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Summary record of the 835th meeting

Topic:
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order to maintain in being a treaty which had become anachronistic; in such a case, an exception to the rule *pacta sunt servanda* should be allowed.

78. Like Mr. Verdross, he considered that article 44 should not apply to a treaty which had been executed. And not only frontier treaties should be considered as having been executed but also the large number of treaties which established a certain régime as between States. Such treaties were executed in two ways: first, there was an immediate execution which established the conditions for the régime, and then an extended execution which maintained the régime in existence. The *clausula rebus sic stantibus* should be applied with extreme care to such treaties, lest it upset the régime in question.

79. To forestall possible abuse, the article should state that the proposed rule would apply to the exceptional case where a decisive element in the conclusion of the treaty had been modified. It would be the Drafting Committee's business to work out a formula offering ample safeguards.

80. The Commission's draft should contain a rule concerning the operation of the *clausula rebus sic stantibus* in order that those participating in the conference of plenipotentiaries which would carry the Commission's work to completion should realize the importance of the question and beware of the risk of the doctrine being abused.

81. Mr. AMADO said that never before, perhaps, had he followed a discussion with such keen interest, nor had he ever experienced such great satisfaction in seeing the correct rule crystallizing out. Every member of the Commission, each in his own way, had made a useful contribution. It remained for the Drafting Committee to work out the best formulation and to remove the minor differences between the versions of the article in the different languages.

The meeting rose at 1 p.m.

835th MEETING

Thursday, 20 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 44 (Fundamental change of circumstances) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 44.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that his own position remained very much what it had been in 1963 when he had submitted his second report. There were far too many indications, both in State practice and in legal literature, of the existence of a rule or doctrine that the continuance of a treaty could be affected by a fundamental change of circumstances for the issue to be ignored. The Commission was faced with the alternatives of either stating that no such rule existed, or trying to define it with sufficient strictness for it to be acceptable as part of the codification of the law of treaties. The first course was ruled out because it would certainly not receive the support of the majority of governments. Having taken the second course, the Commission had to a large extent discharged its task by adopting a close definition of the conditions for the operation of the rule. No doubt the drafting of article 44 could still be improved, but the position had been reached where the Commission had arrived at a text which, if applied in good faith, should not leave any room for abuse of the *rebus sic stantibus* principle.

3. It had been suggested by some members that article 44 would involve grave dangers to the stability of treaties, unless it contained procedural safeguards in the form of a requirement of the exhaustion of negotiations, and possibly even of a jurisdictional clause. He had some sympathy for those views but felt that there was no reason for making procedural requirements part of the substance of article 44 when the Commission had not done so in the case of article 37, on *jus cogens*, which represented a much greater danger to the stability of treaties. The provisions of article 44 were undoubtedly less susceptible to broad interpretation than some other articles in which the Commission had not included any procedural safeguards.

4. What the Commission should ensure was that the application of the provisions of article 44 was linked with the procedural provisions embodied in article 51, thereby providing the necessary guarantees against a purely arbitrary application of the doctrine of fundamental change of circumstances.

5. The *pacta sunt servanda* rule in itself prevented a State, acting in good faith, from abusing the provisions of article 44. The draft articles on the law of treaties were intended to become an international convention, and the application of that convention in good faith would provide a further guarantee against abuse.

6. It was almost impossible to prevent an arbitrary application of the law by one State on the basis of an interpretation of a legal rule which was considered inadmissible by others. In the present state of international law, protection could not be complete. In that respect, the situation of article 44 was no different from that of other articles, or indeed of other parts of international law.

7. The narrow formulation of the text of the article itself was calculated to diminish the dangers of the doctrine. It had been agreed by all members that the drafting should be as tight as possible so as to make it clear that

[1] See 833rd meeting, after para. 48, and para. 49.

any application of the *rebus sic stantibus* doctrine was exceptional.

8. With regard to the wording of the article, he noted that the majority of members agreed with the suggestion to merge the first two paragraphs of the 1963 text, thereby dispensing with the old paragraph 1 which had been designed to emphasize the exceptional character of recourse to the notion of fundamental change of circumstances. It was felt that the psychological advantage thus gained did not justify the considerable inelegance of repeating in the introductory paragraph what was already stated in the form of a rule in the next paragraph.

9. The Drafting Committee had now decided that the set of articles to which article 44 belonged should be formulated negatively. In the 1963 text, paragraph 1 stated that a party could only invoke the change of circumstances " as a ground for terminating or withdrawing from the treaty under the conditions set out in the present article ", while paragraph 2 set out the conditions for the application of paragraph 1. If the rule were now stated negatively, the former paragraphs 1 and 2 could be merged into one paragraph, stating that a fundamental change of circumstances " may not be invoked as a ground for terminating the treaty unless... ". Wording of that kind would provide all the degree of emphasis formerly achieved by the presentation in two paragraphs in 1963.

10. He accepted the suggestion by Mr. Ago that the idea contained in sub-paragraph (*c*) should be transferred to the opening phrase of paragraph 1, although, at least as far as the English text was concerned, there could be no question but that the conditions set out in sub-paragraphs (*a*), (*b*) and (*c*) were cumulative; in English legal drafting, the provisions of those three sub-paragraphs could never be interpreted disjunctively. Paragraph 1 could therefore be reformulated to read more or less:

> " A fundamental change which has occurred with regard to circumstances — or a fact or state of facts — existing at the time when the treaty was concluded, and which is not provided for in the treaty, may not be invoked by a party as a ground for terminating or withdrawing from the treaty unless: ",

followed by sub-paragraphs (*a*) and (*b*). That formulation would have the advantage of keeping the conditions in sub-paragraphs (*a*) and (*b*) distinct, while at the same time achieving the intended cumulative effect.

11. The various suggestions which had been made with regard to the words " a fact or state of facts " and the suggested alternative " circumstances " could be referred to the Drafting Committee. He appreciated the purpose of Mr. Tunkin's proposal, but felt that the word " fact ", if used by itself, would require an extremely narrow interpretation if the rule itself was to be kept narrow.

12. In sub-paragraph (*a*), the word " essential " was, in his opinion, fundamental to the safety of the text. To say that the fact or state of facts constituted merely a " basis " of the consent of the parties would make the provisions of the article much too wide.

13. In sub-paragraph (*b*), the introduction of the term " continuing " seemed to be generally approved. That adjective to some extent met the point raised by Mr. Verdross on paragraph 2, with regard to the distinction between executed and executory clauses of a treaty.

14. He could not agree with the suggestion that the intention of paragraph 2 was to exclude executed treaties, and accordingly could not accept the change of wording proposed by Mr. Verdross. The purpose of paragraph 2 was to exclude from the operation of the article treaties which dealt with boundary settlements. The reason for that exclusion was not that the provisions of those treaties were " executed " provisions, but that treaties of that type were intended to create a stable position. It would be inconsistent with the very nature of those treaties to make them subject to the *rebus sic stantibus* rule. In a recent arbitration case, Mr. Ruda and himself had been concerned with problems arising out of a boundary treaty more than half a century old, and they would both find it extremely difficult to understand the idea that a treaty of that type could be regarded as completely executed and terminated.

15. The question of determining what treaties were covered by the exception stated in paragraph 2 was largely one of fact. In the case of territorial settlements, the provisions of the treaty could be apparently completely executed, but problems could later arise as to the interpretation or the application of an obligation contained in the treaty.

16. Admittedly, it was difficult to define the treaties covered by the exception in paragraph 2. It had been suggested by some members that it was sufficient to refer to treaties which fixed boundaries. However, a wording of that kind would create ambiguity; the expression " to fix a boundary " had such a direct meaning, as referring to actual delimitation of frontiers, that it would exclude such cases as the cession of an island, like Heligoland.

17. He had suggested that article 44 should include a paragraph similar to paragraph 3 of his redraft of article 43, stating that a party to a treaty whose own breaches had caused a change of circumstances would be unable to invoke that change as a ground of termination. It had been suggested by one government that the exclusion should apply to any party which had contributed to the change in circumstances, but he himself had not wished to go so far. In any case, his suggestion had not attracted much comment in the Commission and should perhaps be considered by the Drafting Committee.

18. Lastly, he had placed before the Commission a proposal for the inclusion in article 44 of a paragraph on the subject of equitable compensation for unjust enrichment, similar to paragraph 4 of his redraft of article 43, though it was not a proposal that he himself would advocate. The question whether such a provision should be included in the draft articles, and whether it should apply both to article 43 and to article 44, should perhaps be considered when the Commission came to consider article 53, on the legal consequences of the termination of a treaty.

19. Mr. VERDROSS said he wished to remove the misunderstanding which seemed to have arisen between himself and the Special Rapporteur; he approved the underlying idea of paragraph 2 of the Special Rapporteur's

redraft. What he had meant to say in his earlier statements was that treaties fixing a boundary or effecting a transfer of territory were not the only treaties to which the *clausula rebus sic stantibus* was inapplicable.

20. More generally, in his opinion the clause could not be invoked in respect of treaties which were completely executed, but he had never intended to say that completely executed treaties ceased to be valid: on the contrary, they continued to exist as treaties, and disputes concerning their interpretation could still arise.

21. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 44 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[2]

ARTICLE 45 (Emergence of a new peremptory norm of general international law)

Article 45

Emergence of a new peremptory norm of general international law

1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in article 37 is established and the treaty conflicts with that norm.

2. Under the conditions specified in article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void. (A/CN.4/L.107, p. 41)

22. The CHAIRMAN invited the Commission to consider article 45, for which the Special Rapporteur in his fifth report (A/CN.4/183/Add.3, p. 23) had proposed an amended text for paragraph 2 reading:

> If certain clauses only of the treaty are in conflict with the new norm and the conditions specified in article 46, paragraph 1, apply, those clauses alone shall be void.

He had also proposed the substitution of the word " if " for the word " when " in the first line of paragraph 1.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been no detailed comments on article 45 and such governments as had made observations had merely referred to their comments on article 37 and reiterated their difficulties with the *jus cogens* rule itself.

24. Some comments submitted in writing by Mr. Liu applied to both article 37 and article 45 and were in line with the observations of certain governments.

25. Paragraph 2 dealt with the problem of separability. The Commission had established a distinction between article 37 and article 45 in that it had allowed separability in the latter but not in the former. Even if the Commission were ultimately to decide to deal with the whole question of separability in a single article, there would still be a strong case for retaining paragraph 2 so as to underline the difference between those two articles.

26. In paragraph 1, he proposed only a minor drafting change, the replacement of the word " when " by the word " if ", so as to stress that the rule applied to an exceptional type of case. The term " when " could give the impression that the cases envisaged occurred in the ordinary course of events.

27. He had left the wording " A treaty becomes void " in order to meet the wish of the Commission. The point had, however, been made by governments that there was some inelegance in using that expression because the result was a case of nullity, the consequences of which were dealt with not in article 52, on the legal consequences of the nullity of a treaty, but in article 53, on the legal consequences of the termination of a treaty. Personally he would prefer a different expression to describe the effects of the emergence of a new rule of *jus cogens*. In his view, the situation in article 45 was that performance had become contrary to international law and the treaty was therefore terminated.

28. Mr. YASSEEN said that article 45 should stand. In 1963, the Commission had unanimously taken the view that the nullity contemplated in the article was a nullity *ex nunc*, and for that reason had preferred the conjunction " when " to the conjunction " if ". However, he could accept the latest redraft, for the expression " becomes void " was sufficient to convey the idea that the nullity was not retrospective. The States had not done anything wrong in concluding the treaty; consequently, if a new peremptory rule subsequently emerged which conflicted with the treaty, the treaty could not be void *ab initio*.

29. With regard to paragraph 2 dealing with separability, he had no objection regarding the substance. The principle of separability was not admitted in cases where the treaty was void *ab initio* as conflicting with a rule of *jus cogens* existing at the time of its conclusion, a case governed by article 37, but should be admitted in cases where the *jus cogens* emerged after the conclusion of the treaty. Since, however, the Commission was proposing to deal with the entire question of the separability of treaties in a separate article, there was no reason why an exception to the system should be made specifically in the case of article 45. Since the provisions concerning separability had been provisionally dropped from each of the articles concerning the nullity or termination of treaties, paragraph 2 should be dropped, pending a thorough study of the whole question in connexion with article 46.

30. Mr. CASTRÉN said that he wished to repeat the proposal he had made during the discussion on article 37, that articles 37 and 45 should be amalgamated; he hoped the Drafting Committee would take that proposal into consideration.

31. He could accept the drafting change proposed by the Special Rapporteur in paragraph 1, but the provision should also be improved so far as substance was concerned. It seemed excessive to provide that a treaty became void in consequence of the emergence of a new peremptory rule of general international law. The treaty had been valid until the international law had changed. Actually, the general rule was that an instrument that was declared void was void *ab initio*. He had the impression that the Government of the United States held the same opinion, as could be seen from the Special Rapporteur's fifth report. The report also mentioned that the delegation of

[2] For resumption of discussion, see 842nd meeting, paras. 38-57.

El Salvador to the Sixth Committee of the General Assembly had suggested that the Spanish text of the article begin with the words " *Un tratado se extingue cuando* ", without mentioning nullity (A/CN.4/183/Add.3, p. 22). The Commission itself, in paragraph (2) of its commentary to article 45 as adopted in 1963, had said " it [the rule] does not nullify the treaty, it forbids its further performance ".[3]

32. In the light of that comment, and in order to simplify paragraph 1, he proposed that it be redrafted to read:

> " 1. A treaty terminates if it is incompatible with a new peremptory norm of general international law of the kind referred to in article 37 which emerged after the treaty entered into force ".

33. Paragraph 2 was perhaps hardly necessary, since the entire question of the separability of treaties could be dealt with in article 46. If the Commission nevertheless wished the paragraph to stand, he would propose that the words " shall be void " be replaced by the words " shall terminate ".

34. Mr. AGO said that to his mind the expression " becomes void " indicated quite definitely that the nullity was a nullity *ex nunc*. If some members of the Commission considered that, by its very nature, the nullity was necessarily a nullity *ex tunc*, it would be better to add that the treaty " terminates " and so to remove all ambiguity.

35. Mr. VERDROSS proposed that, in paragraph 1, the words " a new peremptory norm of general international law of the kind referred to in article 37 " be replaced by the words " a new norm having the character of *jus cogens* ". The provision would then be simpler and clearer and would have the advantage of dispensing with the adjective " peremptory " *(impérative)* which was pleonastic seeing that any norm was peremptory.

36. Mr. AGO said that the French word " *impératif* " denoted something from which there could be no derogation; the corresponding term in other languages might not have quite the same meaning, but in each language the term used should be the customary term.

37. Mr. de LUNA said that he would have to oppose Mr. Castrén's proposal for the amalgamation of articles 45 and 37 for the very reason that he supported Mr. Castrén's approach to the substance of the article. The case dealt with in article 45 was one of the termination or extinction of a treaty which had been validly in force. The treaty could no longer be executed because of the emergence of a new *jus cogens* rule. It was a case of supervening legal impossibility of the object of the treaty, parallel to that in article 43, where the performance of the treaty had become physically impossible.

38. Viewed from that standpoint, the situations envisaged in articles 37 and 45 were radically different and so should be dealt with in separate articles. In the case covered by article 37, the treaty was void *ab initio*; in the case in article 45, a treaty the original object of which had been perfectly licit was later extinguished as a result of the subsequent emergence of a new rule of *jus cogens* which made its object legally impossible.

39. He agreed with Mr. Yasseen that the problem of separability should be dealt with in one general article and that paragraph 2 should therefore be dropped.

40. He did not see how the term " imperative " could in any language convey the idea of a constitutional norm. As he had stated during the discussion on article 37 (828th meeting, para. 34), *jus cogens* could be defined, in the words of Mr. Bartoš in 1963, as " the superstructure of the international community which resulted from the evolution of international society " and " the minimum of rules of conduct necessary to make orderly international relations possible ".[4] Those minimum rules proceeded from the conscience of the international community at a particular moment in its historical evolution.

41. For those reasons, it was essential to describe fully the implications of the *jus cogens* character of a rule of international law.

42. Mr. AMADO said he supported Mr. Verdross's proposal for the deletion of the word " peremptory ". The meaning of paragraph 1 would not be affected by the change, for the reference to article 37 showed clearly that a rule of *jus cogens* was meant.

43. The Drafting Committee should consider carefully whether both expressions, " becomes void " and " terminates ", should stand.

44. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission had acted wisely in keeping separate the provisions of articles 37 and 45. The case envisaged in article 37 was one of nullity, whereas that in article 45 was one of termination.

45. The concept embodied in article 45 was new to international law but not to legal science. Countries with a rigid constitution had long been familiar with the problem of the conflict between constitutional law and statute law. In those countries a distinction was made between cases where a statute conflicted with a pre-existing rule of constitutional law and cases where a statute came into conflict with a subsequently adopted rule of constitutional law, and the constitutional court of Italy and the constitutional courts or supreme courts of certain Latin American countries had established a clear distinction between the effects of such conflict in the two cases. Where a statute had been adopted in violation of a pre-existing constitutional norm, it was invalid because, in adopting it, the legislature had acted *ultra vires*. If, however, a statute came into conflict with a subsequent norm of constitutional law, the case was one of derogation. Since a statutory provision was automatically repealed by the subsequent enactment of legislation that was incompatible with it, then *a fortiori* a statutory provision would be repealed by the subsequent adoption of a norm of constitutional law which conflicted with it.

46. For these reasons, he agreed with the view that the expression " becomes void " was inappropriate in paragraph 1, which should state simply that the treaty

[3] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 211.

[4] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 76, para. 33.

terminates. The effects of the emergence of a new rule of *jus cogens* were adequately described by the words "*prend fin*" used in the French version: the treaty came to an end.

47. With regard to paragraph 2, he held the view that the question of separability should be dealt with as a whole. Perhaps when the Commission came to consider article 46, it might find that the articles on *jus cogens* had certain peculiar features which justified a special reference to separability.

48. Mr. TUNKIN said that the effect of the emergence of a peremptory norm in the case contemplated in article 45 would be analogous to its effect in the situation covered in article 37. The difference was that in the former case the effect would be *ex nunc*, as was quite clearly brought out in the text adopted at the fifteenth session, the meaning of which could hardly be misunderstood.

49. The reference to article 37 must be maintained, because that article stated what was meant by a peremptory norm.

50. As the Commission had not yet reached a decision about the provisions to be inserted concerning separability, consideration of paragraph 2 should be deferred.

51. Mr. BRIGGS said that the effect of the emergence of a new peremptory norm invalidating a treaty *ex nunc* would mean some interference in the expectations of the parties, and would destroy a legal relationship that had been valid when the treaty had been concluded. That consideration might have prompted the United States Government to interpret article 37 as having retroactive effect. It seemed to him that there was also an element of retroactivity in article 53, paragraph 2.

52. As he had indicated during the discussions on article 37, the rules of *jus cogens* set out in articles 37 and 45 were a threat to the stability of treaties, in the absence of compulsory international jurisdiction.

53. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was running into a terminological difficulty, the reason for which was that naturally everybody tried to import into international law ideas which were sometimes peculiar to his own country's system of international law.

54. The expression "becomes void" was clear. But according to the theory and case-law of many States, a juridical act which was declared void was deemed never to have existed, and only some of its effets were admitted. In the case contemplated by article 45, the Commission's intention was that the existence of the treaty should not be disputed but that it should cease to produce its effects *ex nunc*.

55. Similarly, the use of the adjective "peremptory" *(impérative)* was accounted for by the fact that, in the legal systems derived from Roman law and French law, a peremptory rule was a rule from which there could be no derogation. Actually, the point which the Commission had meant to stress was precisely that the new norm referred to in article 45 was a universal norm from which there could be no derogation. In certain legal systems, particularly in German administrative law, peremptory norms were distinguished from permissive norms.

56. The Commission should explain in its commentaries to the articles the difficulties raised by the use of certain expressions. It was perhaps inclined to use excessively terse language, and it might be desirable to offer some fuller explanations to prevent any misunderstanding of its intentions.

57. Article 45 raised the further question of transitional measures. If provisions concerning such measures were added to the article, the effect of the emergence of a new rule of *jus cogens* might be postponed indefinitely. At the same time, there was no doubt that, in practice, States would endeavour to make adjustments to deal with exceptional situations.

58. Mr. VERDROSS said he supported the Chairman's remarks on terminology. The Commission should remember that its draft would eventually become a worldwide convention which would be translated into many languages. It should, therefore, choose terms that would be understood by all and were susceptible of translation.

59. Mr. ROSENNE, referring to the Chairman's observations on problems of terminology, said that the Drafting Committee was already finding it difficult to prepare concordant texts in three languages and could not be expected to examine problems of translation into other languages. All it could hope for was to express as lucidly as possible the rules in the articles themselves and to incorporate any explanations that were necessary in the commentary.

60. In his view, the transitory aspect of the situation that could arise with the emergence of a new peremptory norm was covered by the words "becomes void and terminates".

61. He was in favour of maintaining two separate articles on *jus cogens*, but agreed that the distinction between article 37, which dealt with nullity *ab initio*, and article 45, which was concerned with subsequent nullity, might be brought out by placing greater stress on the fact that article 45 dealt primarily with the aspect of termination. One way of achieving that would be to delete the references in article 53, paragraph 2, to a treaty becoming void.

62. The language of paragraph 1 in article 45 ought not to be changed, apart from the substitution, suggested by the Special Rapporteur, of the word "if" for the word "when".

63. He felt no deep concern about the problem of retrospective effect as far as articles 37 and 45 were concerned, because the matter would be adequately covered by the general rules of the inter-temporal law in its application to the interpretation of treaties.

64. Mr. AMADO said that the word "peremptory" was the right term in article 37. But if article 45 spoke of "a new peremptory norm of general international law of the kind referred to in article 37", the reader would wonder whether there were any peremptory norms of a kind other than those referred to in article 37. The adjective "peremptory" was not only unnecessary in article 45, it was also a source of confusion.

65. Mr. RUDA considered that the opening words of paragraph 1 as adopted in 1963, "A treaty becomes

void and terminates ", should stand. What happened was that the treaty did not terminate spontaneously because of the emergence of a new rule of *jus cogens*, but that the effect of the new rule was that the treaty became void and consequently terminated.

66. He shared Mr. Amado's opinion concerning the use of the word " peremptory ". It was true that in article 45, as in article 37, the notion to be conveyed was that of public order. Article 37 was based on the idea that, in modern international law, there were fundamental norms of international public order from which no State could derogate, even by agreement with another State. That idea, which was clear enough to jurists brought up in the tradition of the Roman legal system, was reflected in the word " peremptory ", not in the word " imperative ". The text as it stood might create the impression, as Mr. Amado had said, that there were norms of general international law which were not peremptory — an idea that contained an inherent contradiction, for all norms of international law, as indeed the rules of any law, were peremptory, precisely because they were rules of law.

67. The intention in the particular context was to say that there were certain rules of public order from which the parties could not derogate. The difference in terminology and approach as between the Roman law system and the common law system presented a difficulty which could, however, be overcome by the simple solution proposed by Mr. Verdross, which was that the paragraph should refer to " a norm having the character of *jus cogens* ".

68. So far as paragraph 2 was concerned, he was inclined to share Mr. Yasseen's view that it would be wise to postpone consideration of that provision until the Commission dealt with article 46, concerning the separability of treaty provisions.

69. Mr. YASSEEN said that the expression " *norme impérative* " denoted a rule of *jus cogens*. All rules of law were mandatory, but not all were peremptory. In article 37, the Commission had given a full definition of *jus cogens* as a peremptory norm of international law from which no derogation was permitted. Article 37 consisted of two parts: one stated that the rule was peremptory, and the other, which in the opinion of some was explanatory and in the opinion of others substantive, stated that no derogation from such a rule was permitted. Consequently, when article 45 said that a treaty became void and terminated if a new peremptory norm of general international law of the kind referred to in article 37 was established, it was referring back to both of the two parts of article 37. From the practical point of view, that was all the Commission meant to say.

70. With regard to the view that article 45 ought to refer only to the termination of the treaty, he said that it ought to specify the reason for the termination, which was in effect the nullity of the treaty. There was no room for any doubt: a treaty that was incompatible with a rule of *jus cogens* was void. It would surely be wrong to refrain from mentioning the nullity just because nullity was always *ab initio*. In any case, even if some thought that a nullity was always a nullity *ab initio*, the Commission was preparing a draft convention and was perfectly free to say that, in the particular case, the nullity was not a nullity *ab initio* and did not operate *ex tunc* but only *ex nunc*. That conclusion was quite evident from the text of the article, which opened with the words " A treaty becomes void and terminates . . . ". That was why he thought that the 1963 text should be retained, if it was intended to set out clearly the meaning of *jus cogens*, whose effects were recognized by the Commission in the law of treaties.

71. Mr. AGO said that the problem was quite simple: as he had already said, in each language the term used should be the term customarily employed to express the idea that was intended to be expressed. In the French text, the customary term " *impérative* " should be used, and in English the word " peremptory "; it was not without reason that the Commission had not employed the English word " imperative ". If, however, the Commission wished to avoid all ambiguity, it might use in article 45 precisely the same formula as in article 37 and omit the words " of the kind referred to in article 37 ", which were a little inelegant; article 45, paragraph 1, would then simply speak of " a new peremptory norm of general international law from which no derogation is permitted ".

72. The Chairman had rightly drawn attention to the problem of substance and to the comments of jurists who had criticized the Commission for preparing an excessively terse text that was difficult to apply, an opinion apparently shared by several Governments, including that of the United States. The international community and the international legal order had no legislator capable of changing, from one day to the next, the rules of the civil code and of deciding that some particular rule became peremptory. It might take a long time for a dispositive rule to become peremptory. A peremptory rule began to take shape at a particular time, but was not in fact " established " as such until much later.

73. In addition, several members of the Commission considered that the article should specify as clearly as possible that the nullity was operative only as from the time when the peremptory norm was established. That being so, perhaps the order of the passage should be reversed and the Drafting Committee might consider a text on the following lines :

> " If a new peremptory norm of general international law emerges from which no derogation is permitted, an existing treaty which is incompatible with that norm becomes void and terminates as from the time when the new norm is established. "

The word " emerges " would indicate the long process by which a peremptory norm eventually became established, whereas the expression " is established " would denote the completion of the process.

74. Mr. de LUNA, commenting on the expression " peremptory norm ", said that any legal precept was mandatory; the contrast was between *jus dispositivum* and *jus cogens*. Clearly, however, some norms were more peremptory than others, and it was the former which constituted *jus cogens*. It would be more sensible and more elegant to drop the cross-reference to article 37

and to define in article 45 the rule of *jus cogens* in exactly the same terms as in article 37.

75. He had never argued that nullity always operated *ex tunc*. There were two kinds of nullity—absolute and relative; there was the nullity which could be declared *de officio*, and there was the nullity which could only be declared on the application of a party and which consequently never operated *ex tunc*, but always *ex nunc*. The formula which the Commission should choose was therefore clear, and the article should be referred to the Drafting Committee.

76. Mr. TUNKIN said that the wording suggested by Mr. Ago had certain obvious drawbacks. First, it departed considerably from the general structure of article 37. Secondly, it made no reference to article 37. During the discussion of that article there had been general agreement in the Commission that it should be read in conjunction with article 45 so as to obviate any possibility of misunderstanding and therefore a cross-reference from one to the other was necessary.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had been a useful one on an article which was perhaps more intricate than had at first been realized. Provided articles 37 and 45 were read together, there should be no room for misunderstanding as to their meaning. Some governments had complained that the Commission, after drawing a distinction between nullity and termination, had then confused the two concepts in articles 52 and 53, but that was a defect that could be remedied by better drafting. Perhaps in places elegance might have to be sacrificed in the interests of clarity so as to bring out the connexion between articles 37, 45, 52 and 53. The word "peremptory" was not indispensable in article 45, but it did catch the attention of the reader. Perhaps the Drafting Committee could be asked to consider whether or not it should be retained. The reference to article 37 was, of course, necessary because it linked the two articles.

78. The Drafting Committee should also be asked to consider the point made by the Chairman about the need to cover transitional arrangements that might be necessary with the emergence of a new norm of general international law, as there was perhaps some force in the contention that the statement of the rule was rather too abrupt. The new text suggested by Mr. Ago seemed to be designed to soften the draft in that regard, and to reassure those States that had expressed concern about the rule being too indefinite on account of the difficulty of knowing when a peremptory norm had become established.

79. As far as merging articles 37 and 45 was concerned, Mr. Castrén would have noted that most members were in favour of keeping them separate—and that was his own firm opinion—for otherwise serious confusion might result.

80. The CHAIRMAN suggested that article 45, together with the various proposals made concerning the article, be referred to the Drafting Committee.

It was so agreed.[5]

[5] For resumption of discussion, see 842nd meeting, paras. 58-70.

Arrangements for the Eighteenth Session

81. The CHAIRMAN said that Mr. Rosenne had proposed that, in conformity with a proposal submitted to and adopted by the General Assembly, the Commission decide forthwith that its summer session would last for twelve weeks, on the understanding that it would be free to meet for a shorter period if such a long session proved not to be necessary.

82. Mr. VERDROSS said that he would not object to a summer session of twelve weeks if the Commission had the necessary funds at its disposal, though personally he might not be able to attend for the whole of the session.

83. The CHAIRMAN proposed that the Commission decide that its summer session should last until 22 July 1966.

It was so decided.

The meeting rose at 12.30 p.m.

836th MEETING

Friday, 21 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Work

1. The CHAIRMAN said that the Officers of the Commission had met that morning and submitted the following recommendations:

(a) it is noted that it is impossible for the Commission to complete at the present session its examination of all the articles in part II of the draft and it is accordingly recommended that the Commission should not go beyond article 51;

(b) it is recommended that the Drafting Committee speed up its work and meet more frequently and that the Commission hold shorter meetings in order to allow the Drafting Committee the time it needs;

(c) it is recommended that the second Vice-Chairman, Mr. Paul Reuter, be asked to replace the General Rapporteur, Mr. Elias, now absent, and undertake the drafting of the Commission's report on its present session;

(d) it is recommended that the articles adopted at the present session be included in the report without any commentary and that the commentaries be added when the Commission's final report on the draft articles on the law of treaties is prepared;