily arise in any of the three cases. Those different kinds of termination could have different effects on the validity, or the continuing validity, of acts done under the treaty, as the Special Rapporteur himself had recognized with regard to termination under article 45. He therefore raised the general question whether the Special Rapporteur's draft adequately encompassed all those variations.

6. He accepted the general principle embodied in paragraph 1 (b), but found the use of the term "legality" inappropriate. The French version used the expression "*caractère légitime*" and the Spanish "*carácter lícito*", while the Spanish version of article 52 used the term "*validez*". Perhaps the best English word to use was "validity".

7. With regard to the Special Rapporteur's proposed new paragraph 1 (c), he had doubts about the concluding words "including any rights or obligations arising from a breach of the treaty"; the proper place for that point was article 42.

8. Another question was whether a general provision should not be included in the draft articles reserving the question of State responsibility. A provision of that type had been included in article 63, paragraph 5. The Special Rapporteur had mentioned the point in paragraph 4 of his observations on article 59 where he proposed the insertion of a new paragraph 2 (A/CN.4/186/Add.2), and in paragraph 5 of his observations on article 55 (A/CN.4/186/Add. 1).

9. With regard to paragraph 2, he suggested that the concluding words "takes effect" be replaced by the words "becomes operative", so as to bring the wording into line with that used in Part I, in particular, in articles 15 and 22.

10. Lastly, he noted that the question dealt with in the Special Rapporteur's paragraph 3 was also the subject of paragraph 2 of article 56. Perhaps the matter should be discussed when the Commission came to examine article 56; the question of combining the two provisions could then be considered.

11. Mr. CASTRÉN thought that the new text proposed by the Special Rapporteur was better, more concise and more precise than the text adopted by the Commission in 1963.³ He agreed that the order of the former paragraphs 2 and 3 should be reversed, and that the words "shall retain its validity only to the extent that it is not in conflict" in the former paragraph 2 should be replaced by the words "may be maintained in force only to the extent that its maintenance in force does not conflict . . .".

12. On the other hand, he was not sure that it was advisable to add a new paragraph 1 (c), as the Special Rapporteur had proposed in order to meet the suggestion of the United Kingdom Government. That provision might be of some use in supplementing and clarifying the other provisions of paragraph 1, but he was inclined to share the view, expressed by Mr. Jiménez de Aréchaga at the previous meeting,⁴ that the questions it dealt

with were already disposed of, at least in part, in paragraphs 1 (a) and 1 (b) and in some other general provisions of the draft. In any event, if the provision was retained it should be amended, for its present wording was unsatisfactory.

13. He agreed with Mr. Jiménez de Aréchaga that the proviso relating to paragraph 3, in the introductory sentence of paragraph 1, was liable to cause confusion; perhaps that difficulty could be overcome by transferring it to paragraph 1 (b).

14. In paragraph 2, the word "particular" seemed unnecessary and he suggested that it be deleted.

15. Mr. de LUNA said he was in general agreement with the principles underlying the Special Rapporteur's redraft, which gave expression to the rule that the termination of a treaty operated *ex nunc* and not *ex tunc*. International law, in the interests of the stability of treaties, did not look with favour on retroactivity in any form. Consequently, with the exception stated in paragraph 3 of the new draft, rights established in reliance on the treaty were not affected by its termination.

16. He was in favour of the new paragraph 1 (c), which met the point made by the United Kingdom Government. What he did not like, were the terms "act" and "situation", which he found unduly broad. According to the traditional concepts accepted by continental lawyers, a treaty could give rise to rights, obligations, faculties and powers. By virtue of the rule *pacta sunt servanda*, it created rights, in that it enabled a party to demand a certain conduct from another party; that other party was correspondingly under an obligation so to conduct itself. A treaty conferred a legal faculty when it conferred the possibility of obtaining a legally prescribed result by performing a particular act. A treaty conferred powers when it enabled a party to take some action to which certain results were attached. He suggested that paragraphs 1 (b) and 1 (c) be redrafted using terms which conveyed to the representatives of the various legal systems exactly what article 53 was intended to set forth.

17. With regard to the opening sentence of paragraph 1, he supported Mr. Rosenne's suggestion that the wording should be amended so as to cover not only the provisions of the treaty itself, but also those of the agreement terminating the treaty.

18. He agreed with those who found it inelegant to begin paragraph 1 with a reference to the exception stated in paragraph 3.

19. The idea expressed in the concluding words of paragraph 1 (c) was correct, but he agreed with Mr. Rosenne that the proper place for that passage was in article 42.

20. Mr. PAREDES said that he was prepared to agree to the Special Rapporteur's redraft of article 53, provided that the scope of the article was clarified. He could accept its provisions if they related to the termination of a treaty as a result of supervening circumstances, but not if they related to treaties that were null and void *ab initio*.

21. Treaties that were void *ab initio* could not have any legal consequences. For example, if a country entered

³ *Ibid.*, p. 216.

⁴ Paras. 64-65.

into a treaty by which it undertook to pay a certain sum of money, and it was later discovered that the agreement had been based on an error, the treaty was void and could have no effects whatsoever, even though it had been lawfully concluded originally. The position was similar in the event of coercion. If a country was occupied by foreign troops and signed an undertaking to build a road for them, on the treaty being declared null and void, all its effects disappeared with it.

22. On the other hand, where a treaty was terminated as a result of its breach, or of the emergence of a new preemptory norm of international law, it was proper to have regard for the validity of acts performed or any relationships established while the treaty was in force. Considerations of equity, justice and law all militated in favour of maintaining those acts and relationships after the termination of the treaty.

23. He agreed with Mr. Reuter on the question of retroactivity where a new rule of *jus cogens* was concerned. One example of limited retroactive effect was that of a hypothetical agreement on the non-dissemination of nuclear weapons, which would affect a treaty in force by which one country undertook to deliver certain nuclear weapons to another. The new rule would make it impossible to deliver the weapons, but there would still remain an obligation to refund any amounts received in payment.

24. Article 53 should state clearly that it dealt with the termination of treaties as a result of supervening circumstances and not with treaties that were void *ab initio*.

25. Mr. BRIGGS observed that paragraph 1 of the Special Rapporteur's redraft opened with the words "Subject to paragraph 3", and paragraph 3 purported to provide that certain acts performed, rights acquired, situations created and obligations incurred, would remain valid even where a treaty became void through the emergence of a new rule of *jus cogens* under article 45, although other such situations would be invalidated. Personally, he was unable to discover workable or practicable criteria in paragraph 3 for distinguishing them.

26. The difficulty resulted, in his opinion, from the awkward language adopted by the Commission in article 45 (A/CN.4/L.115). In that article, it was stated that a treaty which came into conflict with a new rule of *jus cogens* "becomes void and terminates". It seemed quite unnecessary to include the words "becomes void and", which merely repeated the language previously used. The legal situation was that the new rule of *jus cogens* terminated what had been a valid treaty. It would therefore be inaccurate to speak of the invalidity of acts performed or obligations incurred under that valid treaty before it was terminated. If paragraph 3 was needed at all, its proper place was in article 52, which dealt with the legal consequences of the nullity of a treaty.

27. Apart from the case of a treaty terminating under article 45, article 53 dealt not with nullity, but with the lawful termination of a treaty. He accordingly supported Mr. Rosenne's suggestion that in the opening sentence of paragraph 1 the words "unless the treaty

otherwise provides" should be replaced by the words "unless otherwise agreed".

28. As in the case of article 52, he doubted the desirability of using the expression "not affect the legality of any act done" in paragraph 1 (b); it could be misconstrued as a reference to municipal law. The wording should be improved so as to make it clear that the article was concerned exclusively with international law. That would, he thought, largely meet Mr. Jiménez de Aréchaga's objections to the concept of acquired rights.

29. With regard to the Special Rapporteur's proposed new paragraph 1 (c), he supported Mr. Rosenne's suggestion that the concluding words be deleted. The subject matter of those words properly belonged in article 42.

30. He suggested that the Drafting Committee consider redrafting paragraph 1 to read:

"1. Unless otherwise agreed, the lawful termination of a treaty shall:

(a) release States which were parties to it from any continuing obligation to apply the provisions of the treaty;

(b) not affect any rights or obligations arising from the application of the treaty prior to such termination".

31. Mr. LACHS said that on the whole the Special Rapporteur's new draft was a great improvement on the 1963 text.

32. As to paragraph 1, however, he shared Mr. Rosenne's misgivings over the proviso "unless the treaty otherwise provides". It should perhaps be replaced by broader language, though he was not sure that Mr. Rosenne's proposal was adequate.

33. In paragraph 1 (b), different wording should be found, so as to dispense with the use of the term "legality", a point which he had already raised in connexion with article 52.

34. The idea embodied in the Special Rapporteur's new paragraph 1 (c) was correct and the concluding portion should be retained. However, the words "any rights accrued or any obligations incurred prior to such termination" did not define the problem clearly enough. For two types of rights and obligations were at stake: first, rights established and obligations entered into at the time when the treaty was concluded—they were "vested under the treaty", to use the words of Chief Justice Marshall—and secondly, rights and obligations created during the operation of the treaty. It was necessary to make it clear which of the two were meant. He thought it should be the latter group only.

35. With regard to paragraph 3, he doubted whether its proper place was in article 53, which dealt with cases of termination arising from the will of the parties. The case envisaged in paragraph 3 was that of a treaty which became void as a result of the emergence of a new rule of *jus cogens*; it was not a case of termination pure and simple. Perhaps paragraph 3 should be transferred to article 52, with a cross-reference in article 53.

36. Mr. VERDROSS said that the Special Rapporteur was to be congratulated on his success in improving the wording of the article.

37. The word “legality” in paragraph 1 (b) called for the same comment as he had made at the previous meeting with reference to article 52,⁶ and Mr. Rosenne had also just made. The term “validity” would be more suitable in article 53 too, and would be in keeping with the spirit of the article. Legality and validity were two different things. For example, in municipal law, when a soldier married without his superior officer’s permission the marriage was valid, although it might be contrary to law under certain national legislation. In international law, an act performed in accordance with a treaty between two States was valid, but might be contrary to another treaty concluded between one of those two States and a third State.

38. With regard to paragraph 1 (c), he agreed with the views expressed by Mr. Jiménez de Aréchaga at the previous meeting and by Mr. Castrén at the present meeting.

39. He agreed with Mr. Lachs that the substance of paragraph 3 could be included in article 52.

40. Mr. AGO observed that article 53 was simplified and substantially improved in the Special Rapporteur’s sixth report (A/CN.4/186). Nevertheless, it still raised a number of delicate problems which were more important than appeared at first sight, especially in the French text, which in several places did not correspond to the English.

41. In general, he agreed with the view that the article should deal only with the case in which a treaty terminated after having had an entirely normal and legal existence—and thus having produced its effects—not with the case of a treaty which was void *ab initio*.

42. The wording of paragraph 1 (a) was probably correct in English, but in French the expression “*obligation de continuer à appliquer le traité*” conveyed the false impression that an obligation further to apply the treaty would arise at the time when it ceased to be in force, and that it was from that obligation that the parties were to be released.

43. Paragraph 1 (b) raised, not a problem of validity, to which Mr. Verdross had referred, but the problem of legality, which the Special Rapporteur had rightly tried to deal with. In the frequently quoted example of the treaty on the slave trade which had terminated owing to the abolition of slavery, the question that arose was whether acts performed under the terms of that treaty before the emergence of the new rule of *jus cogens* were not only valid, but lawful; it was necessary to ensure that an act performed under the treaty was not made to appear unlawful retrospectively and raise a question of responsibility. The Drafting Committee should therefore try to express the two ideas of validity and of legality or lawfulness in that paragraph.

44. The expression “situation resulting from the application of the treaty” was no doubt rather vague, as Mr. de Luna had remarked, but it was not certain that the two cases covered by paragraphs 1 (b) and 1 (c) could be combined; he himself saw a difference between them.

45. He saw no need to refer to “rights accrued” in paragraph 1 (c), but the French text should be carefully revised, as the expressions “*nouveaux*” and “*nés du traité*” were wrong. The rights and obligations meant were those deriving from the application of the treaty, not from the treaty itself. The last phrase, “including any rights or obligations arising from a breach of the treaty”, was rather startling and should be amended to remove any ambiguity. In any event, the problem of responsibility should not be mentioned at that point.

46. Paragraph 2 was satisfactory in English, but needed revision in French. The expression “*s’applique aux rapports*”, in particular, was inappropriate, because it gave the impression that the reference was to legal relations, whereas the meaning intended was that paragraph 1 applied in relations between States.

47. Mr. EL-ERIAN said that the Special Rapporteur was to be commended for his lucid analysis of the comments by governments on article 53 and the way in which he had tried to meet the points he considered should be taken into account in the text. The general structure of the article should be retained because it rightly distinguished between the legal effects of termination and the legal consequences of acts performed under the treaty.

48. He had not made up his mind about the best order for the provisions of the article, but termination should certainly be dealt with first and then denunciation or withdrawal. If a treaty terminated on account of its having become void under article 45, that would mean termination for all the parties, so the content of paragraph 3 should be moved to paragraph 1.

49. He was unable to understand the relevance of the United Kingdom Government’s point that where a treaty’s provisions had already been executed it might be extremely difficult to restore the *status quo*, since there was no provision in article 53 of the kind contained in article 52, paragraph 1 (b).

50. The content of paragraph 3 must certainly be retained, because a new rule of *jus cogens* would have overriding force, and no acquired rights which conflicted with it could be maintained. Some of the comments by governments were due to the fact that, as explained in paragraph (1) of the Commission’s 1963 commentary,⁶ article 53 did not deal with any question of responsibility or redress that might arise from acts which were the cause of the termination of a treaty.

51. Mr. TUNKIN said that the article needed careful scrutiny by the Drafting Committee. He agreed with Mr. Rosenne that the introductory proviso should be expanded to cover any agreement in whatever form, but he was not yet certain whether the word “validity” should be substituted for the word “legality” in paragraph 1 (b), or whether both terms ought to be used.

52. His views on paragraph 1 (c) were similar to those of Mr. Jiménez de Aréchaga, Mr. Castrén and Mr. Verdross. He agreed with Mr. Lachs that the text was open to two interpretations and might be read as relating to either of two groups of rights and obligations:

⁶ Para. 7.

⁶ *Yearbook of the International Law Commission, 1963, vol. II, p. 216.*

those laid down in the treaty itself, or those deriving from acts performed under the terms of the treaty. The first group ought not to be covered, since the treaty would have lapsed, and the second group was covered in paragraph 1 (b). So-called "acquired rights" had so often given rise to abuse that the Commission should be wary of introducing that concept.

53. He could understand the logic of Mr. Briggs's views on article 53, which resulted from his rejection of the principles of *jus cogens*, but he could not subscribe to them. Now that article 45 had been included in the draft, the inference to be drawn from that rule was inescapable. Voidance or termination in application of article 45 was termination of a special kind resulting from the treaty becoming contrary to a fundamental principle of international law, and its consequences were bound to be different from those of other forms of termination.

54. Though the wording of paragraph 3 might need further improvement, the substance was correct. By virtue of that provision, to quote the example used by Mr. Briggs, a transaction concluded under an old slavery treaty would not become illegal, but the situation it had created could not continue because it conflicted with a new rule of *jus cogens*.

55. He had no firm views about the position of paragraph 3; possibly the provision ought to be transferred to article 52.

56. The CHAIRMAN, speaking as a member of the Commission, said that he had no objection to the principles stated in article 53 and that on the whole he thought the new version proposed by the Special Rapporteur was an improvement.

57. The question raised by paragraph 1 (b) was whether a situation or an act was in conformity with the objective rules of the treaty; that was not a matter of validity, but of legality or lawfulness. The question of validity was covered by other articles of the draft.

58. With regard to paragraph 3, he shared Mr. Tunkin's view that the principle stated was correct, but that it was perhaps out of place in that article. From the point of view of drafting, he preferred the former wording: "shall retain its validity only". The new text, which stated that the situation "may be maintained in force only to the extent that its maintenance in force does not conflict" with the new norm, was mainly concerned with the result; it would be better to specify that the reason why such a situation could be maintained was because it was "legal". It was a question of determining whether the termination of the treaty as a result of the emergence of a new norm of general international law affected, or did not affect, the legality of the situation which continued after the treaty had terminated. He thought the Drafting Committee would be able to state the principle contained in paragraph 3 in an acceptable manner and suggest an appropriate place for it in the draft.

59. Subject to those reservations, he could accept the new draft of article 53.

60. Mr. VERDROSS said he still maintained that, under the terms of paragraph 1 (b), an act done in

conformity with a treaty concluded between A and B which terminated, could nevertheless be a violation of another treaty concluded between A and C and, consequently, not "legal".

61. The CHAIRMAN, speaking as a member of the Commission, explained that when referring to "legality" in connexion with paragraph 1 (b), he had meant legality with respect to the treaty in question.

62. Mr. JIMÉNEZ de ARÉCHAGA said that not enough attention had been given to the important comments made by Mr. Reuter at the previous meeting⁷ about the application of article 53 to rules of *jus cogens*, where the time factor was an essential aspect. The doctrine of *jus cogens* was not new, since it represented the application to international law of well-established concepts of contract law and of general principles of law concerning the invalidity of agreements with an illicit purpose, whose execution called for acts *contra bonos mores*. But while the notion of *jus cogens* was not new, the substantive contents of that notion were constantly changing in accordance with the development of international law. While other grounds of invalidity, such as fraud, coercion and error, provided for by the Commission in its draft would remain unchanged, the question whether a given agreement violated a rule of *jus cogens* might receive a different answer in 1940 than in 1966. The Commission had therefore to take the time element into account. For that purpose, article 37 dealt with the case in which there was an established rule of *jus cogens* in existence and the treaty was entered into subsequently, while article 45 dealt with the opposite case of a treaty executed prior to the emergence of a rule of *jus cogens*. It was in order to take account of the time factor that the Commission had provided in article 37 for invalidity *ab initio* and in article 45 for termination by the treaty becoming void.

63. The bearing of that distinction, and of articles 52 and 53, on the important example given by Mr. Reuter of the rule of *jus cogens* forbidding the use of force and acts of aggression, ought to be examined. As the Commission had indicated in one of its reports, such a rule of *jus cogens* had come into existence in 1945,⁸ which meant that treaties entered into after that date, which were designed to instigate aggression against another State, would be invalid *ab initio*, and any acts performed in reliance on them would be illegal, as stipulated in article 52, paragraph 2 (b).

64. On the other hand such a treaty entered into before 1945 would fall under the provisions of article 53, and the parties would be released from any obligations still to be performed under the treaty. However, the legality of acts performed while the treaty was in force would not be open to question, nor would the situation resulting from its application, particularly where territorial settlements were concerned. In other words, although the treaty might lapse, the executed settlement remained in force as was clear from the passage in the Special Rapporteur's observation on article 53 reading: "Nevertheless, it would be inadmissible to regard the

⁷ Paras. 68 *et seq.*

⁸ *Yearbook of the International Law Commission, 1963, vol. II, pp. 198-199, commentary on article 37, para. (3).*

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).

65. The 1963 text of paragraph 2, and the new text of paragraph 3, contained a provision designed to make clear that while the legality of acts performed before the emergence of a new rule of *jus cogens* was protected, the further maintenance in force of a situation resulting from the application of a treaty that had come into conflict with such a rule might not be required. But that particular provision could never apply to territorial arrangements resulting from a treaty concluded prior to the emergence of the rule because, as the Commission had already determined in connexion with article 44 on “change of circumstances”, territorial situations which resulted from executed treaties did not call for further enforcement of the treaty.

66. A hypothetical example of the type of situation that article 53, paragraph 3 was framed to cover could be drawn from the international conventions on narcotic drugs of natural origin, which might be considered to enunciate rules of *jus cogens*. Supposing that a treaty was entered into by two States, whereby one agreed to set up a manufacturing plant to supply the other with synthetic drugs and the international conventions were then extended to cover such drugs, a wider rule of *jus cogens* would have emerged and would terminate the treaty. The deliveries and payments already made under the treaty would be legal, but there would be no further obligation to deliver or receive the products, and under article 53, paragraph 3, neither party would be entitled to ask for further enforcement of the situation resulting from the application of the treaty; thus a State would not be entitled to ask for compensation for the termination of exports or for the cost of building the plant.

67. Mr. Reuter's comments had shown that the important provisions of article 53, paragraph 3, would require extremely careful drafting so as to obviate any misinterpretation. Possibly the phrase “the further enforcement of a situation” used by the Special Rapporteur in his report, but not in the new text of the article itself might be preferable to the phrase “a situation . . . may be maintained in force”, as it would stress that a new act of enforcement was required to enter into conflict with the new rule of *jus cogens*.

68. Mr. BARTOŠ said he was categorically opposed to the use of the word “legality” in paragraph 1 (b). The comment made on that point by the Government of Israel seemed to him to be pertinent; the fact that a treaty terminated did not affect the legal consequences of an act done in conformity with the provisions of the treaty. The act might be legal or illegal, permissible or prohibited, valid or invalid, but that depended on other considerations, and article 53 was not the place to define the nature of such an act.

69. Mr. AGO said he wished to complete his observations on article 53 by commenting on paragraph 3. Admittedly, that paragraph was an important one, but it should not be regarded as more important than it really was. Its purpose was to safeguard a number of situations which might be challenged because they had

been created on the basis of principles that were no longer accepted. But it must be remembered that those situations differed from one another and did not all require the safeguard in question.

70. Mr. Tunkin had given an interesting example of the kind of situation article 53 was intended to cover. It was now accepted as a rule of *jus cogens* that wars of aggression were prohibited, and that consequently an aggressor could not validly impose a treaty transferring territory to his advantage. Such a treaty would no longer be valid today, but—as Mr. Tunkin had pointed out—that did not mean that all frontiers, many of which had been fixed in such circumstances, must be renegotiated. In such cases, the part of the treaty providing for the transfer of territory ceased to exist as soon as the transfer took place. Consequently, it had no longer existed when the new *jus cogens* rule had supervened, and the Commission need not concern itself with safeguarding sovereignty over the transferred territory, which was not in question.

71. On the other hand, there were acts or situations which could be affected because the treaty remained in existence. Suppose, for example, that a treaty concluded in the past constituting an international protectorate was considered in the light of a supervening rule of *jus cogens* which prohibited international protectorates, so that all treaties setting up international protectorates had become null and void. The protectorate situation—the relationship between the protecting and the protected State—would cease to exist because the treaty had been in force when the new rule of *jus cogens* had been established. Again, the safeguard provided in paragraph 3 was not required.

72. Of course, all cases were not so simple and there might be instances in which the rule stated in paragraph 3 was necessary; but he hoped the Drafting Committee would study the text carefully in order to determine whether it was necessary and, above all, to prevent wrong inferences being drawn from it.

73. Unlike Mr. Bartoš, he thought that the issue was not the legal character of the act, but whether it was “lawful” or “licit”. The important point was to establish that a certain act performed at a given moment in execution of a treaty could not become unlawful *a posteriori*, and that it could not be claimed that a State had incurred international responsibility by performing an act in accordance with a treaty, even if the treaty had ceased to be valid.

74. Mr. AMADO said he was glad that his colleagues had cleared away the undergrowth from ground which he had found difficult from the outset. The only point remaining to be clarified was the meaning of the term “legality”. Behind that vague and abstract expression—for which he had a profound dislike, as it offended his sense of the concrete—lay concealed the idea of “well-foundedness”—the idea that the termination of a treaty did not affect the “legal efficacy” of an act performed in accordance with the treaty.

75. Mr. ROSENNE said that the discussion had only served to increase his uncertainty about the scope and purpose of the article. The contention by one member of the Commission that article 53 dealt with cases of

termination arising out of the will of the parties seemed to be at variance with article 30, paragraph 2 as adopted at the previous session (A/CN.4/L.115), and raised the question what was meant by the expression "lawful termination". During the discussion on that article Mr. de Luna and himself had expressed serious reservations about its scope, on the grounds that the draft articles concerning termination did not cover all the grounds on which a treaty could be lawfully terminated.⁹

76. At the fifteenth session Mr. Verdross had suggested¹⁰ including at the beginning of Part II, section III, an introductory article stating the general cases in which an article could be terminated, including termination when the treaty had been fully implemented or by reason of obsolescence or desuetude. The first of those cases was not explicitly covered in the articles on interpretation and modification, yet it was one of the main reasons for termination. It thus appeared that article 30 might require adjustment.

77. Article 53 might appear simple, but if so the appearance was deceptive, and the Drafting Committee would probably have to examine all the articles concerning termination in order to establish what the consequences were for each type of termination and to ascertain which had not been covered in the draft.

78. Mr. EL-ERIAN said that, if paragraph 3 was transferred to article 52, some of the comments he had made on the structure of article 53 would not apply.

79. The important question had been raised whether there existed a rule of *jus cogens* forbidding the establishment of protectorates. The Commission's position on *jus cogens* in general had been the subject of lively controversy in legal circles and a recent article in the American Journal of International Law had discussed three categories of *jus cogens*, contending that they were a part of positive international law.¹¹ His own opinion was that all protectorates were a derogation from the principles of the sovereign equality of States and were a violation of the provision in article 3 of the Commission's draft that every State possessed the capacity to conclude treaties, and of the provision in article 35 that a treaty procured by coercion of the representative of a State was without any legal effect. The exercise of responsibility for the external relations of a dependent territory was contrary to the Charter and all colonial protectorates were the result of coercion.

80. Mr. BARTOŠ said he understood Mr. Ago's view to be that if the treaty was valid, acts and situations in conformity with the treaty were lawful. He thought that might be a presumption. Nothing in the text guaranteed that the treaty itself was lawful, and in the absence of a guarantee it could not be said that everything which had resulted from the treaty must be considered lawful. What could be said was that the fact that the treaty terminated did not affect the juridical character, whether lawful or not, of such acts or situations. There could be a lawful act based on a treaty which itself was

vitiated. To maintain that all acts arising out of, and in conformity with, a treaty were lawful, introduced the question of lawfulness, and that was not the place to do so. If the treaty was assumed to be in full conformity with the law he would agree with Mr. Ago; but if that was in doubt he could not say that all acts and situations in conformity with a treaty whose lawfulness had not been investigated were validated by confirmation.

81. Mr. AGO said he thought the only point which arose was that an act which had been performed when the treaty was in force, and which had been in no way unlawful, either under the terms of the treaty or under the rules of international law existing at the time, could not become unlawful *a posteriori* simply through the emergence of a new rule of international law.

82. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of retaining the word "legality" (*caractère légitime*). Article 53 dealt with the consequences of a particular case of the termination of a treaty. The act was deemed to have been legal under the terms of the treaty which terminated, and its legality was not in doubt. The question to be settled was what effect the termination of the treaty had on the legality of the act.

83. He had been against the use of the term "legality" in article 52, because there the reference was to an act performed under a treaty which had been found to be void; it was not possible to speak of the "legality" of the act, because the treaty was void. The case contemplated in article 53 was quite different.

84. Mr. de LUNA said that article 53, both in its previous and in its new form, dealt with the legal consequences of the termination of a treaty. What was the general rule the Commission intended to state? It was the rule of non-retroactivity. The termination of the treaty did not affect what had gone before; it had effects *ex nunc*, but not *ex tunc*.

85. Once that was established, he did not see why the Commission should try to complicate its statement of non-retroactivity, and he was not clear about the relationship between paragraphs 1 (b) and 1 (c). If paragraph 1 (b) called for so many explanations among experts in the Commission, would it ever be understood outside?

86. He himself thought that paragraph 1 (c) was a sufficient statement that rights accrued—it did not matter whether that term, which had not always been viewed with favour, was retained or not—and obligations deriving, not from the treaty itself, but from its application, as Mr. Ago had rightly observed, must be respected and were not affected by the fact that the treaty terminated. It was also understood that it was impossible to go back on what had already been executed in accordance with the treaty, since that was no longer part of what subsisted at the time when the treaty was extinguished.

87. If paragraph 1 (b) really added a shade of meaning which some members regarded as indispensable, the Drafting Committee should consider combining it with paragraph 1 (c).

88. Mr. REUTER said that the discussion had confirmed his view that it would be hard to arrive at an

⁹ Yearbook of the International Law Commission, 1966, vol. I, part I, 823rd meeting, para. 19 and 841st meeting, paras. 25 and 31.

¹⁰ Yearbook of the International Law Commission, 1963, vol. I, pp. 94 and 97.

¹¹ A. Verdross, *Jus dispositivum and jus cogens in international law*, American Journal of International Law, Jan. 1966, p. 55.

entirely satisfactory text. In his opinion, the Commission should be content with a modest text; every complicated subject had contradictory aspects and the Commission must reconcile itself to drafting a somewhat contradictory text.

89. Many sound and interesting comments had certainly been made. It was true that, in all the textbooks of international and municipal law concerned with the inter-temporal law, a distinction was made between situations where execution was immediate and situations where execution was successive; but could that distinction be usefully discussed at a conference of plenipotentiaries? In any event, he thought that careful attention should be given to the terminology used, in order to ensure that the wording of the article harmonized with that of other articles, such as article 56.

The meeting rose at 5.55 p.m.

848th MEETING

Tuesday, 10 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.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 53 (Legal consequences of the termination of a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 53.

2. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that the Drafting Committee would have to do a considerable amount of work on articles 52 and 53, which were more difficult to formulate than appeared at first sight. However, perhaps too much had been made of some of the problems, which might disappear if a better draft could be devised.

3. He agreed with Mr. Rosenne's argument that the proviso at the beginning of the article, "Subject to paragraph 3", was not well placed because it related only to paragraph 1 (b), and although some members had suggested that it be transferred, he would have thought it could safely be dropped, since no such general

reservation was strictly necessary in view of the way in which the rest of the article was drafted.

4. To meet another point made by Mr. Rosenne, some such phrase as "or the parties otherwise agree" could be inserted in the introductory sentence after the word "provides". That addition would correspond to certain provisions in part I.

5. As for the substance of paragraph 1, sub-paragraph (a) appeared to have escaped criticism and comment had for the most part been concentrated on sub-paragraphs (b) and (c). The word "legality" had given rise to the same kind of objections in article 52, where the alternative word "validity," suggested by some members, was not quite the appropriate term. As far as the English text was concerned, the idea which the Commission had been trying to express in article 52, paragraph 1 (a) was that the invalidity of a treaty did not deprive of its licit character an act performed in good faith while the treaty was in operation. In article 53, paragraphs 1 (b) and 1 (c) had been cast in negative form, and some members had shown concern lest the language of the former should be interpreted as establishing acts as legal, which might be impeached for reasons outside the treaty. The criticism was unfounded because that particular issue was left open.

6. It was important to decide what the Commission wished to stipulate in those two sub-paragraphs. In his opinion, two points had to be covered. The first was that, in the circumstances contemplated, there would be no retroactive effects and termination would not deprive acts performed while the treaty was in force of their licit character. Perhaps that point of inter-temporal law had not been made sufficiently clear because of linguistic difficulties. In English, the notion of the licit character of an act not being affected was unfamiliar and the term "legality" was used. That term, however, could have more than one sense, so that its inclusion in the article could lead to misunderstanding in the English text.

7. The second point was the continued validity of acts, rights and obligations arising from the existence of a treaty, and in that respect the wording of paragraphs 1 (b) and 1 (c) was perhaps not clear. The Drafting Committee would have to scrutinize them both carefully, to make sure that both points were adequately brought out.

8. Some members of the Commission were in favour of dropping paragraph 1 (c) altogether. The idea of introducing into the text the concept of vested rights, in the special sense that it possessed in one branch of law, had not been his own and he was uncertain whether the article should cover both ways in which such rights and obligations could arise, namely, by virtue of being vested directly under the treaty, or as a result of acts performed under the treaty régime. As it stood, paragraph 1 (c) in his proposed new text dealt with the first category, and more thought would have to be given to the question whether the second category should also be covered. The drafting of paragraph 1 (c) was likely to be delicate, because of the difficulty of finding suitable phraseology that could be accurately rendered into all the working languages.

¹ See 846th meeting, preceding para. 58, and para. 58.