UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

First session

Vienna, 26 March–24 May 1968

OFFICIAL RECORDS

Summary records of the plenary meetings and of the meetings of the Committee of the Whole

UNITED NATIONS

New York, 1969

INTRODUCTORY NOTE

This volume contains the summary records of the plenary meetings and of the meetings of the Committee of the Whole held during the first session of the Conference. The documents of the Conference will be printed after the closure of the second session.

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The summary records of the plenary meetings were originally circulated in mimeographed form as documents A/CONF.39/SR.1 to SR.5, and those of the Committee of the Whole as documents A/CONF.39/C.1/SR.1 to SR.83. They include the corrections to the provisional summary records that were requested by delegations and such editorial changes as were considered necessary.

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[1] Although the Drafting Committee decided to defer consideration of the titles of the articles, they have been retained in the table of contents and in headings in the summary records in order to facilitate reference.

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RESOLUTION 2166 (XXI) OF THE GENERAL ASSEMBLY CONVENING THE CONFERENCE

International conference of plenipotentiaries on the law of treaties

The General Assembly,

Having considered chapter II of the report of the International Law Commission on the work of its eighteenth session, which contains final draft articles and commentaries on the law of treaties,

Noting that the International Law Commission at its first session in 1949 listed the law of treaties among the topics of international law as being suitable for codification, that at its thirteenth session in 1961 it decided to prepare draft articles on the law of treaties intended to serve as the basis for a convention, and that at its fourteenth session in 1962 it included the law of treaties in the revised programme for its future work,

Recalling that in its resolutions 1686 (XVI) of 18 December 1961, 1765 (XVII) of 20 November 1962, 1902 (XVIII) of 18 November 1963 and 2045 (XX) of 8 December 1965 it recommended that the International Law Commission should continue the work of codification and progressive development of the law of treaties, taking into account the views expressed in the General Assembly and the comments submitted by Governments, in order that the law of treaties might be placed upon the widest and most secure foundations, and that in its resolution 2045 (XX) of 8 December 1965 it recommended that a final draft on the law of treaties should be submitted to the Assembly by the Commission in its report on the work of its eighteenth session,

Noting further that, at its seventeenth and eighteenth sessions in 1965 and 1966, the International Law Commission, in the light of the observations and comments submitted by Governments and taking into account the relevant resolutions and debates of the General Assembly, revised the provisional draft articles on the law of treaties prepared at its fourteenth, fifteenth and sixteenth sessions, and that at its eighteenth session the Commission finally adopted the draft articles,

Recalling that, as stated in paragraph 36 of the report of the International Law Commission on the work of its eighteenth session, the Commission decided to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject,

Mindful of Article 13, paragraph 1 a, of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Believing that the successful codification and progressive development of the rules of international law governing the law of treaties would contribute to the development of friendly relations and co-operation among States, irrespective of their differing constitutional and social systems, and would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the Charter,

1. *Expresses its appreciation* to the International Law Commission for its valuable work on the law of treaties and to the Special Rapporteurs for their contribution to this work;

2. *Decides* that an international conference of plenipotentiaries shall be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate;

3. *Requests* the Secretary-General to convoke, at Geneva or at any other suitable place for which he receives an invitation before the twenty-second session of the General Assembly, the first session of the conference early in 1968 and the second session early in 1969;

4. *Invites* States Members of the United Nations, States members of the specialized agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite, to participate in the conference;

5. *Invites* the States referred to in paragraph 4 above to include as far as possible among their representatives experts competent in the field to be considered;

6. *Invites* the specialized agencies and the interested intergovernmental organizations to send observers to the conference;

7. *Refers* to the conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session as the basic proposal for consideration by the conference;

8. *Requests* the Secretary-General to present to the conference all relevant documentation and recommendations relating to its method of work and procedures, and to arrange for the necessary staff and facilities which will be required for the conference, including such experts as may be necessary;

9. *Invites* Member States, the Secretary-General and the Directors-General of those specialized agencies which act as depositaries of treaties to submit, not later than 1 July 1967, their written comments and observations on the final draft articles concerning the law of treaties prepared by the International Law Commission;

10. *Requests* the Secretary-General to circulate such comments so as to facilitate the discussion of the subject at the twenty-second session of the General Assembly;

11. *Decides* to include an item entitled "Law of treaties" in the provisional agenda of its twenty-second session with a view to further discussion of the draft articles in order to facilitate the conclusion of a convention on the law of treaties at the conference of plenipotentiaries convened pursuant to the present resolution.

1484th plenary meeting,
5 December 1966.

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M. Emile Bedran, chargé d'affaires p.i. de l'Ambassade à Vienne.

Liberia

Representatives

H.E. Mr. Nelson Broderick, Solicitor-General *(Chairman of the Delegation)*.

Mr. Herbert R. W. Brewer, Counsellor, State Department.

Liechtenstein

Représentants

S.A.S. le prince Henri de Liechtenstein, chargé d'affaires en Suisse *(chef de la délégation)*.

M. Walter Kranz, chef de la Section du protocole et de la presse, Vaduz.

M^lle^ Marianne Marxer, secrétaire de légation à Berne.

Madagascar

Représentants

M. Benjamin Razafintseheno, directeur général, Ministère des affaires étrangères.

M. Edilbert Razafindralambo, premier président de la Cour suprême.

M. Norbert Ratsirahonana, directeur de cabinet, Ministère de la justice.

M. Jux Ratsimbazafy, chef du Service des affaires politiques extérieures, Ministère des affaires étrangères.

Malaysia

Representatives

Mr. M. O. Ariff, Senior Federal Counsel, Attorney-General's Chambers *(Chairman of the Delegation)*.

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Mali

Représentant

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Mauritania

Représentant

S.E. M. Ahmed Ould Jiddou, ambassadeur extraordinaire et plénipotentiaire à Paris.

Mauritius

Representative

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Mexico

Representantes

Excmo. Sr. Eduardo Suárez, Embajador en Londres *(Jefe de la Delegación)*.

Sr. Bernardo Sepulveda Amor.

Consejero y Secretario

Sr. Ernesto Calderón Varela, Secretario del Servicio Exterior Mexicano, Embajada en Viena.

Monaco

Représentants

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M. Constant Barriera, directeur du Service du contentieux et des études législatives.

M. Jean-Charles Marquet.

M. Hugo Hild, consul général à Vienne.

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Mongolia

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H.E. Mr. Mangaljavyn Jamsran, Ambassador Extraordinary and Plenipotentiary to Austria *(Chairman of the Delegation)*.

M. Ludevdorjyn Khashbat, Second Secretary, Embassy in Moscow.

Mr. Ghendengyn Nyamdo, Legal Department, Ministry of Foreign Affairs.

Morocco

Représentant

S.E. M. Taoufiq Kabbaj, ministre plénipotentiaire.

Nepal

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Netherlands

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New Zealand

Representative

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Nigeria

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Secretary

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H.E. Mr. Enver Murad, Ambassador to Austria *(Chairman of the Delegation)*.

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Sr. Juan José Calle y Calle, Ministro Consejero.

Sr. Luis Marchand Stens, Consejero.

Secretario

Sr. Alejandro San-Martín, Segundo Secretario.

Philippines

Representatives

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H.E. Mr. Enrique Fernando, Associate Justice of the Supreme Court *(Co-Chairman of the Delegation)*.

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Representative and Secretary.

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M. Tadevsz Wasilewski, conseiller au Département juridique et des traités, Ministère des affaires étrangères.

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M^me Renata Szafarz.

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M. Manuel de Sá Nogueira, ministre-conseiller d'ambassade.

Republic of Korea

Representatives

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Mr. Chang Choon Lee, Treaty Section, Ministry of Foreign Affairs.

Mr. Jae Tae Lim, Second Secretary, Embassy to Austria.

Republic of Viet-Nam

Représentants

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M. Trinh-Tich-Loan, conseiller d'ambassade, membre de l'ambassade en République fédérale d'Allemagne.

Secrétaire

M. Trân Kiêu, attaché d'ambassade, membre de l'ambassade en Suisse.

Romania

Représentants

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M. Ioan Voicu, membre du Ministère des affaires étrangères.

Conseiller

M. Iftene Pop, membre du Ministère des affaires étrangères.

San Marino

Représentants

S.E. M. Georges Filipinetti, ministre plénipotentiaire, chef de la délégation permanente auprès de l'Office des Nations Unies à Genève *(chef de la délégation)*.

M. Wilhelm Muller-Fembeck, consul général à Vienne.

M^me Clara Boscaglia, chef de cabinet du Secrétaire d'Etat aux affaires étrangères.

M. Jean-Charles Munger, chancelier de la délégation permanente auprès de l'Office des Nations Unies à Genève.

Saudi Arabia

Representative

H.E. Mr. Aouney W. Dejany, Ambassador, Ministry of Foreign Affairs.

Senegal

Représentant

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Sierra Leone

Representatives

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Singapore

Representative

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Somalia

Representatives

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Mr. Yusef Jama Burale, Acting Head of Treaty Service, Ministry of Foreign Affairs.

South Africa

Representatives

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Mr. John Dudley Viall, Law Adviser, Department of Justice.

Mr. Charles Brothers Hilson Fincham, Under-Secretary, Department of Foreign Affairs.

Mr. Peter Hugh Philip, Minister-Counsellor, Embassy in Vienna.

Spain

Representantes

Sr. Federico de Castro, Catedrático de la Universidad de Madrid, Asesor Jurídico del Ministerio de Asuntos Exteriores *(Jefe de la Delegación)*.

Sr. Santiago Martínez Caro, Secretario de Embajada, Asesor Jurídico Adjunto del Ministerio de Asuntos Exteriores.

Consejeros

Sr. Antonio Poch, Ministro Plenipotenciario, Catedrático de Derecho Internacional.

Sr. José Luis Lopez-Schümmer, Consejero de Embajada Director de Organizaciones Politicas Internacionales.

Sr. Juan Ignacio Tena Ibarra, Secretario de Embajada.

Sr. José Cuenca, Secretario de Embajada [1].

Sr. Julio González Campos, Profesor de la Universidad de Madrid.

Secretario

Sr. Ramón Villanueva, Secretario de la Embajada en Viena.

[1] El Sr. José Cuenca asumió las funciones de representante del 5 al 13 de abril.

Sweden

Representatives

Mr. Hans Blix, Special Legal Adviser, Ministry of Foreign Affairs *(Chairman of the Delegation)*.

Mr. Hilding Eek, Professor, University of Stockholm.

Mr. Reinhold Reuterswärd, Head of Section, Ministry of Foreign Affairs.

Advisers

Mr. Ulf Norström, First Secretary, Embassy in Vienna.

Mr. Peder Törnvall, Lecturer, University of Stockholm.

Switzerland

Représentants

M. Paul Ruegger, ambassadeur plénipotentiaire *(chef de la délégation)*.

M. Rudolf L. Bindschedler, ambassadeur plénipotentiaire, jurisconsulte du Département politique, professeur à l'Université de Berne *(suppléant du chef de la délégation)*.

Mlle Françoise Pometta, collaboratrice diplomatique, division des organisations internationales, Département politique.

Représentant et secrétaire

M. Jean Cuendet, collaborateur diplomatique, Service juridique, Département politique.

Syria

Représentants

S.E. M. Salah El Dine Tarazi, ambassadeur en Union des Républiques socialistes soviétiques.

M. Adnan Nachabe, chef de la Section des traités et des questions juridiques au Ministère des affaires étrangères.

Thailand

Representatives

H.E. Mr. Konthi Suphamongkhon, Ambassador Extraordinary and Plenipotentiary, Embassy at Bonn *(Chairman of the Delegation till 26 April)*.

H.E. Mr. Bun Charoenchai, Ambassador Extraordinary and Plenipotentiary, Embassy at Paris *(Chairman of the Delegation from 27 April)*.

Mr. Vaikandha Samruatruamphol, Second Secretary, Embassy at Lagos.

Mr. Montri Jalichandra, Third Secretary, Treaty and Legal Department, Ministry of Foreign Affairs.

Mr. Prajit Rohanaphruk, Third Secretary, Treaty and Legal Department, Ministry of Foreign Affairs.

Trinidad and Tobago

Representatives

Senator the Hon. G. A. Richards, Attorney-General and Minister for Legal Affairs *(Chairman of the Delegation)*

Mr. Terrence Baden-Semper, Assistant Secretary, Ministry of External Affairs.

Tunisia

Représentants

M. Hamed Abed, sous-directeur au Secrétariat d'Etat à la Présidence *(chef de la délégation)*.

M. Abdelaziz Gassab, conseiller d'ambassade, membre du Ministère des affaires étrangères.

Turkey

Représentants

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M. Yavus Gör, directeur général adjoint, Ministère des affaires étrangères *(chef adjoint de la délégation)*.

M. Attila Atam, conseiller juridique, membre du Ministère des affaires étrangères.

M. Ulug Çerçel, directeur de section, Ministère des affaires étrangères.

Ukrainian Soviet Socialist Republic

Representatives

Mr. Ivan Ivanovich Korchak, Principal Arbitrator of the State Court of Arbitration, Council of Ministers *(Chairman of the Delegation)*.

Mr. Igor Ivanovich Lukashuk, Professor, Kiev State University.

Adviser

Mr. Nikolai Petrovich Makarevich, Second Secretary, Ministry of Foreign Affairs.

Union of Soviet Socialist Republics

Representatives

Mr. Oleg Nikolaevich Khlestov, Director of the Treaty and Legal Department, Ministry of Foreign Affairs *(Chairman of the Delegation)*.

Mr. Feliks Nikolaevich Kovalev, Expert consultant to the Treaty and Legal Department, Ministry of Foreign Affairs *(Deputy-Chairman of the Delegation)*.

Mr. Mikhail Dmitrievich Grishin, Member of the Legal Commission, Council of Ministers.

Mr. Anatoly Nikolaevich Talalaev, Professor, Moscow State University.

Advisers

Mr. Vladimir Georgievich Boyarshinov, Ministry of Foreign Affairs.

Mr. Evgeny Ivanovich Egoshkin, First Secretary, Embassy to Austria.

Mr. Vasily Vasilevich Averyanov, Attaché, Embassy to Austria.

General Secretary

Mr. Boris Ivanovich Zhilyaev, Ministry of Foreign Affairs.

Interpreter

Mr. Valery Sergeevich Artemjev, Ministry of Foreign Affairs.

Secretary

Miss Tamara Mikhailovna Korolyuk, Ministry of Foreign Affairs

United Arab Republic

Représentants

H.E. M. Abdallah El-Erian, ambassadeur, directeur du Département juridique et des traités, Ministère des affaires étrangères *(chef de la délégation)*.

M. Esmat Abdel Méguid, ministre plénipotentiaire, directeur du Département des affaires culturelles et de la coopération technique, Ministère des affaires étrangères *(chef adjoint de la délégation)*.

M. Mohamed Saïd El Dessouki, conseiller, Département juridique et des traités, Ministère des affaires étrangères.

M. Ali Ismail Teymour, premier secrétaire, Département des organisations internationales et conférences, Ministère des affaires étrangères.

United Kingdom of Great Britain and Northern Ireland

Representatives

Sir Francis Vallat, Legal Adviser, Foreign Office *(Chairman of the Delegation)*.

Mr. I. M. Sinclair, Legal Counsellor, Foreign Office *(Deputy-Chairman of the Delegation)*.

Mr. P. G. de Courcy-Ireland, First Secretary, Foreign Office.

Mr. A. G. L. Turner, First Secretary, Commonwealth Office.

Alternate

Mr. D. G. Gordon-Smith, Legal Counsellor, Commonwealth Office.

Adviser

Miss A. J. Chettle, Third Secretary, Foreign Office.

United Republic of Tanzania

Representatives

H.E. Mr. E. E. Seaton, Judge of the High Court *(Chairman of the Delegation)*.

Mr. S. T. Maliti, State Attorney *(Deputy-Chairman of the Delegation)*.

Mr. J. S. Warioba, State Attorney.

Mr. D. M. K. Bishota, Lecturer in Law, University College, Dar-es-Salaam.

United States of America

Representatives

H.E. Mr. Richard D. Kearney, Ambassador *(Chairman of the Delegation)*.

Mr. Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs, Department of State.

Mr. Herbert W. Briggs, Goldwin Smith Professor of International Law, Cornell University.

Mr. Myres S. McDougal, Sterling Professor of Law, Yale University, Member of the Permanent Court of Arbitration.

Mr. Joseph W. Sweeney, Dean, Law School, Tulane University; Reporter, Restatement of Foreign Relations Law of the United States.

Mr. Frank Wozencraft, Assistant Attorney-General, Department of Justice.

Senior Adviser

Mr. Warren Hewitt, Legal Adviser, United States Mission, Geneva.

Advisers

Mr. Jared G. Carter, Attorney-Adviser, Office of the Legal Adviser, Department of State.

Mr. Robert E. Dalton, Attorney-Adviser, Office of the Legal Adviser, Department of State.

Uruguay

Representantes

Sr. Eduardo Jiménez de Aréchaga, Profesor en la Universidad de Montevideo *(Jefe de la delegación)*.

Excmo. Sr. Angel Lorenzi, Embajador en Viena.

Sr. Alvarado Alvarez, Ministro Consejero en Bonn.

Venezuela

Representantes

Excmo. Sr. Rafael Armando Rojas, Embajador *(Jefe de la delegación)*.

Sr. Ramón Carmona, Asesor *ad-honorem* del Ministerio de Relaciones Exteriores *(Jefe de la delegación en ausencia del Sr. Armando Rojas)*.

Sr. Armando Molina Landaeta, Abogado, Jefe de la Consultoria Jurídica del Ministerio de Relaciones Exteriores.

Sr. Luis A. Olavarría, Encargado de Negocios *ad-interim* en Austria.

Sr. Adolfo Raúl Taylhardat, Consejero con rango de Ministro, Embajada en Roma.

Yemen

Representative

H.E. Mr. Adnam Tarcici, Ambassador.

Yugoslavia

Representatives

Mr. Aleksandar Jelić, Deputy Chief Adviser, Ministry of Foreign Affairs *(Chairman of the Delegation)*.

Mr. Vladimir Ibler, Professor of Law, University of Zagreb *(Deputy-Chairman of the Delegation)*.

Mr. Dragutin Todorić, Counsellor, Ministry of Foreign Affairs.

Mr. Aleksandar Djordjevic, Institute for International Affairs and Economy.

Advisers

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M^me^ Gordana Diklić-Trajković, Attaché, Ministry of Foreign Affairs.

Zambia

Representative

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Alternate and Adviser

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Observers for specialized agencies and intergovernmental organizations

a) Specialized and related agencies

INTERNATIONAL LABOUR ORGANISATION

Mr. C. Wilfred Jenks, Principal Deputy Director-General.

Mr. P. P. Fano, Director of the Branch Office in Rome.

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Mr. Georges Saint-Pol, Legal Counsel.
Mr. A. G. Roche.
Mr. J. P. Dobbert.

INTERNATIONAL CIVIL AVIATION ORGANIZATION

Mr. P. K. Roy, Director of the Legal Bureau.
Mr. G. Bonilla, Legal Officer.

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Mr. Aaron Broches, General Counsel.
Mr. Paul C. Szasz, Legal Department.

INTERNATIONAL MONETARY FUND

Mr. Stephen Andrew Silard, Legal Department.

WORLD HEALTH ORGANIZATION

Mr. Claude-Henri Vignes, Member of the Legal Office.

UNION POSTALE UNIVERSELLE

Dr. Zdeněk Caha, sous-directeur général, chef de la Division juridique, administrative et d'information.
M. L. Chaubert, Section juridique et des affaires générales.

International Atomic Energy Agency

Mr. Werner Boulanger, Director, Legal Division.
Mr. D. A. V. Fischer, Director, Division of External Liaison.
Mr. V. Khamanev, Senior Office, Legal Division.

b) Intergovernmental organizations

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Mr. John Robert Hayfron-Benjamin, Solicitor-General of Ghana, Vice-President of the Committee.
Mr. B. Sen, Secretary of the Committee.

BUREAUX INTERNATIONAUX RÉUNIS POUR LA PROTECTION DE LA PROPRIÉTÉ INTELLECTUELLE

M. G. H. C. Bodenhausen, Directeur.
M. Charles L. Magnin, Directeur adjoint.
M. Arpad Bogsch, Directeur adjoint.
M. Ross Woodley, Conseiller.

COUNCIL OF EUROPE

Mr. Héribert Golsong, Director of Legal Affairs.
Mr. H. P. Furrer, Administrator, Secretariat-General.

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

Mrs. Paulette Lundgren, Economic Affairs Officer, GATT Secretariat.

LEAGUE OF ARAB STATES

Mr. Guirguis Yaccoub.

Expert consultant

Sir Humphrey Waldock, Professor of Public International Law, Oxford University, Special Rapporteur on the law of treaties, International Law Commission.

OFFICERS OF THE CONFERENCE AND ITS COMMITTEES

President of the Conference

Mr. Roberto Ago (Italy).

Vice-Presidents of the Conference

The representatives of the following States: Afghanistan, Algeria, Austria, Chile, China, Ethiopia, Finland, France, Guatemala (for 1969), Guinea, Hungary, India, Mexico, Peru, Philippines, Romania, Sierra Leone, Spain (for 1968), Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yugoslavia.

Committee of the Whole

Chairman: Mr. Taslim Olawale Elias (Nigeria).
Vice-Chairman: Mr. Josef Smejkal (Czechoslovakia).
Rapporteur: Mr. Eduardo Jiménez de Aréchaga (Uruguay).

Credentials Committee

Chairman: Mr. Eduardo Suárez (Mexico).
Members: Ceylon, Dominican Republic, Japan, Madagascar, Mali, Mexico, Switzerland, Union of Soviet Socialist Republics, United States of America.

Drafting Committee

Chairman: Mr. Mustafa Kamil Yasseen (Iraq).
Members: Argentina, China, Congo (Brazzaville), France, Ghana, Japan, Kenya, Netherlands, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

SECRETARIAT OF THE CONFERENCE

Mr. C. A. Stavropoulos, Legal Counsel of the United Nations *(Representative of the Secretary-General of the United Nations).*
Mr. A. P. Movchan, Director, Codification Division, Office of Legal Affairs *(Executive Secretary of the Conference).*
Mr. G. W. Wattles, Principal Officer, Office of the Legal Counsel *(Deputy Executive Secretary).*
Mr. N. Teslenko, Deputy Director, Codification Division, Office of Legal Affairs *(Deputy Executive Secretary).*
Mr. J. F. Scott, Office of Legal Affairs.
Mr. S. Torres-Bernárdez, Office of Legal Affairs.
Mr. V. Prusa, Office of Legal Affairs.

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AGENDA *

First session (1968)

1. Opening of the Conference by the Secretary-General
2. Election of the President
3. Adoption of the agenda
4. Adoption of the rules of procedure
5. Election of Vice-Presidents
6. Election of the Chairman of the Committee of the Whole
7. Election of the Chairman of the Drafting Committee
8. Appointment of the Credentials Committee
9. Appointment of other members of the Drafting Committee
10. Organization of work
11. *(a)* Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966

Second session (1969)

11. *(b)* Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966: reports of the first session of the Conference
12. Adoption of a convention and other instruments deemed appropriate, and of the Final Act of the Conference
13. Signature of the Final Act and of the convention and other instruments

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* Adopted by the Conference at its first plenary meeting.

RULES OF PROCEDURE *

CHAPTER I

Representation and Credentials

Composition of delegations

Rule 1

The delegation of each State participating in the Conference shall consist of accredited representatives and such alternate representatives and advisers as may be required.

Alternates or advisers

Rule 2

An alternate representative or an adviser may act as a representative upon designation by the chairman of the delegation.

Submission of credentials

Rule 3

The credentials of representatives and the names of alternate representatives and advisers shall be submitted to the Executive Secretary if possible not later than twenty-four hours after the opening of the Conference. Any later change in the composition of delegations shall also be submitted to the Executive Secretary. The credentials shall be issued either by the Head of the State or Government, or by the Minister for Foreign Affairs. In the absence of a contrary indication, credentials shall have effect for both sessions of the Conference unless withdrawn or superseded by new credentials.

Credentials Committee

Rule 4

A Credentials Committee shall be appointed at the beginning of the first session of the Conference to serve for both sessions. It shall consist of nine members, who shall be appointed by the Conference on the proposal of the President. It shall examine the credentials of representatives and report to the Conference without delay. At the second session of the Conference it shall examine only the credentials of representatives newly accredited to that session.

Provisional participation in the Conference

Rule 5

Pending a decision of the Conference upon their credentials, representatives shall be entitled provisionally to participate in the Conference.

* As adopted by the Conference at its first plenary meeting.

CHAPTER II

Officers

Elections

Rule 6

The Conference shall elect a President and twenty-three Vice-Presidents, as well as the Chairman of the Committee of the Whole provided for in rule 47 and the Chairman of the Drafting Committee provided for in rule 48. These officers shall be elected on the basis of ensuring the representative character of the General Committee. The Conference may also elect such other officers as it deems necessary for the performance of its functions. The term of office shall be for both sessions of the Conference.

President

Rule 7

The President shall preside at the plenary meetings of the Conference.

Rule 8

The President, in the exercise of his functions, remains under the authority of the Conference.

Acting President

Rule 9

If the President is absent from a meeting or any part thereof, he shall appoint one of the Vice-Presidents to take his place.

Rule 10

A Vice-President acting as President shall have the same powers and duties as the President.

Replacement of the President

Rule 11

It the President is unable to perform his functions, a new President shall be elected.

The President shall not vote

Rule 12

The President, or Vice-President acting as President, shall not vote in the Conference, but shall appoint another member of his delegation to vote in his place.

CHAPTER III

General Committee

Composition

Rule 13

There shall be a General Committee of twenty-six members, which shall comprise the President and Vice-Presidents of the Conference, the Chairman of the

Committee of the Whole and the Chairman of the Drafting Committee. The President of the Conference, or in his absence, one of the Vice-Presidents designated by him, shall serve as Chairman of the General Committee.

Substitute members

Rule 14

If the President or a Vice-President of the Conference finds it necessary to be absent during a meeting of the General Committee, he may designate a member of his delegation to sit and vote in the Committee. In case of absence, the Chairman of the Committee of the Whole shall designate the Vice-Chairman of that Committee as his substitute, and the Chairman of the Drafting Committee shall designate a member of the Drafting Committee. When serving on the General Committee, the Vice-Chairman of the Committee of the Whole or member of the Drafting Committee shall not have the right to vote if he is of the same delegation as another member of the General Committee.

Functions

Rule 15

The General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the co-ordination of its work.

CHAPTER IV

Secretariat

Duties of the Secretary-General and the Secretariat

Rule 16

1. The Secretary-General of the Conference shall be the Secretary-General of the United Nations. He, or his representative, shall act in that capacity in all meetings of the Conference and its committees.

2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference and its committees.

3. The Secretariat shall receive, translate, reproduce and distribute documents, reports and resolutions of the Conference; interpret speeches made at the meetings, prepare and circulate records of the public meetings; have the custody and preservation of the documents in the archives of the United Nations; publish the reports of the public meetings; and, generally, perform all other work which the Conference may require.

Statements by the Secretariat

Rule 17

The Secretary-General or any member of the staff designated for that purpose may at any time, make either oral or written statements concerning any question under consideration.

CHAPTER V

Conduct of Business

Quorum

Rule 18

A quorum shall be constituted by the representatives of a majority of the States participating in the Conference.

General powers of the President

Rule 19

In addition to exercising the powers conferred upon him elsewhere by these rules, the President shall declare the opening and closing of each plenary meeting of the Conference; direct the discussions at such meetings; accord the right to speak; put questions to the vote and announce decisions. He shall rule on points of order and, subject to these rules of procedure, have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the limitation of time to be allowed to speakers, the limitation of the number of times each representative may speak on any question, the closure of the list of speakers or the closure of the debate. He may also propose the suspension or the adjournment of the meeting or the adjournment of the debate on the question under discussion.

Speeches

Rule 20

No person may address the Conference without having previously obtained the permission of the President. Subject to rules 21 and 22, the President shall call upon speakers in the order in which they signify their desire to speak. The Secretariat shall be in charge of drawing up a list of such speakers. The President may call a speaker to order if his remarks are not relevant to the subject under discussion.

Precedence

Rule 21

The Chairman or Rapporteur of a committee, or the representative of a sub-committee or working group, may be accorded precedence for the purpose of explaining the conclusion arrived at by his committee, sub-committee or working group.

Points of order

Rule 22

During the discussion of any matter, a representative may rise to a point of order, and the point of order shall be immediately decided by the President in accordance with the rules of procedure. A representative may appeal against the ruling of the President. The appeal shall be immediately put to the vote and the President's ruling shall stand unless the appeal is approved by a majority of the representatives present and voting. A representative rising to a point of order may not speak on the substance of the matter under discussion.

Time-limit on speeches

Rule 23

The Conference may limit the time to be allowed to each speaker and the number of times each representative may speak on any question. When the debate is limited and a representative has spoken his allotted time, the President shall call him to order without delay.

Closing of list of speakers

Rule 24

During the course of a debate the President may announce the list of speakers and, with the consent of the Conference, declare the list closed. He may, however,

accord the right of reply to any representative if a speech delivered after he has declared the list closed makes this desirable.

Adjournment of debate

Rule 25

During the discussion of any matter, a representative may move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the motion, after which the motion shall be immediately put to the vote. The President may limit the time to be allowed to speakers under this rule.

Closure of debate

Rule 26

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall be immediately put to the vote. If the Conference is in favour of the closure, the President shall declare the closure of the debate. The President may limit the time to be allowed to speakers under this rule.

Suspension or adjournment of the meeting

Rule 27

During the discussion of any matter, a representative may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall be immediately put to the vote. The President may limit the time to be allowed to the speaker moving the suspension or adjournment.

Order of procedural motions

Rule 28

Subject to rule 22, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

(*a*) To suspend the meeting;
(*b*) To adjourn the meeting;
(*c*) To adjourn the debate on the question under discussion;
(*d*) For the closure of the debate on the question under discussion.

Basic proposal

Rule 29

The draft articles on the law of treaties adopted by the International Law Commission shall constitute the basic proposal for discussion by the Conference.

Other proposals and amendments

Rule 30

Other proposals and amendments thereto shall normally be introduced in writing and handed to the Executive Secretary of the Conference, who shall circulate copies to the delegations. As a general rule, no proposal shall be discussed or put to the vote at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the discussion and consideration of amendments, or motions as to procedure, even though these amendments and motions have not been circulated or have only been circulated the same day.

Decisions on competence

Rule 31

Subject to rule 22, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal or an amendment submitted to it shall be put to the vote before the matter is discussed or a vote is taken on the proposal or amendment in question.

Withdrawal of motions

Rule 32

A motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that the motion has not been amended. A motion which has thus been withdrawn may be reintroduced by any representative.

Reconsideration of proposals

Rule 33

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on the motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be immediately put to the vote.

Invitations to technical advisers

Rule 34

The Conference may invite to one or more of its meetings any person whose technical advice it may consider useful for its work.

CHAPTER VI

Voting

Voting rights

Rule 35

Each State represented at the Conference shall have one vote.

Required majority

Rule 36

1. Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting.

2. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.

3. If the question arises whether a matter is one of procedure or of substance, the President of the Conference shall rule on the question. An appeal against this ruling shall immediately be put to the vote and the President's ruling shall stand unless the appeal is approved by a majority of the representatives present and voting.

Meaning of the expression "Representatives present and voting"

Rule 37

For the purpose of these rules, the phrase "representatives present and voting" means representatives

present and casting an affirmative or negative vote. Representatives who abstain from voting shall be considered as not voting.

Method of voting

Rule 38

The Conference shall normally vote by show of hands or by standing, but any representative may request a roll-call. The roll-call shall be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President.

Conduct during voting

Rule 39

After the President has announced the beginning of voting, no representative shall interrupt the voting except on a point of order in connexion with the actual conduct of the voting. The President may permit representatives to explain their votes, either before or after the voting, except when the vote is taken by secret ballot. The President may limit the time to be allowed for such explanations.

Division of proposals and amendments

Rule 40

A representative may move that parts of a proposal or an amendment shall be voted on separately. If objection is made to the request for division, the motion for division shall be voted upon. If the motion for division is carried, those parts of the proposal or amendment which are subsequently approved shall be put to the vote as a whole. If all operative parts of the proposal or of the amendment have been rejected, the proposal or the amendment shall be considered to have been rejected as a whole.

Voting on amendments

Rule 41

When an amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Conference shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on until all the amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of that proposal.

Voting on proposals

Rule 42

If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.

Elections

Rule 43

All elections shall be held by secret ballot unless otherwise decided by the Conference.

Rule 44

1. If, when one person or one delegation is to be elected, no candidate obtains in the first ballot a majority of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest number of votes shall be taken. If in the second ballot the votes are equally divided, the President shall decide between the candidates by drawing lots.

2. In the case of a tie in the first ballot among three or more candidates obtaining the largest number of votes, a second ballot shall be held. If a tie results among more than two candidates, the number shall be reduced to two by lot and the balloting, restricted to them, shall continue in accordance with the preceding paragraph.

Rule 45

When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining in the first ballot a majority of the representatives present and voting shall be elected. If the number of candidates obtaining such majority is less than the number of persons or delegations to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after the third inconclusive ballot, votes may be cast for any eligible person or delegation. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest number of votes in the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.

Equally divided votes

Rule 46

If a vote is equally divided on matters other than elections, the proposal shall be regarded as rejected.

CHAPTER VII

Committees

Committee of the Whole

Rule 47

The Conference shall establish a single Committee of the Whole. The Committee of the Whole may set up sub-committees or working groups.

Drafting Committee

Rule 48

The Conference shall appoint, on the proposal of the General Committee, a Drafting Committee, which shall consist of fifteen members, including the Rapporteur of the Committee of the Whole. The term of office shall be for both sessions of the Conference. This committee shall prepare drafts and give advice on drafting as requested by the Conference or by the Committee of the Whole. It shall co-ordinate and review the drafting of all texts adopted, and shall report as appropriate either to the Conference or to the Committee of the Whole.

Officers

Rule 49

Except in the cases of the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee, each committee, sub-committee and working group shall elect its own officers. The Committee of the Whole shall elect a Vice-Chairman and a Rapporteur.

Quorum

Rule 50

A majority of the representatives on a committee, sub-committee or working group shall constitute a quorum.

Officers, conduct of business and voting in committees

Rule 51

The rules contained in chapters II, V and VI above shall be applicable, *mutatis mutandis*, to the proceedings of committees, sub-committees and working groups, except that the Chairman of the Drafting Committee and the chairmen of sub-committees and working groups may exercise the right to vote, and that decisions of committees and sub-committees shall be taken by a majority of the representatives present and voting, but not in the case of a reconsideration of proposals or amendments in which the majority required shall be that established by rule 33.

CHAPTER VIII

Languages and Records

Official and working languages

Rule 52

Chinese, English, French, Russian and Spanish shall be the official languages of the Conference. English, French and Spanish shall be working languages.

Interpretation from official languages

Rule 53

Speeches made in any of the official languages shall be interpreted into the other official languages.

Interpretation from other languages

Rule 54

Any representative may make a speech in a language other than the official languages. In this case he shall himself provide for interpretation into one of the official languages. Interpretation into the other official languages by the interpreters of the Secretariat may be based on the interpretation given in the first official language.

Summary records

Rule 55

Summary records of the plenary meetings of the Conference and of the meetings of the General Committee and of the Committee of the Whole shall be kept by the Secretariat in the working languages. They shall be sent as soon as possible to all representatives, who shall inform the Secretariat within five working days after the circulation of the summary record of any changes they wish to have made.

Language of documents

Rule 56

Important documents shall be made available in the official languages. Other documents shall be made available in the working languages.

CHAPTER IX

Public and private meetings

Plenary meetings and meetings of committees

Rule 57

The plenary meetings of the Conference and the meetings of committees shall be held in public unless the body concerned decides otherwise.

Meetings of sub-committees or working groups

Rule 58

As a general rule meetings of a sub-committee or working group shall be held in private.

Communiqué to the Press

Rule 59

At the close of any private meeting a communiqué may be issued to the Press through the Executive Secretary.

CHAPTER X

Observers for specialized agencies and intergovernmental bodies

Rule 60

1. Observers for specialized agencies and the International Atomic Energy Agency and for intergouvernmental bodies invited to the Conference may participate, without the right to vote, in the deliberations of the Conference and the Committee of the Whole, upon the invitation of the President or Chairman, as the case may be, on questions within the scope of their activities.

2. Written statements of such specialized agencies and intergovernmental bodies shall be distributed by the Secretariat to the delegations at the Conference.

CHAPTER XI

Amendments to the rules of procedure

Rule 61

These rules of procedure may be amended by a decision of the Conference taken by a majority of the representatives present and voting.

NOTE

For the reports of the successive Special Rapporteurs on the law of treaties and the discussion of the topic in the International Law Commission, see the *Yearbooks of the International Law Commission* for the years 1949 to 1966.

SUMMARY RECORDS OF THE PLENARY MEETINGS

FIRST PLENARY MEETING

Tuesday, 26 March 1968, at 3 p.m.

Acting President: Mr. STAVROPOULOS
(Legal Counsel of the United Nations, representing the Secretary-General)

President: Mr. AGO (Italy)

Opening of the Conference

[Item 1 of the provisional agenda]

1. The ACTING PRESIDENT said it was his privilege and honour to welcome the Federal President of the Republic of Austria. The United Nations was grateful for the facilities and assistance provided by the Austrian Government, which had made a notable contribution to the success of the 1961 and 1963 Conferences on Diplomatic and Consular relations.

2. On behalf of the Secretary-General, he declared the United Nations Conference on the Law of Treaties open and invited the Conference to observe a minute's silence for prayer or meditation.

The Conference observed a minute's silence.

3. The ACTING PRESIDENT said that his next duty was to welcome participants on behalf of the Secretary-General of the United Nations, who had asked him to express his regret at his inability to be present and to convey to the Conference his best wishes for its success.

4. The present Conference was the sixth in a series of conferences called by the General Assembly for the purpose, laid down in the Charter, of " encouraging the progressive development of international law and its codification ". It was the most important, and might also prove to be the most difficult, of those conferences. Since the Second World War, there had been a steady increase in the number of treaties concluded each year, and international relations were now carried out more within the framework of treaties than within that of customary international law. Moreover, international relations themselves were taking on an increasing importance with the growing recognition that the pressing problems of humanity could best be dealt with by co-operation at the international level. The rules of law governing such matters as the conclusion, interpretation, validity and termination of treaties were therefore of fundamental importance and the clarification of those rules and their embodiment in a multilateral convention would have an immense significance for the whole future of international law.

5. The draft placed before the Conference was the result of long years of work by the International Law Commission. The Conference was fortunate in having as its expert consultant Sir Humphrey Waldock who, as that Commission's Special Rapporteur, had helped to bring that work to fruition.

6. Following their adoption by the Commission, the draft articles on the law of treaties had been submitted in 1966 to the General Assembly, which had requested further comments from Governments, and had discussed the draft articles at its twenty-first and twenty-second sessions in 1966 and 1967. The present Conference was thus the climax of long years of work by the Commission, by Governments and by the Assembly. The plans for the Conference which had been adopted by the General Assembly called for the examination at the present session of the entire draft at the committee stage. The Conference would meet again in 1969 for a second session, at which the results of the committee stage would be examined in plenary meeting and finally adopted in the form of a convention.

Address by the Federal President of the Republic of Austria

7. H. E. Dr. Franz JONAS (Federal President of the Republic of Austria) said that in December 1966 the General Assembly of the United Nations had decided that an international conference should be convened to prepare a convention on the law of treaties. The antecedents of that decision of the General Assembly could be traced back as far as 1949. In that year the International Law Commission of the United Nations had placed the problem of the law of treaties on its agenda as a topic suitable for codification, and the Commission had been dealing with the problem ever since 1950. At its eighteenth session the Commission had adopted draft articles on the law of treaties, had submitted them to the General Assembly and had recommended the holding of an international conference of plenipotentiaries to study the draft articles with a view to the conclusion of an international convention on the law of treaties.

8. With the opening of the Conference that day the discussions concerning a convention on the law of treaties entered a decisive phase. Delegates to the Conference had an important and responsible task before them. The United Nations was the competent international body for the consolidation and further development of international law as one of the most important means of maintaining peace and progress.

9. It was no accident that the International Law Commission had taken up the codification of the law of treaties as one of its first tasks. International law without treaties was unthinkable. The principles of the international legal order were based on treaties. Treaties should replace armed force and be recognized as a moral force, the expression of democracy and of peace in international life. Treaties should lay down generally applicable rules for the co-existence of peoples, and endow material ties with moral strength. In cases of doubt, naturally, the authority of a court of arbitration was needed, but the stability and effectiveness of treaties were based on mutual trust between the contracting parties. For the same

reasons the United Nations adhered to the principles of respect for treaties and of the peaceful settlement of disputes, renunciation of the use of force in international relations, and the self-determination of peoples.

10. There was another reason why the codification of the law of treaties was growing more and more urgent and important. The development of trade, of the world economy, of science, of technology and now of space research continually created new legal problems which required to be solved by treaties. In short, international legal relations were growing steadily more concentrated. The development of the family of nations, particularly during the present stormy phase of transition, could not be left to chance. In the interests of the human community, a serious effort must be made, through wise treaties, to make the community of peoples a community of law and justice, of freedom and democracy.

11. Recognizing the great significance of the Conference and appreciating the lofty tasks before it, Austria had decided to invite the United Nations to hold it at Vienna, and to Austria's great pleasure, the Secretary-General of the United Nations had informed the Austrian Government that the invitation was accepted. That he regarded as an acknowledgement of the efforts of neutral Austria for the furtherance of international co-operation and understanding among peoples.

12. The distinguished representatives of the participating States could rest assured that Austria would do its utmost to make the Conference a success. All Austrian citizens would be proud if the codification of the law of treaties, which would be an important event in the life of the international legal community, were to be associated with the name of the Federal capital. After the successful United Nations Conferences at Vienna in 1961 and 1963, when diplomatic and consular law had been codified, the position of Vienna as the traditional home of diplomacy and international law would be affirmed anew.

13. On behalf of Austria, he welcomed that great United Nations Conference and prayed that the moral force of law might come into its own, and the spirit of understanding and international co-operation prevail. He wished the Conference every success.

14. The ACTING PRESIDENT thanked the Federal President of the Republic of Austria for honouring the Conference by addressing its opening meeting.

The Federal President of the Republic of Austria withdrew.

Question of participation in the Conference

15. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation felt obliged to make a categorical protest against the discrimination that was being practised in the organization of the Conference. It was well known that all States, as equal members of the international community, had the same right to participate in the settlement of problems of common interest. That followed from the principles of the sovereignty and equal rights of States, enshrined in the United Nations Charter, and from generally accepted principles of international law: no State or group of States was entitled to exclude others from participation in the settlement of problems that were of common interest to all States. Accordingly, all countries without exception should have been allowed to participate in the present Conference. The violation of that principle was a blatant injustice and a gross affront to international law.

16. But owing to the biased attitude of certain States Members of the United Nations, a number of international conferences of common interest had been marred by the imposition of an artificial and discriminatory formula providing that only States Members of the United Nations, members of the specialized agencies and parties to the Statute of the International Court of Justice could participate, regardless of whether or not the Conference in question affected the interests of all the countries of the world. Under the cover of that formula, certain States, particularly the United States and the United Kingdom, were trying to further their narrow political interests and to infringe the rights of a number of sovereign States, especially of socialist countries. Such an attempt was being made at the present Conference, although the purpose of the Conference was to prepare a general multilateral convention, designed to regulate treaty relations between all the countries of the world. The Conference was obviously of interest to certain States which were not Members of the United Nations, but which concluded international agreements, including agreements with States Members of the United Nations. Since the convention to be prepared at the Conference was universal in its purposes, its functions and its subject-matter, any State, irrespective of its political and social structure, should have the right to be a party to it. Obviously, therefore, it was both desirable and necessary that the Conference should be genuinely representative in character and that all those States which expressed the desire to participate in it should be allowed to do so.

17. The United States, the United Kingdom and the other countries which had imposed the decision to prevent certain States from participating in the Conference had acted in violation of the United Nations Charter and had thus prejudiced the achievement of the main purpose of the Conference, which was the codification and progressive development of international law. It was perfectly obvious that the value of the convention to be prepared by the Conference would be vitiated by the exclusion of the People's Republic of China, which accounted for one-fifth of the population of the whole world. On the one hand, that was a gross violation of the rights of that State and of the great Chinese people, and on the other it reduced the significance of the new convention, which would be drawn up without the participation of the People's Republic of China. The same applied to such socialist States as the German Democratic Republic, the Democratic Republic of Viet-Nam, and the Democratic People's Republic of Korea. The German Democratic Republic had diplomatic and consular relations with many countries and participated in a wide variety of international conferences and organizations. It was especially important to note that the German Democratic Republic was in the vanguard of the States which resolutely fought for peace and friendship among nations. It had concluded hundreds of international agreements with Members and non-Members of the United Nations alike. It had also participated

in such general multilateral agreements as the 1963 Moscow Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and many other general multilateral agreements. The convention that was to be prepared was undoubtedly of interest to the German Democratic Republic, and its participation in the Conference would have helped to improve the drafting of the convention, as had been demonstrated by the interesting and significant comments on the draft articles which had been submitted by the German Democratic Republic and which would certainly be found very useful when the articles were being considered.

18. A number of countries represented at the Conference had entered into various treaty relations with the socialist States he had mentioned, and if the latter were debarred from participating in the preparation of a convention on the law of treaties, it was hard to see what instrument would govern those treaty relations. Clearly, the United States and the United Kingdom and their supporters were prejudicing the interests of the entire international community by their discriminatory action. The Soviet Union, which had always supported the principle of universality and of the development of friendly relations among all States, categorically condemned that action and insisted that all States had equal rights to participate in international conferences on questions of common interest.

19. Mr. KRISHNA RAO (India) said that the work of the Conference was of the greatest importance to the newly independent countries. The codification of the law of treaties would serve to express in writing the contemporary rules of law on the subject and thus release those countries from the need to refer to customary rules of international law; the search for those lawyer-based rules often gave only a picture of what international law had been rather than of what it actually was.

20. Against that background, his delegation reaffirmed its steadfast adherence to the principle of non-discrimination between States. Since the international community was a community of States, no distinction should be made between States, whether based on population, size, importance or power. It was significant that the right of all States to participate without discrimination in multilateral conventions adopted under United Nations auspices had been accepted in the vitally important matters of disarmament and outer space.

21. The present Conference, however, had been convened by the United Nations, and General Assembly resolution 2166 (XXI) set out the basis on which that had been done. Under operative paragraph 4 of that resolution, those invited to participate in the Conference were "States Members of the United Nations, States members of the specialized agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite." The Conference could not go beyond the terms of reference laid down for it in that paragraph.

22. Consequently, although his delegation supported the idea put forward by the USSR representative, it must insist, with regret, that the Conference was not legally competent to extend participation in the Conference in the manner suggested. The proper time to raise that question had been during the discussion in the General Assembly leading to the adoption of resolution 2166 (XXI). But whatever convention was eventually adopted by the present Conference should be open to accession by all States. At the appropriate time, his delegation would take a firm stand on that issue.

23. Mr. EL-ERIAN (United Arab Republic) said that his delegation had consistently expressed its support of the principle of universality of participation in conferences preparing general multilateral conventions of concern to all members of the international community. In 1966, during the General Assembly debate on the convening of the Conference, the United Arab Republic had supported the proposal that operative paragraph 4 of General Assembly resolution 2166 (XXI) should be so drafted as to ensure that invitations were issued to all the countries of the world. In doing so, it had been guided by the fact that participation in the formulation of general norms of international law was an inherent right of the independent statehood of sovereign members of the community of nations. That was a fundamental rule which no group of States had the right to infringe or curtail. It was most regrettable that that formula had not been adopted and that certain important States had not been invited to participate in the Conference.

24. Sir Francis VALLAT (United Kingdom) said that the problem raised by the USSR representative was fundamentally political and could not properly be debated at a conference of jurists engaged in preparing a convention on the law of treaties. The Conference had been convened under the auspices of the United Nations, and the General Assembly had unequivocally decided what States should be allowed to participate, since Assembly resolution 2166 (XXI) had been adopted by over 100 votes. It could not be maintained, therefore, that the decision had rested with one or two Governments.

25. The Conference was embarking on a task the importance of which to the future of international law could not be overestimated. Controversy would undoubtedly arise on many points, for international law was not an exact science. He would appeal to participants to confine their remarks to issues which concerned them as international lawyers, and not to add to the burdens of the Conference by attempting to interfere with a decision already taken by the General Assembly.

26. Mr. PELE (Romania) said his delegation regretted that all the States of the world had not been invited to participate in such an important conference. It was becoming obvious that the development of international law required the active co-operation of all countries. Codification could not be confined to systematization of existing legal norms, for the progressive development of international law must also be borne in mind. That was why the Romanian delegation considered that the participation of the People's Republic of China, the German Democratic Republic, the Democratic Republic of Viet-Nam and the Democratic People's Republic of Korea would greatly help the Conference to bring its work to a successful conclusion and to promote peaceful co-existence and friendly co-operation among nations.

27. Sir Lalita RAJAPAKSE (Ceylon) said that the formulation of general multilateral treaties was so universal a task that it should not be carried out by a group of States, however large, but that all States, regardless of their ideology or commitments, should be allowed to participate. The absence of the People's Republic of China, a world power of the first magnitude, and of other States, could only have an adverse effect on the Conference's deliberations and on the value of the ultimate product.

28. Mr. USTOR (Hungary) said that his delegation shared the misgivings expressed by earlier speakers concerning the wording of operative paragraph 4 of General Assembly resolution 2166 (XXI), because it was essential to invite all States to participate in conferences of universal interest. The codification of the law of treaties was of concern to all States, since the convention would govern all subjects of international law, and it was an elementary requirement of democracy that no subject of law should be excluded from its making. That principle had been sacrificed to obvious political aims, and the discrimination practised against the People's Republic of China, the German Democratic Republic, the Democratic Republic of Viet-Nam and the Democratic People's Republic of Korea constituted a violation of the vital principle of the equal sovereignity of States. During the relevant debate in the Sixth Committee of the General Assembly, Hungary had protested that discrimination against those countries was not only illegal, but unjust, inequitable and unfair. His delegation wished again to record its protest against that practice.

29. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that contemporary international life showed a general trend towards the co-operation of all States in matters of general interest. That trend was leading to increased observance of the principle of the universality of multilateral treaties, a principle reflected in such important instruments of international law as the 1963 Moscow Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. In addition, a number of General Assembly resolutions on questions of general interest contained a formula for the participation of all States without exception. The development of international co-operation predicated the participation of all States in universal conventions, as a basic principle of international law.

30. The wording of operative paragraph 4 of General Assembly resolution 2166 (XXI) was therefore highly regrettable, since it excluded a group of peace-loving States from participation. It had been said that a conference of jurists could not deal with political matters, but it seemed anomalous, in preparing an instrument on the law of treaties, to allow even a shadow of discrimination and a departure from the principle of universality. To take only one example, the German Democratic Republic, which was one of the outstanding industrial countries of the world, which abided entirely by the principles of the United Nations Charter in its foreign policy, and which had concluded a number of international agreements as a sovereign State, should not be excluded from participation. The same applied to the Democratic Republic of Viet-Nam, the Democratic People's Republic of Korea and the People's Republic of China. His delegation therefore strongly urged the observance of the principle of universality in the work of the Conference.

31. Mr. JAMSRAN (Mongolia) said that since the codification and progressive development of rules of international law were of interest to all States, all of them should participate in the process. Moreover, that was required by the principle of sovereign equality on which the Charter was founded. The discrimination applied against some States under General Assembly resolution 2166 (XXI), operative paragraph 4, conflicted with the right of all States to conclude treaties. Universal participation in the present Conference, whatever the political and social system of any State would ensure its success.

32. Mr. SEATON (United Republic of Tanzania) said he deplored the exclusion of certain States; progress and international security depended on the rule of law which all States must take a hand in formulating. Every State had an inherent right to participate in the Conference and the law of treaties could not be codified by a restricted group which then imposed rules on others which had not taken part. Though the Conference was not competent to revoke a General Assembly decision, he hoped that the discussion would ensure that in future all States contributed to the creation of legal rules.

33. Mr. OSIECKI (Poland) said that during the discussion in the General Assembly of operative paragraph 4 of resolution 2166 (XXI), his delegation had advocated universal participation in the Conference on the ground that depriving certain States of the right to attend was contrary to the principle of equality of States. The outcome of the Conference was of vital importance because the rules adopted would regulate relations between all States. The States excluded supported the aims of the United Nations, took part in some of the work of specialized agencies and were parties to bilateral and general multilateral treaties.

34. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said he endorsed what had been said about the importance of all States taking part in elaborating a convention on the law of treaties which would help to promote peaceful relations and economic and social progress. Any attempt at codification could only be fully successful if each State made its contribution.

35. The delegations at the General Assembly responsible for excluding certain States had acted in defiance of Charter principles and their action would diminish the prestige of the Conference. For example, the German Democratic Republic was a full subject of international law and maintained diplomatic, consular and economic relations with countries the population of which represented two-thirds of the population of the world. It had concluded numerous treaties and participated in many international bodies. It had trade relations with over one hundred countries, including some in western Europe. Historic events were irreversible and it was no use blinking facts or ignoring the existence of that State.

36. A policy of discrimination was also pursued by western countries with regard to other socialist countries, namely the Democratic People's Republic of Korea, the Democratic Republic of Viet-Nam and the People's Republic of China.

37. Members of the United Nations must put an end to discrimination and support the principle of universality.

38. Mr. KOUTIKOV (Bulgaria) said he objected to discrimination against certain States, which was a violation of contemporary international law and totally anomalous.

39. Mr. ALVAREZ TABIO (Cuba) said that all States had an inalienable right to participate in a conference that would formulate universally applicable rules. If States were to assume legal obligations, they must take part in defining them.

40. Mr. KEITA (Guinea) said he deplored the absence of some States whose lawyers and experts could have contributed so much in devising generally valid rules for regulating relations between States.

41. Mr. HU (China) said that under General Assembly resolution 2166 (XXI), the Conference had one task only, that of preparing a draft convention on the law of treaties, and it should not discuss extraneous matters. The Republic of China was fully represented, and according to the Charter a State could only possess one vote.

42. Mr. JELIC (Yugoslavia) said he regretted that the principle of universality had been flouted and a number of interested States prevented from attending the conference.

43. Mr. NACHABE (Syria) said that his delegation had consistently upheld the right of all States to attend international conferences and to become parties to general multilateral treaties, and on various occasions it had co-sponsored General Assembly resolutions on the subject, particularly those concerned with the codification and progressive development of international law. The exclusion from the conference of some members of the international community was contrary to the letter and spirit of the Charter and illegal.

44. Mr. MOUDILENO (Congo, Brazzaville) said it was quite wrong to exclude from the conference certain international entities which possessed all the attributes of sovereign States and had treaty-making power.

45. Mr. SMEJKAL (Czechoslovakia) said that the work of the Conference would suffer from the absence of a group of States which could contribute to the development of international law. That situation was incompatible with the very foundation of international law, which was universality and justice. One group of States was excluding another group from codifying general international law because of their economic and social structure. That was nothing less than discrimination, which was flagrantly at variance with international law.

46. For instance, the German Democratic Republic was a party to general multilateral treaties such as the Moscow Nuclear Test Ban Treaty and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, while other treaties to which it was a party were registered with the United Nations Secretariat.

47. It was equally absurd that the People's Republic of China, the Democratic People's Republic of Korea and the Democratic Republic of Viet-Nam could not be represented at the Conference.

48. His delegation deeply regretted that the effects of the cold war had also made their appearance at the Conference, which could justifiably be regarded as one of the most important in the history of the United Nations.

49. The ACTING PRESIDENT said that the foregoing statements would appear in the summary record.

Election of the President

[Item 2 of the provisional agenda]

50. The ACTING PRESIDENT said the next item on the agenda was the election of the President of the Conference.

51. Mr. VEROSTA (Austria) proposed Mr. Roberto Ago, an outstanding lawyer with wide experience of work in international organizations which would specially qualify him for the task.

52. Mr. RUEGGER (Switzerland) seconded the proposal.

53. Mr. KRISHNA RAO (India), Mr. EL-ERIAN (United Arab Republic) Mr. SMEJKAL (Czechoslovakia), Mr. RUDA (Argentina), Sir Francis VALLAT (United Kingdom), Mr. YASSEEN (Irak), Mr. REGALA (Philippines), Mr. KELLOU (Algeria), Mr. MATINE-DAFTARY (Iran), Mr. KHLESTOV (Union of Soviet Socialist Republics) and Mr. de BRESSON (France) all supported the proposal.

Mr. Roberto Ago (Italy) was elected President by acclamation and took the Chair.

54. The PRESIDENT said he was deeply appreciative of the honour done to his country and to himself by his election and sincerely grateful for the kind words of the representatives who had just spoken. He wished first to pay a tribute to the contribution made by Austria to the success of the 1961 and 1963 Conferences and to the outstanding leadership of those Conferences by Professor Verdross in 1961 and Professor Verosta in 1963.

55. The international community had grown in a remarkable manner during the past two decades and an active role was now being played by new members of that community whose diverse philosophical, religious, legal, social and economic conceptions were often markedly different from those which had formerly prevailed in the world. Those developments made it imperative to adapt international law to the new dimensions and the new requirements of the society of States.

56. The codification of international law in pursuance of Article 13 (1) of the Charter was therefore both urgent and essential. The task before the Conference, however, was the most ambitious ever undertaken within that framework because of the vital importance to international relations of the rules governing the law of treaties.

57. In the preparation of that task in the United Nations over a period of eighteen years, a leading role had been played by the International Law Commission's Special Rapporteurs on the law of treaties; the Secretariat, in

turn, had contributed valuable documentation. The Commission had prepared a draft which provided the Conference with a most suitable basis for its work.

58. The task of the Conference would be a difficult one. Success would be achieved only at the price of mutual concessions and reciprocal sacrifices; opposing but equally legitimate views would have to be reconciled in order to reach general agreement on the rules which would govern the conduct of States in their mutual relations. It was essential that the Conference should succeed and thereby introduce an element of security into a key sector of international law. If the Conference were to fail, a dangerous uncertainty would be created in a field that was vital to the satisfactory conduct of international affairs and indeed to the very existence of an orderly international society.

59. He relied on the co-operation of all participants in the performance of the Conference's constructive task and could assure them that, in the discharge of his duties, he would endeavour to assist the Conference to the best of his ability.

Adoption of the rules of procedure

[Item 4 of the provisional agenda]

60. The PRESIDENT invited the Conference to adopt its provisional rules of procedure.

The provisional rules of procedure (A/CONF.39/2) were adopted.

Adoption of the agenda

[Item 3 of the provisional agenda]

61. The PRESIDENT invited the Conference to adopt its provisional agenda.

The provisional agenda (A/CONF.39/1) was adopted.

The meeting rose at 7 p.m.

SECOND PLENARY MEETING

Wednesday, 27 March 1968, at 12 noon

President: Mr. AGO (Italy)

Question of the representation of South Africa

1. Mr. SEATON (United Republic of Tanzania), speaking on a point of order on behalf of the African States, said that those States did not recognize the representatives sent by the South African régime. In the first place, that régime was not representative of the population of South Africa as a whole and, in the second place, the policy of discrimination it was pursuing with regard to Africans flagrantly violated the provisions of the United Nations Charter. The principle of universality on which the United Nations system was based applied only to the true representatives of those nations. The Africans of South Africa were not represented at the Conference. The African States asked the Conference to take note of that fact. When those nine million Africans had obtained their independence and freedom, they would be entitled to consider that they were not bound by the Conference's decisions, since their representatives had not been invited to it and had not participated in it.

2. The PRESIDENT said that that statement would be reproduced in the record of the meeting.

Election of Vice-Presidents

[Agenda item 5]

3. The PRESIDENT reminded the Conference that under rule 6 of the rules of procedure (A/CONF.39/2) the Conference had to elect twenty-three Vice-Presidents. The delegations had discussed the election and had reached general agreement on nominations.

4. The rules of procedure of the United Nations General Assembly provided that one of the posts of Vice-President should go alternately for one year to a Latin American State and to a Western European or other State. He suggested that that post should go to Spain in 1968 and to Guatemala in 1969.

It was so decided.

5. The PRESIDENT read out the list of nominations upon which agreement had been reached: Afghanistan, Algeria, Austria, Chile, China, Ethiopia, Finland, France, Guinea, Hungary, India, Mexico, Peru, Philippines, Romania, Sierra Leone, Spain (for 1968), Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Yugoslavia. He proposed that the Conference should elect as Vice-Presidents the representatives of those twenty-three countries.

That proposal was adopted.

Election of the Chairman of the Committee of the Whole

[Agenda item 6]

6. Mr. EL-ERIAN (United Arab Republic) nominated Mr. Elias (Nigeria) for the office of Chairman of the Committee of the Whole.

7. Sir Francis VALLAT (United Kingdom), Mr. USTOR (Hungary), Mr. TABIBI (Afghanistan) and Mrs. ARBOLEDA de URIBE (Colombia) supported that nomination.

Mr. Elias (Nigeria) was elected Chairman of the Committee of the Whole by acclamation.

Election of the Chairman of the Drafting Committee

[Agenda item 7]

8. Mr. KRISHNA RAO (India) nominated Mr. Yasseen (Iraq) for the office of Chairman of the Drafting Committee.

9. Mr. ALVARADO (Peru), Mr. PELE (Romania), Mr. TSURUOKA (Japan), Mr. EUSTATHIADES (Greece) and Mr. OSIECKI (Poland) supported that nomination.

Mr. Yasseen (Iraq) was elected Chairman of the Drafting Committee by acclamation.

Appointment of the Credentials Committee

[Agenda item 8]

10. The PRESIDENT reminded the Conference that under rule 4 of the rules of procedure the Credentials Committee had to consist of nine members appointed by the Conference on the proposal of the President. He understood it had been agreed that the Committee should have the same membership as the Credentials Committee of the General Assembly at its last session; he therefore proposed the following countries: Ceylon, Dominican Republic, Ireland, Japan, Madagascar, Mali, Mexico, Union of Soviet Socialist Republics and United States of America.

11. Mr. HAYES (Ireland) said he regretted that he was unable to serve on the Credentials Committee as he was the only representative of his country at the Conference and he would not be able to remain until the end of its proceedings.

12. The PRESIDENT suggested that the other eight members of the Credentials Committee should be appointed and that the ninth member should be nominated at a subsequent meeting, after consultation with the States participating in the Conference.

It was so decided.

The meeting rose at 1.10 p.m.

THIRD PLENARY MEETING

Wednesday, 27 March 1968, at 5.45 p.m.

President: Mr. AGO (Italy)

Appointment of the Credentials Committee

[Agenda item 8]

(continued)

1. The PRESIDENT said that eight of the nine members of the Credentials Committee had already been appointed at the previous meeting; he now suggested that the remaining vacancy be filled by Switzerland, whose representative had consented to serve. If there were no objection, he would therefore take it that the Conference agreed that the Credentials Committee consist of those nine delegations.

It was so agreed.

Appointment of other members of the Drafting Committe

[Agenda item 9]

2. The PRESIDENT said that the Conference was now called upon to appoint thirteen members of the Drafting Committee in addition to the Chairman of that Committee, who had already been elected by the Conference at its previous meeting, and the Rapporteur of the Committee of the Whole, who similarly had been elected by the Committee of the Whole at its first meeting.

3. The General Committee had decided to recommend that the following thirteen countries be appointed: Argentina, China, Congo (Brazzaville), France, Ghana, Japan, Kenya, Netherlands, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. If there were no objection, he would consider that the Conference agreed to adopt that recommendation.

It was so agreed.

Organization of work

[Agenda item 10]

4. The PRESIDENT said that the General Committee had decided to recommend that the Conference endorse the suggestions contained in the excellent Secretariat memorandum on " Methods of work and procedures of the first session of the Conference " (A/CONF.39/3), which was based on the experience of previous codification Conferences. The General Committee had nevertheless considered that the Conference and its organs should feel free at all times to adapt those methods and procedures to their needs.

5. Since the real success of the Conference would be measured not by the adoption of the various draft articles by the appropriate majorities, first by the Committee of the Whole and later by the Conference itself, but rather by the ratifications and accessions which the future instrument on the law of treaties would attract, he would urge all participants to co-operate in ensuring that the final outcome of the Conference was calculated to gain the broadest possible measure of support on the part of States.

6. If there were no comments, he would consider that the Conference agreed to endorse the Secretary-General's memorandum (A/CONF.39/3) on the understanding already indicated.

It was so agreed.

7. The PRESIDENT suggested that, in accordance with the satisfactory experience of the 1961 and 1963 Conferences, the Drafting Committee be entrusted with the task of preparing a draft preamble.

It was so agreed.

The meeting rose at 6 p.m.

FOURTH PLENARY MEETING

Wednesday, 8 May 1968, at 12 noon

President: Mr. AGO (Italy)

Tributes to the memory of Mr. Antonio de Luna

1. The PRESIDENT said that the meeting had been convened to pay a tribute to the late Mr. Antonio de Luna.

2. Mr. de CASTRO (Spain) said he was grateful to the President of the Conference for his initiative in convening a meeting for the purpose of paying a tribute to the late Mr. de Luna. The death of Mr. de Luna had left a gap in the international community. He personally had known him for very many years, since they had been colleagues at the universities of La Laguna, Salamanca

and Madrid and had worked together in connexion with the founding of the Instituto de Estudios Internacionales y Económicos and on the *Revista española de Derecho Internacional.* Mr. de Luna was a brilliant lawyer and a vital dynamic person, a true humanist with a multiplicity of interests. Much of his time had been spent at conferences, discussions and seminars. Born at Granada and a member of an Andalusian family of French ancestry, he spoke many languages and was at home in several universities in Europe and America. Latterly he had been Ambassador to Colombia and Austria. He had always taken a great interest in the controversy over legal positivism. He had stressed the need to be methodical in international law, maintaining that it was not a creation of the will of States, but was based on a natural law founded on the principles of *pacta sunt servanda* and *jus cogens.* He had maintained most emphatically that the power of great States did not entitle them to use force in violation of the sovereignty of other States and he had spoken very decidedly against unequal treaties. As a jurist and an internationalist he had considered that international law must also be rooted in reality.

3. Mr. AMADO (Brazil) said that he had had a profound respect for Mr. de Luna, a most amiable and energetic man who combined Castilian discipline with Andalusian charm. Greatly beloved by members of the International Law Commission, his absence from the present Conference and from the Sixth Committee of the General Assembly was a great loss to them all. His learning had been immense and varied, reaching back to the roots of international law, both theory and practice, and embracing a detailed knowledge of jurisprudence. He had been an incomparable teacher and a firm friend of his students. His opinions on a wide range of topics could be read in the *Yearbooks* recording the International Law Commission's discussions. In some ways his intellect was perhaps too far-ranging for him to be interested in conclusions. It now remained for the Conference to complete the work to which Mr. de Luna had contributed so much.

4. Mr. YASSEEN (Iraq) said that the international community had suffered a great loss in the death of an eminent internationalist and humanist. In his opinions and actions he represented the tolerance and understanding of his great country, where Islam and Christianity mingled. He cared profoundly for the aspirations of peoples and human dignity and had an encyclopaedic culture. He felt a deep personal grief at Mr. de Luna's death.

5. Mr. BRIGGS (United States of America) said it was very fitting that the Conference should pay a tribute to Mr. de Luna. He himself had worked with him for five years in the Commission, preparing the draft articles on the law of treaties, and had been able to witness the contribution made by him to that work. Mr. de Luna represented the proud Spanish tradition of Vitoria and Suárez. He had been keenly conscious that the law existed for the benefit of all men. He had been untiring in helping to formulate the draft articles on the law of treaties, taking full account of existing international law and adapting it to the modern temper and the emerging needs of an expanding world community. His learning was great but he was no pedant. He had been a warm friend and would have been anxious for the Conference's success in producing a convention capable of wide acceptance.

6. Mr. ELIAS (Nigeria) said that Mr. de Luna had been elected to the International Law Commission in 1961 and had endeared himself to all its members. He was a scholar, jurist and statesman with warm, friendly and urbane manners. He had a zest for the good life, in the Aristotelian sense, and was a man of universal culture.

7. Mr. REUTER (France) said that Mr. de Luna had a generous, energetic and hopeful nature. He had excelled in many things and performed numerous functions. His place was assured among eminent Spaniards.

8. Mr. SECARIN (Romania) said that Mr. de Luna had made a valuable contribution to the progressive development of international law, undertaken by the International Law Commission. He had been a true realist and had been convinced that account must be taken of reality if the common values were to be safeguarded. He had declared that international law had become universal and that it must foster peaceful co-existence between States, without which there could be no future. Mr. de Luna had been active in many spheres and had been devoted to the codification of international law. It would be a tribute to his memory if the Conference were to succeed in its task.

9. Mr. TABIBI (Afghanistan), speaking on behalf of the Asian delegations, said that they felt keenly the loss of Mr. de Luna, who, like one of his contemporaries in the International Law Commission, the late Judge Radhabinod Pal, had done so much towards preparing the draft articles on the law of treaties. Mr. de Luna had been a warm and sincere friend and a true humanist, with a progressive mind and a real understanding of the changing world and present-day needs. For that reason he had been respected and liked by Asian and African jurists. He had been born in the proud line of Spanish lawyers who claimed that Vitoria was the true father of international law, rather than Grotius.

10. The PRESIDENT said that he had always thought of Mr. de Luna as almost an Italian because of his extraordinary knowledge of that language and of Italian culture. One of the most striking things about him had been his faith and dynamic enthusiasm for ideals. A man of the widest culture, he had always sought to work for generous and progressive solutions. He had been a brilliant lawyer, scholar and writer on legal theory as well as a man of action. Later in life he had become a diplomat, serving his country as its ambassador in Bogota and Vienna, but he had always wanted to return to the service of international law and had aspired to become a judge of the International Court of Justice. In the work of the International Law Commission, his contribution had often been decisive in the formulation of the draft articles on the law of treaties. With his example in mind, he hoped that the Conference would succeed in its task.

The Conference observed a minute's silence in tribute to the memory of Mr. de Luna.

The meeting rose at 1 p.m.

FIFTH PLENARY MEETING

Friday, 24 May 1968, at 3.35 p.m.

President: Mr. AGO (Italy)

Report of the Credentials Committee on the first session of the Conference (A/CONF. 39/9 and Corr. 2)

1. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that in the course of the deliberations of the Credentials Committee, his delegation had already stated its position on the credentials submitted by the various delegations to the Conference (A/CONF.39/9 and Corr.2). The Soviet Union delegation could not recognize the credentials of the representatives of Chiang Kai-shek as valid. Only the representatives of the People's Republic of China were qualified to represent China. Nor did the Soviet Union delegation recognize the validity of the credentials of the delegations of South Africa and South Viet-Nam, which did not represent the peoples of those countries. The fact that the Soviet Union delegation would not object to the approval of the report did not mean that its position as stated therein had in any way altered.

2. Mr. HU (China) recalled that the Conference on the Law of Treaties had been convened in pursuance of resolution 2166 (XXI) adopted by the General Assembly, which had invited all the States Members of the United Nations to participate in the Conference. Among them was China, one of the founder Members of the United Nations. The status of the Chinese delegation had just been questioned without any valid reason. It was contrary to the general interest to introduce into the debates of the Conference questions which had nothing to do with its work. The Chinese delegation greatly deplored the attempt to do so.

3. Mr. BISHOTA (United Republic of Tanzania) said that, although his delegation accepted the report of the Credentials Committee, its acceptance must not be interpreted as recognition of the credentials of the representatives of the racist and fascist régime in South Africa. As the Tanzanian delegation had already stated on behalf of the African delegations and on its own behalf, it considered that the present régime in South Africa did not represent the people of that country and that, when the people took over—an event which could not be long in coming—they would be entitled to repudiate any agreement made without reference to them.

4. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that, coming as a jurist to attend the Conference, he had imagined it would deal with matters of law and not engage in political propaganda. The delegation of Viet-Nam based its case on General Assembly resolution 2166 (XXI) already mentioned. The Republic of Viet-Nam was a member of all the specialized agencies, and had rightly been invited to the Conference. The Credentials Committee had found in its report that the credentials of the representatives of the Republic of Viet-Nam were in order. There was no need for the Conference to dwell on a political problem which was alien to its purpose.

5. Mr. PELE (Romania) recalled that Romania was constantly stressing the need to restore the legitimate rights of the People's Republic of China in the United Nations and its specialized agencies and in all international meetings such as the present Conference. International law designated as the legitimate Government of a country the one which exercised effective and stable authority on the territory of the country and possessed all the attributes of power. The only Government qualified to represent the Chinese people was the Government of the People's Republic of China. Accordingly, the credentials submitted to the Conference for China were contrary to rule 3 of the rules of procedure, since they did not emanate from the legitimate Government representing the Chinese people. The delegation which occupied the place of China at the Conference did not represent anyone. Furthermore, it was vital to have the participation of the People's Republic of China, the Democratic Republic of Viet-Nam, the German Democratic Republic and the Democratic People's Republic of Korea in the discussions on the law of treaties. The Romanian delegation condemned the policy of *apartheid* of the South African Government and shared the reservations expressed regarding the representatives of South Africa. Subject to those reservations his delegation would vote in favour of the report of the Credentials Committee.

6. Mr. VIALL (South Africa) associated himself with the remarks made by the representatives of China and the Republic of Viet-Nam concerning the legal position. The South African delegation would vote in favour of the report, which found its credentials in order. Its vote did not in any way imply approval of the opinions to the contrary expressed either in the report or in the present discussion.

7. Mr. BEVANS (United States of America) said that the position of the United States delegations regarding the credentials of the representatives of China, the Republic of Viet-Nam and South Africa was set forth in the report of the Credentials Committee. The credentials of the representatives of those countries were in order. For the reasons indicated by the United States representative in the report of the Credentials Committee, his delegation would vote for the adoption of the report.

8. Mr. GÖR (Turkey) pointed out that the credentials of the representatives of the Greek community of the island of Cyprus were in flagrant violation of the constitution of that country. In consequence, the documents accrediting the representatives of the Greek community of Cyprus could in no case be considered as binding the Turkish community of Cyprus.

9. Mr. TODORIC (Yugoslavia) expressed the strongest reservations regarding the credentials submitted by the representatives of the Republic of China, South Africa and South Viet-Nam.

10. Mr. de BRESSON (France) said he would merely recall his country's well-known view that only the Government of the People's Republic of China was qualified to represent the Chinese State at the international level.

11. Mr. OSIECKI (Poland) fully associated himself with the reservations expressed as to the validity of the credentials of the representatives of the Chiang Kai-shek régime and those of South Africa and South Viet-Nam.

12. Mr. IPSARIDES (Cyprus), replying to the statement by the representative of Turkey, said he was surprised,

to say the least, that the Turkish delegation should raise in the Conference on the Law of Treaties an objection which was tantamount to questioning the sovereignty of Cyprus. The report of the Credentials Committee left no doubt as to the validity of the credentials of the Cypriot delegation. In accordance with rule 3 of the rules of procedure, its credentials had been signed in due and proper form by the Minister for Foreign Affairs. He drew attention to Security Council resolution 186 (1964) of 4 March 1964 and to General Assembly resolution 2077 (XX) of 18 December 1965, and pointed out that Turkey had an embassy at Nicosia and that Cyprus was represented at Ankara by an ambassador whose credentials had been signed by the President of the Republic, Archbishop Makarios; incidentally, the Ambassador of Cyprus at Ankara belonged to the Turkish community of Cyprus.

13. The position taken by the Turkish delegation was altogether unwarranted and could only be regarded as an inadmissible provocation at a time when the Ministers for Foreign Affairs of Cyprus and Turkey had met at Strasbourg and had issued a communiqué indicating that their meeting had been useful and constructive, and when, as a result of the steps taken by the Cypriot Government, the situation in the country had improved to the point where negotiations could be contemplated.

14. The Cypriot delegation requested the Conference to ignore the statement by the Turkish delegation as constituting a violation of the principle of non-interference in the internal affairs of a State.

15. Mr. KOUTIKOV (Bulgaria) said that his delegation accepted the report of the Credentials Committee but made express reservations concerning the representation of China by a delegation from the Chiang Kai-shek régime and also concerning the representation of South Africa and South Viet-Nam.

16. Mr. GÖR (Turkey) said that the representative of the Greek community of Cyprus had confirmed that the Greek Cypriot administration had for a long time been outside the bounds of legality and had been acting unconstitutionally. He had no wish to discuss questions of Cypriot constitutional law and would merely point out that the Cypriot Constitution and the treaties in force must be observed and applied in good faith.

17. The PRESIDENT said that the remarks made during the discussion would be noted.

The report of the Credentials Committee (A/CONF.39/9 and Corr.2) was adopted.

Arrangements for the second session of the Conference (A.CONF.39/C.1/L.378)

18. The PRESIDENT said that, in the absence of objection, he would assume that the Conference adopted the draft resolution submitted by Nigeria (A/CONF. 39/C.1/L.378).

It was so decided.

Closure of the first session of the Conference

19. After the customary exchange of courtesies, the PRESIDENT declared that the first session of the Conference was concluded.

The meeting rose at 4.10 p.m.

SUMMARY RECORDS OF MEETINGS OF THE COMMITTEE OF THE WHOLE

FIRST MEETING

Wednesday, 27 March 1968, at 3.30 p.m.

Chairman: Mr. ELIAS (Nigeria)

Election of the Vice-Chairman of the Committee of the Whole

1. The CHAIRMAN called for nominations for the office of Vice-Chairman of the Committee of the Whole.

2. Mr. BLIX (Sweden) proposed Mr. Smejkal (Czechoslovakia).

3. Mr. SECARIN (Romania), Mr. KRISHNA RAO (India), Mr. SUAREZ (Mexico) and Mr. KELLOU (Algeria) seconded the proposal.

Mr. Smejkal (Czechoslovakia) was elected Vice-Chairman by acclamation.

Election of the Rapporteur of the Committee of the Whole

4. The CHAIRMAN called for nominations for the office of Rapporteur. In accordance with rule 48 of the rules of procedure, the Rapporteur would also be a member of the Drafting Committee.

5. Mr. RODRIGUEZ (Chile) proposed Mr. Jiménez de Aréchaga (Uruguay).

6. Mr. WERSHOF (Canada), Mr. YASSEEN (Iraq), Mr. SMEJKAL (Czechoslovakia) and Mr. de CASTRO (Spain) seconded the proposal.

Mr. Jiménez de Aréchaga (Uruguay) was elected Rapporteur by acclamation.

The meeting rose at 4.25 p.m.

SECOND MEETING

Thursday, 28 March 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966

1. The CHAIRMAN invited the Committee to consider the draft articles on the law of treaties adopted by the International Law Commission at its eighteenth session (A/6309/Rev.1, part II). [1]

Article 1 (The scope of the present articles) [2]

2. Mr. BLIX (Sweden) said he had submitted his amendment to article 1 (A/CONF.39/C.1/L.10) because he did not think it was correct to state that the convention related to treaties concluded between States, when in fact it also applied to the conclusion of such treaties.

3. Mr. KEARNEY (United States of America), introducing his amendment to article 1 (A/CONF.39/C.1/L.15), explained that the article raised a very important problem, as it limited the scope of the convention to treaties concluded between States, thus excluding treaties concluded by international organizations. That approach to the problem of codifying the law of treaties took into account neither the development of international law during the twentieth century nor the growth of the activities of international organizations, which generally had treaty-making capacity. At the present time, international organizations were important elements of the world community, there were already a great many agreements to which they were parties and the number would certainly increase. In the draft provisionally adopted in 1962, article 1 had defined the term treaty as applying to treaties " concluded between two or more States or other subjects of international law ".

4. The exclusion of international organizations from the scope of the convention would create serious difficulties in the future. Many representatives of international organizations were participating in the work of the Conference and might well express their views on that question. It would be desirable to set up a working group, which would include representatives of selected international organizations, to consider the requisite changes. The United States had wished to take into account the comments made in the Sixth Committee of the General Assembly by various developing countries, in particular Liberia, Ceylon, Dahomey and Kuwait, which had wished the scope of article 1 to be extended to treaties concluded by international organizations.

5. If his amendment were adopted, it would be necessary to make a number of changes in the draft, in particular in article 3, which did not state what the effects of the convention on international organizations would be.

6. Mr. USTOR (Hungary), introducing his amendment (A/CONF.39/C.1/L.18), said that article 1 had been useful in the context of the work of the International Law Commission, but he saw no need to retain it, since the scope of the proposed convention on the law of treaties was already stated in the title of the draft and was perfectly clear from the definition of the term " treaty " in article 2.

7. Mr. KRISHNA RAO (India) said that the wording of article 1 was simple and neat. At its fourteenth session the International Law Commission had decided to exclude treaties other than those concluded between

[1] Reprinted in *Yearbook of the International Law Commission, 1966*, vol. II, pp. 177 *et seq.*

[2] The following amendments had been submitted: Sweden, A/CONF.39/C.1/L.10; United States of America, A/CONF.39/C.1/L.15; Hungary, A/CONF.39/C.1/L.18; Republic of Viet-Nam, A/CONF.39/C.1/L.27; Congo (Brazzaville), A/CONF.39/C.1/L.32.

States from the scope of the draft articles. It had done so in order to avoid complicating and delaying the drafting of the articles, in view of the many special characteristics of treaties concluded by international organizations. The Commission, believing that " the best was the enemy of the good ", had chosen to draft a less comprehensive and less ambitious, but more realistic set of articles. The comments of the representatives of States in the Sixth Committee in 1966 and 1967 and the written comments of Governments showed that the vast majority of Governments had accepted the limitation of the scope of the draft.

8. Although the contrary opinion of some States was known, they had only just made a specific proposal to enlarge the scope of the convention. Such a change would necessitate further extensive study, which might well hold up the Conference's work and delay the conclusion of the convention for perhaps five years.

9. The capacity of international organizations to make treaties was not in question. Article 3 of the draft recognized it explicitly, just as it recognized the applicability to such treaties of the relevant rules set forth in the draft. Article 4 also limited the Convention's scope by providing that treaties which were constituent instruments of an international organization or adopted within an international organization should be subject to any relevant rules of that organization.

10. It would be inadvisable to embark on a course which would oblige the Committee of the Whole to assume the role of the International Law Commission, for no working group could successfully undertake an operation which would involve revising the entire draft convention. Citing some of the many articles which would have to be amended if the scope of the convention was enlarged, he urged that in accordance with its mandate, the Conference should try to adopt a modest and satisfactory convention, even if it was not the best and most comprehensive possible. He was accordingly in favour of retaining article 1 as drafted by the International Law Commission.

11. As to the proposal to substitute the word " apply " for the word " relate " (A/CONF.39/C.1/L.15), he would leave it to the Drafting Committee to find the best solution.

12. Mr. ALVARADO (Peru) said he regretted that the provisions relating to bilateral treaties and those relating to multilateral treaties had not been separated in the draft. It would be preferable to divide the articles into three parts: the first part would contain the provisions common to all treaties, the second would relate to bilateral treaties and the third to multilateral treaties. With the method adopted by the International Law Commission there was some danger of provisions applicable solely to bilateral treaties being applied to multilateral treaties. He hoped that when the Drafting Committee came to examine the proposed amendments as a whole, it would bear his comment in mind.

13. Mr. YAPOBI (Ivory Coast) said that the Ivory Coast delegation had been inclined to favour extending the scope of article 1. However, impressed by the arguments of the Indian representative, and taking a practical view, it now supported the retention of the article as it stood in the draft, since the International Law Commission itself, after studying the matter for so many years, had had to exclude treaties concluded by international organizations. In any case, under article 3 the relevant rules of the draft could manifestly apply to treaties concluded by international organizations.

14. Mr TORNARITIS (Cyprus) said that he understood the reasons for the International Law Commission's choice, but he thought that, from a strictly legal point of view, it would be unrealistic to exclude from the scope of the convention a class of treaties as important as treaties concluded by international organizations, whose activities were constantly expanding. He hoped that some way of filling that gap would be found later. In addition, he thought that the retention of the word " concluded " in article 1 would give rise to difficulties.

15. Sir Lalita RAJAPAKSE (Ceylon) said he recognized that treaties concluded between States and treaties concluded by international organizations had similar characteristics, but he hesitated to support the proposition that they should be governed by the same body of principles.

16. Customary law relating to treaties between States had been subjected to the slow action of history for centuries, whereas the principles governing the relationships of international organizations *inter se*, as well as with States, had had only some decades in which to mature. He therefore considered that the eminent jurists of the International Law Commission, who had devoted nearly twenty years to drafting the articles, had been right not to include treaties concluded by international organizations.

17. There was all the more reason for the Conference to refrain from undertaking an extensive revision of the draft, since it had only a few weeks at its disposal. For the problem was not only to adapt the articles to the special characteristics of treaties concluded by international organizations—a formidable task in itself—but also to determine which special characteristics were to be retained or rejected.

18. He shared the United States representative's desire that the principles applicable to treaties concluded by international organizations should develop in a way that would ensure the stability of international relations, but any hasty attempt made at the present Conference, at that late stage, would not achieve the end in view. To attempt to subject such treaties to rules similar to those which had proved satisfactory for relations between States might even inhibit the progress of a trend which, in the practice of organizations, tended to depart from the traditional rules applicable to relations between States.

19. He did not share the fear that the provisions of the draft might come to be applied, as customary law, to treaties concluded by international organizations. If it was the final clause of article 3 which conveyed that impression, it could be amended to remove the ambiguity.

20. The régime of treaties concluded by international organizations could be studied later, and many of the principles embodied in the draft articles would then be readopted for application to such treaties. But such

an extension would require thorough study. It would be advisable to consider the example of special missions, the study of which had been separated from that of permanent diplomatic missions by the Vienna Conference of 1961.

21. The International Law Commission should study the régime of treaties concluded by international organizations and submit a report to the Sixth Committee with a view to the subsequent formulation of rules applicable to such treaties. The amendment submitted by the United States representative would upset the draft before the Conference. It would necessitate such extensive changes that it might not only hold up the work of the Conference, but even oblige it to adjourn in order to refer the question back to the International Law Commission for study.

22. Mr. FRANCIS (Jamaica) said that the principle on which the United States amendment was based had already been discussed at length, and at its eighteenth session, the International Law Commission, in view of the opinion expressed by the majority of States, had confirmed its decision to limit the scope of the draft convention to treaties concluded between States. The questions before the Conference were whether that principle could be accepted without upsetting the balance of the entire draft articles and whether the United States amendment could be embodied in the draft without seriously delaying the work of the Conference. The United States representative recognized that the adoption of his amendment would entail substantial alterations to the draft, since he had proposed the setting-up of a working group. That procedure would have two disadvantages: first, the Committee of the Whole would have nothing to do while the working group was discussing the matter, and secondly, the question would arise of whether international organizations should not participate in the Conference. It would probably be best not to amend article 1 as to substance. On the other hand, if the Conference was willing to accept the considerations involved in the United States amendment, it would be necessary either to provide for the possibility of drawing up a separate instrument which could be annexed to the convention, or to make slight alterations to articles 1 and 3, so that the convention could apply to agreements concluded between States and international organizations by consent of the entities concerned.

23. Mr. MOUDILENO (Congo, Brazzaville) said he had nothing against the substance of the idea expressed in article 1. However, the participants in the Conference, although jurists, also represented Governments. Since any text drawn up by States and adopted by them was called a treaty, it would be preferable to say: " the present treaty establishes the rules relating to treaties ". The words " treaties " and " States " would be defined in article 2.

24. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said he thought it desirable to extend the scope of the draft articles, owing to the importance, particularly to developing countries, of treaties concluded " between two or more States or other subjects of international law ". It was true that the amending of article 1 might delay the conclusion of the Conference's work, but what mattered most was the result obtained.

25. Mr. MARESCA (Italy), taking the three first amendments to article 1 in turn, said they would respectively shorten, lengthen and delete the article. With regard to the Swedish amendment (A/CONF.39/C.1/L.10), it would be a pity to delete the word " concluded ", which aptly described the process by which an agreement was formed, was perfected and entered into force. The deletion of article 1, as proposed in document A/CONF. 39/C.1/L.18, would entail the risk of the convention being applied to agreements which had nothing to do with international agreements. On the subject of the United States amendment (A/CONF.39/C.1/L.15), he recalled what had taken place in 1961 at the United Nations Conference on Diplomatic Intercourse and Immunities. The purpose of that Conference had been to codify diplomatic law. Two topics had been involved: permanent missions and special missions. The problem of special missions had been so important that the Conference had set up a sub-committee to examine it.[3] Similarly, there was no denying that treaties concluded by other " subjects of international law " raised a problem. It would therefore be desirable to set up a working group to study the matter so that the Conference could reach a properly informed decision.

26. Mr. KHLESTOV (Union of Soviet Socialist Republics) pointed out that the amendment of one of the draft articles was not the sole purpose of the United States proposal (A/CONF.39/C.1/L.15). The General Assembly, in resolution 2166 (XXI), had referred to the Conference the draft articles prepared by the International Law Commission. In that connexion, the outstanding quality of the Commission's work, having regard to the interests of many States, should be emphasized. There might be a few shortcomings, but as a whole the draft was excellent. It related solely to treaties concluded between States. The United States amendment would extend the scope of the convention to cover treaties concluded between States and international organizations. That idea was not new. It had been carefully examined by the Commission, which had rejected it and decided, at its fourteenth session, to limit the scope of the draft to treaties concluded between States; agreements between international organizations had their own special characteristics, which it would have been too complicated to allow for in the draft. If the United States amendment was adopted, a very large number of articles would have to be recast. The problem would be entirely changed and would have to be considered from quite a different standpoint; the Conference would be doomed to failure from the outset. There was no denying that treaties concluded by international organizations raised numerous problems, but the topic was being studied both by international lawyers and by the International Law Commission. The important thing at the moment was to ensure that the Conference was successful. Consequently, the delegation of the USSR could not support the United States amendment.

27. Mr. SEATON (United Republic of Tanzania), referring to the comment made by the representative of Congo (Brazzaville), said that the draft instrument

[3] See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II (United Nations publication, Sales No.: 62.XI.1), pp. 49 and 50, paras. 13-16.

submitted to the Conference was certainly a convention. It would therefore be correct to say: " The present convention relates to treaties concluded between States ". That point could be referred to the Drafting Committee.

28. With regard to the United States amendment (A/CONF.39/C.1/L.15), the Tanzanian delegation thought it might be unrealistic to limit the application of the convention to treaties concluded between States at a time when the role of international organizations was assuming increasing importance. Moreover, it did not seem possible to draw a clear distinction between treaties concluded by those organizations and treaties concluded between States. International organizations were subject to the normal rules of international law, especially when a treaty had entered into force. Hence the question raised by the United States amendment was of great importance and needed careful consideration. In particular, it might not be possible to adopt the precise text proposed by the United States, which was susceptible of different interpretations. For instance, the meaning of the words " other subjects of international law " needed to be defined. In order not to delay the work of the Conference, it would probably be preferable not to attempt any far-reaching amendment of article 1 at that stage.

29. Mr. HARRY (Australia) stressed the importance his delegation attached to the codification and progressive development of the law of treaties. All countries were vitally concerned in upholding the principle *pacta sunt servanda*. Moreover, the small and middle-ranking States had a particular interest in a soundly-based system of international treaty law. Of course, the more powerful States were also interested, but the smaller ones, being in a weaker position to secure redress, were more dependent on the sanctity of treaties and liable to suffer from anything prejudicial to orderly international relations. Where treaties were not observed, justice was on the side of the big battalions.

30. The work of the Conference would be to discuss the International Law Commission's proposals by article or group of articles and to take decisions article by article. The Conference should nevertheless bear in mind the suggestion made by the Secretary-General in paragraph 15 of document A/CONF.39/3 that where the Committee encountered a portion of the draft presenting particular difficulties it should hold a debate on that portion as a whole and then refer it to a sub-committee or working group for consideration and report. The Secretary General had rightly suggested that treatment for part V of the draft articles.

31. With regard to article 1, the Australian delegation regretted that the International Law Commission had been obliged to limit its proposals to treaties between States. By so doing, it had excluded a class of treaties of increasing significance in international relations, namely treaties between States and international organizations. The Commission might also have excluded the type of treaty known as a " trilateral " treaty—a treaty to which State A, State B and international organization C were parties. The position in regard to those treaties was not completely clear. Should the draft articles not cover an agreement between States because an international organization was also party to it? Again, the Commission had omitted other important aspects of treaty law from its proposals; for example, the effect of the outbreak of hostilities, succession of States in relation to treaties, State responsibility, and the most-favoured-nation clause.

32. The Australian delegation understood the reasons which had prompted the International Law Commission to deal only with certain aspects of the law of treaties. But that course had disadvantages. It would be difficult for the participants in the Conference to bear in mind the implications for other fields of treaty law of the proposals submitted to it. The Conference would nevertheless have to take care that its decisions did not have undesirable implications for areas of treaty law not substantially before it.

33. It was too late to change completely the approach adopted by the Commission. Nevertheless, in the view of the Australian delegation, the Conference should seriously consider removing the limitation of the draft articles to treaties between States. The draft should be reworded so that treaties involving international organizations were in fact covered. Such a change would require a review of several articles, which it would certainly be difficult for the Committee of the Whole to undertake. The Australian delegation therefore favoured the setting-up of a working group to consider the matter and report to the Committee whether it would be feasible to extend the scope of the draft articles to include international organizations (and other subjects of international law); and, if so, to state what changes would be required in the draft articles.

The meeting rose at 1 p.m.

THIRD MEETING

Thursday, 28 March 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Tribute to the memory of Colonel Yuri Gagarin, Soviet astronaut

1. The CHAIRMAN said he had just been informed that Colonel Yuri Gagarin, the first man to fly in space, had been killed in a training flight accident. His death was a tragic loss not only to the Soviet Union but to the whole world, and he invited the Committee to observe a minute's silence in his memory.

The Committee observed a minute's silence.

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(resumed from the previous meeting)*

Article 1 (The scope of the present articles) *(continued)* [1]

2. The CHAIRMAN invited the Committee to continue its consideration of article 1.

[1] For the list of the amendments submitted, see the summary record of the 2nd meeting, footnote 1.

3. Mr. WERSHOF (Canada) said that his delegation would have no objection to referring the United States amendment (A/CONF.39/C.1/L.15) either to a working group or back to the International Law Commission, if that was feasible.

4. In the meantime he wished to draw attention to an ambiguity in the wording of article 1, which would be eliminated if the United States amendment were adopted, but should be clarified if the text were retained in its existing form. It was not clear whether the International Law Commission had intended the applicability of the draft articles to extend to the treaty relationship *inter se* between States parties to a treaty to which one or more international organizations were also parties. Treaties of that kind were increasing in number, and the question had already been raised by the Food and Agriculture Organization of the United Nations in its observations (A/CONF.39/5). His delegation hoped that the draft articles would cover the treaty relationship between States parties to such treaties.

5. Mr BLIX (Sweden), referring to the United States amendment, said that it would be difficult, if not impossible during the current Conference, to extend the draft to cover treaties made by international organizations, let alone other subjects of international law. A more practical course of action would be for the Conference to adopt a special resolution urging the International Law Commission to prepare a complement to the draft, specifying which of its rules and what additional rules might be applicable to such treaties.

6. His delegation believed that the limitation of the applicability of the draft to treaties between States was a shortcoming, and agreed with the Canadian delegation that problems might arise in connexion with treaties to which both States and international organizations were parties; it was convinced, however, that it was too late to remedy that shortcoming during the present Conference. Of course, to the extent that the draft articles expressed existing customary international law, they would be relevant to treaties made by subjects of international law other than States, and those treaties would also benefit from the consequent clarification of many rules of international law.

7. The establishment of a working group would hardly promote an immediate solution, and it was to be hoped that the United States would not press that part of its proposal. A special resolution by the Conference seemed to be in line with the thinking of other delegations.

8. Mr. RICHARDS (Trinidad and Tobago) said that, although his delegation would not oppose a majority decision to set up a working group as proposed by the United States, it believed that it would be wiser to request the International Law Commission to draft a convention or series of conventions on treaties concluded by subjects of international law other than States.

9. With regard to the ambiguity mentioned by the Canadian representative, the article might be clarified by the insertion of the word " exclusively " after " relate "; that might also make articles 3 and 4 unnecessary. Perhaps the definition of " treaty " in article 2, paragraph 1 *(a)*, might be improved by some reference to the intention of States to create binding obligations.

10. Mr. de BRESSON (France), referring to the United States amendment, observed that, since the expression " other subjects of international law " which it employed obviously meant international organizations, that should be specified in the proposal. The anxiety of a number of delegations that the applicability of the draft articles should not be limited only to States was understandable, since international organizations had acquired a status of their own and concluded agreements with States, whence the fear that subjecting treaties concluded by those organizations to a different régime from that governing treaties concluded by States *inter se* might create delicate legal situations. On the other hand, there was general awareness of the fact that that problem could not be solved by amending just a single article, and it was important to avoid any procedure which would hamper the complete and rapid success of the Conference.

11. Perhaps the best way of dealing with the question would be to appoint a small working group, consisting of the members of the International Law Commission attending the Conference, to study the implications of the United States amendment on the draft as a whole. If the findings of that group showed that adoption of the United States proposal would entail a complete revision of the draft articles, as the USSR representative had suggested, the United States delegation might withdraw its amendment, or the Swedish representative's suggestion might be followed.

12. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that it would not be appropriate to try to enlarge the scope of the draft convention to cover subjects of international law other than States by setting up a working group of the Conference. The International Law Commission had been quite right to limit the first convention on the law of treaties to instruments concluded between States; indeed, the present Conference had been convened on that understanding. It was extremely difficult to decide on the extent to which the draft articles applied to treaties concluded by international organizations, which had very limited practice. Codification was a slow process which must proceed by stages. Moreover, there was the practical difficulty that the Conference was attended by plenipotentiary representatives of States, whereas the international organizations were represented by observers only; the resulting convention would be signed and ratified only by States, and the role that the international organizations should play in the preparation, conclusion and entry into force of an instrument relating to treaties entered into by them presented a difficult problem. Uruguay, therefore, unequivocally supported the Swedisch delegation's suggestion.

13. Sir Francis VALLAT (United Kingdom) said that any differences of opinion between delegations and the International Law Commission in no way implied criticism of the Commission, but merely indicated the special importance which Governments attached to certain matters relating to the provisions of the draft. For example, the United Kingdom attached great importance to treaties to which international organizations were parties, and regretted that the draft articles did not apply to such treaties. Accordingly, it was in favour of the United States proposal, and considered that a working group on the subject of treaties made by international

organizations would not necessarily hold up the work of the Conference. On the other hand, his delegation could support the Swedish proposal. The relevant resolution might be prepared by the Drafting Committee.

14. If treaties entered into by international organizations were not covered by article 1, that should be stated specifically, and his delegation, therefore, could not support the Hungarian proposal to delete the article.

15. Mr SECARIN (Romania) said that adoption of the United States amendment would complicate the work of the Conference, since it entailed a fundamental change in the entire concept of the draft convention. The problem of treaties entered into by international organizations was a vast subject, and its study without the necessary preparation would deflect the Conference from its basic objective. Romania was therefore in favour of the original article 1, which took into account the realities of international treaty relations. That attitude, however, did not in any way rule out the possibility of further studies of treaties entered into by subjects of international law other than States.

16. Mr. SMEJKAL (Czechoslovakia) said that the Swedish and Hungarian amendments (A/CONF.39/C.1/L.10 and L.18) might well be referred to the Drafting Committee, as the sponsors themselves had pointed out. The Hungarian amendment had considerable merit, since the scope of the draft articles was stated in more explicit terms in article 2, paragraph 1*(a)*, than in article 1, and it was evident from the commentary to article 1 that the clause was not substantive.

17. With regard to the United States amendment, all participants in the Conference, as well as the International Law Commission, were aware of the importance of the problem of treaties concluded by international organizations. Nevertheless, the Commission had stated in the second sentence of paragraph (2) of the commentary to article 1 that an attempt to include the relevant provisions would have unduly complicated and delayed the drafting of the articles. The United States representative himself had drawn attention to the objections that might be raised to his delegation's proposal.

18. The Czechoslovak delegation considered that the United States amendment was unacceptable for a number of reasons. First, the legal principles governing treaties between States had been established by long practice, whereas treaties made by international organizations had a number of special characteristics, and were likely to give rise to delicate problems. Secondly, a limited number of organizations had been invited to submit observations on the draft convention, and the Conference consisted of plenipotentiary representatives of States, with observers from some of the international organizations concerned. Thirdly, the United States recognized, in its rationale for the amendment, that a number of changes throughout the articles would be required if the amendment were accepted, but did not set out any specific changes; all the organizations concerned should be consulted on a matter of such great interest to them. Fourthly, many delegations did not have the necessary instructions from their Governments to agree to such an enlargement of the scope of the draft articles. Finally, adoption of the United States amendment would entail a radical departure from the entire framework of the Commission's draft in the form in which it had been presented as a basis for the work of the Conference. He therefore appealed to the United States delegation to withdraw its amendment, on the understanding that the discussion in the Committee would be reflected in the relevant reports.

19. Mr. MERON (Israel) said that, in view of the comprehensive nature of the subject of the law of treaties, the current Conference must endeavour to be cautious and moderate in its decisions. The applicability of the articles to subjects of international law other than States had been exhaustively considered by the International Law Commission, which had referred to such subjects of international law in its 1962 draft. The reason for the Commission's decision to exclude treaties made by those subjects of international law was explained in its commentary: the Commission considered that more detailed studies should be carried out before the subject would be ready for codification. His delegation would not object to setting up a working group on the subject if the majority of the Conference was in favour of that solution; otherwise, it would support the Swedish suggestion.

20. It was doubtful whether three articles were necessary to cover the matters dealt with in them. The proposed scope of the codification should be made clearer. A possible solution might be to amalgamate article 1 and 3, in order to bring out their interrelationship more clearly. The word "relate" in the original article 1 was ambiguous. The Drafting Committee might consider rewording article 1 to read " Treaties concluded betweer States and governed by the present articles ".

21. Mr. OWUSU (Ghana) said that his delegation regretted the omission of rules governing treaty relations between States and international organizations and between international organizations *inter se*. There was an obvious need for codification and clear restatement of the law on those subjects, but it would be expedient for them to be examined by the International Law Commission as a separate topic in the near future. Ghana could not support the United States amendment if its purpose was to have that vast subject examined during the current Conference.

22. The reasons for Ghana's attitude were that the question was already under consideration by the International Law Commission; that its consideration would delay attainment of the ultimate objectives of the Conference; that no satisfactory result could be achieved without detailed examination of the implications; that in referring to " other subjects of international law ", the United States amendment was not confined to international organizations, since the " other subjects " were not so defined; that the international organizations all had their own rules and structures and that, in any case, article 3 took those rules and structures into consideration; that the draft articles had been discussed in detail for a number of years, and that it was too late to incorporate in them the far-reaching changes entailed by the United States amendment; that the observations of Governments indicated a majority in favour of retaining the original article 1; that the fact that international organizations had relations with States, *inter se*, with private and public companies and with individuals made

it necessary for those relations to be the subject of a separate study; and, finally, that when a similar problem had been raised with regard to special missions during the Conference on Consular Relations, it had been decided not to incorporate additional articles in the convention, with the result that special missions had become a separate topic for consideration by the International Law Commission. His delegation therefore supported the Swedish suggestion.

23. Mr. YASSEEN (Iraq) said that he would not comment on the Hungarian and Swedish amendments, which were of a drafting character.

24. He was unable to support the United States amendment, because the Conference was not competent to consider such a far-reaching extension of its work, when the International Law Commission had expressly excluded from the application of its draft treaties concluded between international organizations or between international organizations and States, and when operative paragraph 7 of General Assembly resolution 2166 (XXI) laid down that the Commission's draft was to be used as the basic document at the Conference. Moreover, from the practical point of view, a draft convention should first be established on treaties between States, after which it would be easier to tackle the question of treaties of between international organizations or between States and international organizations.

25. Mr. RUDA (Argentina) said that the Swedish amendment should be referred to the Drafting Committee. It was important to realize that deletion of the word " concluded " would create linguistic problems in some languages.

26. The United States proposal to substitute the word " apply " for the word " relate " was an improvement and more appropriate in a legal text, but its proposal to insert the words " two or more " was unnecessary and might lead to confusion.

27. It was useful to have discussed the problem of treaties between international organizations and international organizations and States, but he was unable to support the United States proposal in that regard, which would involve a formidable amount of work. And in any case the subject was already being dealt with by the Commission. The question of what were subjects of international law was highly controversial, as had been indicated by Sir Humphrey Waldock in the Sixth Committee. For example, would such entities as insurgent movements come within the scope of the draft convention?

28. Although in a sense the content of article 1 also appeared in article 2, it did serve a useful purpose and should be retained. Possibly the Drafting Committee might consider changing the words " the present articles " to the words " the present convention ".

29. Mr. TABIBI (Afghanistan) said that the arguments in favour of the United States amendment had not been convincing and he agreed with the representative of Iraq that the Conference was not competent to extend the scope of the draft convention in the manner suggested. The character of treaties concluded between international organizations or between international organizations and States was different, as was the process by which they were drawn up, from what it was in the case of treaties concluded between States. Any attempt to enlarge the scope of the draft would complicate the Conference's work and would have far-reaching effects on the rest of the articles. The Commission had explained in detail in the commentary its reasons for confining the application of the articles to treaties between States.

30. Mr. OSIECKI (Poland) said he agreed with the Commission's decision, which was a realistic one. It had not overlooked the importance of treaties concluded between international organizations and between international organizations and States. But the latter category possessed certain special features, because the capacity of international organizations to conclude treaties was circumscribed by the terms of their constituent instruments. He opposed the United States amendment, consideration of which would only delay the Conference's work.

31. Mr. FATTAL (Lebanon) said he supported the Swedish proposal.

32. Mr. COLE (Sierra Leone) said that the United States delegation had drawn attention to a very important matter of particular interest to developing countries and he hoped it would be discussed in the near future, but as the Conference had been convened by the General Assembly and given a very precisely defined task in resolution 2166 (XXI), it was not at liberty to extend the scope of the draft articles. Furthermore, in resolution 2167 (XXI), paragraph 4(*b*) the General Assembly had asked the Commission to continue its work on, *inter alia*, relations between States and inter-governmental organizations. The General Assembly was aware of the Commission's decision not to include provisions on treaties between international organizations or between international organizations and States, and evidently approved of it. The United States amendment would not conform to the General Assembly resolutions and was outside the competence of the Conference.

33. Mr. AMADO (Brazil) said that he had taken part in drafting the Statute of the International Law Commission in pursuance of Article 13 (1) of the Charter. The Commission's principal task was to codify rules of international law to be found in custom and practice. The task of discerning those rules was a difficult one because State practice was so diverse. Another of the Commission's tasks was to foster the progressive development of international law. Academic lawyers were prone to pursue the ideal and what the law ought to be, but States held fast to their interests which they defended militantly.

34. For the first time an international conference was engaged on drafting rules governing the conduct of States. The question of the relations between international organizations and States had been considered in the report of the Commission's first Special Rapporteur on the law of treaties, but it had immediately come up against serious difficulties because State practice was not sufficiently abundant to provide a foundation. A kindred topic was also being studied by Mr. El-Erian, who had been chosen by the Commission as Special Rapporteur on the relations between States and international organizations.

35. So far the only occasion when States had formulated rules on a subject not really ripe for codification had been that of the Convention on the Continental Shelf[2] which had been drawn up at the first Conference on the Law of the Sea at a time when the interests at stake had been so great that action had become imperative. There had been little to go on, apart from the 1945 Truman Declaration and some others by States which had followed suit.

36. Important though the treaties concluded by international organizations were, the Conference must get to grips with the vast subject before it and seek to devise rules that would unite States and would meet practical requirements. It was not the moment to undertake such an extension of the application of the draft as envisaged in the United States amendment and he therefore supported the Swedish proposal.

37. Mr CASTRÉN (Finland) said that he was in favour of retaining article 1, but agreed with the Swedish proposal to delete the word " concluded ".

38. He was not opposed to setting up a working party to examine the United States' amendment but feared that, in the time available, not much would be accomplished. There were many differences between treaties concluded between States and those to which international organizations were parties. By referring to " other subjects of international law ", the United States amendment introduced difficult and controversial issues.

39. The Swedish proposal that the Commission consider the subject deserved careful attention.

40. Mr. BINDSCHEDLER (Switzerland) said that it was not possible to delete article 1, as proposed by Hungary (A/CONF.39/C.1/L.18). The article was necessary to define the scope of the future convention; if it were deleted, it might later be argued that the convention could apply to subjects of international law other than States, with all the difficulties which such a proposition would involve. The proposal to delete article 1 raised an issue of substance, not one of mere drafting, and therefore could not be simply referred to the Drafting Committee.

41. As for the United States amendment (A/CONF.39/C.1/L.15), its sponsor himself had recognized that its adoption would necessitate a review of the whole draft, especially of the articles on the conclusion of treaties. From a procedural point of view, the Committee could therefore not take a decision on that amendment until all its implications had been examined and reported on by a working group.

42. The discussion had so far centred on the problem of treaties concluded by and with international organizations. The text of the United States amendment, however, was much wider since it referred to treaties concluded between States " or other subjects of international law ". That broad formula not only covered such entities as belligerents, insurgent movements and parties to certain armistice agreements, but might even cover commercial firms which concluded agreements with States and were held by some writers to be subjects of international law. If the intention of the United States was to cover the treaties of international organizations, the wording of the amendment should be altered so as to limit it exclusively to those organizations.

43. His delegation acknowledged the usefulness of codifying the rules governing the treaties of international organizations, but the task was a difficult one, partly because of the structural differences between the organizations themselves. Codification would also raise the problem of the corporate existence or juridical personality of those organizations, which was invariably of a limited character, where it existed at all. The competence of an organization and its treaty-making power were strictly confined to its purpose and functions; the whole standing in international law of an organization depended on its purpose and functions as set out in its constituent instrument.

44. In view of those difficulties, the International Law Commission had done well to defer the study of the issue and the Conference would be acting wisely if it endorsed that stand. The Swiss delegation would accordingly favour a resolution which would have the effect of calling upon the International Law Commission to study the topic of treaties concluded between, or by, international organizations, and to give priority to it. The topic was one of great interest to his country because Switzerland was host to a great many international organizations.

45. It was essential that the draft to be prepared on that topic by the International Law Commission should be submitted to a conference of plenipotentiaries to which all States Parties to the Statute of the International Court of Justice and all States members of the specialized agencies would be invited, in other words, to a codification conference such as the 1958 and 1960 Geneva Conferences on the Law of the Sea and the 1961, 1963 and 1968 Vienna Conferences. That procedure for codification enabled Switzerland—although not a member of the United Nations itself—to participate in the codification of international law on matters affecting it. His Government had been very disappointed at the procedure adopted to deal with the International Law Commission's draft on special missions, a procedure that had excluded Switzerland from the work of codification on that topic—one which was of vital interest to his country which daily acted as host to international meetings and thus to numerous special missions.

46. He would therefore urge that any future draft on the treaties of international organizations be referred to a conference of plenipotentiaries; only such a conference was suited to the task of preparing an instrument to codify rules that would bind all States.

47. Mr. BREWER (Liberia) said that at the twenty-first session of the General Assembly, his delegation had expressed the view in the Sixth Committee that the draft should cover the treaties of international organizations and that the present Conference should not be convened until the International Law Commission had been able to deal with that question.[3]

48. He therefore supported the United States proposal to make the future convention more comprehensive in

[2] United Nations, *Treaty Series*, vol. 499, p. 311.

[3] *Official Records of the General Assembly, Twenty-first session, Sixth Committee*, 912th meeting, para. 2.

its scope and favoured the suggestion to refer that proposal to a working group which would report to the Committee on the appropriate action to be taken.

49. The CHAIRMAN announced that the delegation of the Republic of Viet-Nam had withdrawn its amendment to article 1 (A/CONF.39/C.1/L.27).

50. Mr. KOUTIKOV (Bulgaria) said that his delegation endorsed the view of the International Law Commission that the draft should be confined to treaties between States. In a note verbale of 17 August 1967, the Bulgarian Government had stated that " at the present stage, the codification of the law of treaties should relate to treaties concluded between States, and [it] notes that the draft convention has been drawn up on those lines " (A/CONF. 39/5), and it saw no reason to modify that position.

51. On the question of drafting, he favoured the retention of the present wording of article 1, which left no room for ambiguity regarding the scope of application of the draft.

52. Mr. MIRAS (Turkey) said that the provisions of article 1, of article 2, paragraph 1 (*a*) and of article 3, sub-paragraph (*a*), unduly restricted the scope of the draft by relating it exclusively to treaties between States. The future convention should also cover treaties entered into by international organizations. Those organizations were comparatively new and were experiencing difficulties in applying the rules of customary international law in the matter of treaties. Codification of those rules was therefore even more important for them than for States.

53. In his delegation's view, the subject should be considered without delay, preferably by the Conference itself, which had all the necessary resources for the purpose. His delegation would, however, not be opposed to the subject being examined by the International Law Commission.

54. Mr. YANG SOO YU (Republic of Korea) said that the scope of the draft articles should be made more comprehensive so as to cover treaties concluded by subjects of international law other than States. He was in favour of setting up a working party to deal with the matter.

55. Mr. THIERFELDER (Federal Republic of Germany) said that since the role and importance of international organizations were bound to continue to increase, every effort should be made to cover the treaties of those organizations. For that purpose, a working group should be set up, with instructions to report at the end of the first session of the Conference or even at the second session; that solution would not unduly hamper the progress of the Conference's work.

56. Sir Francis VALLAT (United Kingdom) said he must reject the contention by the representative of Iraq that it would be *ultra vires* for the Conference to consider the United States amendment. That approach, which would put the Conference into a straitjacket, did not augur well for the future work of the Conference. The issue raised by the United States amendment was one which the International Law Commission itself had considered for many years as part of its work on the law of treaties, and had only decided to leave outside the draft in 1962, at its fourteenth session.

57. The fact that, under operative paragraph 7 of General Assembly resolution 2166 (XXI), the draft articles adopted by the Commission at its eighteenth session had been referred to the Conference as the " basic proposal " for its consideration did not in any way debar the Conference from considering any amendment to that draft. The essential provision of that resolution was its operative paragraph 2, by which the Assembly had decided " that an international conference of plenipotentiaries shall be convened to consider the law of treaties ". The Conference had therefore unquestioned authority to examine a proposal on the law of treaties dealing with a matter which was part of that law.

58. Mr. YASSEEN (Iraq) said that in accordance with the codification procedure followed by the United Nations, the present Conference, like the previous codification conference, had been convened following long and thorough preparatory work. It followed that such a Conference could not itself initiate a codification without preparatory work.

59. The International Law Commission had fully explored the issue now under discussion and had arrived at the conclusion that it should not be covered in the draft. The Commission had considered that the draft should be confined to the essential issues, leaving outside its scope not only the question of the treaties of international organizations, but also such matters as State succession in relation to treaties, State responsibility for treaty violations and international agreements not in written form.

60. That approach, which limited the scope of the draft, had been endorsed by the General Assembly year after year since 1962 and had been confirmed by resolution 2166 (XXI); operative paragraph 2 of that resolution, quoted by the United Kingdom representative, must be read together with operative paragraph 7, which laid down that the Commission's draft articles constituted the " basic proposal for consideration by the Conference ". That provision did not of course mean that the draft was sacrosanct; the articles could be supplemented and amended, but it was not possible to change the whole structure of the draft which the Assembly had referred to the Conference as the basis for its work.

61. For those reasons, he continued to believe that the United States amendment conflicted not merely with the spirit of General Assembly resolution 2166 (XXI), but also with the letter of operative paragraph 7 of that resolution.

62. Mr. TSURUOKA (Japan) said that two incontestable factors constituted a premise for the discussion of the problem before the Conference, namely, the increasing importance in international affairs of treaties concluded by international organizations, on the one hand, and the fluidity of the rules of customary law and the practice on the subject, which were still in full process of development, on the other. There were two possible courses open to the Conference in dealing with the problem. One was to refer it to a working group, which should be asked to examine, if not the whole problem in all its complexity, at least the question whether the rules governing such treaties lent themselves to codification at the present stage of their development; if the answer was in the affirmative,

the group should recommend the most suitable procedure for that purpose.

63. Another possibility was that the Conference should adopt a resolution, the effect of which would be to call upon the International Law Commission to study the issue. In the light of the discussion which had taken place, that was the course his delegation favoured.

64. Mr. KEARNEY (United States of America) said that many delegations agreed that the problem of treaties concluded between international organizations or international organizations and States was an important one and must be tackled as soon as possible. The United States amendment would not present as much difficulty as some had suggested and a working group, with the help of observers for the international organizations represented at the Conference, would have been able to devise requisite adjustments to the draft. However, because of the concern expressed about the possibility of the amendment delaying the Conference's work, his delegation would withdraw it.

65. He certainly could not agree that the amendment was outside the competence of the Conference, and if Mr. Yasseen's argument were true, then the Conference would be unable to introduce any improvements whatsoever in the Commission's draft.

66. Mr. BLIX (Sweden) after thanking the United States delegation for withdrawing its amendment, said the discussion had usefully focused attention on a category of treaties which was of growing importance. He proposed that the Drafting Committee be asked to prepare the text of a draft resolution recommending to the General Assembly that it request the International Law Commission to study the question of treaties concluded between States and international organizations or between two or more international organizations.

67. Mr. YASSEEN (Iraq) said he supported the Swedish proposal because it was essential to formulate rules on the subject in order to complete the law of treaties.

68. Mr. COLE (Sierra Leone) said he wondered whether the Swedish proposal was necessary, in view of the recommendation contained in General Assembly resolution 2167 (XXI), operative paragraph 4.

69. Mr. OWUSU (Ghana) said he too supported the Swedish proposal.

70. Mr. REGALA (Philippines) said he supported the Swedish proposal, which was much more precise than General Assembly resolution 2167 (XXI).

71. He did not agree with the argument that the United States amendment was outside the competence of the Conference; more far-reaching amendments had been considered by the Conference on the Law of the Sea and the Conference on Diplomatic Intercourse and Immunities.

72. Mr JAGOTA (India) said he thanked the United States delegation for withdrawing its amendment, which would have delayed the work of the Conference and would have meant important changes in the structure of the draft articles. The International Law Commission had for good reasons limited the scope of the draft. He supported the Swedish proposal.

73. Mr. EL-ERIAN (United Arab Republic), commenting on the point made by the representative of Sierra Leone, said that the General Assembly resolution which directed the International Law Commission to continue its work on relations between States and inter-governmental organizations must be interpreted in the light of the International Law Commission's decision in 1964 that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority.

74. He therefore thought that the Swedish proposal was useful.

75. The CHAIRMAN said that, if there were no objection, he would take it that the Committee accepted the Swedish proposal.

It was so agreed. [4]

76. The CHAIRMAN suggested that article 1 be referred to the Drafting Committee, together with the amendments submitted by the Congo (Brazzaville), Hungary and Sweden.

It was so agreed. [5]

77. Sir Humphrey WALDOCK, Expert Consultant, said that as his function was not defined anywhere he wished to say that he regarded himself as the servant of the Conference in the same way that he had served the Commission in his capacity as Special Rapporteur on the law of treaties. He was anxious to help in formulating the best possible draft convention and should not be thought of as someone who was attending the Conference simply to defend the Commission's work.

78. Replying to the point made by the Canadian representative, he said that the Commission's intention had been to confine the rules in its draft to treaties concluded between States for the reasons given in the commentary, and in rather greater length in its report on the first part of the seventeenth session. [6] The Commission had decided that the task of framing the fundamental law governing treaties was so heavy in itself that in the interests of clarity it would be preferable to restrict the articles to treaties between States, and that was made clear in the text of articles 1 and 2 and by implication in article 3. Thus the provisions did not apply to treaties between States and international organizations and it was clear from article 3(*a*) that the type of trilateral agreement mentioned by the Canadian representative was not covered.

79. Some comment had been made by speakers on the use of the word " relate " in article 1. The term had been chosen as being more neutral than the word " apply ".

The meeting rose at 7 p.m.

[4] A draft resolution was adopted at the 11th meeting of the Committee of the Whole. For text, see document A/CONF.39/C.1/2.

[5] For resumption of discussion, see 11th meeting.

[6] *Yearbook of the International Law Commission, 1965*, vol. II, p. 158, paras. 19-21.

FOURTH MEETING

Friday, 29 March 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 2 (Use of terms)

1. The CHAIRMAN invited the members of the Committee to introduce their amendments to article 2 of the draft convention.[1]

2. Mr. RODRIGUEZ (Chile), introducing his delegation's amendment (A/CONF.39/C.1/L.22), said he did not quite understand why the International Law Commission had included, at the end of sub-paragraph (*a*), the words " whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ". It might, of course, be useful to express that idea in the convention in order to dispel all possible doubts, but the idea was out of place in an article containing definitions. Furthermore, the word " international " in the first line was unnecessary, as the international nature of an agreement followed from the fact that it was concluded between States. In addition, it was not essential for agreements to be concluded in written form in order to be valid, for under article 3 agreements not in written form also had legal force. Furthermore, even if conclusion in written form were a requirement for the validity of the treaty, that would not justify its inclusion in the definition, any more than other validity requirements. It appeared, however, appropriate to incorporate it in the definition in article 2 with the sole object of making it clear that the convention dealt with treaties in written form.

3. Lastly, the Chilean delegation thought it would be well to mention in sub-paragraph (*a*) that an agreement between States must produce legal effects. That idea had been included in the 1953 and 1956 drafts, but had been dropped from the latest draft. It was, however, a very important element in view of the object of the convention and experience of international relations. In the first place, the purpose of the convention was to regulate legal relationships created between States by treaties; it would therefore seem justified to define a treaty as producing legal effects. In the second place, it appeared essential to include that idea in the definition, so as to distinguish between agreements between States which produced legal effects and those which did not and reserve the term " treaty " solely for the former. It often happened that declarations made on the international plane represented, like treaties, a concurrence of wills, but did not produce legal effects. Such declarations were often the preliminaries to a real agreement, which was concluded later when circumstances permitted. It would be dangerous to confuse them with treaties and to make both of them subject to the rules of the convention, thereby gravely restricting freedom of expression in international affairs. For those reasons, the Chilean delegation had submitted an amendment replacing sub-paragraph (*a*) by the following text: " ' Treaty ' means a written agreement between States, governed by international law, which produces legal effects ". That wording also had the advantage of being very brief.

4. The purpose of his amendment to sub-paragraph (*d*) was to show that reservations were possible only to multilateral treaties and to preclude the possibility of making reservations to bilateral treaties. That might seem unnecessary at first sight, but it would be useful to make the position clear.

5. The Chilean delegation understood that the words " to vary the legal effect of certain provisions of the treaty " (sub-paragraph (*d*)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided. In view of that interpretation, the Chilean delegation had not submitted any amendment to the last part of sub-paragraph (*d*).

6. Mr. BENITES-VINUEZA (Ecuador) said that his amendment (A/CONF.39/C.1/L.25) was not designed to change the text of article 2 to any great extent, but to add to it some elements which had not been included. An international treaty was an agreement concluded voluntarily, with a view to creating rights and obligations, varying them or extinguishing them. Four elements had to be taken into consideration, namely, that a treaty must be concluded freely, that it must be concluded in good faith, that its object must be licit and that the legal nexus must be based on justice and equity. Good faith must be regarded as fundamental, as was shown by Article 2 of the United Nations Charter which provided that States must fulfil in good faith the obligations assumed by them. Clearly, if good faith was an essential element in fulfilling international obligations, as provided in the Charter, it must be an express, not an implied, condition of the contractual act which constituted the obligation.

7. It was equally clear that it should also be stipulated that the treaty must have a licit object and be freely consented to. In that connexion, the Government of Luxembourg had stated in its comments in 1964 that the object of a treaty was always to establish a legal relationship between the parties. Ecuador considered that the legal relationship created by the contractual act should be based on justice and equity.

8. Mr. KORCHAK (Ukrainian Soviet Socialist Republic), introducing the amendment in document A/CONF.39/C.1/L.19/Rev.1, said that general multilateral treaties were playing an increasingly important part in contemporary international relations; they were an element in the development of international law and international co-operation. Such agreements had characteristics of their own; they should therefore be mentioned

[1] The following amendments had been submitted to article 2: Austria and Spain, A/CONF.39/C.1/L.1. and Add.1; Sweden, A/CONF.39/C.1/L.11; China, A/CONF.39/C.1./L.13; United States of America, A/CONF.39/C.1/L.16; Ceylon, A/CONF.39/C.1/L.17; Congo (Democratic Republic of), Czechoslovakia, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, United Arab Republic, United Republic of Tanzania, A/CONF.39/C.1/L.19/Rev.1; Chile, A/CONF.39/C.1/L.22; Hungary, A/CONF.39/C.1/L.23; France, A/CONF.39/C.1/L.24; Ecuador, A/CONF.39/C.1/L.25; Spain, A/CONF.39/C.1/L.28; Republic of Viet-Nam, A/CONF.39/C.1/L.29; Mexico and Malaysia, A/CONF.39/C.1/L.33 and Add.1; India, A/CONF.39/C.1/L.40.

and defined in article 2. Moreover, several States had already asked that such a definition be included in the convention and had advanced convincing arguments for it.

9. Mr. JAGOTA (India) explained the reasons why his delegation had submitted an amendment to article 2, paragraph 1 (A/CONF.39/C.1/L.40). Sub-paragraphs (*e*), (*f*) and (*g*) had been introduced at a fairly late stage in order to give definitions of the status of States at the various stages in the conclusion of a treaty. The International Law Commission's intention in inserting those definitions had been to show that at each of the three stages in question, States assumed certain obligations, as was clear from articles 15 and 23. As the terms " negotiating State ", " contracting State " and " party " were used in the draft convention it had been considered appropriate to define them. Unfortunately, those terms were to be found in many treaties concluded between States in which they were used interchangeably and without any precise interpretation. Furthermore, a definition would only be justified if the term was used in a special sense throughout the convention. But those terms were not used in article 15. Lastly, the definitions were incomplete. They were intended to show the precise point at which the obligations arose. But between the time when a State was regarded as a " negotiating State " and the time when it became a " contracting State " there was an interval which had not been allowed for, either in the definitions or in the body of the draft convention; in article 22, for example, the meaning given to the words " contracting States " did not fit the definition; at that stage, the State in question was neither a "negotiating State" nor a "contracting State". Moreover, sub-paragraphs (*f*) and (*g*) appeared to overlap to some extent; with the wording of those sub-paragraphs, which used the phrases " whether or not the treaty has entered into force " and " for which the treaty is in force " there were in fact two expressions to denote the same status.

10. The deficiencies could be remedied in various ways. Either definitions might be given which corresponded precisely to the various stages; or only the terms " negotiating State " and " party " might be defined; or else the definitions in sub-paragraphs (*e*) and (*f*) might be deleted and the various stages described in the main body of the convention. It was the third solution which the Indian delegation was advocating in its amendment.

11. Mr. HU (China) said that the first part of his amendment (A/CONF.39/C.1/L.13) was intended to bring out that only sovereign States had the legal capacity to make treaties. In sub-paragraph (*d*), the word " multilateral " should be added before the word " treaty ", because a reservation could be made only in respect of a multilateral treaty. Lastly, the commentary to article 2 made it cleac that the definition of international organizations was intended to exclude non-governmental organizations, but it would be better to say so explicitly in article 2, sub-paragraph (*i*).

12. Mr. BEVANS (United States of America) said that the amendments to article 2 submitted in document A/CONF.39/C.1/L.16 now applied only to sub-paragraphs (*b*) and (*d*); the United States delegation had decided to withdraw the amendment to sub-paragraph (*a*) because its amendment to article 1 had not been accepted.[2]

13. Mr. VEROSTA (Austria) said that the amendment by Austria and Spain (A/CONF.39/C.1/L.1) would replace the word " document ", in sub-paragraph (*c*), by the word " instrument ". The term " document " was used only in article 2, whereas " instrument " was the term employed throughout the remainder of the draft. The latter term should be retained, in principle, if the opinion of Oppenheim and the definitions in *The Shorter Oxford English Dictionary*, for example, were to be followed.

14. Mr. VIRALLY (France) said that the French amendment to article 2 (A/CONF.39/C.1/L.24) embodied two quite separate proposals. The first was to add a new sub-paragraph (*c*) to paragraph 1 giving a definition of the expression " adoption of the text of a treaty ". That expression appeared in various articles of the draft, but seemed not always to be used with the same meaning. In some cases it was apparently a synonym for " drafting the text of a treaty ", as in article 4; elsewhere it had a different meaning, as, for instance, in article 2, paragraph 1 (*c*). The purpose of the amendment submitted by France was to remove that ambiguity. The brackets in the first paragraph of document (A/CONF.39/C.1/L.24 had been inserted in error.

15. The second proposal was broader in scope. It was to add to article 2 a definition of the " restricted multilateral treaty " referred to in article 17, paragraph 2.

16. Article 17 made provision for the application of a special system for the acceptance of reservations to certain multilateral treaties. Paragraph 2 of that article was wholly justified, since it related to a very important class of treaties—those establishing very close co-operation between several States, such as treaties of economic integration, treaties between riparian States relating to the development of a river basin or treaties relating to the building of a hydroelectric dam, scientific installations, or the like. All those treaties had special characteristics. The very close co-operation they established required, first of all, that all the States expected to participate should in fact become parties to the treaty. If only a single one of those States fell out, the enterprise would have to be abandoned or put on a different basis, which would make it necessary to amend the treaty. The same applied if a further State associated itself with the original group. Moreover, the treaty had to be applied in its entirety.

17. The International Law Commission had been wise to propose that the rules on the acceptance of reservations to multilateral treaties should not apply to restricted multilateral treaties, but it had not carried the idea to its conclusion. For there were other rules applicable to ordinary multilateral treaties which conflicted with the special character of restricted multilateral treaties. That applied, in particular, to the adoption of the text of such treaties, which could only take place by unanimous consent (article 8), to the amendment of such treaties, which required the application of the same rule (article 36), and to agreements to modify such treaties between

[2] See 3rd meeting, para. 64.

certain of the parties only (article 37)—rules which were incompatible with that special class of treaty.

18. The definition submitted by France would make it possible to overcome that difficulty by means of purely drafting changes to eight articles embodying provisions applying specifically to multilateral treaties, which would not be appropriate for restricted multilateral treaties. The eight articles were articles 8, 17, 26, 36, 37, 55, 65 and 66.

19. In view of the nature of the proposed amendments to article 2, which he had just explained, he believed that, after discussion, they should be referred to the Drafting Committee for incorporation in article 2 when it was put into final form.

20. Mr. de CASTRO (Spain) explained that the purpose of his amendment (A/CONF.39/C.1/L.28) was to delete the word " international ", which he found unnecessary and liable to cause confusion. In the Spanish text the words " *por escrito* " should be placed between the words " *celebrado* " and " *entre Estados* ".

21. Mr. BLIX (Sweden) said that his amendment to article 2 (A/CONF.39/C.1/L.11) would insert the word " limit " after the word " exclude " in sub-paragraph (*d*). No doubt the phrase " to exclude or to vary " could also cover the ability to " limit " the legal effect of certain provisions, but it would be better to say so explicitly. That also seemed to be the opinion of the Bulgarian Government, as expressed in its comments on the draft.

22. He drew the Committee's attention to the fact that in sub-paragraph (*h*) it was stated that the term " third State " meant a State not a party to the treaty, so that the " negotiating State " and the " contracting State " referred to in sub-paragraphs (*e*) and (*f*) might both be regarded as " third States ". Under the terms of article 30, neither rights nor obligations could be created for them without their consent. Under article 15, however, they were obliged to refrain from acts tending to frustrate the object of a proposed treaty.

23. The Swedish delegation would not submit any amendment on that point, but it hoped that the Drafting Committee would look into the matter.

24. Mr. HARASZTI (Hungary) said that the purpose of his amendment (A/CONF.39/C.1/L.23) was to extend the scope of the term " reservation " to include declarations made by a State as to interpretation when it signed, ratified, acceded to, accepted or approved a treaty. The reason for the amendment was that, as the title of Part II, Section 2 showed, the draft articles only covered reservations formulated with respect to multilateral treaties.

25. When signing or ratifying a treaty, States sometimes made declarations as to interpretation, in which they attributed a specific meaning to certain of its provisions. The present wording of sub-paragraph (*d*) would not always make it clear whether the definition covered such declarations or not, and whether articles 16 to 20 applied to them. That situation could give rise to serious difficulties. It was therefore preferable to provide expressly that declarations as to interpretation were to be treated as reservations. The form of the amendment could be decided on by the Drafting Committee.

26. Mr. SEPULVEDA AMOR (Mexico), introducing the amendment in document A/CONF.39/C.1/L.33, pointed out that the International Law Commission's draft omitted an important element, namely, the intention to create rights and obligations. That element had been present in the earlier drafts, but in 1959 the Commission had decided against including it in the definition of a treaty, on the ground that it would be preferable to omit any reference to the object of a treaty, since it was impossible to cover all cases.[3] The Mexican delegation wished to point out, however, that the purpose of a treaty was to establish legal relations between the parties, which was not true of declarations of principle or political instruments such as the Atlantic Charter, which also constituted international agreements. The Mexican delegation therefore considered that the existence of a legal relationship between States which concluded a treaty should be regarded as an essential element of that legal act.

27. Sir Lalita RAJAPAKSE (Ceylon), introducing his delegation's amendment (A/CONF.39/C.1/L.17) to article 2, paragraph 2, said that the International Law Commission had found it necessary to state that the use of terms in the draft articles was without prejudice to the use of those terms or to the meaning which might be given to them in the internal law of any State. In order to avoid a possible conflict with the use of such terms in internal law, however, it seemed desirable to extend the proviso to areas in which the terms in question were used more frequently than in internal law.

28. Mr. WERSHOF (Canada), speaking on a point of order, moved " that article 2 and the amendments thereto be referred to the Drafting Committee, without any decision being taken on them by the Committee of the Whole, for consideration and subsequent report by the Drafting Committee to the Committee of the Whole as to the amendments to article 2 which may become necessary in the light of the action taken by the Committee of the Whole on the other articles of the draft convention ". He pointed out that of the many amendments submitted to article 2, some raised purely drafting points, some proposed terms which were not yet included in the other articles but might be added later, and others dealt with highly controversial questions which would be discussed when the articles concerned were taken up. He therefore considered that the Committee of the Whole would be in a better position to reach a decision on those amendments after the substance of the articles had been debated and the Drafting Committee's report on the amendments to article 2 had been discussed.

29. Mr. KHLESTOV (Union of Soviet Socialist Republics) observed that there was some duplication and overlapping among the numerous amendments proposed. He suggested that in order to speed up the Committee's work, a working group consisting of all the sponsors of amendments be set up under rule 47 of the rules of procedure, to reduce the various proposals to three or four amendments embodying the points discussed. The Drafting Committee already had a heavy task, and only texts already adopted by the Committee of the Whole should be referred to it, so that it could confine itself to

[3] *Yearbook of the International Law Commission, 1959*, vol. II, p. 96, paragraph (8) (*b*) of commentary to article 2.

points of drafting. The proposed working group, on the other hand, could do some useful consolidation work.

30. Mr. TABIBI (Afghanistan) agreed with the representative of the USSR that the Drafting Committee should confine itself to points of drafting. It was for the Committee of the Whole to settle questions of substance. If the amendments were referred to the Drafting Committee, the Committee of the Whole would be obliged to discuss them again after the Drafting Committee had revised them, which would delay progress. He therefore supported the Soviet representative's proposal.

31. Mr. FATTAL (Lebanon) said that in view of the interdependence of the articles, the Committee of the Whole might have to refer all seventy-five of them to the Drafting Committee. The proposal of the USSR representative therefore seemed the more practical.

32. Mr. JIMÉNEZ de ARÉCHAGA (Uruguay), Rapporteur, said that the amendments which added a new definition to the text, such as the definition of a general multilateral treaty or of adoption, should be discussed together with the substantive questions to which they related. The amendments which concerned different aspects of the same question could be dealt with by the method proposed by the USSR representative, the sponsors of related amendments endeavouring to replace them by a single text. The other amendments, which were the only ones of their kind, should either be the subject of an immediate decision by the Committee of the Whole or be referred to the Drafting Committee.

33. Sir Lalita RAJAPAKSE (Ceylon) pointed out that his country's amendment was the only one relating to article 2, paragraph 2, and asked whether the Committee's views on it could not be heard at once.

34. Mr. EUSTATHIADES (Greece) observed that the Canadian representative's motion only covered article 2, which contained the definitions and was suitable for the proposed procedure; it could not set a precedent for other articles of a different kind. The Soviet representative's proposal was useful in the case of related amendments. It was for the Committee of the Whole to reach a decision on the remainder, though the desire expressed by some sponsors to have their amendments referred to the Drafting Committee must be taken into account.

35. Mr. JAGOTA (India) said he feared that, by accepting the procedural motion as it stood, the Committee might set a precedent for any similar controversies which arose in the future. There would also be a risk, not only of overburdening the Drafting Committee, but of encountering problems relating to its competence, which was defined in rule 48 of the rules of procedure. Furthermore, from the point of view of speed, it would be better for the Committee of the Whole to take the necessary decisions itself. He therefore suggested that the Committee should adopt a practical approach and consider whether certain problems should be referred to the Drafting Committee. The Committee of the Whole could first examine article 2, paragraph 1, sub-paragraph by sub-paragraph and then discuss those amendments which proposed additions. After discussing each sub-paragraph and amendment, the Committee could decide whether to refer it to the Drafting Committee or to adopt the procedure proposed by the Soviet representative, depending on the circumstances. It could defer discussion of controversial issues connected with questions of substance arising out of other parts of the draft.

36. Mr. BEVANS (United States of America) supported the Canadian representative's motion, which he regarded as the more satisfactory proposal in practice. All the amendments raised points of drafting which it would be preferable to submit to the Drafting Committee.

37. Mr. STAVROPOULOS (Representative of the Secretary-General) observed that since 1961 there had been a remarkable development; the Drafting Committee was tending to become a conciliating body, through which decisions could be quickly reached. First of all, however, it must know the opinion of the Committee of the Whole, as otherwise it would itself become a seat of controversy.

38. The best method would be to take article 2 paragraph by paragraph and ask the sponsors of related amendments to agree on a single text.

39. The Canadian representative's motion seemed premature, in so far as the Committee's views were not yet known.

40. The CHAIRMAN suggested that the Committee should first hear those representatives who had asked to speak. He thought it preferable to hear what they had to say before referring the matter to the Drafting Committee. The amendment submitted by Ceylon, for example, was the only one of its kind, but the speakers on the list might have interesting points to raise concerning it. The discussion in the Committee of the Whole might make it possible to reduce the area of disagreement. He thought a distinction could usefully be made between amendments concerning matters of substance, related texts — whose authors should agree informally on only two or three amendments for submission to the Committee, and proposals which speakers themselves had asked to have referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

FIFTH MEETING

Friday, 29 March 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 2 (Use of terms) *(continued)* [1]

1. The CHAIRMAN invited the Committee to continue its consideration of article 2.

2. Mr. NACHABE (Syria) said that he would speak only on the amendments to paragraph 1 of article 2.

3. He supported the Austrian and Spanish proposal (A/CONF.39/C.1/L.1 and Add.1) to replace in para-

[1] For a list of the amendments submitted, see 4th meeting, footnote 1.

graph 1(*c*) the term " document " by the more appropriate term " instrument ", to describe the full powers. He also supported the Swedish amendment (A/CONF.39/C.1/L.11) to paragraph 1(*d*), because in many cases a reservation was made for the purpose of limiting the legal effect of a treaty.

4. He was prepared to accept the proposal for a new sub-paragraph dealing with general multilateral treaties and found the new text proposed in document A/CONF. 39/C.1/L.19/Rev.1 preferable to the earlier version (A/CONF.39/C.1/L.19 and Add.1 and 2). He would prefer, however, a formulation to the effect that the expression " general multilateral treaty " meant a treaty concluded in the general interest of the international community.

5. He would accept the Hungarian amendment to paragraph 1(*d*) (A/CONF.39/C.1/L.23), which could be combined with the Swedish amendment (A/CONF. 39/C.1/L.11), so that the concluding part of the paragraph would read: " ... to exclude, to limit the interpretation or to vary the legal effect of certain provisions of the treaty in their application to that State ".

6. He would also accept the French amendment (A/CONF.39/C.1/L.24) to introduce definitions of the expressions " adoption of the text of a treaty " and " restricted multilateral treaty ".

7. He supported the Spanish proposal to delete the word " international " before the word " agreement " in paragraph 1(*a*) (A/CONF.39/C.1/L.28, para. 1); since the passage referred to an international agreement " between States ", the word " international " was unnecessary. The second amendment (A/CONF.39/C.1/L.28, para. 2) was also acceptable in so far as it shortened the French text.

8. He could not, however, accept the United States proposal (A/CONF.39/C.1/L.16) to eliminate from paragraph 1(*b*) the definitions of the terms " acceptance " and " approval ". Those terms were used in a large number of multilateral treaties and were sanctioned by usage, contrary to what was stated by way of explanation in the United States amendment.

9. Lastly, he was prepared to accept the amendment by Ecuador to paragraph 1(*a*) (A/CONF.39/C.1/L.25); the detailed formulation of that proposal was preferable to the language used in the somewhat similar proposals by Chile (A/CONF.39/C.1/L.22) and by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1).

10. Mr. EUSTATHIADES (Greece) said that the proposal made both by Chile (A/CONF.39/C.1/L.22) and by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) to mention the fact that a treaty produced legal effects was not objectionable in itself but was somewhat doctrinal in character.

11. The proposal by Ecuador (A/CONF.39/C.1/L.25) to introduce the concepts of good faith, licit object and free consent should be examined by the Drafting Committee, bearing in mind that good faith was dealt with in article 23 of the draft, that the question of the licit object was one of *jus cogens* dealt with in article 50, and that free consent related to the subject-matter of articles 48 and 49.

12. With regard to the joint proposal to include a definition of " general multilateral treaty " (A/CONF. 39/C.1/L.19/Rev.1), it must be noted that that was not to be found anywhere in the draft. All the references to multilateral treaties were unqualified. That remark applied also to the French proposal (A/CONF.39/C.1/L.24, para. 3) to introduce a definition of " restricted multilateral treaty ".

13. The proposal by India (A/CONF.39/C.1/L.40) to delete sub-paragraphs (*e*) and (*f*) of paragraph 1 deserved consideration, but should be left aside until the Committee had agreed the final text of the articles to which the sub-paragraphs related.

14. He was not in favour of the Chinese proposal (A/CONF.39/C.1/L.13) to introduce a new sub-paragraph specifying that the term " State " meant a sovereign State, and in that connexion would draw attention to paragraphs (3) and (4) of the International Law Commission's commentary to article 5.

15. The proposal to replace in paragraph 1 (*c*) the term "document" by the term "an instrument" (A/CONF.39/C.1/L.1 and Add.1) should be examined by the Drafting Committee.

16. With regard to paragraph 1(*d*), he preferred the Hungarian proposal (A/CONF.39/C.1/L.23) to the Swedish proposal (A/CONF.39/C.1/L.11).

17. Finally, he supported the amendment by Ceylon (A/CONF.39/C.1/L.17) to add a passage at the end of paragraph 2, although admittedly the whole paragraph did not contain much substance.

18. Mr. OGUNDERE (Nigeria), referring to the proposal to include a definition of " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1), said that Nigeria had consistently maintained that all States had a right to participate in general multilateral treaties. He noted, however, that the International Law Commission had discussed the question at length and had decided not to include any provision on the subject in its draft for the reasons given in paragraph (8) of the commentary to article 2 and in paragraph (4) of the section on " Question of participation in a treaty " which followed the commentary to article 12. For those reasons, his delegation would be unable to support either the proposal in question or the French proposal to introduce a definition of " restricted multilateral treaty " (A/CONF.39/C.1/L.24, para. 3).

19. Mr. MARESCA (Italy) said that definitions were always dangerous, but in the present instance there was the additional danger that the definitions might be used for purposes other than the very limited one of article 2. As was indicated by the title of the article, " Use of terms ", the only purpose of those particular provisions was to avoid unnecessary repetition.

20. Some of the amendments proposed were of a purely drafting character. Of those, he opposed the proposal by Spain (A/CONF.39/C.1/L.28) to delete the word " international " before the word " agreement " in paragraph 1 (*a*), because there were agreements between States which did not constitute international agreements.

21. A second category of amendments attempted to introduce new concepts into some of the sub-paragraphs. They included a proposal by Ecuador (A/CONF.39/

C.1/L.25) which was commendable in its inspiration; but the references to such matters as good faith, licit object and free consent would be better placed in other articles of the draft than in article 2; the point was one which should be decided by the Drafting Committee. Of the others in the same category, he opposed the Chilean proposal (A/CONF.39/C.1/L.22) to mention the legal effects and the Chinese proposal (A/CONF.39/C.1/L.13) to specify that " State " meant a sovereign State; both those proposals amounted only to a statement of the obvious.

22. He would place in a third category the amendments by Hungary (A/CONF.39/C.1/L.23) and Sweden (A/CONF.39/C.1/L.11) to paragraph 1 (*d*) on the subject of reservations. He supported those proposals, but thought that they should be combined.

23. He also supported the proposal by France to introduce definitions of the expressions " adoption of the text of a treaty " and " restricted multilateral treaty " (A/CONF.39/C.1/L.24).

24. With regard to the proposal to introduce a definition of " general multilateral treaty ", the revised version (A/CONF.39/C.1/L.19/Rev.1) was an improvement on the earlier one (A/CONF.39/C.1/L.19 Add.1 and 2). However, the proposal focused attention on the content of the treaty, whereas the whole concept of a multilateral treaty was based on the number of parties. He suggested that the Drafting Committee should be invited to examine the point.

25. Mr. SMEJKAL (Czechoslovakia), speaking as one of the sponsors of the joint amendment (A/CONF.39/C.1/L.19/Rev.1) said that its purpose was to fill a gap in the draft. Until 1962, the International Law Commission's drafts had included references to general multilateral treaties, but since then all such references had unfortunately been dropped. Amendments would, however, now be proposed to a number of subsequent articles which would have the effect of introducing references to general multilateral treaties, so that it would become necessary to define that expression in article 2.

26. The sponsors of the proposal would welcome any suggestions for improvements in the wording of the proposed additional paragraph, and he thanked the representative of Syria for his valuable suggestion in that respect.

27. Speaking as the representative of Czechoslovakia, he said that, of the other amendments proposed, he supported the amendment by Sweden to paragraph 1 (*d*) (A/CONF.39/C.1/L.11) which made that paragraph more precise.

28. He did not support the United States proposal to drop the definitions of " acceptance " and " approval ". That proposal was based on the limited practice of a few States; the expressions in question were in general use elsewhere.

29. The proposal of Ceylon (A/CONF.39/C.1/L.17) involved a question of substance rather than of drafting, and his delegation doubted the advisability of adopting it.

30. He supported the amendment by Hungary (A/CONF.39/C.1/L.23) to clarify paragraph 1 (*d*) by introducing the adjective " multilateral " before the word " treaty ". In the case of a bilateral treaty, a so-called reservation merely constituted an offer to conclude a new treaty.

31. As the representative of a small country, he warmly supported the Chilean proposal (A/CONF.39/C.1/L.22) to introduce a reference to the fact that a treaty should produce legal effects.

32. The Indian amendment (A/CONF.39/C.1/L.40) deserved careful consideration.

33. Finally, the amendments contained in documents A/CONF.39/C.1/L.1 and Add.1, A/CONF.39/C.1/L.28 and A/CONF.39/C.1/L.33 and Add.1 should be referred to the Drafting Committee.

34. Mr. EL-ERIAN (United Arab Republic) said that he would not discuss in detail the various amendments which had been put forward but would offer some general remarks on the nature of article 2 and the character of the decision which the Committee was called upon to take on it.

35. Article 2 merely served to indicate the use made in the draft of a number of terms; it was not intended to provide comprehensive definitions. The International Law Commission had advisedly entitled the article " Use of terms " and not " Definitions ", which was the title of the corresponding article in others of the Commission's drafts, such as those on diplomatic and consular relations. Moreover, the article did not, and indeed could not, indicate the use of all terms, but only of those which appeared most frequently in the draft. Consequently, whatever decision the Committee took on article 2 could only be provisional. The article was not an independent provision; it could be read only in conjunction with the various other articles to which each of the sub-paragraphs of its paragraph 1 related.

36. He would accept the proposal to set up a working group to examine the various proposals and determine which were of a drafting character and which involved points of substance, but would also agree to that task being entrusted to the Drafting Committee, if the majority so desired. He shared the Legal Counsel's views regarding the interpretation of the role of the Drafting Committee, provided of course that all controversial issues were decided by the Committee of the Whole.

37. His delegation had joined the sponsors of the proposal to include a new paragraph indicating the use of the expression " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1); the introduction of that new element in article 2 was necessary in order to take into account the increasingly important role being played by international organizations in the making of international law. The future convention on the law of treaties should take note of the fact that international law was no longer a set of fragmentary rules largely embodied in bilateral treaties or treaties with a limited number of parties. General multilateral treaties, which were constantly increasing in number and in importance, were often virtually acts of international legislation; they related to matters of concern to the whole community of States and that fact should be emphasized in article 2.

38. Mr OSIECKI (Poland) said that the second French amendment (A/CONF.39/C.1/L.24) and the joint amendment (A/CONF.39/C.1/L.19/Rev.1) deserved especially careful attention, since they both sprang from a desire to fill gaps in article 2, the former with regard to restricted

multilateral treaties, and the latter in respect of general multilateral treaties.

39. His delegation could not support the United States proposal (A/CONF.39/C.1/L.16) to delete the words " acceptance " and " approval " in paragraph 1 (*b*). In many countries, the term " ratification " was used in a narrow sense to mean the solemn procedure of consent to a treaty expressed by the Head of State, whereas many treaties were not subject to that procedure, but were merely approved by the Council of Ministers or by the Chairman of that Council. Acceptance, too, was a widely used practice, as the International Law Commission had explained in its commentary to article 11. Deletion of those words might therefore place a number of States in an embarrassing position.

40. Mr. FATTAL (Lebanon), referring to the United States amendment (A/CONF.39/C.1/L.16), said he agreed that the terms " acceptance " and " approval " were disputable. In paragraph (10) of its commentary to article 11, the International Law Commission pointed out that, on the international plane, " acceptance " was an innovation which was more one of terminology than of method, while in paragraph (12) it merely stated that the introduction of the term " approval " into the terminology of treaty-making was even more recent than that of " acceptance ".

41. In his opinion, the Commission had been unwise to cite the practice of the League of Nations, instead of entering into more detailed explanations. In his dictionary of the terminology of international law, Basdevant [2] deplored the use of the term " acceptance ", and ascribed to it four different meanings: first, a term used in certain international agreements to denote ratification; secondly, a term used exceptionally in a treaty to describe simultaneously two different acts, one a statement that signature did not require ratification and the other ratification of a previous signature; thirdly, a term used in some international instruments to describe accession; and fourthly, a term sometimes used to describe both ratification and accession in respect either of an international agreement negotiated and signed, or of provisions laid down by an international organ, which provisions the act thus described had the effect of rendering binding for the State from which the act emanated. Basdevant was even more severe in his castigation of the use of the term " approval ". He stated that, since the use of that term in the sense of ratification by a State of a treaty signed on its behalf resulted from confusion between the internal measure authorizing the organ representing the State abroad to ratify, and the external act which was the ratification given by the organ, the term should be avoided and the term " ratification " only should be used instead, since its meaning had long been established by custom.

42. Consequently, he suggested that sub-paragraph 1 (*b*) be amended to read " 'Acceptance' means the international act whereby a State establishes on the international plane its consent to be bound by a treaty. It may consist, as the case may be, of signature, ratification, accession or approval ". In that context " approval " would mean all procedures *sui generis* expressing consent to be bound by a treaty which differed from the first three. That solution, moreover, might help to simplify the texts of articles 10, 11 and 12.

43. The Lebanese delegation could support the amendment by Austria and Spain to sub-paragraph 1 (*c*) (A/CONF.39/C.1/L.1 and Add.1) and the Hungarian amendment (A/CONF.39/C.1/L.23) to sub-paragraph 1 (*d*).

44. On the other hand, it considered that the Chinese amendments (A/CONF.39/C.1/L.13) were not justified. With regard to the first, it was not correct to say that a State meant a sovereign State for the purposes of the draft articles, since non-sovereign States had been known to conclude treaties. The Chinese representative's arguments in favour of his last amendment were also unconvincing, for the United Nations was as yet far from being a supra-State organization and, indeed it was undesirable that it should become one; the ideal international community was one governed by the rule of law.

45. The Chilean amendment (A/CONF.39/C.1/L.22) seemed unnecessary since the phrase " which produces legal effects " was amply covered by the phrase " governed by international law ".

46. Similarly, the reference to " justice and equity " in the Ecuadorian amendment (A/CONF.39/C.1/L.25) was inaccurate, for although justice and equity might be among the factors which determined rules of law, that was by no means always the case.

47. The Ceylonese amendment (A/CONF.39/C.1/L.17) might be made clearer by adding the words " previously concluded " after the word " treaty ".

48. Finally, he could not support the joint amendment (A/CONF.39/C.1/L.19/Rev.1) since the effect of the definition would be to suggest that for a treaty between three States to be on a subject of general interest would be enough to make it a general multilateral treaty; he was sure that the sponsors had not wished to go as far as that in their definition.

49. Mr. BINDSCHEDLER (Switzerland) said he wished to begin by raising a procedural point. The list of terms in article 2 clearly could not be exhaustive and must contain only the absolutely necessary definitions; it was impossible to decide which those were until the entire draft convention had been studied. The Committee should therefore follow the procedure of the Conference on Consular Relations, and take no decision on article 2 until it had examined all the draft articles.

50. The Swiss delegation would not support the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) because it was not sure that the definition proposed was correct; in its opinion, it was the number of parties to a treaty, rather than the subject, that determined whether a multilateral treaty was general or restricted.

51. Nor could it support the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1), because it added nothing new to the text: all treaties naturally established a legal relationship between the parties.

52. The Ecuadorian amendment (A/CONF.39/C.1/L.25) seemed to run counter to the purpose of article 2, since its content was substantive rather than descriptive; moreover, references to justice and equity, which were

[2] *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), pp. 5, 6 and 49.

vague terms, opened the door to differences of interpretation liable to jeopardize the entire structure of treaty law.

53. He agreed with the Lebanese representative that the new sub-paragraph proposed by the Chinese delegation (A/CONF.39/C.1/L.13) was unacceptable, since treaties had been entered into by non-sovereign States. The Chinese representative had foreseen that difficulty, and had suggested that it would be met by the provision of article 5, paragraph 2; but in that event there would be a contradiction between the two articles, and it seemed wiser not to introduce the somewhat loose subject of sovereignty into the definitions. Furthermore, the Chinese amendment to sub-paragraph 1 (*i*) seemed unnecessary.

54. He could support the Hungarian and Swedish amendments (A/CONF.39/C.1/L.23 and L.11) and also welcomed the French proposals (A/CONF.39/C.1/L.24): it was most important to define the adoption of the text of a treaty, in order to avoid misinterpretation in such contexts as that of article 6, paragraph 2 (*b*), and also to include a definition of a restricted multilateral treaty. He also fully endorsed the amendment by Austria and Spain (A/CONF.39/C.1/L.1 and Add.1).

55. On the other hand, his delegation could not agree to the United States proposal (A/CONF.39/C.1/L.16) to delete the references to acceptance and approval from sub-paragraph 1 (*b*). Those procedures had been introduced into the formalities of treaty-making by the League of Nations, and their history was set out in the commentary to article 11, paragraph 2, of the draft. The United States proposal to deal with the question in a new article 9 *bis* would make the text less clear, and the original wording should be retained.

56. The Swiss delegation also could not support the Chilean amendment (A/CONF.39/C.1/L.22), for all treaties by their very nature produced legal effects.

57. Finally, his delegation had not had time to examine the Indian amendment (A/CONF.39/C.1/L.40) with due care, but on preliminary consideration it was inclined to think that sub-paragraph 1 (*e*) and 1 (*f*) should be maintained.

58. Mr. KOUTIKOV (Bulgaria) said that his delegation whole-heartedly supported the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1), in the belief that a definition of a general multilateral treaty was indispensable to the convention.

59. Bulgaria had already drawn attention to the limiting legal effects of certain provisions of treaties in their application to States making reservations, and fully supported the Hungarian and Swedish amendments (A/CONF.39/C.1/L.23 and L.11) to sub-paragraph 1 (*d*), but agreed with other delegations that the Drafting Committee should be asked to consider the possibility of amalgamating those two amendments.

60. Mr MWENDWA (Kenya) said his delegation felt strongly that the draft articles, which were the result of lengthy deliberations in the International Law Commission, should not be the subject of hasty amendment. With regard to article 2, the Commission had wisely decided to use the word " treaty " as a generic term, covering all agreements between States in written form and governed by international law, and to abandon the distinction made in its 1962 draft between treaties in simplified form and general multilateral treaties. Moreover, the term " governed by international law " brought out clearly the difference between agreements governed by international law and those subject to the national law of one of the parties.

61. He could not agree with the United States delegation that the words " acceptance " and " approval " should be omitted from paragraph 1 (*b*), since those terms had acquired an importance of their own. Perhaps mention should also be made of " adhesion ", a term widely used in treaties and juridical works, especially those of French-speaking countries. Finally, the text of sub-paragraph 1 (*h*) seemed to be somewhat ambiguous: the Drafting Committee might be asked to find clearer wording.

62. With regard to the amendments before the Committee, he observed that some of the proposals represented attempts to force the issue and to anticipate decisions which should properly be taken in connexion with substantive articles. In his delegation's opinion, only amendments designed to clarify the definitions should be referred to the Drafting Committee at that stage; indeed, it would go so far as to suggest that the original article should be taken as a basis for the consideration of the draft as a whole, and that the Committee should take no decisions on article 2 until all the articles had been examined.

63. Mr. SMALL (New Zealand), referring to the amendments by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) and Chile (A/CONF.39/C.1/L.22), pointed out that the International Law Commission had regarded the intention to create a legal relationship as an essential element of its draft until 1962, but had since abandoned the idea of including an explicit reference to that intention. The Drafting Committee might consider whether such a reference was necessary; the New Zealand delegation believed that the element was already implicit in the phrase " governed by international law " in paragraph 1 (*a*).

64. With regard to the Austrian and Spanish amendment (A/CONF.39/C.1/L.1 and Add.1), his delegation assumed that the International Law Commission had used the word " document " deliberately in sub-paragraph 1 (*c*) to cover the widely-used practice of having full powers conveyed by telegraph. The Expert Consultant might clarify that point; if the New Zealand delegation's assumption was incorrect, it could support the Austrian amendment.

65. Mr. ARIFF (Malaysia) said that the definition of " treaty " in paragraph 1 (*a*) was insufficiently comprehensive, since it failed to indicate the intention of the parties to a treaty. It was a generally accepted principle of municipal law that the intention of the parties was to establish a legal relationship, and he therefore supported the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1), with the possible insertion of the word " legal " before " relationship ".

66. Mr. RUDA (Argentina) said he agreed with earlier speakers that the current debate should be a provisional discussion of article 2, pending the approval of all the other articles.

67. Some of the amendments submitted to paragraph 1 (*a*) were substantive, while others related to drafting points. Although the Argentine delegation had been impressed by efforts to improve the substance of the International Law Commission's text, it tended to prefer the original version. On the other hand, the amendments by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) and Chile (A/CONF.39/C.1/L.22) deserved consideration, although his delegation believed that the last two phrases of the Commission's text must be retained.

68. The United States amendment to paragraph 1 (*b*) (A/CONF.39/C.1/L.16) should be debated more thoroughly, especially in connexion with article 11. It was certainly inappropriate to take a decision on the deletion of the words " acceptance " and " approval " at that stage.

69. With regard to the Swedish and Hungarian amendments (A/CONF.39/C.1/L.11 and L. 23), he considered that the word " multilateral " should be inserted before " treaty " in the fourth line of paragraph 1 (*d*). He also agreed that the words " or to interpret " should be inserted before the words " the legal effect " in the fifth line, because interpretation might be regarded as a form of reservation. He was not sure whether the word " vary " did not cover " limit ", and whether the Swedish amendment was therefore indispensable; if other delegations considered a reference to limitation necessary, however, the Argentine delegation could accept that addition.

70. The Indian delegation alone had proposed the deletion of two provisions (A/CONF.39/C.1/L.40); it seemed premature to express an opinion on that proposal, and the amendment might be reconsidered after all the draft articles had been examined.

71. Where additions to the Commission's text were concerned, the Argentine delegation was inclined to support the French amendments (A/CONF.39/C.1/L.24), particularly the new definition of the adoption of the text of a treaty. The definition of a restricted multilateral treaty might well be included, but the French text was not quite clear, and might be reworded by the Drafting Committee.

72. Finally, with regard to the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1), although the heading of article 2, " Use of terms ", indicated that the purpose of the article was to define certain terms used in the draft articles, the term " general multilateral treaty " did not appear anywhere in the text. It would be paradoxical to insert the definition of a term which was not used in the draft convention. The question of participation in a treaty was highly important, since it affected the essence of the contractual relations entered into; moreover, in its comments and amendments (A/CONF. 39/6/Add.2), the Hungarian delegation proposed the insertion of a new article 5 (*a*) entitled " Participation in a treaty ". It might therefore be wise to await the consideration of that proposal before taking any decision.

73. Mr. KEMPFF MERCADO (Bolivia) said that the definition of " treaty " in paragraph 1 (*a*) was incomplete. In his delegation's opinion, the definition should contain the fundamental concepts of the validity of a treaty, and he therefore supported the Ecuadorian amendment (A/CONF.39/C.1/L.25). It was necessary that the definition should include a reference to the capacity of the parties and to their freedom of consent, to good faith and to the need for the treaty to deal with a licit object.

74. Mr. SEATON (United Republic of Tanzania) said he supported the amendment by Ecuador (A/CONF.39/C.1/L.25) because the principle of good faith should apply at the negotiating stage as well as to the performance of a treaty in accordance with article 23. The amendment also laid down the essential element of free consent as well as the requirement that the object of the treaty should be licit. The amendment set forth all the elements necessary for a treaty to be binding.

75. In his view the appearance of general multilateral treaties was one of the most promising elements in modern life and he hoped that a satisfactory definition of them would be found. However, opinions differed; for example, the Swiss representative believed that the determining factor was the number of participating States, whereas the Lebanese representative had argued that a treaty could deal with a subject of general interest, even though concluded by only three parties. The Argentine representative's objection did not appear persuasive, since he supported the inclusion of a clause on restricted multilateral treaties though there was no mention of them elsewhere in the text, but was against defining multilateral treaties because the draft articles were silent on the matter.

76. Mr. HARRY (Australia) said that one essential element of a treaty was the intention of the parties to create legal rights and obligations, and that was only implicity suggested in the Commission's text. Its views on that point were set out in paragraph (6) of its commentary. It would be preferable for the text to be more precise in the manner suggested in the first Chilean and the Mexican and Malaysian amendments. Suitable wording could be found by the Drafting Committee.

77. The qualification " international " in paragraph 1 (*a*) of article 2 should be maintained to make clear that the article was dealing with agreements between States that were full subjects of international law.

78. He sympathized with the amendment of Ecuador but thought its wording too long and complicated.

79. He was not inclined to favour the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) since no mention was made of a general multilateral treaty anywhere in the text.

80. He was not yet ready to express any final view of the French amendment (A/CONF.39/C.1/L.24). The Committee would have to come back to the whole question of definitions when it had concluded discussion on the rest of the articles.

81. On the question of interpretative statements, he considered that the Commission's view had been sound and that they should be treated as reservations only if they excluded, limited or otherwise varied the legal effects of certain provisions in a treaty.

82. Sub-paragraphs (*e*) and (*f*) should be retained, as well as sub-paragraph (*b*). The distinctions made were useful.

83. Mr. MUTUALE (Democratic Republic of the Congo) said that it would appear from the commentary that States were free to choose whether a treaty was to be

governed by international law or by the internal law of a certain State. That did not seem entirely satisfactory and he therefore subscribed to the Chilean amendments (A/CONF.39/C.1/L.22) which made the position perfectly clear.

84. He hoped that the eight-country amendment, which filled an obvious gap, would not create difficulties. In fact, it reintroduced an element which had previously existed in an earlier draft by the Commission, and was important because a special category of new treaties had come into existence.

85. He agreed with the United Arab Republic representative that the Committee should take provisional decisions on article 2 and then come back to it when it had a clear idea of the terms used throughout the draft.

86. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the Hungarian (A/CONF.39/C.1/L.23) and Swedish (A/CONF.39/C.1/L.11) amendments were well founded.

87. He presumed that the United States amendment to sub-paragraph (*a*) was withdrawn in view of the decision not to extend the draft to treaties between States and international organizations or between two or more international organizations.

88. He could not agree with the United States proposal to drop the words " acceptance " and " approval " in sub-paragraph (*b*), because the process of submitting treaties for approval by the appropriate organs was used in a number of countries, notably his own and various African and Asian countries. The sub-paragraph should be comprehensive and take into account the practice of all States. The Commission had wisely not defined what was meant by acceptance or approval but had simply indicated that they were methods whereby a State established its consent to be bound.

89. The Ceylonese amendment was acceptable but it would be preferable to refer to the constitutions of international organizations rather than to their practice.

90. He was in favour of including the definition of general multilateral treaties because of the large number which had come into existence and because of their special features. He therefore supported the eight-country amendment, as well as the French amendment which dealt with a special category of multilateral treaty.

91. The wording of the Ecuadorian amendment (A/CONF.39/C.1/L.25) was perhaps a little tortuous but it deserved consideration. On the other hand, he had serious doubts about the Chilean amendment (A/CONF. 39/C.1/L.22), because the proposition it contained was self-evident. It was the essence of an international agreement that it created legal obligations.

92. He would comment at a later stage on the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1).

93. Sub-paragraphs (*e*) and (*f*) in the Commission's draft were self-evident and could be dropped.

94. He agreed with the suggestion that only provisional decisions need be taken on article 2 pending consideration of the rest of the draft.

95. Sir Francis VALLAT (United Kingdom) said that his delegation was inclined to agree with the Commission's draft, which was the result of very careful thought, and did not favour amendments which departed greatly from it. The definitions should be kept to the minimum required for the needs of the substantive articles.

96. He doubted whether the Hungarian amendment to sub-paragraph (*d*) (A/CONF.39/C.1/L.23) was an improvement and the point was already covered elsewhere.

97. He was concerned about the statement made in the third sentence of paragraph (2) of the commentary because, in the experience of his Government, many agreed minutes could certainly not be regarded as international agreements.

98. His delegation favoured the Chilean and the Mexican and Malaysian amendments, and considered that the French amendment to sub-paragraph (*c*) would usefully amplify the article with a definition of what was meant by adoption.

99. He agreed with the Argentine representative that it was undesirable to add a definition of general multilateral treaties, particularly in view of the disagreement about what constituted such an instrument.

100. The Ceylonese amendment (A/CONF.39/C.1/L.17) was perhaps useful but little purpose would be served by inserting the words " or in any treaty ".

101. He favoured the Canadian representative's suggestion that the amendments should be referred to the Drafting Committee for consideration in the light of the decisions taken on the substantive articles.

102. Mr. BLIX (Sweden) said that he had some doubts about the Hungarian amendment, because an interpretative statement which did not purport to vary obligations under a treaty was not a reservation.

103. Such amendments as the Spanish amendment (A/CONF.39/C.1/L.28), the second Chilean amendment (A/CONF.39/C.1/L.22), the amendment of the Republic of Viet-Nam (A/CONF.39/C.1/L.29), the Indian amendment (A/CONF.39/C.1/L.40) and the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1) were of a drafting character and should be referred to the Drafting Committee.

104. He reserved his position on certain amendments which contained additions to article 2, such as the United States amendment to delete the reference to " acceptance " and " approval ". Little purpose would be served in discussing the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) at that stage, as it raised the difficult problem of the right of accession to general multilateral treaties. Similarly, a decision on the French amendment concerning restricted multilateral treaties should be deferred until the substantive articles had been dealt with.

105. Perhaps provisional decisions could be taken on the amendments of a terminological character. He doubted whether the first Chinese amendment (A/CONF.39/ C.1/L.13) was necessary.

106. The Ecuadorian amendment (A/CONF.39/C.1/L.25) was too detailed and failed in its aim of describing a valid treaty, since it omitted such elements as the competence of the negotiators. Furthermore, an instrument could be a treaty even if its object was illicit and it had not been freely consented to.

107. The Chilean amendment did not seem necessary, since legal effects would follow under the terms of the other articles.

108. Mr. ALCIVAR-CASTILLO (Ecuador) said that the purpose of his amendment (A/CONF.39/C.1/L.25) was to reintroduce into the draft some reference to the requirements for the essential validity of a treaty. Good faith was one of those requirements and the reference thereto in article 23 did not suffice, since that article only stipulated the need to perform a treaty in good faith; good faith was equally necessary with regard to the actual conclusion of the treaty and in relation to the intention of the parties when entering into the agreement.

109. Provisions on the essential validity of treaties had been included in the Special Rapporteur's draft, following the example of his predecessor, but the International Law Commission had eliminated them, with the sole exception of draft article 5 on the capacity of States to conclude treaties. His amendment (A/CONF.39/C.1/L.25) was designed to fill that gap by specifying, even if only in the article on the use of terms, that a treaty, to be a valid treaty, must be concluded in good faith, deal with a licit object, be freely consented to, and be based on justice and equity. He had not of course included capacity, because capacity was already mentioned in article 5.

110. The requirement of a licit object was not covered by article 50, since the violation of a rule of *jus cogens* was clearly not the only case of an illicit object. With regard to free consent, a treaty required the concurrence of the parties and not merely a meeting of their wills.

111. It was perhaps a platitude to say that a treaty must be based on justice and equity, but it was a platitude well worth stressing in view of the large number of unequal treaties. The same charge of uttering platitudes had been levelled at those who, at the San Francisco Conference of 1945, had succeeded in introducing into the Charter the words " justice " and " law ", which had been significantly omitted from the Dumbarton Oaks draft of 1944.

112. Mr. BEVANS (United States of America) explained that his proposal to omit " acceptance " and " approval " from paragraph 1 (*b*) was based on the fact that those terms were not sanctioned by traditional international usage; internal procedures were totally irrelevant to that proposal. At the same time, there was no intention to exclude acceptance and approval as possible means of expressing the consent of a State to be bound by a treaty; his delegation would propose a new article 9 to make clear that signature, ratification and accession were not the only means of expressing such consent. In that connexion, he would draw the Drafting Committee's attention to the second paragraph of the rationale for the United States amendment (A/CONF.39/C.1/L.16).

113. The amendment by Ecuador (A/CONF.39/C.1/L.25) struck him as an attempt to include in paragraph 1 (*a*) of article 2 all the provisions of Part V of the draft.

114. He had some doubts regarding the proposal (A/CONF.39/C.1/L.1 and Add.1) to replace in paragraph 1 (*c*) the word " document " by " instrument ", since an instrument usually had a seal, and it was his experience that many full powers did not bear a seal.

115. His delegation had given thought to the suggestion to delete the word "international" before "agreement" in paragraph 1 (*a*) (A/CONF.39/C.1/L.28) but, on balance, had reached the conclusion that it should be retained.

116. He did not favour the proposals which had been made to treat interpretative statements as reservations. If the wording of paragraph 1 (*d*) were to be expanded to include interpretation, it would be necessary to introduce other terms as well, such as " understanding ". He therefore preferred leaving the text of the paragraph unchanged.

117. The Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1) contained some useful elements and should be referred to the Drafting Committee.

118. Lastly, the proposed definition of " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1) lacked the necessary precision for inclusion in article 2. The concept of a treaty which dealt with " matters of general interest for the international community of States " was not exact enough: it could be held to cover such instruments as a treaty of alliance between three powerful States, or an agreement on currency problems between three or four States, treaties which were undoubtedly of interest to other States.

119. Mr. de BRESSON (France) said that his amendment (A/CONF.39/C.1/L.24, para. 3) relating to restricted multilateral treaties was not of the same order as the proposal (A/CONF.39/C.1/L.19/Rev.1) to introduce the concept of general multilateral treaty. The French amendment was intended to define the type of treaty to which the provisions of article 17, paragraph 2, related. It did not introduce any new idea into the draft and, of course, did not raise the same difficulties as the attempt to introduce the concept of a " general multilateral treaty ". Moreover, the introduction of that concept would raise problems of substance which it would be unwise to underestimate.

120. He supported the Rapporteur's recommendation that article 2, with all the amendments thereto, should be referred to the Drafting Committee; if that Committee found that any amendment involved a question of substance, it would defer its decision on it until that question had been settled in the Committee of the Whole.

The meeting rose at 6.45 p.m.

SIXTH MEETING

Monday, 1 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 2 (Use of terms) *(continued)* [1]

1. Mr. JAMSRAN (Mongolia) said that he favoured the amendment in document A/CONF.39/C.1/L.19/Rev.1, which would add a definition of a general multilateral

[1] For a list of the amendments to article 2, see 4th meeting, footnote 1.

treaty to article 2, paragraph 1. He did so because of the increasing importance of that class of treaty, to which several references had been made in previous drafts.

2. The Hungarian amendment (A/CONF.39/C.1/L.23) proposed purely drafting changes which clarified and improved the wording of paragraph 1 (*d*). He therefore supported that amendment as well.

3. He also approved the first part of the Chilean amendment (A/CONF.39/C.1/L.22), to add the word " multilateral " before the word " treaty " in sub-paragraph (*d*). He had doubts, however, about the proposed new definition of the word "treaty". Any treaty concluded by States, irrespective of its name, had legal effects, as was confirmed by the phrase " governed by international law ". The definition proposed in the Chilean amendment suggested that there could exist between States some treaties which had legal effects and others which had not. He could not therefore accept that part of the Chilean amendment, or the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1) which expressed the same idea in different words.

4. Mr. KEITA (Guinea) said it seemed to him essential, in order to reach a decision on the amendments, to analyse the intentions of the authors of the draft and see whether the proposed amendments fulfilled the purpose of article 2.

5. That purpose clearly appeared from the text of the article and the commentary thereto: it was to enumerate the terms used in the draft convention and to specify the meaning with which they were used.

6. The amendments which provided a definition of restricted multilateral treaty (A/CONF.39/C.1/L.24) and general multilateral treaty (A/CONF.39/C.1/L.19/Rev.1) were very much in keeping with the current debate, since the two cases in question were covered by paragraphs 2 and 3 respectively of article 17. Those amendments reflected the distinction which was made in the general theory of contract between contracts *intuitu personae* and contracts of acceptance *(contrats d'adhésion)*. The delegation of Guinea therefore supported those two amendments.

7. The amendment submitted by Ecuador (A/CONF.39/C.1/L.25) met Guinea's fundamental concern that justice and good faith should prevail in relations between States, but went beyond what the authors of the draft articles were aiming at in their wording of article 2. Consideration of that amendment should therefore be deferred until a later stage in the discussion.

8. He supported the amendments in document A/CONF.39/C.1/L.1 and L.17, but he did not fully understand the significance of the phrase " or in any treaty " in the latter amendment.

9. The other amendments were drafting changes, which he was confident could be left to the Drafting Committee. It must be remembered, however, that treaties were not *belles lettres*, and some repetition was occasionally unavoidable.

10. Mr. MERON (Israel) said that the long discussion on the amendments to article 2 would serve the purpose of indicating to the Drafting Committee the opinion of the Committee of the Whole on the various proposals involved. The Committee of the Whole did not have to take a formal decision for the time being, since article 2 dealt with definitions adopted solely for the purposes of the draft convention and related to its substantive articles. Under those conditions, a vote on the amendments would be premature.

11. It would be preferable to refer the various amendments to the Drafting Committee, which would report to the Committee of the Whole after the discussion of the substantive articles. In the meantime the Committee could provisionally use the terminology proposed by the International Law Commission.

12. The delegation of Israel also thought it would be better to incorporate some on the explanations contained in article 2 in the wording of the corresponding substantive articles. In 1965, the International Law Commission had incorporated in what had become article 71 the explanation of the term " depositary " which had appeared in article 1 (*g*) of the 1962 draft. The same thing could be done with terms such as " full powers " and " reservation ", which would then be discussed *in concreto*, instead of, as in article 2, *in abstracto*.

13. He thought that as a whole, the amendments before the Committee did not improve the wording of the draft. The word " document " in sub-paragraph (*c*) was preferable to the more formal word " instrument ", because the developing practice of States was often to produce letters or telegrams as at least provisional evidence of full powers. The commentary to article 6 confirmed that practice.

14. The term " vary " used in sub-paragraph (*d*) with respect to reservation seemed to cover the idea expressed in the words " limit " and " restrict ", whose insertion in that sub-paragraph was called for by the amendments of Sweden (A/CONF.39/C.1/L.11) and of the Republic of Viet-Nam (A/CONF.39/C.1/L.29) respectively.

15. With regard to the United States amendment (A/CONF.39/C.1/L.16), he feared that the deletion from sub-paragraph (*b*) of the terms " acceptance " and " approval ", which were increasingly used in international practice, would make the draft too rigid. On the other hand, he approved of the substitution of " an " for " the " before the words " international act ".

16. Mr. RODRIGUEZ (Chile) explained the intended meaning of the expression " produces legal effects " in the Chilean amendment (A/CONF.39/C.1/L.22). The main purpose of the convention was to regulate legal relations between States. Moreover, a dividing line should be drawn between treaties intended to produce legal effects and agreements not intended to do so, even though they sometimes did. A definition of a treaty *lato sensu*, covering all agreements of whatever kind, would make the convention too wide in scope and might curtail the international dialogue which was the necessary preliminary to treaty-making. Some speakers had objected that the amendment was unnecessary because an agreement which did not produce legal effects was not a treaty. His reply to that was that if legal effects were implied in the term " treaty ", the definition should mention them. Others had maintained that the amendment would add to the text a condition for the validity of treaties. In fact, it was not a rule governing validity, which would be out of place in a definitions article, but merely a criterion for

distinguishing treaties from agreements not intended to produce legal effects.

17. Mr. NETTEL (Austria), referring to sub-paragraph (iii) of the Hungarian amendment (A/CONF.39/C.1/L.23), observed that a declaration as to interpretation did not interpret the legal effect of certain provisions of a treaty: it interpreted those provisions in order to give them a certain legal effect in their application to the State making the declaration. He therefore proposed that the last part of article 2, paragraph 1 (*d*) should be drafted to read: "... whereby it purports to exclude or to vary the legal effect of, or to interpret, certain provisions of the treaty in their application to that State ". He proposed that the matter should be referred to the Drafting Committee.

18. Mr. HAYES (Ireland) said that the effect of inserting the word " interpret ", as proposed in the Hungarian amendment (A/CONF.39/C.1/L.23), would be to include in the category of reservations declarations intended to clarify a State's position. However, as was brought out in the International Law Commission's commentary, the rules applicable to reservations should not be extended to cover such declarations. The word " limit ", in the Swedish amendment (A/CONF.39/C.1/L.11), and the word " restrict ", in the amendment of the Republic of Viet-Nam (A/CONF.39/C.1/L.29), might not have that effect; if they did not they would not in any case add anything to the word " vary ", which was already in the text. He was therefore opposed to those three amendments.

19. Sir Lalita RAJAPAKSE (Ceylon) observed that no substantive objection had been raised against the Ceylonese amendment (A/CONF.39/C.1/L.17). A reference to the use in treaties of the terms used in the draft articles would certainly be valuable. Many agreements used the term " contracting States ", for example, in a sense differing from that given to it in article 2, paragraph 1. It might perhaps be better to add the words " or in any treaty ". He would leave it to the Drafting Committee to find the best wording, but asked that the substance of his amendment should be maintained in its entirety.

20. Mr. OWUSU (Ghana) remarked that the many statements to which the amendments had given rise showed that at first sight they fell into three classes: substantive amendments, drafting amendments and mixed amendments. On further examination, however, an amendment which had seemed to be a drafting amendment might well turn out to be an amendment of substance. He therefore proposed that the Committee should defer decisions on the proposed amendments to article 2 of the draft articles before it until all the other draft articles had been fully discussed and decisions taken on them. He asked that the Committee should vote on that formal proposal after all the speakers on the Chairman's list had been given the floor.

21. Mr. BURALE (Somalia) commended the International Law Commission's work and expressed the view that the substance of article 2 required no amendment. It must be recognized, however, that the importance of international law had increased during the last few decades because the international community had understood the need to harmonize its efforts to ensure co-operation and understanding between States. General multilateral treaties were of interest to all States and participation in them should be universal. His delegation therefore supported the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) inserting a definition of " general multilateral treaty " in article 2.

22. Mr. GON (Central African Republic) said he supported the amendment by Austria and Spain (A/CONF. 39/C.1/L.1 and Add.1), which made the text of article 2, paragraph 1 (*c*) more precise. On the other hand, he was afraid the Chilean amendment (A/CONF.39/C.1/L.22) was too restrictive, for it drew a distinction between treaties which produced legal effects and those which did not, which seemed rather strange. The same comments applied to the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1). The amendments in documents A/CONF.39/C.1/L.13, L.22 and L.23 related to reservations. In so far as they restricted the scope of reservations, his delegation supported them. It could not, however, accept the amendment in document A/CONF.39/C.1/L.19/Rev.1 at that stage. It was important that the draft should not be overloaded with unnecessary definitions; moreover, the commentary by the International Law Commission on the definition of multilateral treaties in the context of articles 2 and 12 showed the difficulties which would have to be overcome if a definition of that class of treaties was incorporated in the draft. The Commission had shown good sense in omitting that definition. The Central African delegation supported the French amendment (A/CONF.39/ C.1/L.24). The definition of a restricted multilateral treaty filled a gap, for that type of treaty was referred to in article 17. Furthermore, the amendment took account of an existing situation in international law. His delegation thought that the final decision on article 2 should not be taken until the substantive articles had been examined.

23. Mr. MAIGA (Mali) referring to the amendments submitted, said that the fundamental problem in law was to find a firm basis to justify and enforce the legal rules. A definition of the term " treaty " would be valuable only if it corresponded to a basic reality. There were two essential elements to be taken into consideration: the agreement must be freely consented to and States were legally bound by it. The amendments by Ecuador (A/CONF.39/C.1/L.25) and France (A/CONF. 39/C.1/L.24) took those elements into account. In view of the evolution of international life, the general multilateral treaty and the restricted multilateral treaty should be included in the definitions. His delegation therefore supported the amendments in documents A/CONF.39/ C.1/L.19/Rev.1 and A/CONF. 39/C.1/L.24.

24. Mr. BROCHES (Observer for the International Bank for Reconstruction and Development), speaking at the invitation of the Chairman, said he thought that the words " negotiating States " in the French amendment (A/CONF.39/C.1/L.24) might cause some difficulty. In using the term " negotiating States ", it was assumed that the text of a treaty would invariably be formulated by States, whether in direct negotiations, or at an international conference, or in a plenary organ of an international organization. In certain cases a different technique had been used, especially with respect to three multilateral treaties concluded under the auspices of the Bank: the

Articles of Agreement of the International Finance Corporation, the Articles of Agreement of the International Development Association and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Each of those treaties had been " adopted " by the Executive Directors of the Bank, who had thereupon submitted the proposed instruments to the member Governments of the Bank for signature, followed by acceptance, ratification or approval. It was not at all unusual for treaties to be adopted within an organ of an international organization, but the adoption usually took place in the plenary organ of the organization, so that it could be said that the treaty had been adopted by States. In the examples just cited that had not been so. The Executive Directors of the Bank did not constitute a plenary organ and most of the Directors had been elected by, and represented, several States. There were even cases, such as the Agreement on the Privileges and Immunities of the International Atomic Energy Agency, in which the text of a treaty had been adopted by a body, such as the Board of Governors of the Agency, on which only a fraction of the membership of the organization was represented. In such cases it was difficulty to speak of " negotiating States ".

25. It was true that article 4 provided that the proposed convention would not fully apply to treaties adopted within an international organization. However, article 2 dealt with the use of terms and would presumably apply to any treaty within the scope of the proposed convention. In fact, a definition of the term " adoption of the text of a treaty " in article 2 might influence the meaning of the term " adopted ", as used in article 4.

26. Sir Humphrey WALDOCK (Expert Consultant) said it should be remembered that in article 2 the International Law Commission had tried to define the terms used; it had not intended to list all the necessary conditions for the validity of treaties. The only point regarding sub-paragraph (*a*) which the Commission had discussed at length was the question whether to mention the intention of establishing legal relations between States. The Commission had preferred not to mention that intention, as it believed that the words " governed by international law " were sufficient. He himself had some doubts on the point, since in many cases an instrument might have the characteristics of a treaty because of the intention with which it had been drawn up. Certain communiqués now published at the end of important conferences were in fact agreements between ministers and had legal effects.

27. With regard to the words " ratification ", " acceptance ", " approval ", and " accession ", the International Law Commission had not wished to complicate the question of the procedure relating to treaties. It had found that those words were often used to mean the same thing. The Commission had had some difficulties with the words " ratification " and " signature ". It had finally decided to include the four words which now appeared in sub-paragraph (*b*).

28. In connexion with the term " full powers " he drew attention to the use of the word " document ". Since full powers could take the form of a telegram or letter, the Commission had considered it advisable to take into account a " simplified form " of full powers. Purists might perhaps think that the term " full powers " should be reserved for a more formal document, but the Commission had decided that it could be acceptably used in a very general sense.

29. When the International Law Commission had drafted sub-paragraph (*d*), it had taken cognizance of the existence of declarations as to interpretation and had accordingly drafted sub-paragraph (*d*) in its present form. Some such declarations were of a general nature and represented an objective interpretation of what was understood to be the meaning of a treaty. The purpose of others was to clarify the meaning of doubtful clauses or of clauses which were controversial for particular States. Others, again, dealt with the application of a treaty in certain circumstances peculiar to a State. The Commission had considered that reservations should be understood to mean declarations which purported to exclude or vary the legal effect of certain provisions in their application to a particular State. That question called for thorough examination, but the Conference should be very cautious about the application of the term " reservations " to declarations as to interpretation in general.

30. The representative of Ceylon had proposed extending the application of article 2, paragraph 2 to other treaties and to the practice of international organizations. The International Law Commission had not omitted to consider that question so far as other treaties were concerned. It had, for example, had in mind the Statute of the International Court of Justice, which referred to conventions and to treaties, and the question had been raised whether the definition of a treaty given in sub-paragraph (*a*) was equally appropriate for that term as used in the Statute of the Court. The Commission had therefore limited the application of the proposed definitions specifically to their use in the draft articles. It envisaged that, by placing the words " For the purposes of the present articles " at the beginning of article 2, it would safeguard sufficiently the use of the terms defined in the article when used in any other treaties with a different meaning.

31. The Commission had, on the other hand, thought it necessary to mention the internal law of a State in paragraph 2, because the convention on the law of treaties might itself become internal law in a number of countries. It was therefore necessary to include a proviso safeguarding the use of the terms in the internal law of any State. The Conference and the Drafting Committee might reflect on that problem and see whether they agreed that the Commission's text sufficiently covered other treaties and the practices of international organizations.

32. Some delegations had commented that the terms " negotiating State ", " contracting State " and " Party " had been introduced into the text rather late and perhaps somewhat hastily. Those reproaches were not justified. The Commission had studied the question of the status of States at the different stages in the drafting and conclusion of a treaty. Different rights might attach to each of those stages. The text had been much more complicated on that point at the beginning than it was at present. The Commission had simplified the problem

and had introduced sub-paragraphs (*e*), (*f*) and (*g*) merely in order to provide convenient labels for referring to the various relationships which a State might have to the text of a treaty.

33. The CHAIRMAN observed that the Committee had before it two proposals relating to article 2. The Canadian representative had proposed [2] that the Committee should refer the amendments to the Drafting Committee without taking any decision on them and that the Drafting Committee should examine the amendments and submit a report to the Committee after it had considered the rest of the draft articles. The representative of Ghana had made a rather similar proposal, except that it did not include reference to the Drafting Committee. He asked the representative of Ghana if he could support the Canadian proposal.

34. Mr. OWUSU (Ghana) said that he was prepared to accept the Canadian proposal if the Committee could take a decision forthwith on the nature of the different amendments, some of which dealt with points of drafting and others with points of substance. The drafting amendments would then be referred immediately to the Drafting Committee and the Committee of the Whole would defer consideration of the substantive amendments.

35. The CHAIRMAN pointed out that only two of the amendments submitted dealt with points of substance, namely, the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) and the French amendment (A/CONF.39/C.1/L.24). The sponsors of those amendments could consult each other pending further consideration of article 2 by the Committee of the Whole. The other amendments would be referred to the Drafting Committee in accordance with the Canadian proposal.

36. Mr. VIRALLY (France) said that the two amendments mentioned by the Chairman differed in purpose and scope and should be considered separately. It would be better, therefore, to refer all the amendments to the Drafting Committee, which could deal immediately with those relating to drafting only. It would defer consideration of the others until the Committee of the Whole had taken a decision on their substance. The French delegation therefore supported the Canadian proposal.

37. Mr. JAGOTA (India) supported the Canadian proposal and observed that some of the amendments could be discussed immediately in the Drafting Committee, whereas others might be considered when the Committee of the Whole examined the substantive articles.

38. Mr. TABIBI (Afghanistan) said that that procedure should be followed only for article 2, for a precedent should not be established. It was for the Committee of the Whole to take decisions on the substance, and it would even be dangerous to ask the Drafting Committee to decide on the nature of the various amendments. The Committee of the Whole should set up working groups to study certain problems of substance.

39. Mr. VARGAS (Chile) said he supported the Canadian proposal, although he believed that the Drafting Committee's functions should not be widened. That Committee should, however, invite the sponsors of amendments to participate in its work and state their views.

40. The CHAIRMAN said that that was an unusual procedure; the Drafting Committee could only recommend a text to the Committee of the Whole for adoption.

41. Mr. MOUDILENO (Congo, Brazzaville) suggested that the Drafting Committee should formulate the definitions of the terms used, before the Committee of the Whole continued its work on the draft articles.

42. Mr. YASSEEN (Iraq), speaking as Chairman of the Drafting Committee, explained that the authors of amendments were not usually invited to participate in the Drafting Committee's work, but the Committee could ask them for explanations if necessary.

43. Mr. DE CASTRO (Spain) suggested that the authors of amendments should meet in a small group to try to reach an agreement. The Drafting Committee's function was to clarify the wording used; its powers should not be widened.

44. After an exchange of views, in which Mr. WERSHOF (Canada), Mr. MYSLIL (Czechoslovakia) and Mr. REGALA (Philippines) took part, the CHAIRMAN put the Canadian proposal to the vote.

The proposal was adopted by 76 votes to 2, with 12 abstentions. [3]

Article 3 (International agreements not within the scope of the present articles) [4]

45. Mr. HU (China), introducing his delegation's amendment (A/CONF.39/C.1/L.14), said that article 3 merely repeated what was said in article 1 and in article 2, paragraph 1*(a)*. However, although the Chinese delegation did not see the need for article 3, it would not ask for a vote on its amendment. He thought the amendments of the United States (A/CONF.39/C.1/L.20) and of Gabon (A/CONF.39/C.1/L.41) were fairly similar, and if article 3 was retained, they should perhaps be combined in a single text.

46. Mr. BEVANS (United States of America) said that the United States delegation was withdrawing its amendment to article 3 (A/CONF.39/C.1/L.20) because its amendment to article 1 (A/CONF.39/C.1/L.15) had not been accepted.

47. Mr. BINDSCHEDLER (Switzerland), introducing his delegation's amendment (A/CONF.39/C.1/L.26), said that article 3 rightly left no doubt as to the validity of international agreements not covered by the convention. It was, moreover, desirable in the interests of the development of international law, to which the convention under discussion would make an important contribution, that the rules set forth in it could be applied to that type of agreement. On the other hand, it was redundant to

[2] See 4th meeting, para. 28.

[3] At the 80th meeting, the Committee of the Whole decided to defer until the second session of the Conference consideration of all amendments relating to general multilateral treaties and to restricted multilateral treaties.

[4] The following amendments had been submitted: China, A/CONF.39/C.1./L.14; United States of America, A/CONF.39/C.1./L.20; Switzerland, A/CONF.39/C.1/L.26; Spain, A/CONF.39/C.1./L.34; Gabon, A/CONF.39/C.1/L.41; Ethiopia, A/CONF.39/C.1/L.57 and Corr.1; Iran, A/CONF.39/C.1/L.63; Mexico, A/CONF.39/C.1/L.65.

state that those rules were not applicable by virtue of the convention. The last part of sub-paragraph (*b*) was not clear and for that reason the Swiss delegation had proposed its deletion. The amendment was one of drafting only, and the Swiss delegation was prepared to withdraw it in favour of the Gabon amendment (A/CONF.39/C.1/L.41).

48. Mr. DE CASTRO (Spain) explained that his delegation's amendment (A/CONF.39/C.1/L.34) was only concerned with a matter of drafting in the Spanish text.

The meeting rose at 1.10 p.m.

SEVENTH MEETING

Monday, 1 April 1968, at 3.20 p.m

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December, 1966 *(continued)*

Article 3 (International agreements not within the scope of the present articles) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 3 of the International Law Commission's draft [1].

2. Mr. JENKS (Observer for the International Labour Organisation), speaking at the invitation of the Chairman, said he was gratified at the Committee's decision to recommend that the question of agreements to which subjects of international law other than States were parties should be examined by the International Law Commission. The International Labour Office would be glad to co-operate fully in that task, which must include the question of how any codification of such rules was to become binding on the international organizations concerned, how it was to provide for any adaptations of the general rules necessary to meet the special circumstances of particular organizations and how it was to permit future development and growth.

3. Articles 3 and 4 of the draft stated principles of vital significance for the long-term development of international organizations and of international law. Article 4 stated both a rule and an exception. The rule was that treaties adopted within an international organization were subject in principle to the general law of treaties, and the exception was that the rule was not applicable in respect of matters for which a *lex specialis* existed by virtue of any relevant rules, including the established practice of the organization concerned.

4. The rule was important because it would create confusion if there were a different law of treaties for the instruments adopted within each of the forty international and regional organizations, a number which might continue to increase. Few of them could be expected to evolve a distinctive body of practice and none could claim that its practice or needs were special in respect of the whole of the law of treaties. The ILO certainly made no such claim.

5. The exception was equally important because there were cases in which an organization had special rules and a well-established body of practice governing conventions which created a body of international obligations more coherent, stable and better-adapted to requirements of the situation than could be secured by applying the more flexible provisions of the general law. The International Labour Organisation was responsible for 128 international labour conventions ratified by over 115 member States, and some 1,200 declarations of application in respect of other territories. That network of obligations was governed by the provisions of the ILO Constitution and by a well-established body of practice tested over almost fifty years. The ILO was not the only organization with a distinctive body of treaty practice, but only the League of Nations and the United Nations together possessed comparable experience as to duration, scale and variety of action. The Conference was entitled to know how the draft articles would affect the ILO's discharge of its responsibilities, and the ILO was entitled to expect that the Conference would give full regard to the obligations of members of the United Nations as members of the International Labour Organisation.

6. In some cases there was a clear incompatibility between ILO's rules and practice and the provisions of the draft articles and a change in the former, which could not in any case operate retroactively in respect of conventions to which member States had already become parties, would be inconsistent with the Organisation's constitutional structure and with the object of labour conventions. In other cases, the ILO's rules and practice and the provisions of the draft articles could be rendered compatible only by a strained interpretation of the one or the other or by some artificial modification of the ILO's existing rules, for which there was no particular need. In still other cases, in order to obtain a reasonable and equitable result, the draft articles would have to be read in the light of established ILO rules and practice.

7. In some instances it would be unprofitable to discuss to which of those categories a case belonged.

8. Article 8 provided that the adoption of a text drawn up at an international conference took place by a vote of two-thirds of the states participating in the conference, unless by the same majority it was decided to apply a different rule. The ILO rule was quite different; there a two-thirds majority was required of the votes cast by the delegations present, and half of the delegates eligible to vote did not represent Governments.

9. Article 9 provided that the text of a treaty was established as authentic and definitive by such a procedure as might be provided for in the text or was agreed upon by participating States, or failing that by authentication of the representatives of States, whereas under the ILO Constitution, ILO conventions were authenticated by the signatures of the President of the Conference and the Director-General.

10. Article 12 dealt with accession. ILO conventions were concluded within the constitutional obligations relating to their application, and accessions which did not include those obligations were therefore inconceivable.

[1] For the list of the amendments submitted, see 6th meeting, footnote 4.

11. Articles 16 to 20 dealt with reservations. According to ILO practice, reservations incompatible with the object and purpose of the treaty were inadmissible, and that principle had been maintained consistently. The procedural arrangements concerning reservations embodied in the draft articles were inapplicable to the Organisation because of its tripartite character. Great flexibility was necessary in the application of certain international labour conventions to widely varying circumstances, but the provisions regarded by the International Labour Conference as wise and necessary were embodied in the terms of the conventions, and if proved inadequate could be revised at any time in accordance with regular procedures. Any other method would destroy the international labour code as a code of common standards.

12. ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28.

13. On the subject of the relationship between successive treaties on the same subject and the amendment and modification of treaties, the ILO had wide experience and had created a substantial body of law and practice.

14. The ILO's rules governing the procedure for the revision of conventions and the legal consequences of revision differed from and were better adapted to those needs than article 36, which contained the saving clause " unless the treaty otherwise provides ". Only some of the relevant rules were contained in the conventions; some derived from the Constitution and some from the procedural rules in the form of standing orders.

15. A few international labour conventions expressly permitted the modification of certain provisions by *inter se* agreements generally, on condition that the rights of other parties were not affected and that the *inter se* agreement provided equivalent protection. However, in the majority of labour conventions such agreements would be regarded as incompatible with the effective execution of the object and purpose of the treaty as a whole, as would be the case with a convention relating to one of the fundamental human rights. Such problems could not conveniently be dealt with by reference to article 37 of the draft. The ILO Constitution conferred rights to initiate proceedings relating to the application of a convention upon interested parties other than governments that were parties to the convention, and those rights which flowed directly from the Constitution would not be affected by any *inter se* arrangements.

16. Article 57 defined the consequences of a material breach of a multilateral treaty, while articles 62 to 64 set out the procedure to be followed when a breach was alleged. Articles 24 to 34 of the ILO Constitution specified the procedures applicable in the event of any failure by a member to secure the effective observance of an international labour convention it had ratified. They included provision for the appointment by the Governing Body, in appropriate cases, of a commission of inquiry to examine the alleged failure. Those articles of the Constitution constituted a *lex specialis* more appropriate for the application of international labour conventions than the necessarily general provisions of article 62 to 64.

17. He was not suggesting any modification of the general law as proposed in the draft articles, but asked for a clear recognition that an international organization might have a *lex specialis* that could be modified by regular procedures, in accordance with established constitutional processes. The questions at issue were not limited to procedural ones and were too complex to be dealt with by detailed amendments to the draft articles and could only be properly covered by a broad and comprehensive provision. The practical importance of those procedures for member States depended on the extent to which they were parties to international labour conventions and must be assessed in the light of long-range considerations of general international policy.

18. The principle that conventions adopted within an international organization might be subject to a *lex specialis* was of long term as well as immediate importance.

19. International legislative techniques remained so defective that the way must be left open to develop specialized procedures for special purposes as the need arose. One of the prior requirements in codifying international law had been to ensure that it did not operate as a bar rather than as a stimulus to progressive development. If the law of treaties had been codified a generation ago, much of the present draft would have found no place in it. Article 4 provided the necessary flexibility for the progressive attainment of the long-term purposes of the United Nations Charter, and he hoped that it would be adopted substantially in its present form.

20. Mr. AUGÉ (Gabon) said his delegation had submitted an amendment (A/CONF.39/C.1/L.41) which was intended for the Drafting Committee's consideration and the purpose of which was to achieve greater clarity in article 3. The words " to which they would be subject independently of these articles " had been dropped, as no mention was made of them in the Commission's commentary. The introductory phrase " the fact that the present articles do not relate " had also been dropped.

21. Mr. KEBRETH (Ethiopia) said that article 3 was an important one, the purpose of which was to state the binding character of oral agreements and those concluded between States and other subjects of international law or between such other subjects. The Commission's main concern appeared to have been the question whether oral agreements and agreements not concluded strictly between States remained outside the purview of the law of treaties. The draft convention being worked out would have to become a parent instrument providing substantive rules to cover as far as possible all international agreements, for in the final analysis international organizations were the creation of States. In a broader sense, it might be said that article 3 was intended to serve as a vital link between the convention on the law of treaties and the customary laws of treaties that were as yet uncodified.

22. His delegation felt considerable uncertainty about the words " to which they would be subject independently of these articles ". Through the use of those words, customary laws and the many practices and procedures, especially of international organizations, would apply. But the question remained of the application of the progressive and substantial principles contained in the convention. Any suggestion of a difference between the

laws of inter-State treaties and other treaties should be avoided at the present stage of the law.

23. The purpose of the Ethiopian amendment (A/CONF.39/C.1/L.57 and Corr.1) was to eliminate the words "to which they would be subject independently of these articles" and to get rid of the suggestion that oral agreements between States were excluded from the application of the convention under its article 1. They were only implicitly excluded from the application of the rules of the convention by virtue of article 2, paragraph 1 (*a*).

24. The intention of paragraph (*b*) of the Ethiopian amendment was to state that the convention should apply to all other agreements; the words "so far as possible" had been included in that paragraph in order to emphasize the fact that the convention would not apply to agreements not strictly between States in a literal sense.

25. There seemed to be some overlapping in the existing text of article 3, and he hoped that the amendment would be of assistance to the Drafting Committee.

26. Mr. MATINE-DAFTARY (Iran) said that his delegation's amendment (A/CONF.39/C.1/L.63) aimed at achieving a progressive development of international law. He failed to understand why the Commission had refused to tackle the problem of treaties concluded with or between international organizations, which were such a prominent feature of modern life, and why it had not succeeded in producing a more comprehensive draft.

27. Precedents must be examined in order to establish the legal status of an oral agreement. That form of agreement seemed to have belonged mainly to the era of secret diplomacy and colonialism, and was totally at variance with the principles of open diplomacy proclaimed in the Covenant of the League of Nations and the United Nations Charter, notably in Article 102. It seemed difficult to imagine that that article could cover oral agreements, since they could not be registered with the Secretariat.

28. Another obvious objection to oral agreements was that they could not be subjected to the scrutiny of internal state organs and the processes of ratification.

29. He was unable to understand the meaning of paragraph (3) of the Commission's commentary to article 3, or why it should have assigned equal importance to oral agreements and treaties with international organizations. In his opinion, because of the dangers attaching to oral agreements, they should be regulated separately and not dealt with in the present draft. He would therefore be satisfied if the Chinese amendment (A/CONF.39/C.1/L.14) was adopted.

30. Mr. SEPULVEDA AMOR (Mexico) said that, in order to make the meaning of article 3 clearer, his delegation had submitted an amendment (A/CONF.39/C.1/L.65) to delete the concluding phrase "independently of these articles". The reason for the proposal was the following: the undoubted meaning of the phrase was that the legal force of the agreement referred to in the text of article 3 rested on rules other than "the present articles", rules which might form part of another convention or be rules of customary law; in other words, it rested on international law.

31. Consequently his delegation proposed that the concluding phrase should be altered to read "in accordance with international law".

32. At the same time, his delegation considered that the wording proposed in the amendment by Gabon (A/CONF.39/C.1/L.41) would improve the drafting and it should therefore be taken into consideration by the Drafting Committee.

33. Mr. YASSEEN (Iraq) said that he was in favour of retaining article 3 as it stood. It correctly stated that the legal force of certain forms of agreement was not affected by the fact that the present articles did not relate to them. The reservation was an important one, because the present convention could not be regarded as the sole source of rules on the law of treaties.

34. He could not support the Swiss amendment (A/CONF.39/C.1/L.26) to delete the phrase "independently of these articles". In his view, those words were necessary, for they emphasized the fact that the rules set forth in the articles under discussion could be applied not only as written law but because they were custom or general principles of international law.

35. Mr. ALVAREZ TABIO (Cuba) said that it was essential to adjust the text of article 3 so that it expressed the intention of the International Law Commission. It was explained in paragraph (5) of the commentary to article 2 that the fact that the scope of the draft articles had been limited to treaties between States was not "in any way intended to deny that other subjects of international law" had the capacity to conclude treaties; it was added that "the reservation in article 3 regarding the legal force of and the legal principles applicable to their treaties was inserted by the Commission expressly for the purpose of refuting any such interpretation of its decision to confine the draft articles to treaties concluded between States".

36. Paragraphs (2) and (3) of the commentary to article 3 explained even more clearly the purpose of the article. Altogether, it was apparent that the Commission's intention had been threefold: first, to state that the draft articles did not affect the legal force of those types of international agreements which had been excluded from their scope; secondly, that those agreements were governed by the relevant legal principles, the application of which was also in no way affected by the draft articles; thirdly, that the substantive rules set forth in the draft articles could be applied to those agreements. In other words, the Commission had intended to make a reservation regarding the application of those substantive rules to types of agreements excluded from the scope of the draft by the terms of paragraph 1 (*a*) of article 2.

37. That intention was not clearly expressed by article 3, especially its concluding words "to which they would be subject independently of these articles", the interpretation of which could give rise to doubts. Those doubts were not completely removed by the Spanish amendment (A/CONF.39/C.1/L.34), although its wording represented an improvement. The best solution would be to adopt the Mexican amendment (A/CONF.39/C.1/L.65) and combine it which the Spanish amendment, so that the concluding words of article 3 would read:

"... shall not affect in any way the legal force of such agreements or the application to them of any of the rules set forth in the present articles independently of the rules of international law to which they might be subject".

38. Mr. CHAO (Singapore) said that he could not support the Spanish amendment (A/CONF.39/C.1/L.34) as it would only lead to uncertainty. Nor could he support the Swiss amendment to delete the final phrase in article 3, the purpose of which was fully explained in the commentary. Brevity did not always make for clarity. Perhaps article 3 did state an obvious rule of customary international law, but there would be no harm in keeping it for reasons of caution and he did not therefore support the Chinese amendment to drop the article altogether.

39. He could accept the amendment of Gabon, provided the final phrase reading " to which they would be subject independently of those articles " was added at the end, and the word " convention " substituted for the word " articles " at the beginning of the text.

40. Mr. MIRAS (Turkey) said that article 3 was not indispensable. If, however, the Commission decided to retain it, the language of its sub-paragraph (*b*) should be amended so as to express the idea that international agreements not in written form could in certain circumstances have legal force. The present text might give the impression that all oral international agreements without exception had legal force, a proposition which would not be true. He suggested that the Drafting Committee take that remark of his into consideration in the final drafting of article 3, if it were ultimately decided to retain it.

41. Mr. PINTO (Ceylon) said that although the total legal effect of article 3 was minimal, it did, like articles 69 and 70, serve some purpose in that it helped to delimit the scope of the draft articles. His own suggestion would be to replace those articles by a general reservation to cover all the aspects of treaty law which had been left outside the scope of the draft articles. Paragraphs 28 to 34 of the International Law Commission's report on its eighteenth session (A/6309/Rev.1, part II) [2] dealing with the scope of the draft articles, set out a number of areas of treaty law which had been excluded, many of which did not form the subject of articles such as articles 3, 69 and 70. It would therefore be more satisfactory to deal with the whole matter in a general provision, which he suggested should be formulated by the Drafting Committee for incorporation in the preamble to the future convention on the law of treaties.

42. Should the Committee decide to retain article 3, he would prefer the existing text to that proposed by Switzerland (A/CONF.39/C.1/L.26): without the concluding phrase the article would seem to say that the non-applicability of the draft articles to two categories of treaties would not affect the application to those same treaties of the rules set forth in those articles themselves —a proposition which would be self-contradictory. He believed that the same objection applied to the amendment by Gabon (A/CONF.39/C.1/L.41).

43. Mr. FRANCIS (Jamaica) said that there was no fundamental disagreement on the substance of article 3, but there was obviously room for improvement in the drafting of the article.

44. He was opposed to the amendment to delete article 3 (A/CONF.39/C.1/L.14), since that would reintroduce the uncertainties which it had been the International Law Commission's purpose to remove. He also opposed the amendments by Spain (A/CONF.39/C.1/L.34) and Iran (A/CONF.39/C.1/L.63).

45. He could support the amendment by Gabon (A/CONF.39/C.1/L.41), provided the ideas contained in the Mexican amendment (A/CONF.39/C.1/L.65) were introduced at the end of the text; the reference, however, should be to the rules of general international law rather than simply to " international law ". It was necessary to introduce the Mexican amendment in some form because, without it, the text proposed by Gabon would contain a contradiction.

46. The CHAIRMAN said he wished to point out that the Swiss delegation's amendment (A/CONF.39/C.1/L.26) had not been withdrawn. Its sponsor had merely stated that if the Committee were to adopt the amendment by Gabon (A/CONF.39/C.1/L.41), he would withdraw his own amendment (A/CONF.39/C.1/L.26).[3]

47. Mr RUDA (Argentina) said it was essential to retain article 3 in order to safeguard the legal effect of the two categories of treaties excluded from the scope of the draft articles by virtue of the provisions of article 1 and article 2, paragraph 1 (*a*). He therefore opposed the proposal (A/CONF.39/C.1/L.14) to delete article 3; deletion would create grave problems of interpretation.

48. Although the codification of the law of treaties related exclusively to treaties concluded between States, some of the rules contained in the draft could be relevant to treaties concluded between States and other subjects of international law, or between such other subjects of international law; whence the necessity for sub-paragraph (*a*).

49. Sub-paragraph (*b*) was even more necessary, since the draft articles, as indicated in article 2, paragraph 1 (*a*), dealt only with treaties in written form. It was essential to state that the exclusion of international agreements not in written form did not affect the legal force of those agreements, and he therefore strongly opposed the amendment by Iran (A/CONF.39/C.1/L.63).

50. The amendments by Switzerland (A/CONF.39/C.1/L.26) and Mexico (A/CONF.39/C.1/L.65) derived from the same idea, although it was better expressed in the Mexican amendment; the idea was that the international agreements excluded by articles 1 and 2 remained subject to the rules set forth in the draft in so far as those rules were applicable to them by virtue of the rules of international law in force.

51. The amendment by Gabon (A/CONF.39/C.1/L.41) represented a valuable attempt to simplify the text and should be referred to the Drafting Committee, on the understanding that, as suggested by the Jamaican representative, a proviso would be added at the end that the rules referred to were those to which the international

[2] *Yearbook of the International Law Commission, 1966*, vol. II, pp. 176 and 177.

[3] See 6th meeting, para. 47.

agreements in question were subject by virtue of the rules of international law.

52. Mr. RICHARDS (Trinidad and Tobago) said that the clear purpose of article 3 was to remove doubts; those doubts, however, would not have arisen if article 1 had been drafted, as suggested by his delegation, to state that the future convention related exclusively to treaties concluded between States. If, however, the Committee did not accept his idea for article 1, an article on the lines of article 3 became necessary.

53. With regard to the wording of article 3, he favoured the language proposed by Gabon (A/CONF.39/C.1/L.41), but would like the opening words to take the form proposed in the United States amendment (A/CONF.39/C.1/L.20); he understood the reasons for the withdrawal of that amendment,[4] but regretted it as far as the drafting was concerned. He now suggested that article 3 be worded to read:

> " Nothing in the present articles shall affect the legal force of international agreements not in written form or of agreements concluded between States and other subjects of international law or between such other subjects of international law or the application to them of any of the rules of international law."

54. The other amendments, and especially the amendment by Iran (A/CONF.39/C.1/L.63), were not acceptable to his delegation.

55. Mr. SECARIN (Romania) said that article 3 was necessary because the previous articles limited the scope of application of the whole draft convention *ratione materiae* to treaties in written form and *ratione personae* to treaties between States. It had to be made clear that the limited scope of the codification in no way meant that other categories of treaties were outside the ambit of international law. Many of the provisions of the draft did no more than restate existing rules of international law. Those rules would continue to apply to all treaties, including those which had been specifically excluded from the scope of the draft, and were binding by virtue of their original source. For those reasons, although he appreciated the efforts of a number of delegations to improve the drafting of article 3, he urged the Committee to adopt it in the form in which the International Law Commission had formulated it.

56. Mr. VIRALLY (France) said that article 1 and paragraph 1 (*a*) of article 2 clearly defined the scope of the convention and excluded from it treaties concluded by subjects of international law other than States and agreements not in written form. Accordingly, the convention could have no legal effect on those two categories of agreements, and it might be said that article 3 merely stated the situation created by articles 1 and 2. Nevertheless, the International Law Commission had wisely decided to include in article 3 a clause stressing that rules of customary international law continued to apply to agreements falling outside the scope of the convention. The French delegation could therefore accept article 3 in its original form, but considered that the wording gave rise to some difficulties of interpretation.

57. The Gabon amendment (A/CONF.39/C.1/L.41) would have been an improvement on the Commission's text, being both clearer and more concise, but it unfortunately omitted the crucial phrase of the whole article, and might therefore be combined with the Mexican amendment (A/CONF.39/C.1/L.65), which specified that the rules to which agreements in the two categories were subject were those applicable to them in accordance with international law. The French delegation would, however, prefer to see the word " general " inserted before the words " international law ".

58. Mr. MARESCA (Italy) said that, since article 3 represented a counterweight to articles 1 and 2, its accurate wording was highly important to the entire system of the convention.

59. He could not agree with the Chinese delegation that the article should be deleted, or with the Iranian delegation that paragraph (*b*) should be omitted, for agreements not in written form were widely used in modern treaty, making arrangements. The deletion of the last phrase proposed by Switzerland, would remove the *raison d'être* of the entire article, for without that phrase the rules set out in the convention would apply to the two categories of agreements referred to in article 3.

60. The Drafting Committee should take into serious consideration the Mexican proposal to alter the last phrase to read " in accordance with international law ", since that seemed to be the most flexible formulation.

61. Mr. KRISHNA RAO (India) said that his delegation had no objection to the Mexican amendment (A/CONF.39/C.1/L.65), which might be referred to the Drafting Committee.

62. It could not support either the Chinese amendment (A/CONF.39/C.1/L.14), for the reasons given in the commentary to the article, or the Swiss amendment (A/CONF.39/C.1/L.26), the adoption of which would deprive the article of much of its value.

63. It would also have difficulty in accepting the Ethiopian amendment (A/CONF.39/C.1/L.57), which restated in positive form what the Commission had stated in a negative form, for reasons given in the commentary. That restatement, however, led to somewhat different results. For example, the use of the words " so far as possible " in paragraph (*a*) of the Ethiopian amendment made the provision weaker than the Commission's paragraph (*b*). Moreover, the Ethiopian paragraph (*b*) would have the effect of extending the scope of the application of the convention, which was limited to treaties concluded between States in article 1. The International Law Commission had recognized the validity of treaties in the two other categories and had emphasized that only rules deriving from customary international law were applicable to such agreements, whereas the Ethiopian amendment made all the rules of the convention automatically applicable to such agreements. Thus, the Commission provided for an objective criterion, based on recognized sources of international law, but the Ethiopian amendment set up a subjective and controversial criterion. Moreover, the Commission's reasons for drafting its text in that form were stated in the last two sentences of paragraph (2) of its commentary to article 3. The Indian delegation therefore appealed to the Ethiopian delegation to reconsider its amendment.

[4] *Ibid.*, para. 46.

64. Mr. FATTAL (Lebanon) said that article 3 was obviously not substantive and he urged the sponsors of amendments to withdraw their proposals or to agree to have them referred to the Drafting Committee. Articles 3 and 4 should really be voted on in their original form.

65. Mr. KRISPIS (Greece) said that, since the scope of the convention was clearly limited in article 1 and paragraph 1 (*a*) of article 2, the advocates of the deletion of article 3 probably had in mind that the rule in question should be interpreted *a contrario*. Nevertheless, it seemed advisable to retain the article, taking great care not to create difficulties by extending the scope of the convention through inaccurate wording.

66. His delegation was in sympathy with the intention of the Mexican amendment (A/CONF.39/C.1/L.65), which made it clear that the rules applicable to the two categories of agreements referred to in article 3 were customary rules of international law, not necessarily those set out in the convention; on the other hand, the convention itself restated some of those customary rules, for the distinction between the codification and the progressive development of international law was difficult to draw. He therefore suggested that the Mexican amendment be redrafted to read " so far as they represent a restatement of customary international law ".

67. Mr. KEARNEY (United States of America) said that the debate had centred largely on the ambiguity of the concluding phrase of article 3. In his delegation's opinion, the Gabon and Mexican amendments went a long way towards eliminating that ambiguity, and the Jamaican suggestion seemed valuable. The article might be referred to the Drafting Committee for consideration in the light of comments made in the Committee.

68. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that article 3 played an important part in the entire system of the draft convention, by stating clearly the rules governing the two classes of agreements to which the rules of the convention did not relate. Furthermore, it provided that the fact that such agreements did not lie within the scope of the convention did not affect their legal force, and admitted the possibility of the application to them of the rules of the convention, under certain specific conditions. It was obvious that certain provisions of the convention, such as, for instance, article 27, paragraph 1, were applicable to the agreements in question. The article therefore established a proper balance, and any deletion from it could only imperil that balance; on the other hand, the Commission's wording might be regarded as a little cumbersome.

69. The USSR delegation therefore could not support either the proposal to delete the article, or the United States amendment (A/CONF.39/C.1/L.20), which would have had the effect of extending the scope of the convention. The Swiss and Gabon amendments (A/CONF. 39/C.1/L.26 and L.41), which both omitted the crucial last phrase of the article, were also unacceptable, since their effect would be to make all the rules of the convention applicable to the two types of agreement in question. Nor could his delegation support the Ethiopian amendment, for the reasons stated by the Indian representative, and also because, at all events in the Russian text, the word " oral " was used instead of " not in written form "; agreements were frequently expressed in writing, but not concluded in written form. The Iranian proposal (A/CONF.39/C.1/L.63) to delete paragraph (*b*) was also unacceptable, since it would not make clear what rules would apply to international agreements not in written form. Finally, although the Mexican amendment (A/CONF.39/C.1/L.65) might be regarded as a drafting proposal, it should be borne in mind that the convention itself would ultimately become international law. For all these reasons, the USSR delegation considered that it would be wiser to retain the original text of article 3.

70. Mr. ALVARO ALVAREZ (Uruguay) said that the substance of the International Law Commission's text for article 3 should be retained. The decision to limit the scope of the draft to treaties concluded between States did not imply that all the rules set out in the convention would be inapplicable to treaties concluded by subjects of international law other than States. It in no way interfered with the legal force of such agreements or with that of international agreements not in written form. The ruling of the Permanent Court of International Justice in the *Eastern Greenland* case,[5] for example, should be borne in mind. Another aspect of the legal force of agreements not in written form had arisen in connexion with Article 102 of the United Nations Charter, which imposed on Member States the obligation to register treaties; the fact that a treaty, whether or not in written form, had not been registered did not mean that it had no legal force; it simply meant that it could not be invoked by the parties before any organ of the United Nations. Moreover, it was agreed, as a matter of interpretation, that those organs themselves could invoke the treaty in question if it had come to their notice.

71. His delegation considered that the amendment by Gabon (A/CONF.39/C.1/L.41) might help to improve the Commission's wording, but that it should be amalgamated with the Mexican amendment (A/CONF.39/C.1/L.65).

72. Mr. YAPOBI (Ivory Coast) said that his delegation fully supported the substance of the Gabon amendment (A/CONF.39/C.1/L.41), but hoped that the text could be reworded. The amendment consisted of two ideas: that the convention would not affect the legal force of the agreements in question, and that it would not affect the application to such agreements of the rules set forth in the convention. It was illogical, however, to state that the convention could not " affect " the application of the agreements when it was clearly stated that they did not fall within the scope of the convention. Perhaps the last phrase of the amendment should be reworded to read: "... or prevent the application to such agreements of the rules set forth in the present convention ".

73. Mr. SUPHAMONGKHON (Thailand) said his delegation believed that it would be unwise to delete any part of a text which had been carefully elaborated by the International Law Commission. He appealed to the sponsors of substantive amendments to withdraw them, and thought that the Drafting Committee would have no difficulty in dealing satisfactorily with all those amendments which affected the wording only.

74. Mr. BROCHES (Observer for the International Bank for Reconstruction and Development), speaking at the invitation of the Chairman, said that IBRD, and its

[5] P.C.I.J., Series A/B, No. 53.

affiliate, the International Development Association (IDA), were parties to over 700 international agreements and were therefore vitally concerned with the retention of the essence of article 3, which would be seriously affected, if not destroyed, by some of the proposed amendments. Thus, the Swiss and Gabonese amendments (A/CONF.39/C.1/L.26 and L.41), though very differently worded, were similar in that they eliminated the essential qualifying phrase at the end of the article. If those amendments were adopted, the article might be paraphrased as follows: " the fact that the convention does not apply to the agreements in question shall not affect their legal force or the application to them of the rules of the convention. " Such a text would be internally inconsistent, since it was hard to see how the fact that the convention did not apply to certain agreements could fail to affect the application to those agreements of its rules. Moreover, the proposed formulations would be inconsistent with article 1 as it stood and would appear to accomplish indirectly what the Committee had refused to do directly when it declined to extend the scope of the proposed convention to the agreements concluded by international organizations. Some of the rules expressed in the convention might well be applicable to those agreements, but only because they were rules of customary law. It was therefore essential to retain the qualifying words at the end of the text, otherwise the scope of the convention would be indirectly extended to treaties concluded by international organizations.

75. The International Bank therefore strongly urged the Committee to retain the International Law Commission's text, which had been formulated with great precision.

76. The CHAIRMAN said that the majority of the Committee seemed to be against the Chinese and Iranian amendments (A/CONF.39/C.1/L.14 and L.63) and substantially in favour of retaining the article in its original form. He suggested that article 3 be referred to the Drafting Committee, together with the Swiss, Spanish, Gabonese, Ethiopian and Mexican amendments (A/CONF.39/C.1/L.26, L.34, L.41, L.57 and L.65).

It was so agreed.[6]

The meeting rose at 6.10 p.m.

[6] For resumption of the discussion of article 3, see 28th meeting.

EIGHTH MEETING

Tuesday, 2 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations) [1]

1. Mr. SAINT-POL (Observer for the Food and Agriculture Organization of the United Nations), speaking at the invitation of the Chairman, said that a large number of agreements had been concluded within the framework of FAO,which had drawn up rules governing the preparation of agreements and conventions adopted within that organization. Those rules applied to agreements concluded between States within FAO and to agreements concluded between a group of States and FAO.

2. The Food and Agriculture Organization had always tried to follow the principles of international law and comply with the decisions of the United Nations General Assembly, but it had sometimes had to depart from them owing to the highly technical nature of its work, which was evident from the titles alone of most of its agreements: for example, the Constitution of the European Commission for the Control of Foot-and-Mouth Disease and the International Plant Protection Convention.

3. The rules relating to treaties concluded within FAO were to be found in the basic texts of the organization; some of them were even included in its Constitution.

4. Naturally, there were differences between those rules and the provisions of the draft articles before the Committee. For example, the procedure followed by FAO in negotiations differed slightly from the rules laid down in the draft articles. It was important to note in that respect that the FAO Committee responsible for preparing draft agreements did not necessarily include the member States which might become parties to the agreements.

5. The main rules laid down in the FAO Constitution concerned the entry into force of agreements, the authentication of the text, the functions of the organization as a depositary, the registration of treaties and the full powers of representatives signing agreements. The rules applied by FAO to treaties met the requirements of both developed and developing countries.

6. The provisions of the draft convention could be applied without difficulty both to treaties concluded between States independently and to treaties concluded between States under the auspices of FAO. With regard to treaties concluded between States within the general framework of FAO in accordance with article XIV of its Constitution and treaties concluded between a group of States on the one hand and FAO on the other, with a view to the establishment of a commission or an institution, in accordance with article XV of the Constitution, the rules of the organization which were already in force should apply. In addition, the rules applicable to technical assistance treaties concluded between FAO and States and to treaties concluded between FAO and other international organizations could be codified in the near future.

7. He pointed out that the application of any provision of the draft articles which conflicted with the rules adopted by FAO on treaty law would entail an amendment

[1] The following amendments had been submitted: Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.12; United States of America, A/CONF.39/C.1/L.21; Spain, A/CONF.39/C.1/L.35/Rev.1; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.39; Gabon, A/CONF.39/C.1/L.42; Sweden and the Philippines, A/CONF.39/C.1/L.52 and Add.1; Ceylon, A/CONF.39/C.1/L.53; France, A/CONF.39/C.1/L.55; Peru, A/CONF.39/C.1/L.58; Zambia, A/CONF.39/C.1/L.73; Jamaica and Trinidad and Tobago, A/CONF.39/C.1/L.75; Congo (Brazzaville), A/CONF.39/C.1/L.76.

to the organization's Constitution, adopted with the assent of two-thirds of its members.

8. Finally, he considered that the proviso contained in article 4 should be retained. He would even suggest an addition, to the effect that the application of the convention to treaties which were constituent intruments of an international organization or were adopted within an international organization should be subject not only to any relevant rules of the organization but also to the practice of the organization.

9. The CHAIRMAN invited the sponsors of amendments to state, when submitting them, whether they wished to have their proposals put to the vote or referred to the Drafting Committee. He announced that the Zambian representative had withdrawn his delegation's amendment (A/CONF.39/C.1/L.73).

10. Mr. KORCHAK (Ukrainian Soviet Socialist Republic), introducing his delegation's amendment (A/CONF.39/C.1/L.12), said he thought there was no need to stress the importance of article 4. At its eighteenth session, the International Law Commission had altered the wording of the article to take account of the comments of a number of Governments. That improvement had not been sufficient, however, as was shown by the many amendments submitted. In particular, the phrase " shall be subject " was unsatisfactory.

11. By virtue of article 4, any international organization could avoid the obligation to apply the provisions of the convention. The number of treaties concluded by international organizations was continually increasing, however, and if the article was adopted the scope of the convention would be severely restricted.

12. The Ukrainian delegation was opposed to any amendment whose purpose was to limit the scope of the convention.

13. He noted that the Peruvian amendment (A/CONF. 39/C.1/L.58) was very similar to the Ukrainian amendment. It provided a realistic solution to the problem of the relationship between the convention and treaties concluded within international organizations. The Peruvian and Ukrainian delegations should therefore consult each other with a view to putting the amendment to article 4 in final form.

14. In conclusion, he said that the adoption of his country's amendment would extend the scope of the convention without affecting treaties concluded within the framework of international organizations.

15. Mr. McDOUGAL (United States of America), introducing his delegation's amendment (A/CONF. 39/C.1/L.21), said that if the convention was to achieve what was expected of it, the treaties which could escape its provisions should be as few as possible. He feared, however, that article 4, as it stood, conferred upon States a comprehensive, automatic and unquestionable exemption from the fundamental principles of the convention, if they chose to create an international organization or conclude agreements within the structure of such an organization. The intervention of the observer for the International Labour Organisation at the previous meeting could only enhance that fear.

16. The United States delegation thought that the exclusion of two such important types of treaty from the scope of the convention would greatly undermine its authority and reduce its significance. It the fundamental principles of the convention were considered appropriate to govern international agreements concluded between States independently of international organizations, it was difficult to see why they should be otherwise when States established an organization or operated within its structure. In these circumstances, it might well be asked how fundamental the principles really were.

17. The United States delegation did not wish to deprive international organizations of the necessary flexibility in procedural matters, but it did seek to make a sharp distinction between procedural matters involving considerations of convenience or economy and the substantive rules of the law of treaties, which should apply to all treaties without exception. Otherwise, States desiring to evade the convention's basic provisions would only need to establish an international organization to meet their requirements.

18. The reasons given in the International Law Commission's commentary in support of the latest version of article 4 were none too persuasive. The United States delegation thought that the convention could safeguard the flexibility and security needed by international organizations if it included suitable exceptions to articles 6, 8, 9, 13, 16, 17, 37 and 72. The addition of such exceptions was a simple matter.

19. It was necessary to proceed on the express principle that the treaties referred to in article 4 were subject to the substantive rules of the convention. If the representatives of international organizations considered that some of those rules should not apply to agreements concluded within their organizations, it was for them to justify the need for such immunity article by article.

20. The arguments so far advanced did not distinguish between the internal affairs of an organization, such as the procedure for the formation of agreements, which should be subject to its own rule-making, and treaty relations between States, which involved matters such as the principles relating to invalidity and were beyond the rule-making competence of international organizations. Nor had a proper distinction been made between participation in the framing of a constituent instrument of an international organization and admission to membership of an organization, or between withdrawal from membership and the termination of the constituent instrument. The importance of the functions of a depositary had also been exaggerated. The observer for the International Labour Organisation and other speakers had emphasized the need for flexibility in the law of treaties to take future problems into account. But that was true of all agreements concluded by States.

21. The general terms and automatic nature of the immunity conferred by article 4 would only arouse the suspicion of national legislators, particularly when commentators tended to interpret the phrase " adopted within an international organization " as applying to agreements concluded under the auspices of, or deposited with, an international organization. Consequently, the United States delegation urged the deletion of article 4.

22. Mr. DE CASTRO (Spain), introducing his amendment (A/CONF.39/C.1/L.35/Rev.1), reminded the Com-

mittee that the present article 4 corresponded to article 48 of the 1963 draft, in which it had appeared in Part II, relating to the invalidity and termination of treaties.[2] The commentary to article 48 had stated that the principles embodied in section II appeared not to require modification for the purposes of being applied to the treaties in question. Those principles should apply to all treaties, of whatever kind, since they were of a fundamental nature.

23. In proposing its amendment, the Spanish delegation had been actuated by two basic considerations. First, to make it sufficiently clear in the future convention that its provisions were applicable to all treaties connected with international organizations; the convention would thus apply to the widest possible extent to treaties of that kind, in accordance with the wishes expressed by many Governments in the comments they had made in 1966 and 1967. Secondly, a balance should be maintained between *lex generalis* of which the future convention would partake, and the *lex specialis* of each international organization. He had studied the comments in document A/6827/Add.1 and those made at the previous meeting by the observers for the International Labour Organisation and the International Bank for Reconstruction and Development, and he had also taken into account the suggestions put forward by the United Nations in the same document for safeguarding the Secretary-General's functions as depositary of treaties.

24. The text submitted by the International Law Commission did not make a clear enough distinction between the different kinds of treaty in which an international organization was involved, apart from the case dealt with in article 3 of the draft.

25. With respect to the constituent instruments of international organizations, the text did not bring out clearly enough the two quite separate moments in the life of such treaties: first, the adoption of the text, the expression of consent by States, the formulation of reservations and the entry into force of the treaty, all of which preceded the establishment of the organization; and secondly, the operation of the organization after its establishment. At that stage, the treaty might already be largely governed by the rules formulated by the organization or by the provisions of the treaty itself, for example in the matter of amendment or withdrawal. The text of article 4 ignored that fact and introduced a danger of confusion and obscurity into a particularly difficult subject.

26. The phrase " shall be subject " used in article 4 was infelicitous, as the representative of the Ukrainian SSR had observed. In the case of constituent instruments of organizations, subjection to the rules of an organization which had not yet come into existence was meaningless with respect to certain of the rules. Furthermore, in the case of such treaties, as of others, the very principle of such subjection was open to question and raised the problem of the balance between *lex generalis* and *lex specialis*, which should be solved in such a way as to make the convention as widely applicable as possible.

27. The Spanish delegation was therefore proposing the application to constituent instruments of international organizations of articles 5 to 15, on the conclusion of treaties, since the subject matter of those articles could not be subject to the rules of an organization which had not yet been established, and of articles 23, 39 to 50 and 58 to 61, because those articles should apply to all treaties and could not possibly be made subject to such rules. He would not mention other rules set out in Part V, since those rules themselves stated that they were subject to the provisions of the treaty, and it was therefore unnecessary to repeat it.

28. With regard to treaties adopted within an organ of an international organization or under the auspices of an international organization, the application of the convention should be the rule and the application of the rules of the organization the exception. If that class of treaties was examined closely, it would be found that at certain stages in their preparation the rules of an organization could apply: that was true of rules dealing with the capacity of its members to conclude treaties, conclusion and entry into force. Conclusion and entry in force were the natural sphere of the *jus specialis* of organizations.

29. Lastly, with regard to treaties deposited with international organizations, he shared the proper concern of the Secretary-General of the United Nations, who hoped that the convention would not modify the rules governing his functions as depositary at present in force in the United Nations. In that respect, only the subject matter of article 71 to 75 justified a limitation of the application of the rules of the convention.

30. In conclusion, he emphasized that he had tried to respect the spirit of the draft and that the provisions which the International Law Commission itself had considered mandatory would remain so if the amendment were adopted. On the other hand, the other provisions would be made subject to the rules of the international organizations as their nature required. His delegation's amendment should be regarded as both of substance and of drafting.

31. Sir Francis VALLAT (United Kingdom) said that in substance article 4 was one of the most important before the Committee. Perhaps the most striking development in the international field in the twentieth century had been the growth of international organizations and the part they played in relations between States. Each organization had a constitution, rules and practices designed to meet its own needs. It was vital that, in the codification of the law concerning treaties between States, the texture which had been and would in future be, created by international organizations should not be inadvertently destroyed or damaged. The representative of the ILO had stressed the importance of the established practices of his organization, and no doubt other organizations were in a similar position. However, the Conference would not have time to ensure that all the established practices of international organizations were catered for and that was why the United Kingdom delegation had submitted an amendment (A/CONF.39/C.1/L.39) adding the words " and established practices ". It might be that the words " rules " was sufficient, but there was a tendency to interpret it in a limited sense referring to

[2] *Yearbook of the International Law Commission, 1963*, vol. II, p. 213.

the written rules or possibly regulations, but not including practices established by usage, etc. The United Kingdom amendment would put the matter beyond doubt and his delegation was willing that it should be referred to the Drafting Committee.

32. Mr. AUGÉ (Gabon) explained that by its amendment to article 4 (A/CONF.39/C.1/L.42) his delegation had tried to simplify the wording of the article and its title. The amendment could be referred to the Drafting Committee.

33. Mr. BLIX (Sweden) explained that his delegation had submitted an amendment (A/CONF.39/C.1/L.52) to delete article 4, not because it was dissatisfied with the idea expressed in that article, but because it thought that the principle did not need to be stated. The various amendments submitted showed that the idea was hard to express in precise terms. It would therefore be better to delete the article, which seemed unnecessary. As States were free not to apply the articles of the convention if the treaty to which they were parties so provided, it was hard to see why States acting within an international organization should not be entitled to stipulate in a treaty that they would conform to the rules of the organization and derogate from the provisions of the convention.

34. Most of the articles were of a residuary character. For example, article 20 began: " Unless the treaty otherwise provides ". Even without that introductory phrase, States would certainly have been able to depart from the rule by agreement among themselves. It was not a peremptory norm. As the International Law Commission had said in paragraph (2) of its commentary to article 50, the majority of the general rules of international law did not have the character of *jus cogens*. The wording of many of the articles could probably have been simplified if that basic principle had been stated at the beginning of the draft. Provisos similar to that in article 50 were, in fact, to be found in articles 13, 21, 24, 25 and 33. The absence of such clauses did not mean that States could not derogate from the rules of the convention. It was only where articles contained peremptory norms that no derogation was permitted. The norms stated in articles 48 and 49 appeared to be of that kind.

35. Consequently, if States could derogate from the rules of the draft convention by agreement between themselves, they should also be able to do so by adopting certain rules or practices within an international organization, and it did not seem necessary to say so. On the other hand, if the draft contained mandatory rules, States could not derogate from them either by agreement among themselves or by adopting certain rules within an international organization. That limitation, incidentally, was not clear from the present wording of article 4.

36. In some comments on that article, the fear had been expressed that international organizations might too lightly deviate from the rules of the convention. The Swedish delegation did not share that fear. If some of the residuary rules of the convention did not satisfy the needs of an organization, there was nothing to prevent States members of that organization from adopting special rules or practices enabling them to depart from the rules of the convention. Moreover, experience had shown that international organizations tended to have a consolidating influence. Hence it would not seem dangerous tacitly to grant States acting within an international organization the right to establish a *lex specialis*, with the sole restriction that they could not derogate from peremptory norms. As it seemed difficult to formulate such a right, which derived from the very nature of the draft convention, the Swedish delegation thought it would be better not to mention it and to delete article 4.

37. Sir Lalita RAJAPAKSE (Ceylon), introducing his delegation's amendment (A/CONF.39/C.1/L.53), said that the present wording of article 4 would permit some latitude in the application of the convention to two types of treaty: first, treaties which were the constituent instruments of international organizations and, secondly, treaties adopted within international organizations. In the Ceylonese delegation's opinion, an international organization created by treaty needed a certain freedom to enable it to develop and to perform with maximum efficiency the functions for which it had been established. Thus the application of the convention to a treaty which was the constituent intrument of an international organization should be subject to any relevant rules of that organization. The Ceylonese delegation had added the words " or decisions " so as to take into account the established practice of the organization.

38. Article 4, however, appeared to go too far in according the same latitude with respect to treaties " adopted within an international organization ". An organization which had adopted a treaty should not be permitted to determine the extent to which the articles of the convention would apply to that treaty. There was no reason to fear that organizations such as those represented by observers in the Committee would abuse the latitude given them; but it would be preferable to make it quite clear that treaties adopted within an organization should be on quite a different footing from treaties which were the constituent instrument of an organization and should be subject to the articles of the convention. That was why the words " or are adopted within an international organization " had been omitted from the amendment. The representative of the ILO had advanced some very interesting arguments for the retention of article 4. He himself, however, was still convinced that the rationale of his delegation's amendment remained valid.

39. Since the adoption of a treaty within an organization was a relatively new technique, some of the articles in the draft would have to be slightly modified in order to cover it. The Ceylonese delegation had already submitted an appropriate amendment to article 8 (A/CONF. 39/C.1/L.43), but the role of the organizations in question would also have to be taken into account in articles 6, 9, 16, 17 and 72.

40. Mr. VIRALLY (France) thought that in view of the increasingly important role of international organizations in contemporary life and in the formation of international law, article 4 was one of the most significant articles in the draft convention. It raised various problems which should be carefully differentiated.

41. A treaty which was the constituent instrument of an organization could be identified by its object. At the conclusion stage it was comparable to any other treaty,

but the position changed when it entered into force. Ordinary treaties were applied by the States parties to them through their executive, legislative and judicial organs. A treaty which was the constituent instrument of an organization was applied both by the parties as members of the organization and by the organs of the organization. That produced a whole series of consequences which the draft convention could not cover. The inclusion of constituent instruments of international organizations in article 4 was therefore justified.

42. Treaties concluded within an organization did not have the same unity. Some treaties were adopted merely for reasons of convenience, and there would be no justification for trying to infer legal consequences from that fact. When the Convention on Diplomatic Relations had been drawn up, for instance, it had been agreed to deal with special missions separately from permanent missions. The General Assembly had decided not to convene a conference to deal with the draft articles on special missions, but to pursue the topic itself. If article 4 of the draft convention on the law of treaties had been in force at that time, the Convention on Diplomatic Relations would have been subject to it, whereas the draft articles on special missions might have escaped its provisions. Such a difference in treatment was unjustifiable.

43. The question therefore arose in what cases the application of a special legal régime was justified. The French delegation thought it was justified for treaties whose adoption constituted the actual function of the organization—treaties which were inseparable from its constituent instrument and from its very existence. The observer for the ILO had explained the part played in that connexion by the international labour conventions in achieving the aims of that organization. Treaties of that kind should be governed by special rules as to their interpretation, validity and application. The purpose of the French amendment (A/CONF.39/C.1/L.55) was to restrict the application of article 4 to agreements concluded under a treaty which was the constituent instrument of an international organization. The amendment stressed the need for a direct link between the treaty adopted by the organization and the constituent instrument of the organization, because it was that link which justified the special régime.

44. The French delegation also considered that the present wording of article 4, which stated that the application of the draft articles " shall be subject to any relevant rules of the organization", was too vague, since it was difficult to decide what was to be understood by " relevant rules ". In a convention as important as the one being drawn up, it was necessary to be more precise, so the French amendment read " any relevant rules resulting from the treaty ".

45. The amendment in document A/CONF.39/C.1/L.55 was a drafting amendment, but it also contained substantive changes. The French delegation wished it to be referred to the Drafting Committee for Consideration in the light of the comments made by delegations in the Committee of the Whole.

The meeting rose at 1.5 p.m.

NINTH MEETING

Tuesday, 2 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 4. [1]

2. Mr. CALLE Y CALLE (Peru), introducing his amendment (A/CONF.39/C.1/L.58), said that the purpose of article 4 was to make a general reservation to the application of the draft articles in the case of treaties which were constituent instruments of international organizations or had been adopted within international organizations. His delegation did not support the proposals to delete that article since there were sound practical reasons for making those two categories of treaties subject to special rules. However, the provisions of article 4 went too far since they would have the effect of establishing two separate bodies of treaty law, one for States concluding treaties among themselves in the ordinary way and another for States concluding treaties among themselves, but within the framework of international organizations.

3. The purpose of the Peruvian amendment was to introduce a less radical formula which would make the draft articles applicable in principle to the two categories of treaties in question but subject to the proviso " without prejudice to any relevant special provisions laid down in such constituent instruments or adopted by virtue of them " (A/CONF.39/C.1/L.58). That language made it clear that the special provisions adopted by an international organization in accordance with its constitution prevailed as *lex specialis* over the *lex generalis* embodied in the draft articles. In the Peruvian amendment the expression " within an international organization " had been modified to " within the competence of an international organization ". That more precise language placed the emphasis on the legal aspects of the matter and on the constitutional validity of the treaty-making procedure, instead of on the mere fact that a treaty had been concluded " within an international organization ".

4. He noted that the Ukrainian amendment (A/CONF.39/C.1/L.12) was intended to serve a somewhat similar purpose, so, while he insisted on the substance of his proposal, he would be content to leave the drafting to the Drafting Committee.

5. Mr. FRANCIS (Jamaica), introducing the joint amendment by his delegation and that of Trinidad and Tobago (A/CONF.39/C.1/L.75), said that its main purpose was to confine the application of article 4 to the constituent instruments of international organizations; treaties concluded within international organizations would thus be subject to the general law of treaties. While there were good reasons for extending special

[1] For the list of the amendments submitted, see 8th meeting, footnote 1.

treatment to treaties which were the constituent instruments of international organizations, the other category of treaties did not differ from ordinary treaties between States.

6. By virtue of article 1, treaties between States and international organizations had been excluded from the scope of the draft. Consequently, a treaty concluded within the framework of an international organization could only be a treaty between States which happened to be members of the organization. From a legal point of view, there was no valid reason for establishing a different set of rules for that type of treaty.

7. When the draft convention entered into force, some States would need to enact legislation in order to give effect to some of its provisions. Similarly, certain international organizations might have to amend some of their rules, or even revise their constituent instruments, in order to take its provisions into account. In that event his Government would give its full co-operation to those organizations, in order to facilitate that process.

8. Though the amendment (A/CONF.39/C.1/L.75) raised the issue of principle, he would have no objection to its being referred to the Drafting Committee.

9. Mr. MOUDILENO (Congo, Brazzaville), introducing his delegation's proposal to delete article 4 (A/CONF.39/C.1/L.76), said that he saw no reason to make a special category of treaties which were constituent instruments of international organizations, or had been concluded within international organizations. All such treaties were treaties concluded between States and were therefore within the scope of the draft articles as set forth in article 1. In particular, treaties concluded within international organizations were the outcome of State activity, to which the same rules should apply as to similar activity outside those organizations.

10. He had no wish to belittle the importance of international organizations or of their activities. If it were desired to recognize their importance in the draft, he would suggest that article 4 should be reworded to read: " In accordance with article 1, the present articles shall apply *ipso jure* to treaties which are constituent instruments of international intergovernmental organizations or which are adopted within such organizations ".

11. Mr. GOLSONG (Observer for the Council of Europe) speaking at the invitation of the Chairman, said that the discussion had revealed the complexity of the special problems which the codification of the law of treaties involved with regard to the practice so far followed in the matter by international organizations.

12. The problems to which the observer for the ILO had referred at the seventh meeting arose in similar manner for a regional organization like the Council of Europe, which had sponsored some sixty treaties affecting not only its member States but some twenty-five States represented at the present Conference. Moreover, some of those treaties protected not only the nationals of member States but all persons, whatever their nationality. All those treaties had been drawn up and applied by virtue of special rules which did not necessarily coincide with those embodied in the draft articles, and for that reason article 4 was necessary for his organization as well as for others which were more universal in character.

13. The basic rule embodied in article 4 was not the result of the work of international secretariats; it had emerged from the decisions taken and the attitudes adopted by States. It thus reflected a development of State practice based on the interests of States. The fact that an increasing number of multilateral treaties were concluded within international organizations showed that the flexibility of that procedure was in the interest of States.

14. At the previous meeting, the United States representative had invited officials of international organizations to make known their needs. In response to that request, he would stress that the needs in question were those of the States members of the organizations and not those of international administrations.

15. The representative of Sweden, in advocating the deletion of article 4, had claimed that, with the exception of a few articles such as articles 48 and 49, to which perhaps such articles 23 and 59 should be added, none of the provisions of the draft articles stated rules of *jus cogens*, and had then gone on to argue that, since it was open to States to depart from the rules of *jus dispositivum* which constituted the bulk of the draft, article 4 was not necessary.

16. Deletion of article 4 might be acceptable if all the delegations shared the views of the Swedish delegation, but that was by no means the case. It was significant that the United States amendment (A/CONF.39/C.1/L.21) to delete article 4 was based on the totally different argument that States should not evade the rules embodied in the draft articles by concluding their treaties within international organizations.

17. The United States amendment listed eight articles which, in the event of the deletion of article 4, would require amending in order to take into account the needs of international organizations, and added that " the views of interested international organizations might be sought regarding the completeness " of that list of articles. The experience of the Council of Europe showed that there were no less than twenty-seven articles which would have to be amended. That figure clearly indicated the magnitude of the problem and demonstrated that a general clause on the lines of article 4 was preferable. It was significant that the International Law Commission had at an early stage of its work endeavoured to solve the problem piecemeal in connexion with each separate article, but had reached the conclusion that a general article was necessary.

18. With regard to the treaties covered by article 4, the amendment proposed by Spain (A/CONF.39/C.1/L.35/Rev.1) constituted a useful contribution in that it attempted to clarify the various types of treaties concerned. There might still be some difficulty, however, in drawing a clear line between the constitutent instruments of international organizations and treaties adopted within those organizations, particularly with respect to treaties establishing appropriate institutional machinery, such as the important European Convention on Human Rights. On the other hand, although that Convention had been adopted within the framework of the Council of Europe, it was doubtful whether it had been adopted by virtue of the constitutent instrument of that organization; the French amendment (A/CONF.31/C.1/L.55) should therefore be carefully examined.

19. The fact that the term " adopted " was used in article 4 made it advisable to explain the use of that term in article 2, paragraph 1, as proposed in the French amendment (A/CONF.39/C.1/L.24) to that article. The meaning of the term was explained in paragraph (1) of the commentary to article 8 but not in the draft articles themselves.

20. With regard to the question of the " relevant rules " of an organization, those rules should include the established practices of the organization in the exercise of its competence. If there were any doubt on that point, the best method of clearing it up would be to adopt the United Kingdom amendment to introduce in article 4 the words " and established practices " (A/CONF.39/C.1/L.39).

21. He did not believe that it would be possible to limit the general provision of article 4 to " any relevant rules resulting from the treaty " which was the constituent instrument of an international organization, as proposed by France (A/CONF.39/C.1/L.55). The established practice of the International Labour Organisation, for example, a practice which had been accepted by certain States with some hesitation, was that international labour conventions were not signed. That practice was not based on the text of the Constitution of the International Labour Organisation, and would therefore fall outside the terms of the French amendment. If the purpose of that amendment was to prevent *ultra vires* acts by international organizations, the Peruvian amendment (A/CONF.39/C.1/L.58) would seem to be directed to solving the same problem but its language was more adequate.

22. Mr. YACCOUB (Observer for the League of Arab States), speaking at the invitation of the Chairman, said that he wished to make a few comments on article 4 without binding his organization with regard to it.

23. He felt that article 4 should be retained as it stood because it introduced an element of flexibility which was necessary to the life of international organizations. The constituent instrument of the League of Arab States contained a number of provisions embodying special rules in the matter of the law of treaties. For instance, its article 4 made provision for the competence of the Council of the League to adopt the text of draft conventions for submission to member States; article 7 specified that a unanimous decision of the Council was binding on all the member States, but that a majority decision was binding only on those States which had voted for it. Under article 17, every member State was bound to deposit with the League secretariat a copy of any treaty signed by it with another country, whether a member of the League or not.

24. He favoured the United Kingdom amendment (A/CONF.39/C.1/L.39) to introduce a reference to the established practices of international organizations, and also the French amendment to article 2 (A/CONF.39/C.1/L.24) to include a definition of " restricted international treaty ".

25. Mr. MAGNIN (Observer for the United International Bureaux for the Protection of Intellectual and Industrial Property—BIRPI), speaking at the invitation of the Chairman, said that in view of the large number of treaties for which international organizations were responsible, a draft treaty designed to codify the written or unwritten rules concerning the conclusion of treaties must of course take into account the relevant practice of those organizations. Draft article 4 spoke of treaties which were constituent instruments of international organizations or which were adopted " within " international organizations. Various amendments, and certain delegations in their oral statements, had used other expressions concerning, for example, treaties concluded " under the auspices " or " within the framework " of international organizations. Such questions of drafting were debatable; what mattered was that the practices of all international organizations should be reserved. According to article 2, paragraph (i), the expression " international organization " meant an intergovernmental organization. There were several types of intergovernmental organizations; the international Unions for the protection of intellectual property, of which BIRPI was the permanent secretariat, played a considerable role where treaties were concerned. In the document submitted to the Conference concerning article 26 (A/CONF.39/7, section B 5), BIRPI had stressed the importance of those Unions and, in particular, of the Paris Union for the Protection of Industrial Property and the Berne Union for the Protection of Literary and Artistic Works, each of which comprised some 100 States. The Acts of those Unions and the revisions adopted at regular intervals were treaties. However, they were treaties of a particular type in that, because the Union formed a united whole, a State which was a party only to the latest of those treaties was implicitly bound to a State which was a party only to an earlier treaty in the same series. It was therefore understandable that, for the adoption of such treaties, the States concerned should have laid down special rules different from those applicable to ordinary treaties which were those to which the International Law Commission's draft text referred and in whose conclusion States acted in some degree as severally independent entities. One such rule was that of unanimity, which the States had confirmed as recently as June 1967 on revising the Berne Convention at the Stockholm Diplomatic Conference. That rule, together with all those which the States had found it necessary to observe within the Unions, must naturally be reserved.

26. In his opinion, the best way to accomplish that would be to adopt a general provision of the same type as that laid down in article 4; such a provision could be prepared by the Drafting Committee. Alternatively it would of course be possible to provide for the insertion of reservations in various articles of the treaty, as suggested by the United States delegation. That, however, would be a more complicated procedure, for such reservations would have to be inserted in many articles and there would be no assurance that nothing had been overlooked at one point or another.

27. However, if it was recognized, as the representatives of Sweden and Switzerland had pointed out, that with specified exceptions the provisions of the treaty did not possess the quality of *jus cogens* but were in reality nothing more than recommendations, the problem raised concerning draft article 4 would be less pressing.

28. Mr. BROCHES (Observer for the International Bank for Reconstruction and Development), speaking at the invitation of the Chairman, said he endorsed the

plea of the observer for the International Labour Organisation for the retention of article 4. The International Bank, in a memorandum submitted to the Conference, had expressed the view that both the constituent instruments of international organizations and the treaties adopted within them needed special treatment (A/CONF.39/7/Add.1 and Corr. 1, paragraphs 11 *et seq.*). It had also suggested additions intended to clarify the meaning of the phrase " relevant rules of the organization " so as to indicate that they included the constituent instruments themselves as well as *ad hoc* decisions, which together with standing rules constituted established practice.

29. However, suggestions had been made for the deletion or restriction of article 4. One of the delegations advancing such a proposal had indicated certain consequential changes that might as a result be made in several other draft articles; it had also asked that the views of interested international organizations be obtained as to the completeness of its list (A/CONF.39/C.1/L.21). The following observations by the Bank, which related to about thirty articles, were made in response to that request.

30. If article 4 were deleted, constituent instruments would be equated with other multilateral treaties, thus disregarding the substantial differences between them and, in particular, the special necessity for preserving the integrity of the former. Such a move would require changes in at least articles 14, 37, 41, 57, 59 and 62.

31. If article 14, paragraph 1, were made applicable to constituent instruments of international organizations, it would permit contracting States to accept as valid the consent of a State to be bound by part of the treaty only, and thus leave a potential gap in the constituent instrument.

32. He noted in connexion with paragraph 3 (*c*) of article 27 and with article 38, that even if article 4 were deleted, the " practice in the application of the treaty " should be understood as including the practice of the organization whose constituent instrument was involved.

33. Article 37, dealing with modifications of treaties agreed by certain States *inter se*, could not be applicable to multilateral agreements which were constituent instruments, nor were the rules in article 41 concerning separability appropriate for them. The provisions regarding termination and suspension in article 57 should, as far as constituent instruments were concerned, be made expressly subject to any provisions in such treaties concerning breach—which might require a modification of paragraph 4.

34. In cases where constituent instruments contained provisions for termination and withdrawal, those provisions should be regarded as exhaustive, and parties should not be permitted to invoke a fundamental change of circumstances as a ground for termination or withdrawal under article 59.

35. The scope of the application of article 62 would be diminished by some of the changes he was advocating; nevertheless, a special proviso might be needed in paragraph 4 concerning the settlement of disputes, in order to prevent a member of an international organization challenging the validity of the instrument from claiming that the provision regarding disputes was also invalid.

36. When States created an international organization, they assumed obligations with respect to each other and to the organization itself. Moreover, they also authorized it to enter into obligations with States, both members and non-members, with other international organizations and with individuals. While States were free to establish and dissolve an organization, they should not be free to terminate or suspend its constituent instrument in such a way as to prevent the organization from discharging its commitments. For example, the Bank's Articles of Agreement provided substantial protection to the organization and to its lenders by reserving 80 per cent of the capital subscription of each member for the sole purpose of enabling the Bank to meet its obligations to those lenders.

37. If article 4 were to disappear, a number of changes in other articles would be necessary to safeguard such commitments, at least within the terms of the constituent instrument. For example, article 26 might be expanded by a provision to the effect that it was without prejudice to the rights and obligations of States under treaties which were constituent instruments. Similarly, articles 51 and 54 should contain a qualification concerning such treaties. Article 65, paragraph 2 (*b*), should stipulate that the acts performed by an international organization under its constituent instrument before its nullity was invoked should not be rendered unlawful. Articles 66, 67 and 68 might be amended so as to indicate that termination, nullity and suspension could not affect the acquired rights, obligations or legal situations of the international organization of which the treaty was a constituent instrument.

38. Finally, changes would be needed in articles 62, 63, 72 and 74 to provide for notifications to be made to the organizations themselves if certain steps were taken in connexion with their constituent instruments.

39. If treaties adopted within international organizations were removed from the scope of article 4, provisions in the draft articles that at present referred to decisions or undertakings by " negotiating States " would have to be amended in order to take account of such treaties, particularly when the adoption took place in an organ that was not a plenary organ, such as the Executive Directors of the Bank or the Board of Governors of the International Atomic Energy Agency. Those provisions included articles 6, 8, 9, 10, 11, 12, 14, 17, 53, 71 and 74. It would perhaps be easier to devise such amendments if a suitable term were adopted for what he might call ' the sponsoring organization ".

40. Major amendments would be needed in article 17 to provide that reservations should require the acceptance of the competent organ of the sponsoring organization, except in cases of constituent instruments which had entered into force, when the competent organ of the new organization would be the judge of the acceptability of the reservation.

41. In its written submission, the Bank had suggested an addition to article 27 concerning the interpretation of multilateral treaties.

42. It might also be necessary to provide in article 18, paragraph 1, in article 72, paragraph 2, and in article 73 for notifying sponsoring organizations of certain steps taken in connexion with treaties adopted within them.

43. Mr. CAHA (Observer for the Universal Postal Union), speaking at the invitation of the Chairman, said that the task of the Universal Postal Union (UPU) since its inception in 1874 had been primarily legislative. The treaties concluded by UPU were essentially treaties about technical postal matters, and UPU had its own rules and practice with regard to the conclusion of treaties. As an example, he mentioned the different majorities required for the adoption of a legislative text, ranging from the majority of States members present and voting to the majority of States members of the Union represented in the Congress or the Committee. There was also the question of the entry into force of the Acts of the Union and in particular the practice with regard to reservations, which had to be confirmed in the final protocol of the Act concerned.

44. The deletion of article 4 would certainly create problems for the Union, and he believed that a satisfactory draft could be devised on the basis of the International Law Commission's draft and of the United Kingdom and French amendments.

45. Mrs. BOKOR-SZEGÖ (Hungary) said she was in favour of the Commission's article 4 as it stood and hoped that the promulgation of the present convention would induce international organizations to bring their rules of procedure into line with its provisions.

46. She supported the Ukrainian amendment (A/CONF. 39/C.1/L.12) which stressed that the rules in the draft should apply to all types of treaty, taking into account the relevant rules of international organizations; it harmonized the general with the particular, as did the Peruvian amendment (A/CONF.39/C.1/L.58).

47. She was not in favour either of the United States amendment (A/CONF.39/C.1/L.21)—because it would be difficult to specify exceptions in every relevant article—or of the Ceylonese amendment (A/CONF.39/C.1/L.53). The Spanish amendment (A/CONF.39/C.1/L.35/Rev. 1) would give rise to protracted and unnecessary discussions. The United Kingdom amendment (A/CONF.39/C.1/L.39) would create uncertainty and endanger the stability of contractual relations between States.

48. She agreed with the French representative that there was no difference in principle between treaties concluded within international organizations and those concluded under the auspices of an international organization.

49. Mr. KRAMER (Netherlands) said that the text of article 4 suggested that there need be no uniform rules for two categories of treaties but that the rule of each organization would prevail. It implied that each organization was competent to decide what rules governed its constituent instrument or any treaty adopted within the organization. It seemed to him unwise to allow such latitude. Nor did he favour withdrawing from the application of the convention a substantial number of international agreements; it would be preferable to bring them within its scope.

50. He was unable to understand why the exemption from the general law of treaties should be identical for constituent instruments of international organizations and treaties adopted within them, because the two were widely different.

51. Article 4 was too sweeping and needed considerable redrafting. He was unable to support the proposal by Sweden and the Philippines (A/CONF.39/C.1/L.52 and Add. 1) to delete it altogether, since that would leave certain very real practical problems unsolved. He was inclined to favour the Spanish and United States amendments, which would indicate where *lex generalis* had to give way to *lex specialis*.

52. The final decision on article 4 would have to be postponed until its implications for each article in the draft and the exceptions required had been decided.

53. Mr. MERON (Israel) said there seemed to be general sympathy for the basic proposition that some exemption from the rules of the draft convention in favour of the *lex specialis* of the international organizations was necessary. Although the underlying idea was that the convention should not interfere with the treaty-making practices of the international organizations, the proposed exemption seemed to involve both procedure and substance. The decision whether a treaty was adopted within the international organization or under its auspices was a matter of diplomatic convenience, affected by financial and technical considerations, and was not a good basis for a legal distinction. Thus, different rules would be applicable to conventions such as the Vienna Conventions on Diplomatic and Consular Relations, adopted by plenipotentiary conferences, and the draft on special missions, which would be dealt with by the Sixth Committee of the General Assembly.

54. Israel took the view that a more material criterion should be sought in the actual connexion of the treaty with the organization within which it had been drawn up, so that the treaty had a material link with the constitution of the organization. The ILO Conventions were a good example of such agreements; but many treaties drawn up within the United Nations had at best a tenuous connexion with the organization, whose machinery was used primarily as a matter of convenience, and the connexion was even less evident in the case of agreements drawn up at conferences convened by United Nations bodies in which non-member States had participated.

55. The Committee had to decide whether article 4 should be deleted, or whether substantial changes could improve it. His delegation believed that deletion of the article would not solve any problems. The United States delegation recognized that fact in proposing specific exemptions in various articles (A/CONF.39/C.1/L.21); the International Law Commission also had originally taken that approach, but had abandoned it in 1963, on finding that it would create considerable difficulties.

56. In choosing between a general exception and specific exceptions, his delegation preferred the general, for four reasons. First, it was better not to complicate the text of the convention by detailed amendments to specific articles. Secondly, since the principle *expressio unius est exclusio alterius* would apply, great care must be taken not to omit the amendment of any article which might have even an indirect effect on the treaty-making of international organizations; it was doubtful whether the Conference could undertake such an exhaustive examination of the draft. Thirdly, proper latitude must be left for future developments in international law and in international organizations, and the article as it

stood provided the necessary flexibility. Finally, the needs of some international organizations were different from those of the United Nations, and it would be very difficult to provide for those needs by the method of specific amendments.

57. With regard to the other amendments before the Committee, the Ukrainian amendment (A/CONF.39/C.1/L.12) introduced an element of ambiguity, for it failed to specify what rules would prevail in the event of a conflict. The Spanish amendment (A/CONF.39/C.1/L.35/Rev.1) introduced an unduly broad exemption, extending even to agreements deposited with an international organization, and further complicated the draft by citing a large number of articles. In the case of the United Kingdom amendment (A/CONF.39/C.1/L.39), it would be hard to determine exactly what was meant by "established practices"; the Secretary-General of the United Nations stated in his written comments (A/CONF.39/5) that the word "rules" in article 4 could be interpreted to mean " legally valid rules, adopted and applied in accordance with the constitutions of the organizations concerned ". The Gabon amendment (A/CONF.39/C.1/L.42) seemed to be of a drafting nature and could be referred to the Drafting Committee. The Ceylonese amendment (A/CONF. 39/C.1/L.53) would not meet recognized needs of the international organizations, and the note to the amendment, explaining that treaties " adopted within " an international organization would not be covered and that consequential amendments would be required, would give rise to the same difficulties as the United States amendment.

58. Difficulties would also be caused by the French amendment (A/CONF.39/C.1/L.55), in determining what treaties were or were not concluded by virtue of constituent instruments; it might even be argued that all United Nations activities were carried on by virtue of the Charter. Similar problems arose in connexion with the Peruvian amendment (A/CONF.39/C.1/L.58).

59. The Israel delegation accordingly considered that the Commission's article 4, although imperfect, should be retained. In taking that position, it concurred with the view expressed in the Secretary-General's memorandum (A/CONF.39/5) that exercise of the rule-making authority would be limited to a few cases of genuine need of States or of depositaries, and that the general international law of treaties as embodied in the future convention would apply to the vast majority of problems concerning the treaties connected with international organizations.

60. Mr. THIERFELDER (Federal Republic of Germany) said that although the Commission had been right to lay down special rules for the categories of treaties dealt with in article 4, he doubted the wisdom of providing in general terms for exceptions in both categories of treaties, in view of the difference between the rules concerned. Thus, in the case of constituent instruments, the rules governing termination were particularly important, whereas in the case of treaties adopted within an international organization, it was the rules governing the adoption procedure that were most important. Without some differentiation, the over-all exception would be unduly broad.

61. His delegation could not support the amendment by Congo (Brazzaville) (A/CONF.39/C.1/L.76), while the Ceylonese amendment (A/CONF.39/C.1/L.53) and that of Jamaica and Trinidad and Tobago (A/CONF.39/C.1/L.75) would both have the effect of omitting one of the two categories of exemption altogether. Nor, since the question of the residuary nature of the articles was not yet sufficiently clear, could he support the Swedish and Philippine amendment (A/CONF.39/C.1/L.52).

62. On the other hand, he could sympathize with the reasoning behind the United States and Spanish amendments (A/CONF.39/C.1/L.21 and L.35/Rev. 1), which were both designed to limit the exception set out in article 4 and differed only in the technical means of achieving that purpose. The United States text seemed to be clearer than the Spanish, and should not give rise to many technical difficulties; if the majority of the Committee held the contrary opinion, a text along the lines of the Spanish amendment might be adopted, although that might entail some duplication of effort.

63. If the original form of article 4 were retained he doubted whether the Ukrainian amendment (A/CONF.39/C.1/L.12) would improve the text, since difficulties of interpretation might arise in cases of conflict. He thought that the reference to " established practices " in the United Kingdom amendment (A/CONF.39/C.1/L.39) was covered by the term " relevant rules ". The Gabon amendment (A/CONF.39/C.1/L.42) seemed to be concerned with a drafting point only.

64. It had been pointed out in the written comments of the Secretary-General of the United Nations and of the Council of Europe that the interpretation of the expression " adopted within international organizations " gave rise to difficulties. His delegation would submit that the difficulty lay less in the wording than in the variety of the practice of different organizations. The French and Peruvian amendments (A/CONF.39/C.1/L.55 and L.58) were attempts to clarify that point, but hardly seemed to improve the Commission's text. Accordingly, if a general approach was adopted, the Commission's text should be retained.

65. Mr. SMEJKAL (Czechoslovakia) said he had serious doubts over the wording of article 4, since the limitation of the application of the convention to the two categories of treaties might in practice give rise to the risk of eliminating them from the scope of the convention. His delegation therefore agreed with the International Law Commission that the limitation should apply only to treaties adopted within an international organization, and that treaties which were merely concluded under the auspices of such organizations or were deposited with them should not be subject to the relevant rules of the organization. That did not mean, however, that his delegation underestimated the practical difficulties stressed by the representatives of international organizations in their statements. The representative of the International Bank had wisely suggested that the *lex specialis* might be specified in the articles where an exemption was absolutely indispensable, and that that method might be used concurrently with a general formulation of article 4.

66. From the point of view of drafting, his delegation was in favour of limiting the scope of the general exemption along the lines of the Ukrainian amendment (A/CONF.39/C.1/L.12), which was in line with suggestions made by

Czechoslovakia and the Secretary-General of the United Nations in their written comments.

67. Mr. TSURUOKA (Japan) said that the Commission's text of article 4 did not clearly set out the scope of the exceptions contained in it. The general impression was that it extended a very broad right to derogate from any of the provisions of the convention to all international organizations, not only in respect of their constituent instruments, but also in respect of treaties adopted within those organizations. According to the Commission's text, the convention would apply to multilateral treaties, like the Vienna Convention on Diplomatic Relations, which were concluded at international conferences, whereas instruments such as the future convention on special missions would be subject to the relevant rules of the United Nations, simply because it would be adopted in the General Assembly. Such a differentiation seemed unjustified. The grant of such latitude to international organizations by express provisions might result in an interpretation *a contrario*, in other words in the interpretation that States were not allowed any such latitude in their treaty relationships under the convention now being discussed. It might be argued that similar flexibility should be allowed to States, which would also be placed in situations similar to those against which international organizations wished to secure safeguards under article 4. It would seem best to leave the matter to a flexible interpretation of the convention, and the Japanese delegation was therefore in favour of deleting article 4.

68. Mr. KRISPIS (Greece) said that article 4 was extremely important. In view of the large number of treaties being produced—some 600 a year—many of them through the constantly growing number of international organizations, the latest being the World Intellectual Property Organization established at the Stockholm Conference of July 1967, it was essential to specify the rules governing such instruments. His delegation believed that the best method was to lay down the *lex generalis* and to follow it by a statement of the *jus specialis*. If no general provision along the lines of article 4 was included in the convention, two different systems would be created, one for treaties concluded outside organizations and the other for treaties adopted within organizations. The deletion of article 4 would be tantamount to an attempt to solve the problem by ignoring it. The fact that a rule was *jus dispositivum* did not make it superfluous. On the other hand it was useful to have an indication that a rule was *jus dispositivum*, for instance by using the words " unless otherwise provided ".

69. His delegation could not support the Swedish and Philippine amendment (A/CONF.39/C.1/L.52), since the fact that an appropriate article was difficult to draft made it all the more important to exert every effort to avoid the creation of two systems of the law of treaties. Where *jus specialis* was concerned, his delegation had some sympathy with the United States and Spanish amendments (A/CONF.39/C.1/L.21 and L.35/Rev. 1), because their approach to the provision was analytical, whereas the International Law Commission had preferred the opposite approach.

70. With regard to the Commission's general text, he suggested that the words " drawn up and " be inserted before the word " adopted ", in accordance with paragraph (3) of the commentary. That suggestion was, however, subject to the Drafting Committee's decision on article 2, for if the definition of " adoption of the text of a treaty " proposed by the French delegation (A/CONF.39/C.1/L.24) was approved, the term " adopted " might suffice.

71. With regard to the other amendments, the proposal in the United Kingdom amendment (A/CONF.39/C.1/L.39) to insert the words " and established practices " gave rise to the question whether established practices were not the rules of international organizations: article 4 did not distinguish between written and unwritten rules, and established practices, provided that the relevant *longus usus* was accompanied by the necessary *opinio juris*, seemed to be covered by the term " any relevant rules ". The same argument applied to the introduction of the words " or decisions " in the Ceylonese amendment (A/CONF.39/C.1/L.53): under article 4 a rule might be interpreted to mean either the provision of a treaty or a decision of an international organization.

72. Adoption of the Commission's text as it stood would result in uneven application of the convention to the two categories of treaties in question. Where constituent instruments were concerned, the convention would be applicable, because the organization would not yet be in existence when the constituent instrument was drawn up, so that no relevant rules of the organization could apply; but where treaties were adopted within international organizations the opposite would be the case, for when such agreements came into force, they would have a life of their own, and such instruments as a convention on the law of treaties would apply to them, independently of the rules of the international organizations.

73. Mr. RUDA (Argentina) said the debate had shown that the rule laid down in article 4 was one of *lex lata*, codifying existing rules of customary law. The law established on a customary basis between States, added to long practice, resulted in rules differing from those of general international law existing in treaties. In his delegation's opinion, article 4 only reflected the current situation, and introduced no innovation.

74. The debate had also shown fairly wide agreement that constituent instruments of international organizations were subject to general treaty law as well as to rules peculiar to the organization. That view was substantiated by paragraph (2) of the commentary to the article. The problem before the Committee was therefore the formal one of how best to reflect those ideas in a single article.

75. He agreed with the Swedish representative that there was no reason why an organization should not conclude treaties in the form most appropriate to it, provided there was no conflict with peremptory norms of international law. That was the precise purpose of article 4, which raised no theoretical problems that might have an adverse effect on treaty law in general. In view of that general agreement on the substance of the article, he believed that it should be maintained in a general form, for otherwise the Committee would have to study a long series of specific exceptions, which would increase in number as the debate continued. For instance, the United States amendment (A/CONF.39/C.1/L.21) referred to eight articles, the observer for the Council of Europe had mentioned twenty-seven, and the observer for the

International Bank had referred to more than thirty. It therefore seemed preferable to make further efforts to draft a clear general provision.

76. Mr. BINDSCHEDLER (Switzerland) said that originally the Commission had contemplated not a binding convention but a code on the law of treaties. Undoubtedly the convention should not be *jus cogens* but *jus dispositivum* in character. Moreover, his delegation did not consider that *jus cogens* existed in international law. Thus States could derogate from the convention and adopt other provisions necessary to promote the progressive development of international law. Consequently the proviso about a contrary convention between the parties was superfluous from the legal point of view because States were always free to depart by mutual agreement from the rules laid down in the convention. The Swiss delegation would therefore have no strong objection to the adoption of the Swedish and Philippine proposal to delete the article, and supported the Swedish suggestion to include a general provision concerning the nature of the convention.

77. Nevertheless, it would still be advisable to include a clause along the lines of article 4 for practical and policy reasons, in order to provide guidance to States in the procedures of treaty-making. The Swiss delegation agreed in principle with the International Law Commission's text, and considered that it had been wise to exclude treaties concluded under the auspices of international organizations, since those agreements did not differ essentially from other multilateral treaties. The role of the organizations in such cases was purely technical, and he was therefore unable to support the Spanish amendment (A/CONF.39/C.1/L.35/Rev. 1).

78. Perhaps the limitation in respect of constituent instruments was unnecessary, since the organization would not yet exist when its constituent instrument was adopted, and the provision would therefore apply only to revisions of the instrument. On the other hand, treaties adopted within international organizations should be subject to special rules. The question whether the exception should be restricted to adoption could not be settled until the definition of the adoption of the text of a treaty had been finally formulated.

79. The Swiss delegation could not support the United States amendment (A/CONF.39/C.1/L.21), since there was always a danger that the enumeration would be incomplete.

80. On the question of the drafting of the general clause, he could support the Peruvian text (A/CONF.39/C.1/L.58), which stressed the general rule and subordinated the exception, whereas the Commission's text laid greater emphasis on the exception than on the rule. If the Peruvian amendment was not adopted, however, his delegation would be in favour of a combination of the Ukrainian and French amendments (A/CONF.39/C.1/L.12 and L.55), both of which restricted the scope of the article.

81. Finally, he considered that a decision on the article should be taken in the Committee of the Whole, not in the Drafting Committee, since questions of substance were involved.

The meeting rose at 6.10 p.m.

TENTH MEETING

Wednesday, 3 April 1968, at 11.5 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations *(continued)* [1]

1. Mr. DENIS (Belgium) said that the amendment by Sweden and the Philippines (A/CONF.39/C.1/L.52 and Add.1) and the comments which had accompanied its introduction raised an important question of principle. Did the draft articles constitute rules from which States could derogate or would they be binding on States unless they provided expressly for derogations? The nature of each article from that point of view should be established by the Conference and specified in an appropriate formula, either in the text of each article or in an article of general application.

2. With regard to the purpose of article 4 itself, the Belgian delegation thought that the convention should allow for the fact that an increasing number of treaties were drawn up within international organizations. Clearly, treaties should not be exempted without good reason from the operation of the uniform régime established by the convention, but it was also important that the convention should not abolish the special régimes governing the activities of numerous international organizations with regard to the framing of treaties between States. The convention should therefore contain express provisions to that effect. Owing to the difficulty of an exhaustive enumeration of the articles open to derogation, the Belgian delegation favoured a provision of general application.

3. For the designation of treaties to be accorded the right to a special régime, the difficulty would be to decide whether or not a treaty had been adopted " within an international organization ". The Peruvian amendment (A/CONF.39/C.1/L.58) referred to treaties adopted " within the competence of an international organization "; the French amendment (A/CONF.39/C.1/L.55) spoke of agreements concluded in virtue of a treaty which was the constitutent instrument of an international organization. Those two amendments had the advantage of introducing an element of law which was essential for the application of the exception, whereas the phrase " adopted within an international organization " referred to a *de facto* situation which might not necessarily be legally justified by the rules of the organization in question.

4. Mr. DIOP (Senegal) said that his delegation favoured the codification of international relations in principle but had to point out that the codification of principles hitherto derived from customary law should not entail the establishment of excessively rigid criteria which might paralyse the development of regional law. Inter-

[1] For the list of the amendments submitted, see 8th meeting, footnote 1.

African law was a case in point. That being said, the Senegalese delegation might be expected to accept article 4, which restricted the application of the convention with respect to the constituent instruments of international organizations and treaties adopted within such organizations. It was evident, however, that the restriction was calculated to some extent to impair the application of article 8, which provided that the adoption of a treaty at an international conference should take place by a majority of two-thirds. A provision of that kind might offer more drawbacks than advantages. The observer for the United International Bureaux for the Protection of Intellectual Property had already drawn attention to the procedural difficulties it might cause.

5. The Senegalese delegation would not go so far as to ask for the deletion of article 4 altogether. Nor would it support the United States amendment, which called for the deletion of the article subject to the insertion in certain other articles of exceptions in favour of the rules of international organizations. The Ceylonese amendment (A/CONF.39/C.1/L.53) came nearest to reflecting the wishes of the Senegalese delegation. If the Committee took a different view, the Senegalese delegation could accept the French amendment (A/CONF.39/C.1/L.55), which drew a distinction between treaties which were constituent instruments and agreements concluded in virtue of such treaties.

6. Mr. REGALA (Philippines) said that all delegations were agreed that the rights enjoyed by international organizations by virtue of their statutes should not be impaired. The International Law Commission itself had stated in paragraph (4) of its commentary to article 1 that the elimination of the references to treaties of " other subjects of international law " and of " international organizations " was not to be understood as implying any change of opinion on its part as to the legal nature of those forms of international agreement. It was precisely that point that was the basis of the Swedish and Philippine delegations' proposal (A/CONF.39/C.1/L.52 and Add.1) for the deletion of article 4. If article 4 were adopted, there would be a danger of impairing the present legal situation or the practice whereby certain specialized agencies of the United Nations were empowered to lay down rules concerning a whole range of treaties relating to their work. The number of international agreements was continually increasing. If article 4 was to be retained, it should be drafted in fairly broad terms that would take due account of the existing legal situation with regard to the treaties and constituent instruments of international organizations. In his comments on article 4 (A/CONF.39/5), the United Nations Secretary-General had said: " If draft article 4 becomes part of a convention, what is the effect of that convention, once it is brought into force, on the future applicability of those rules, on the one hand, in respect of States parties to the new convention, and, on the other, in respect of non-parties? ". That was the situation which needed clarifying.

7. In view of the foregoing observations, the amendment submitted by the United Kingdom delegation (A/CONF.39/C.1/L.39) would be satisfactory to the Philippine delegation.

8. Mr. BOLINTINEANU (Romania) said that the constituent instruments of an international organization and treaties adopted within international organizations were also treaties between States, in that they possessed the same legal character as the latter. As it had been decided that the convention applied to treaties between States, it might be asked whether it was necessary to specify that a whole category of treaties might be subject to exceptions to the general provisions of the convention. In any event, such treaties should not derogate from the peremptory norms of the convention, but in view of the large number of residuary rules contained in the convention, there was nothing to prevent States, when adopting the statutes of an organization or agreements concluded within an organization, from introducing provisions permitting derogations, just as with any other treaty.

9. It was also true, on the other hand, that the scope of the special rules which had come into being within the framework of the international organizations should not be under-estimated. It would seem that opinion in the Committee was crystallizing in favour of the retention of article 4. The Romanian delegation would, therefore, also vote for its retention, while urging that the article should be so drafted as to express the true relationship between the law as codified by the convention and the rules laid down in the constituent instruments of international organizations or in treaties adopted within an international organization. A general rule in a convention could not be made subject to a rule contained in a constituent instrument of an international organization or in a treaty adopted within such an organization. The wording of the Peruvian (A/CONF.39/L.58) and the Ukrainian amendments (A/CONF.39/L.12) deserved careful consideration.

10. Mr. MAKAREWICZ (Poland) said that, in his view, the convention should contain a reservation concerning the applicability of its provisions to treaties which were constituent intruments of an international organization or were adopted within an international organization. That reservation should be placed in a general clause in the introductory part of the convention. His delegation did not regard the present wording of the article as satisfactory, but the article as such was necessary and should be retained.

11. Mr. JAGOTA (India) said he doubted whether there was any need for articles 3 and 4, once the scope of the convention had been limited to treaties concluded between States. His delegation had already stated its position on article 3. Article 4 limited the convention's scope with respect to treaties between States which were either constituent instruments of an international organization or adopted within such an organization. Those were not treaties concluded by the international organizations themselves, but only multilateral treaties establishing an international organization or adopted within one. That was a class of treaties between States to which the whole of the convention would apply. Why, in that case, should reservations be made concerning a certain category of multilateral treaties? Nevertheless, the need to make such reservations, either in a general clause or in various articles, had been emphasized.

12. The Indian delegation was in favour of retaining article 4, but as it dealt with derogations from the applic-

ability of the convention to certain classes of multilateral treaty, it should not be too restrictive. The restrictions should not apply to treaties concluded under the auspices of an organization or to treaties for which the organization was the depositary. Indeed, the rules of the convention should apply to all multilateral treaties without exception. An exception was justified only in order to establish a link between the principles stated in the convention and practices already established by international organizations. In order to ensure the uniform application of the convention to all agreements, it would be better to add, at the end of article 4, the words " unless the treaty otherwise provides ", taken from article 17, paragraph 3. Those words would enable any party to such agreements to refrain from taking advantage of the freedom afforded the parties, in which case the restriction would apply and to that extent the interests of the organization would be protected.

13. The Indian delegation was therefore in favour of retaining article 4 and did not support the amendments deleting it. It was not in favour of reducing the exceptions, as was advocated in documents A/CONF.39/C.1/L.53 and L.75 or, of broadening the restrictions to include treaties concluded under the auspices of an organization or deposited with an organization. It could support the United Kingdom amendment (A/CONF.39/C.1/L.39) adding the words " and established practices ", on the understanding that those practices would have the legal status of a rule. The purely drafting amendments submitted by the delegations of the Ukrainian SSR, Gabon, France and Peru (A/CONF.39/C.1/L.12, L.42, L.55, and L.58) should be referred to the Drafting Committee.

14. Mr. ABED (Tunisia) said he was in favour of retaining article 4, as its deletion would leave a serious gap. The French amendment (A/CONF.39/C.1/L.55) reflected the position of his own delegation; but the article would gain by more precise and better drafting. The French amendment could serve as the basis for a new text.

15. Mr. MARESCA (Italy) said that his delegation's position was dictated by legal considerations. Article 4 was necessary to the general balance of the convention; for it was impossible to disregard the fact that treaties which were the constituent instruments of an international organization or were adopted within an international organization were also sources of law. Each organization had its own rules, which constituted a special international legal order. The relations between international law and the special international law of certain organizations could not be regarded as relations of subordination. Cantonal law could be considered to be subordinate to federal law, but the rules of law codified by the Conference could not be subordinate to the rules of any international organization, however important. The Italian delegation therefore believed that it would be dangerous to delete article 4, but that a better formula should be found in order to avoid using the word " subject ". The Peruvian delegation had found a satisfactory formula in its amendment (A/CONF.39/C.1/L.58), which ensured the necessary balance between general international law and special international law. The amendments submitted by the United Kingdom and the French delegations involved certain dangers, as their wording was open to arbitrary interpretation. The various amendments could be referred to the Drafting Committee.

16. Mr. RAZAFINDRALAMBO (Madagascar) said that his delegation was opposed to amendments such as those of Sweden and the Philippines, and of the Congo (Brazzaville), which deleted article 4 entirely. That would impair the actual stability of international organizations, for if the convention as a whole was to have a peremptory character, the provisions governing each organization would have to be amended to take account of its articles. It was true that the Conference's task was to codify the law of treaties, but it should nevertheless be realistic and not run the risk of disturbing the activities of international organizations.

17. The delegation of Madagascar was also opposed to amendments which would modify article 4 in part, by excluding from it treaties adopted within international organizations. If it was agreed that treaties which were the constituent instruments of international organizations should be excluded from the scope of the convention, there was all the more reason to exclude agreements concluded within the framework of such treaties.

18. His delegation was in favour of the French amendment (A/CONF.39/C.1/L.55), but would prefer the term " constituent instrument " to be in the plural in order to bring the text into conformity with the title of article 4 and the text of article 3. The phrase " subject to any relevant rules of the organization " should be retained. In addition, the phrase " and established practices " should be added at the end of article 4, as the United Kingdom delegation proposed. That addition was by no means superfluous, since the words " relevant rules ", in the International Law Commission's draft, if interpreted in the context of the Commission's work, seemed only to refer to rules in written form.

19. Mr. RICHARDS (Trinidad and Tobago) said that since there were only minor differences between the joint amendment submitted by his delegation and that of Jamaica (A/CONF.39/C.1/L.75) and the amendments of Ceylon (A/CONF.39/C.1/L.53) and France (A/CONF.39/C.1/L.55), he thought the three amendments could usefully be referred to the Drafting Committee, which could prepare a text taking the ideas expressed in them into account.

20. Mr. OWUSU (Ghana) said that the delegation of Ghana was opposed to the deletion of article 4 because it thought it necessary to stipulate that the convention applied to treaties which were constituent instruments of an international organization or were adopted within an international organization. The basic problem was to define precisely the scope of the reservation in article 4, so as to preserve both the integrity of the convention and certain special rules and practices of international organizations regarding the drafting, ratification, amendment and interpretation of agreements concerning them. The Ghanaian delegation was opposed to the amendments which would enlarge the scope of the reservation. It approved of the existing wording of article 4, which was drafted in clear and precise terms, and merely wished the expression " and established practices " to be added, as proposed by the United Kingdom representative.

21. His delegation was opposed to the amendments of the United States (A/CONF.39/C.1/L.21), Ceylon (A/CONF.39/C.1/L.53), Gabon (A/CONF.39/C.1/L.42), Jamaica and Trinidad and Tobago (A/CONF.39/C.1/L.75), Sweden and the Philippines (A/CONF.39/C.1/L.52 and Add.1), the Congo (Brazzaville) (A/CONF.39/C.1/L.76) and Spain (A/CONF.39/C.1/L.35/Rev.1).

22. The amendments of Peru (A/CONF.39/C.1/L.58) and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.12) were mainly concerned with drafting and should be referred to the Drafting Committee.

23. His delegation disapproved of the growing practice of referring articles and amendments to the Drafting Committee before the Committee of the Whole had taken a decision on them. In regard to article 4, there seemed to be wide differences in the positions of various delegations, and the Committee should pronounce on the various amendments submitted to it before referring them to the Drafting Committee.

24. Mr. DE CASTRO (Spain) said he thought that a decision should be taken on the order of precedence of the norms applicable. Should the convention apply or should the rules of the organization take precedence in so far as they did not conflict with the mandatory provisions of the convention? The Committee of the Whole should decide whether to retain or to delete article 4 and settle the question of precedence of the norms of the future convention.

25. The expression "subject to" might give rise to misunderstanding.

26. He therefore supported the amendments of Peru (A/CONF.39/C.1/L.58) and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.12) on the understanding that they referred to valid and relevant rules.

27. Mr. STREZOV (Bulgaria) said his delegation accepted the idea expressed in article 4 that the articles of the future convention should not apply absolutely to the constituent instruments of international organizations or to agreements adopted within such organizations.

28. The Bulgarian delegation nevertheless shared the opinion of those Governments which had maintained, when the articles were being drafted, that steps should be taken to prevent the rules of international organizations from restricting the freedom of negotiating States, except where the conclusion of the treaty formed part of the organization's activities and it was drawn up within the framework of the organization for reasons other than a mere desire to use the organization's conference services.

29. He supported the Ukrainian amendment, which improved the wording of article 4.

30. Mr. AMADO (Brazil) said that the statement made by the Argentine representative at the previous meeting had exactly expressed the position of Brazil. He merely wished to emphasize that the proliferation of international organizations was a fact, and that the International Law Commission, being extremely scrupulous, could not have ignored such an important aspect of contemporary life. The Brazilian delegation agreed that the amendments of Peru, France, the Ukrainian Soviet Socialist Republic and the United Kingdom should be referred to the Drafting Committee. It was sure that the members of the Drafting Committee would be wise enough to refer back to the Committee of the Whole anything they considered to be a question of substance requiring a decision of principle.

31. Mr. VIGNES (Observer for the World Health Organization), speaking at the invitation of the Chairman, said he would not repeat the arguments put forward by the observers for several international organizations, but must stress the need to retain at least the principle of article 4. It would also be useful for the text of the article to refer to the "established practices" of international organizations. Certain rules of organizations which corresponded to their particular functions should be allowed to apply. For instance, it was not possible for a health organization such as WHO to apply the traditional principle of reciprocity, for in health matters, reciprocity was not always possible; sometimes it was even unacceptable.

32. Mr. STAVROPOULOS (Representative of the Secretary-General) pointed out that the Secretary-General of the United Nations had expressed his opinion on article 4 in document A/6827/Add.1.[2] He had stressed that article 4 contained a provision which should be incorporated in the convention in a form covering treaties concluded under the auspices of international organizations or deposited with them. For it was not possible to change the existing legal situation in regard to treaties in respect of which established practice authorized the organization to lay down rules.

33. The representative of Spain had asked him to comment on the amendment submitted by the Spanish delegation (A/CONF.39/C.1/L.35/Rev.1). He recognized the value of that amendment, which reconciled the needs of international organizations with the fundamental principles of the draft convention, and which, in particular, extended the scope of article 4 to treaties adopted under the auspices of, or deposited with, an organization. However, to apply articles 5 to 15, which related to the conclusion of treaties, to the constituent instruments of international organizations, did not seem satisfactory. It should be possible for such constituent instruments freely to establish the conditions on which States could become members of the organization. The Spanish amendment made several other articles mandatory with respect to constituent instruments. The future might perhaps show that it was not desirable to eliminate the necessary flexibility with regard to those articles. As to the other treaties, the second paragraph of the Spanish amendment listed certain articles from which organizations could derogate, all the other provisions being applicable to them. There again, sufficient flexibility might not have been allowed. The General Assembly, for example, in laying down rules relating to the League of Nations treaties deposited with the Secretary-General, had not confined itself to the subject-matter of articles 71 to 75 of the draft. The Spanish amendment was certainly constructive, but it had not entirely succeeded in solving the problems that arose.

34. Sir Humphrey WALDOCK, Expert Consultant, observed that some representatives had interpreted article 4 as though the International Law Commission had intended to make a general reservation in favour of international organizations and relegate the provisions

[2] Reproduced in document A/CONF.39/5.

of the convention to the background. That had not been the intention of the Commission, which, on the contrary, had proceeded on the assumption that the provisions of the convention would be generally applicable to all treaties. The wording of article 4 as it appeared in the draft was the logical outcome of stating an exception. At least part of the Peruvian amendment might provide a satisfactory solution to the problem raised by the use of the words " shall be subject." In any case, the point was obviously one of drafting.

35. The Swedish representative had asked him to give an opinion on the residuary nature of the provisions of the draft convention. Many of the rules, particularly in Part I, authorized States to make arrangements other than those provided for in those rules. The draft convention was a codification of general rules of law. Many other rules of international law from which States were free to derogate were not, for that reason, described as residuary. It did not appear necessary, in that connexion, to include in the draft convention a general provision relating to the possibility of derogating from the rules stated in the convention.

36. Similarly, he did not see the necessity for drawing a distinction, with regard to the provisions of article 4, between constituent instruments and treaties adopted within an international organization. The fact that States were free to derogate from many of the rules of the present convention would mean that they could do so with regard to the constituent treaty of an organization as well. Moreover, the words " any relevant rules of the organization " gave the text the necessary flexibility by referring only to the rules which were appropriate in the particular circumstances.

37. He thought that the inclusion in a general article of the provision contained in article 4 was the safest method. The fact that particular exceptions had appeared in earlier drafts was not significant; it must not be forgotten that the various parts of the convention had been examined several times during the different sessions of the International Law Commission.

38. With regard to the extension of article 4 to other classes of treaty, he pointed out that the International Law Commission had decided against including treaties concluded under the auspices of an organization, because it had realized, when examining the other articles, particularly those on the termination of treaties, that the concept of treaties concluded under the auspices of an international organization was too broad. The formula "an agreement concluded in virtue of such a treaty", proposed by France, seemed more ambiguous than the Commission's wording. It could be interpreted too narrowly if it was taken to refer to treaties resulting directly from provisions of a constituent instrument calling specifically for the conclusion of particular treaties, and too widely if it was taken to refer to any treaty falling within the general competence of international organizations.

39. He had reservations regarding the extension of the scope of article 4 requested by the Secretary-General of the United Nations. The problems raised in that connexion had a different legal explanation and should not be dealt with in connexion with article 4.

40. With regard to the established practices of international organizations, the International Law Commission had considered that the words " any relevant rules " covered that aspect of the matter. That phrase was intended to include both rules laid down in the constituent instrument and rules established in the practice of the organization as binding. In any case, that was a question of drafting.

41. The CHAIRMAN put to the vote the amendments of the United States (A/CONF.39/C.1/L.21), Sweden and the Philippines (A/CONF.39/C.1/L.52 and Add. 1) and the Congo (Brazzaville) (A/CONF.39/C.1/L.76) proposing the deletion of article 4.

At the request of the representative of the United Kingdom, the vote was taken by roll-call.

Yugoslavia, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Australia, Congo (Brazzaville), Federal Republic of Germany, Japan, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Sweden, United States of America.

Against: Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Austria, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Central African Republic, Ceylon, Chile, Colombia, Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Ethiopia, Finland, France, Gabon, Ghana, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Liberia, Liechtenstein, Madagascar, Malaysia, Mali, Mexico, Monaco, Mongolia, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Poland, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa, Spain, Syria, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela.

Abstentions: China, Switzerland.

The amendments by the United States, Sweden and Congo (Brazzaville) were rejected by 84 votes to 10, with 2 abstentions.

42. Mr. HARRY (Australia), explaining his delegation's vote, said that in voting for the amendment submitted by the United States, the Australian delegation had not been seeking the outright deletion of article 4, but its replacement by special provisions to be inserted in the relevant articles.

43. The CHAIRMAN suggested that the Committee should vote on the amendments in document A/CONF. 39/C.1/L.53 and L.75, proposing that article 4 should refer only to the constituent instruments of international organizations.

44. Mr. FRANCIS (Jamaica), speaking on a point of order, proposed that the Committee should first vote on the other amendments. The vote taken could be considered, under rule 41 of the rules of procedure, as implying the adoption or the rejection, as the case might

be, of the joint amendment sponsored by his delegation and that of Trinidad and Tobago (A/CONF.39/C.1/L.75).

45. The CHAIRMAN asked the sponsors of the joint amendment to say whether they would agree to their amendment being referred to the Drafting Committee without any express decision on it being taken by the Committee of the Whole.

46. Mr. FRANCIS (Jamaica) said that, when introducing the amendment, he had indicated that the sponsors wished it to be referred to the Drafting Committee. In any case, they did not desire the amendment to be put to the vote, and therefore withdrew it.

47. Sir Francis VALLAT (United Kingdom) said that the amendment in document A/CONF.39/C.1/L.53 raised a problem of substance which required a decision by the Committee of the Whole before it was referred to the Drafting Committee.

48. The CHAIRMAN said that he too thought it preferable that the Committee should take a decision on the amendment, which he then put to the vote.

The amendment by Ceylon (A/CONF.39/C.1/L.53) was rejected by 70 votes to 5, with 5 abstentions.

49. Mr. DE CASTRO (Spain) said that he withdrew his amendment (A/CONF.39/C.1/L.35/Rev.1).

50. The CHAIRMAN observed that the amendments in documents A/CONF.39/C.1/L.12, L.39, L.42, L.55 and L.58 were still before the Committee. Those amendments seemed to him to be of a drafting character, so that they should be referred to the Drafting Committee without any previous vote on them by the Committee of the Whole.

51. Mr. MERON (Israel) said he thought the amendment submitted by the Ukrainian SSR (A/CONF.39/C.1/L.12) raised a question of substance, inasmuch as it would make the provisions of the convention take precedence over any other provisions. The Committee of the Whole should therefore take a decision on that amendment.

52. Sir Lalita RAJAPAKSE (Ceylon) said that the amendment submitted by France (A/CONF.39/C.1/L.55) also raised a question of substance which called for a decision by the Committee of the Whole.

53. Mr. VIRALLY (France) said that he was not asking for a vote on his delegation's amendment, but if the Committee wished to vote on it he would not, of course, object.

54. The CHAIRMAN put to the vote the amendment submitted by the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.12).

The amendment was rejected by 42 votes to 26, with 19 abstentions.

55. Mr. KRISHNA RAO (India), speaking on a point of order, reminded the Committee that the Chairman had first decided that the remaining amendments were drafting amendments and would not be voted on. If any representatives challenged the Chairman's decision, a vote should be taken on that decision itself.

56. The CHAIRMAN said he had changed his decision in order to avoid difficulties in the Drafting Committee's work.

57. Mr. BINDSCHEDLER (Switzerland) observed that if there was to be voting on all the amendments, it should, in accordance with the rules of procedure, begin with that furthest removed from the text submitted to the Committee, namely, the Peruvian amendment (A/CONF. 39/C.1/L.58).

58. Mr. VIRALLY (France) supported the Swiss representative with regard to the order of the amendments. He also supported the Indian representative: the Chairman's decision to refer the remaining amendments to the Drafting Committee should be put to the vote if it was challenged by some representatives.

59. The CHAIRMAN said he would put his decision to the vote if it was challenged. He then proposed that the Committee of the Whole should refer all the remaining amendments (A/CONF.39/C.1/L.39, L.42, L.55 and L.58) to the Drafting Committee.

It was so decided.[3]

The meeting rose at 1.35 p.m.

[3] For resumption of the discussion on article 4, see 28th meeting.

ELEVENTH MEETING

Wednesday, 3 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (*continued*)

Texts proposed by the Drafting Committee

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts proposed by his Committee.

Article 1 (The scope of the present convention) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had examined the various amendments to article 1, and had reached agreement on the following text (A/CONF.39/C.1/1):

"*The scope of the present Convention*

"The present Convention applies to treaties concluded between States."

3. That text differed from the International Law Commission's draft in that the words "The present articles" had been replaced by the words "The present Convention" as proposed in the amendment by Congo (Brazzaville) (A/CONF.39/C.1/L.32), both in the title and in the article itself; that change was in line with the practice of codification conferences. The words "relate to" had also been changed to "applies." The Drafting Committee had deemed it useful to retain the term "concluded" and had not accepted the wording "which are concluded" for reasons of style, although it wished to emphasize that the draft covered both treaties which had been concluded in the past and treaties which might be concluded in the future. It had rejected the proposal to delete the article because it considered that article necessary for the purpose of defining the scope of the convention at the outset.

[1] For earlier discussion of article 1, see 2nd and 3rd meetings.

4. Mr. KRISPIS (Greece) said that in the form in which it had emerged from the Drafting Committee, article 1 had more the appearance of a title or of a clause of a preamble. In fact, if the convention were to be entitled " convention on the law of treaties between States " article 1 would have no meaning. The same would be true if the preamble to the convention included a clause to the effect that it applied to treaties between States.

5. If it were desired to express a genuine legal rule in article 1, in other words, a rule stating the area of application of the convention, it would seem more appropriate to insert the word " only " or the word " solely " either immediately after " applies " or immediately before " between." He was not, however, making a formal proposal to that effect.

6. The CHAIRMAN said he would put article 1 to the vote as proposed by the Drafting Committee.

Article 1 was adopted by 63 votes to none, with 1 abstention.

Draft resolution approved by the Drafting Committee.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the draft resolution adopted by the Drafting Committee on 1 April (A/CONF.39/C.1/2) reflected the views which had been expressed in the Committee of the Whole.[2] Its operative paragraph recommended to the General Assembly that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations.

The draft resolution (A/CONF.39/C.1/2) was adopted unanimously.

8. The CHAIRMAN invited the Committee to resume its discussion of the draft articles adopted by the International Law Commission.

Title of Part II, Section 1

9. The CHAIRMAN said that it would perhaps be difficult for the Committee to decide on the title of Section 1 of Part II until it had examined all the articles in that section.

10. Mr. MOUDILENO (Congo, Brazzaville) said he agreed and that he would introduce his amendment to the title of Section 1 (A/CONF.39/C.1/L.79) when the Committee had concluded its discussion of the various articles in that section.

Article 5 (Capacity of States to conclude treaties)[3]

11. The CHAIRMAN said that he had been informed that the proposers of a new article 5 *bis* (A/CONF. 39/C.1/L.74 and Add.1) wished their proposal to be kept entirely separate from the discussion of article 5 itself. He would therefore invite the Committee to consider only article 5 and the amendments to it.

12. Mr. ZEMANEK (Austria), introducing his amendment (A/CONF.39/C.1/L.2), said that its purpose was to introduce a new paragraph which would establish an international obligation for a federal union to confirm or approve the powers of its constituent member which entered into a treaty in the circumstances set forth in paragraph 2. That was in conformity with established practice. If paragraph 2 were retained in its present form, the other party to the treaty would have the delicate task of examining the internal law of the federal union to which its treaty partner belonged. The Austrian amendment would release it from that obligation.

13. The proposed new paragraph had been couched in terms analogous to the provisions of article 6 (Full powers to represent the State in the conclusion of treaties) and article 43 (Provisions of internal law regarding competence to conclude a treaty).

14. The confirmation extended by the competent authority of the federal union would have the effect of precluding the federal State from invoking, as grounds of invalidity of the treaty, any violation of its constitutional law by its constituent member.

15. A provision on those lines had been included by the International Bank in its Convention on the settlement of investment disputes between States and nationals of other States of 18 March 1965, article 25; paragraph (3) of that Convention[4] required the approval of the federal State for any agreement between one of its constituent members or sub-divisions and a foreign investor.

16. His delegation would be prepared to vote for the deletion of article 5. If, however, the Committee decided to retain the article, his amendment should be put to the vote, since it was not of a mere drafting character.

17. Mr. CASTREN (Finland) said that the International Law Commission had experienced great difficulties when attempting to draft an article on capacity to conclude treaties. The Commission's various drafts had attracted much criticism from Governments and some had suggested the deletion of the article altogether. The Commission had ultimately dropped certain portions of the text and the article had emerged in its present unsatisfactory form.

18. It was undeniable that capacity to conclude treaties was one of the most important prerogatives of States, which were the main subjects of international law. There existed, however, considerable differences between States, and some had only a limited capacity to conclude treaties. Some constituent members of composite States had full internal autonomy but no capacity to conclude treaties; many political sub-divisions were mere provinces.

19. The wording of paragraph 1 was much too general and did not reflect the real position in international law. In fact, there was no need for an express provision of that type, because the capacity of both sovereign States and semi-sovereign States to conclude treaties was implied in all the provisions of Section 1 of Part II of the draft. Neither the 1961 Vienna Convention on Diplomatic Relations nor the 1963 Vienna Convention on Consular Relations contained any express provision that States had the right to maintain diplomatic or

[2] See, in particular, 3rd meeting, paras. 5 and 75.

[3] The following amendments had been submitted: Austria, A/CON.39/C.1/L.2; Finland, A/CONF.39/C.1/L.54; New Zealand A/CONF.39/C.1/L.59; Australia, A/CONF.39/C.1/L.62; Mexico and Malaysia, A/CONF.39/C.1/L.66 and Add.1; Nepal, A/CONF. 39/C.1/L.77/Rev.1; Congo (Brazzaville), A/CONF.39/C.1/L.80; Republic of Viet-Nam, A/CONF.39/C.1/L.82. Subsequently, a sub-amendment to the Austrian amendment was submitted by the Byelorussian Soviet Socialist Republic (A/CONF.39/C.1/L.92), and Finland submitted a revised version of its proposal (A/CONF. 39/C.1/L.54/Rev.1 and Corr.1).

[4] United Nations, *Treaty Series*, vol. 575, p. 176.

consular relations; that right had been considered as inherent.

20. The provisions of paragraph 2 were much too narrow. First, they only referred to one particular kind of composite State, whereas unions of States other than federal unions had existed in which the constituent members had some capacity to conclude international treaties. Secondly, they referred only to the federal constitution, ignoring the constituent instruments which had preceded the adoption of the constitution, such as the international agreements between the States which had become members of a federal union.

21. His delegation had accordingly proposed the deletion of article 5 (A/CONF.39/C.1/L.54) but would not press the proposal if the Drafting Committee agreed to consider two amendments to the present text.[5] First, to insert in paragraph 1, after the word " State," the words " which is a subject of international law "; that qualification was necessary in order to limit the unduly broad and vague language of that paragraph. That proposal was based on paragraph (4) of the International Law Commission's commentary, which defined a State for the purposes of the draft; that definition should be incorporated in the text of article 5 and not just left in the commentary. A similar proposal had been put forward by the delegation of the Congo (Brazzaville) (A/CONF.39/C.1/L.80).

22. Secondly, to reword paragraph 2 to read on the following lines: " States members of a union of States may possess a capacity to conclude treaties if such capacity is admitted by the constitution or the other constituent instruments of the union, and within the limits laid down in the said instruments."

23. Mr. SMALL (New Zealand), introducing his delegation's amendment (A/CONF.39/C.1/L.59), said that, like other delegations, he had considerable doubts about the utility of article 5, especially paragraph 2. The existing text was only the incomplete fragment which had survived the International Law Commission's extensive debates on the intractable subject of international personality and State capacity, debates which had ranged far beyond the scope of the law of treaties.

24. If article 5, and especially paragraph 2, were to be retained, his delegation believed, and had so proposed in document A/CONF.39/C.1/L.59, that it was advisable to avoid the use of the word " State " with two completely different meanings in the two paragraphs of the article. In paragraph 1, the word " State " was used in the general sense of the ordinary contractual entity at international law to which all the draft articles related. In paragraph 2, however, the words " States members of a federal union " were used to describe the component members of that union. In order to avoid the confusion which might result from that duality in the use of the word "State", he proposed that the words " States members " in paragraph 2 be replaced by the words "Political sub-divisions". If that wording raised any difficulty, he would suggest as possible alternatives: " Constituent members " or " Constituent elements ".

25. In making that proposal, the New Zealand delegation assumed that there was general agreement in the Committee that, in the case of a State with a federal constitution, solely the federal union itself constituted a " State " for the purpose of international law. The proposed amendment was put forward as a measure which might be considered if paragraph 2 were eventually retained; it did not prejudge the more general question whether it was necessary to preserve that paragraph.

26. Mr. HARRY (Australia) said that he could support the proposal to delete the whole of article 5; alternatively, he would not have any strong objection to the Austrian proposal to add a new paragraph, but he considered it preferable to delete paragraph 2, as proposed in his delegation's amendment (A/CONF.39/C1./62).

27. The statement in paragraph 2 that some States possessed the capacity to conclude treaties only if their constitution so permitted conflicted with paragraph 1, which said that every State possessed that capacity. It was also inconsistent with article 1 which specified that the convention would apply only to States, in other words, to entities having the status described in the Commission's commentary to article 5. Part of the difficulty arose from the fact that the same word, " State " with a capital *S*, was used with two different meanings in the two paragraphs of the article.

28. Under the constitution of the Australian Federation, the six constituent states, with a small *s*, had no international standing and the making of treaties was a function of the Federal executive alone. He was well aware, of course, that in some federal unions the constituent members could and did possess a capacity to conclude treaties; to take an example, the Byelorussian SSR and the Ukrainian SSR, two of the component members of the USSR, had for over twenty years been parties to multilateral treaties. Their treaty-making capacity had never been questioned since they had become members of the United Nations. Paragraph 2 was clearly not necessary to establish the treaty-making capacity of States in that class: a country accepted by the general political international organization as a member did not need a special article to establish its treaty-making capacity in international law.

29. The purpose of paragraph 2 appeared therefore to be to cover such federal component units as the German *Länder* and the Swiss Cantons, with their limited treaty-making power. He saw no reason for singling out such units, among all the subjects of international law, for special mention, important though their status was historically.

30. There was no need to retain that paragraph, which was merely a survival from earlier drafts by the International Law Commission covering also other unions, international organizations and dependent States. The paragraph would in any case require amendment as proposed by Austria (A/CONF.39/C.1/L.2) and New Zealand (A/CONF.39/C.1/L.59), in order to make clear the role and responsibility of the federal authorities. Its removal, on the other hand, would neither impair the functioning of any federal system nor affect the rights of any component unit under a federal constitution.

31. Mr. SEPULVEDA AMOR (Mexico), introducing the proposal by his country and Malaysia to delete

[5] These amendments were circulated in document A/CONF. 39/C.1/L.54/Rev.1 and Corr.1.

article 5 (A/CONF.39/C.1/L.66 and Add. 1), said that paragraph 1 was superfluous. It was not necessary to reaffirm the treaty-making capacity of States in the international legal order; that capacity was inherent in the international personality of States. It was implicit both in the terms of article 1 which the Committee had just adopted, and in the definition of " treaty " in paragraph 1 (*a*) of article 2. Moreover, the capacity to conclude treaties was not confined to States and that fact was not clearly reflected in paragraph 1 of article 5.

32. The deletion of paragraph 2 was all the more necessary because it dealt with matters pertaining to the domestic legal order of federal unions. The capacity of a component member of a federal union to conclude treaties was based on the federal constitution, in other words on internal law and not on international law. If paragraph 2 were maintained, it would introduce an element of uncertainty into the conclusion of treaties. The purpose of the Mexican amendment was to restore the subject to the domestic legal order, where it properly belonged.

33. Sardar BHIM BAHADUR PANDE (Nepal), introducing his delegation's amendment (A/CONF.39/C.1/L.77/Rev.1), said that it was of a drafting character: its purpose was to place on the same footing all States which had a capacity to conclude treaties. Once it was recognized that a state member of a federal union possessed that capacity, there was no reason to make any difference between it and other States in the wording of article 5. That was why his delegation proposed that the two paragraphs of article 1 be combined in a single formulation. He did not wish his amendment to be put to the vote, but would request that it be referred to the Drafting Committee.

34. Mr. MOUDILENO (Congo, Brazzaville), introducing his amendment (A/CONF.39/C.1/L.80), said that its purpose, as far as paragraph 1 was concerned, was to clarify the meaning of the word " State " by adding the words " which is a subject of international law." The reasons for introducing that idea had already been outlined by the representative of Finland. His amendment possessed the additional advantage of avoiding the confusion which arose from the use of the word " State " with two different meanings in the two paragraphs of the article.

35. The purpose of the changes proposed to paragraph 2 was to clarify its meaning. Since his whole amendment was of a drafting character, he requested that it be referred to the Drafting Committee.

36. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation had submitted its proposal for the deletion of article 5 (A/CONF.39/C.1/L.82) because, since article 1 already stated that the convention applied to treaties between States, it was undesirable to restate that fact in a different form in paragraph 1 of article 5. Furthermore, paragraph 2 might be regarded as an attempt to interfere in essentially domestic matters.

37. On the other hand, in view of the lengthy deliberations in the International Law Commission which had resulted in the existing text, he understood the reluctance of some delegations simply to delete the clause, and could therefore support the new proposal by the Finnish delegation (A/CONF.39/C.1/L.54/Rev.1 and Corr.1).

38. Mr. BLOMEYER-BARTENSTEIN (Federal Republic of Germany) said that his country, which had a long tradition of federal structure, had refrained from submitting an amendment to paragraph 2, because the effects of that provision, if it were retained, would by and large correspond to its constitutional practices. Nevertheless, his delegation was not entirely satisfied with the clause, because it went beyond the scope of the draft as defined in article 1. Under both article 1 and article 3, the draft related only to treaties concluded between States, not to those concluded by other subjects of international law; yet most constituent members of federations, even if they possessed some treaty-making capacity, did not have the status of States in international law. Thus, the *Länder* of the Federal Republic of Germany possessed only a very limited treaty-making capacity and, in the context of the draft convention, might be regarded as " other subjects of international law." Paragraph 2 could therefore be deleted, particularly in view of the provisions of article 3.

39. If, however, the prevailing opinion in the Committee was in favour of retaining paragraph 2, two points should be carefully considered. First, the Committee should study the question whether the paragraph applied equally to all the draft articles: his delegation had some doubts in that regard, particularly in connexion with article 43. The special relationship between a federal union and its component members could not be ignored, especially with regard to possible violations of the federal law by a member. The Austrian amendment (A/CONF.39/C.1/L.2) was designed to settle that question, but the provision might still create constitutional difficulties for some countries. Secondly, if the paragraph were retained, the term " states members of a federal union " should be re-examined. Although the term fitted into the structure of the Federal Republic of Germany, that might not be the case with all federal constitutions.

40. Mr. MALITI (United Republic of Tanzania) said that paragraph 1 should be retained in its original form. Although the statement was self-evident, it was sometimes essential to state the obvious.

41. With regard to paragraph 2, the Austrian amendment (A/CONF.39/C.1/L.2) was acceptable to his delegation, since it would serve to eliminate the serious difficulty of deciding whether a given constitution allowed the component members of the federal union to make treaties. The problem might arise even if the written constitution provided a clear answer, for subsequent practice tended to refine the original provisions of a constitution. Moreover, the Austrian amendment would be useful for outside States contemplating the conclusion of a treaty with a member of a federal union.

42. His delegation had no strong views on the New Zealand amendment (A/CONF.39/C.1/L.59), since the International Law Commission's wording seemed quite clear. Perhaps the New Zealand amendment could be referred to the Drafting Committee.

43. Mr. CHEA DEN (Cambodia) said that the International Law Commission's text of article 5 had considerable merit. It made no claim to laying down a new rule of the law of treaties, but represented a general rule, derived from international custom and practice.

Its codification was advisable to eliminate uncertainties with regard to the scope of the capacity to conclude treaties. It would constitute no interference in the organic domestic law of sovereign States, and, moreover, laid down the principle that all States, large and small, irrespective of their structure, had equal capacity to conclude treaties.

44. Sir Lalita RAJAPAKSE (Ceylon) said he supported the proposals to delete paragraph 2. The clause was incomplete in that it merely recognized that constituent members of a federal union might possess the capacity to conclude treaties, if such capacity was admitted by the federal constitution. If the reference was to domestic procedure only, it was unnecessary; but the paragraph also seemed to entail certain external consequences, even though they were not elaborated. The International Law Commission pointed out in paragraph (5) of its commentary that there was no rule of international law which precluded the component States from being invested with the power to conclude treaties with third States, but his delegation doubted whether that practice was sufficiently developed to warrant codification at that stage.

45. Paragraph 2 as it stood left too many questions unanswered. For example, did the clause apply to all the draft articles? Who issued full powers for treaty-making in the absence of an authority dealing with foreign affairs in the component State? Did the treaty bind the member of the union or the federation? In the latter case, was the federation bound only in respect of the member's territory and assets? Those and other questions were too complex to be dealt with in the time available to the Conference. His delegation considered that nothing would be lost by omitting the provision.

46. Mr. WERSHOF (Canada) said that the International Law Commission's text was unsatisfactory for three reasons. The first was the terminological question of the contradictory use of the word " State "; the second was a matter of the interpretation and application of paragraph 2, especially in its reference to the constitution of a federal State; and the third was the omission of certain additional legal considerations relating to treaty-making capacity as exercised in federal States.

47. With regard to the first point, the word " State " was used in article 1 and in paragraph 1 of article 5 to refer to the fully sovereign international person, but was used in quite a different sense in paragraph 2 of article 5. Since it was the federal union rather than the political sub-division which should be designated as a State, his delegation fully supported the New Zealand amendment (A/CONF.39/C.1/L.59).

48. As to the interpretation and application of the article, paragraph 2 provided that the extent to which a political sub-division might enjoy treaty-making capacity depended on the federal constitution. But since the federal constitution was an internal law of the federal State, its interpretation fell within the exclusive jurisdiction of the internal tribunal of the federal State having jurisdiction in constitutional matters. No sovereign State could agree that an outside body might have the power to interpret its constitution. That opinion was confirmed by Article 2(7) of the United Nations Charter and in General Assembly resolution 2131 (XX). Moreover, it was stated in paragraph (8) of the Commission's commentary to article 43 that any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. That view did not, however, seem to be embodied in paragraph 2 of article 5, and it would be most unfortunate if the article were interpreted as an invitation to outside States to purport to interpret the constitution of a federal State.

49. From the practical point of view, the article would in many cases place States dealing with federal States in a very awkward position. Whereas the legal capacity of political sub-divisions might be clear in the case of federal States with written constitutions, it would be less readily ascertainable to outsiders in the case of federal States whose constitutions were unwritten or partly written. To avoid situations in which other States and depositaries of treaties might be placed in the invidious position of concerning themselves with the interpretation of the constitutions of federal States, further consideration should be given to clarifying the scope of the paragraph, if it was retained. Accordingly, the Canadian delegation could support the Austrian amendment (A/CONF.39/C.1/L.2), which set out the principle that the question of any treaty-making capacity of a component unit must be confirmed by an authority of the federal union.

50. Finally, with regard to the omission of certain essential legal elements from the article, it had been pointed out that paragraph 2 recognized a practice which already existed in certain federal States. But the precise legal implications of the practice were not adequately reflected; for example it raised the important questions of international personality, State responsibility and recognition, which could not be dealt with in the convention. On the other hand, without those provisions the rule would be incomplete, since it embodied only some of the many elements to be considered. If the convention was to contribute to the stability of treaty relations between States, all the rules formulated therein must be clear, accurate and complete. The best solution would therefore be to delete the article, or at least paragraph 2. Failing that, article 5 would be generally acceptable only if it incorporated the Austrian and New Zealand amendments (A/CONF.39/C.1/L.2 and L.59).

51. Mr. ZEMANEK (Austria) said that his delegation was concerned with three terminological questions in article 5. The first was the use of the word " State " in paragraph 2: it obviously had a different meaning in paragraph 1. The Austrian delegation wondered whether the meaning ascribed to the word in article 1 was the same as in article 5, paragraph 2; the same doubts were evident from the New Zealand amendment (A/CONF. 39/C.1/L.59) and the amendment of the Congo (Brazzaville) (A/CONF.39/C.1/L.80). Secondly, his delegation was puzzled by the use of the term " federal union " in paragraph 2: Austria was a federal State, but his delegation was not aware of any instance of the term " union " being used to mean anything other than a union of sovereign States. Finally, his delegation questioned the use of word " may " in paragraph 2: if the treaty-making capacity of a member of a federation was admitted by a federal constitution, the member

possessed that capacity, but no constitution would stipulate that the member " might " possess that capacity.

52. Mr. KRISHNA RAO (India) said his delegation strongly supported the retention of paragraph 1 without any substantive changes and endorsed the Commission's reasoning in paragraphs (3) and (4) of the commentary in favour of it. It noted that it was stated in paragraph (3) that the Commission had decided to retain the two provisions, subject to minor drafting changes, but it was not clear whether those changes had already been made by the Commission or were to be made during the Conference.

53. Paragraph (5) of the commentary on the other hand raised some doubts concerning the need to retain paragraph 2. Clearly, the source of the treaty-making capacity of component units was the power vested in them by the federal constitution. Since, however, there were few examples in practice of such treaty-making capacity, the question had not attracted international recognition, and was pre-eminently a domestic matter. It would therefore suffice to leave each federal State to decide whether its component units were to have treaty-making capacity, how that capacity was to be admitted and the extent of the treaty-making powers granted. Moreover, since it was stated in paragraph (5) of the commentary that there was no rule of international law which precluded the component States from being invested with the power to conclude treaties, it seemed unnecessary to include a positive rule in the convention, particularly since special problems might arise in connexion with articles 43 and 62 of the draft. The Indian delegation therefore supported the Australian and Nepalese proposals (A/CONF.39/C.1/L.62 and L.77/Rev.1) to delete paragraph 2.

54. Mr. SINCLAIR (United Kingdom), referring to the history of article 5, pointed out that the final Special Rapporteur on the law of treaties had proposed in 1962 a comprehensive article dealing with the capacity of unitary and federal States, of other subjects of international law invested with treaty-making capacity by treaty or international custom, of States the conduct of whose international relations had been entrusted to another State, and of international organizations.[6] The International Law Commission had decided in 1962, however, that it would be inappropriate to enter into all the detailed problems of capacity which might arise, and had confined itself to three broad provisions on capacity covering States and other subjects of international law, member States of a federal union, and international organizations.[7] Thus, even at that stage the Commission had been aware that its preliminary draft did not deal comprehensively with the variety of entities possessing treaty-making capacity. The Commission's subsequent decision to exclude international organizations and other subjects of international law had resulted in the submission of a truncated provision on treaty-making capacity.

55. The United Kingdom shared the view of those members of the Committee who considered that article 5 was unnecessary and liable to lead to confusion. Particular difficulties arose in connexion with paragraph 2. There were many different types of federal States, and the treaty-making capacity of their component members might be non-existent, might be subject to severe limitations imposed by the federal constitution or might, in certain cases, be of some significance. But the Mexican representative had rightly suggested that the Committee might be trespassing beyond the boundary between international law and domestic law in seeking to include a provision on the treaty-making capacity of component members of a federation. It must in any event be recognized that the extent of such capacity must be determined exclusively by the supreme constitutional authority of the federation concerned.

56. His delegation would therefore be in favour of deleting paragraph 2, but if that course were followed, the question would then arise whether it was necessary or even desirable to retain paragraph 1, which seemed merely to repeat what was already stated in article 1 and paragraph 1 (*a*) of article 2. The decision that the convention would apply to treaties concluded between States, in conjunction with the definition of the term " treaty," logically led to the assumption that States were entitled to conclude and had the capacity to conclude treaties.

57. The United Kingdom therefore supported the Mexican and Malaysian proposal (A/CONF.39/C.1/L.66 and Add.1) to delete the entire article, but if the Committee decided to retain the provision in whole or in part, his delegation would be prepared to support the Austrian and New Zealand amendments (A/CONF.39/C.1/L.2 and L.59).

58. Mr. ALCIVAR-CASTILLO (Ecuador) said that the term " State " was used in article 5 in the sense assigned to it in the Charter of the United Nations, the Statute of the International Court of Justice, the Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations; in other words, it meant a State for the purposes of international law. A State must possess independence in order to have obligations and rights.

59. The condition laid down in paragraph 2 would need to be amplified in order to avoid disputes about the constitutional powers of members of a federal union, but that task could be left to the Drafting Committee.

60. Mr. OSIECKI (Poland) said he was opposed to the deletion of article 5 which was both concise and lucid. Paragraph 1 stated the indisputable principle that all States were sovereign, and eliminated all discrimination. It would be a mistake to drop paragraph 1, since states members of a federal union could conclude treaties within the limitations fixed by the federal constitution.

61. He could not support the New Zealand amendment, because the expression " political sub-divisions " was too vague and would cause difficulties of interpretation. Nor could he support the amendment by the Congo (Brazzaville) (A/CONF.39/C.1/L.80), because paragraph 1 should be consistent with the terms of article 1 as just adopted.

62. Mr. BRODERICK (Liberia) said he was in favour of retaining paragraph 1 and the principles set out in paragraph 2, even though its drafting might need modification on the lines of the amendment submitted by the

[6] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 35 and 36.

[7] *Ibid.*, p. 164.

Congo (Brazzaville). Sovereign States *ipso facto* had the capacity to conclude treaties, and though that might be self evident, it needed stating. Article 5 should therefore be retained as it stood.

63. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the draft discussed by the International Law Commission in 1962 had contained a provision which stated that all independent States possessed the capacity to conclude treaties and that dependent States possessed a restricted capacity; the latter provision had, however, been abandoned lest it should appear to sanction colonial dependence, which was wholly contrary to the principles of the Charter and other international instruments. The present terms of article 5 recognized the full equality of States and were consistent with the provision adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Paragraph 1 expressed an important principle and must certainly be retained.

64. Paragraph 2 should also be retained since, under the federal constitutions of certain States such as Switzerland, the Federal Republic of Germany and the Soviet Union, states members of the Union had the capacity to conclude treaties. Two of the constituent republics of the Soviet Union, namely, the Ukrainian Soviet Socialist Republic and the Byelorussian Soviet Socialist Republic, were parties to numerous multilateral and bilateral treaties. Any question as to whether a state member of a federal union possessed capacity to conclude treaties must be decided in accordance with the constitutional rules of the State concerned, and no outside State was entitled to regulate the question.

65. Mr. JAMSRAN (Mongolia) said that article 5 must be retained because it enunciated the important right of each State to conclude treaties, regardless of its political and legal system. The equal right of all States to possess such a capacity derived from the fact that they were subjects of international law. The principle was upheld in the Declaration on the Granting of Independence to Colonial Countries and Peoples. Article 5 had special significance for newly independent States, now that the old concept of dependent States had disappeared for ever.

66. Mr. FRANCIS (Jamaica) said that article 5 should be retained, but with the proper safeguards which would be provided by the adoption of the Austrian amendment.

67. Mr. MUTUALE (Democratic Republic of the Congo) said he had some doubts about the New Zealand amendment, because States were masters of their own constitutions and free to choose how their constituent entities should be named. The question was not one of concern to public international law. Generally speaking, he was in favour of the Commission's draft.

68. Mr. EEK (Sweden) said that article 5 could be omitted, although he could agree to the retention of paragraph 1 in order to restate a basic principle; paragraph 2, on the other hand, was complicated and of doubtful validity. He did not question the capacity of political sub-divisions to become parties to a treaty, but it did not seem correct to equate that capacity under international law with their capacity under internal constitutional law. Evidently other States would have to rely on a federal government's interpretation of its own constitutional structure; it did not seem, however, that the time was ripe for regulating the matter. He was therefore in favour of dropping paragraph 2.

69. Mr. KRISPIS (Greece) said that the crux of article 5 was in paragraph 2. His delegation favoured the deletion of that paragraph, as was proposed in the amendments submitted by Finland (A/CONF.39/C.1/L.54), Mexico and Malaysia (A/CONF.39/C.1/L.66 and Add.1), and the Republic of Viet-Nam (A/CONF.39/C.1/L.82) and for the reasons put forward by the respective sponsors. It was also his belief that article 3 covered the case dealt with in article 5, paragraph 2. Paragraph 1 had a logical place as the introduction to paragraph 2, and if paragraph 2 were dropped, paragraph 1 would have to be dropped as well, as the relevant rule was contained in article 1 and article 2, paragraph 1 (*a*). If the majority were in favour of keeping article 5 his delegation would support the Austrian amendment (A/CONF.39/C.1/L.2); the idea in that amendment was very important, in view of the fact that there was no rule of international law permitting States to examine the constitutions of other States. The amendment submitted by the Congo (Brazzaville) (A/CONF.39/C.1/L.80) would improve the drafting.

70. Mr. CUENDET (Switzerland) said that he was in favour of retaining article 5 and that he could support the amendments submitted by Austria (A/CONF.39/C.1/L.2) and New Zealand (A/CONF.39/C.1/L.59). The provision in paragraph 1 of the article might be superfluous, but its inclusion was justified by the fact that the capacity to conclude treaties was a condition of their validity.

71. The Swiss delegation also thought it useful to retain paragraph 2 of article 5, despite the objections that had been made to it. The question was not one of domestic law, for although it was the federal constitution that divided international competence between the federal State and the member states, it could not confer on the latter the capacity to conclude valid international treaties; that capacity could be recognized only under international law.

72. The Swiss delegation agreed with the Canadian delegation that only the federal State was competent to interpret the federal constitution within the meaning of article 5, paragraph 2. Accordingly, it was in favour of the Austrian amendment which dispelled any doubts that might exist in that regard.

73. The representatives of Canada and Ceylon had criticized the text because it contained no provisions on the responsibility of the federal State for treaties concluded by member states; but those were questions with which the draft convention was not designed to deal.

74. Mr. MYSLIL (Czechoslovakia) said that his delegation had no doubt that paragraph 1 should be retained because the capacity to conclude treaties was one of the fundamental attributes of sovereignty. That paragraph also formed a logical introduction to part II of the draft convention and could not be omitted on the ground that the point was already covered in articles 1 and 2, which served quite different purposes. The argument

that it was self-evident could apply to a number of other articles, and its omission would only lead to a gap in a work of codification.

75. He was in favour of retaining paragraph 2, but in view of the difficulty of providing for all present and future federal arrangements and of the borderline between national and international law, he was willing to consider amendments aiming at the improvement of the wording.

76. Mr. TARAZI (Syria) said that article 5 should be retained. It formulated a rule analogous to the municipal rules of contract law concerning the capacity of individuals to enter into contracts. Now that the concept of dependent States had given way to full sovereign equality between States which were subjects of international law, an article on capacity was fully justified.

77. Paragraph 2 dealt with a practical problem that was perfectly relevant to the draft and should be retained with the clear separation between internal and international law established by the Commission, so that no conflict on that score could arise. The Austrian amendment did not quite fill the bill and the other amendments could be referred to the Drafting Committee.

The meeting rose at 6 p.m.

TWELFTH MEETING

Thursday, 4 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1866 *(continued)*

Article 5 (Capacity of States to conclude treaties) *(continued)*[1]

1. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said he unreservedly supported the text of article 5 as drafted by the International Law Commission. In connexion with paragraph 1, he stressed that the basis of the capacity of States to conclude treaties was sovereignty. Sovereignty was an inalienable attribute of the independent State; it was also the basis of the universal participation of States in international affairs. In addition, at the root of international law lay the problem of maintaining peace and it was beyond question that in order to ensure lasting peace the fundamental rights of all members of the international community, including the right to conclude treaties, must be safeguarded.

2. The importance of paragraph 1 could not be overestimated, but paragraph 2 was also very important. The Byelorussian people had gained its freedom and independence as a result of the October revolution, and the Byelorussian SSR had been a sovereign State since 1919. It had concluded a large number of bilateral and multilateral agreements and was a founder member of the United Nations. It was a member of many specialized agencies and of the International Atomic Energy Agency, and it participated in the work of numerous bodies in the United Nations system. The status of the Byelorussian SSR as a subject of international law was affirmed in its Constitution and recognized in the Constitution of the USSR. The Byelorussian SSR was thus fully qualified to establish and maintain direct relations with foreign States. Paragraph 2 was, accordingly, consonant with the legislation and practice of the Byelorussian SSR. The text was the result of a compromise reached after long and patient work by the International Law Commission, and as it stood, it was entirely acceptable to the other participants in the Conference. Although in some federal States only the federal government had the capacity to conclude treaties, in others the component members of the union enjoyed that capacity. Paragraph 2 reflected that situation and was in conformity with international practice. He would, however, be prepared to accept the Austrian amendment (A/CONF.39/C.1/L.2), provided that the following phrase was added to it: "if it is provided for in the constitutional law of a federation, or of States members of a federation".[2] He asked that that addition be treated as a formal sub-amendment to the Austrian amendment.

3. Mr. MARESCA (Italy) said he thought it unnecessary to state rules which merely repeated what had already been said. The use of the words "concluded between States" in articles 1 and 2 implied the capacity of States to conclude international treaties. The old principle *pacta sunt servanda inter gentes* itself confirmed that capacity.

4. The 1961 and 1963 Vienna Conferences provided a useful precedent in that connexion. It had been proposed that the notion of *jus legationis* should be introduced into the 1961 and 1963 Conventions. It had been concluded, however, that that was unnecessary, as the point was so self-evident. Article 5, paragraph 1 was not essential, therefore, and could be deleted without impairing the clarity of the convention.

5. Paragraph 2 dealt with the more limited problem of federal States. To refer to the constitution of a State in connexion with international relations raised great difficulties. The paragraph therefore appeared to present more dangers than advantages. As it was not essential, it could also be deleted; or at least it should be modified on the lines of the Austrian amendment, which was calculated to reduce the uncertainty created by the reference to the internal law of a State.

6. Mr. KEARNEY (United States of America) also thought that article 5, paragraph 1 merely repeated what was implicit in articles 1 and 2. If, however, some representatives were very anxious to retain the paragraph, the United States delegation would not object.

7. Paragraph 2 raised a different problem. A number of federal States represented at the Conference believed that the retention of paragraph 2 would cause them difficulties, whereas it had not been shown that its deletion would cause difficulties for the other federal States. Paragraph 2 left too many questions unanswered, owing to the wide constitutional differences between one federal State and another. Failure to answer those questions would sooner or later cause difficulties for federal States.

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[1] For the list of the amendments submitted, see 11th meeting, footnote 3.

[2] This sub-amendment was circulated as document A/CONF. 39/C.1/L.92.

8. The United States delegation was therefore in favour of deleting paragraph 2.

9. Mr. VOICU (Romania) said that a convention whose object was to codify the law of treaties should be in harmony with the fundamental principles of contemporary international law, in particular the principle of equality of the rights of States. The express affirmation of the capacity of any State to conclude treaties, which was a concrete and essential attribute of its international personality, should be prominent in the legal instrument being prepared.

10. That capacity concerned both States, as parties to treaties, and the international community as a whole. It was inherent in the very concept for the State of the purposes of contemporary international law. The question of capacity was not purely theoretical; it went to the root of the law of treaties. The Conference should therefore state the *jus tractatuum* explicitly. Article 5 was not tautological. If the convention was to meet the practical requirements of international relations, it must state the rule regarding capacity as it stood at present. The controversy aroused by the article clearly showed that it was far from being just a pleonasm.

11. The Romanian delegation was accordingly in favour of retaining article 5 as drafted by the International Law Commission.

12. All the amendments which would delete or alter the wording of paragraph 2 deserved consideration, but the Drafting Committee should nevertheless be asked to work out a better formulation of paragraph 2 if necessary, without in any way altering the substance of the article, which had already suffered a series of cuts in the International Law Commission and was regarded by the Romanian delegation as being perfectly satisfactory as it stood.

13. Mr. DE LA GUARDIA (Argentina) said that his country was a federal State and that under its constitution the members of the federation were not entitled to conclude treaties. Hence article 5 raised no difficulties for Argentina.

14. He had nevertheless appreciated the arguments advanced for deleting the article. Basically, paragraph 1 dealt with only one aspect of international capacity. As to paragraph 2, the text was not sufficiently clear: the meaning of the word "State", for example, differed from its meaning in paragraph 1. Furthermore, the matter dealt with was solely one of internal constitutional law, which had no place in the convention. In any case, the deletion of paragraph 2 would not impair the treaty-making capacity of the member states of certain federations.

15. In the first place, therefore, he supported the amendments deleting article 5. If they were not adopted, he would support the Australian amendment (A/CONF.39/C.1/L.62), which would delete paragraph 2. Lastly, if that amendment was not adopted either, he would support the amendments of Finland (A/CONF.39/C.1/L.54/Rev.1 and Corr.1) and the Congo (Brazzaville) (A/CONF.39/C.1/L.80), which would improve the wording by making it clearer.

16. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said he would confine himself to answering the questions raised by various speakers, in particular the representative of Ceylon.

17. By creating the Soviet Union, the member republics had not surrendered their sovereignty, which was guaranteed in the constitution of the Union and affirmed in the constitutions of the republics. Moreover, the constitution of a member republic could not be altered without its agreement.

18. The republics enjoyed all the attributes of sovereignty. By virtue of its constitution, the Ukrainian Soviet Socialist Republic, for example, could maintain direct relations with other States, conclude treaties with them and exchange diplomatic and consular missions. The right to maintain foreign relations was thus widely recognized. The Ukraine was a party to over a hundred multilateral agreements and a member of many international organizations. The agreements concluded by a member republic of the Soviet Union were applicable solely within its territory and involved its own responsibility only. If necessary, however, the other republics or the Union could help a member republic to discharge its international obligations. The point dealt with in article 5, paragraph 2, concerned not only the republics of the Soviet Union but also the members of other federations. Article 5, paragraph 2, should reflect the general practice, not the practice of a particular federation. Consequently, the Ukrainian Soviet Socialist Republic could not support the Austrian amendment.

19. Mr. OGUNDERE (Nigeria) said that his country, being a federation, attached great importance to the retention of article 5. The Nigerian delegation would therefore vote against any proposal to delete it. Paragraph 1 was satisfactory. With regard to paragraph 2, he appreciated the force of the arguments advanced by the New Zealand representative in support of his delegation's amendment (A/CONF.39/C.1/L.59), but he could not agree to the words "States members" being replaced by the words "Political sub-divisions", which lacked precision. The Austrian amendment (A/CONF.39/C.1/L.2) was difficult for Nigeria to accept because it expressed only imperfectly what happened, for example, when a constituent unit of the Nigerian Federal Republic had dealings with bodies such as the World Bank or the International Monetary Fund. Before one of the units was granted a loan, the Federal Government usually had to provide, in addition to its guarantee, an attestation regarding the constitutional and legal position of the unit concerned. It was true that such arrangements were not in force in all federations. The important point was that the federal authority should be able to certify that, under the constitution, the constituent unit in question possessed the capacity to conclude an international treaty. The New Zealand and Austrian amendments should be referred to the Drafting Committee.

20. Mr. ALVAREZ TABIO (Cuba) said that the discussion had produced no convincing argument for deleting either the whole or part of article 5. On the contrary, everything seemed to militate in favour of retaining the article. At first sight, since a State was sovereign, it seemed unnecessary to include an article on its treaty-making capacity in international law. Internationally, a State was independent and could bind itself without interference from outside. Internally, its authority could not be equalled by any other power. Those principles could not, however, apply to States

with special structures, such as federal States, which in any case were not all organized alike. Their sovereignty was shared by the organs of the federal power and the member states, in accordance with their constitutions. In some cases the member states had treaty-making capacity and in others they did not. It was therefore necessary to state the general rule, without forgetting the exception. Paragraph 2 involved no interference in the internal affairs of a State, since it specified that the constitution determined the rights of member states.

21. The Austrian amendment (A/CONF.39/C.1/L.2), on the other hand, did not fully safeguard the internal law of the federal State, since it provided for confirmation. It would therefore be preferable to retain the existing text.

22. Mr. JIMENEZ DE ARECHAGA (Uruguay) pointed out that article 5, paragraph 2, had been adopted by the International Law Commission by a small majority. In the opinion of the Uruguayan delegation, the reason for deleting it was not that it involved interference in the internal affairs of a State. On the contrary, the paragraph postulated that international law would abdicate in favour of internal constitutional law—and that in the fundamental role of establishing what subjects of law were empowered to act. In fact, the capacity of a component State to act was determined not only by the constitution of the federal State, but also by the fact that other States agreed to conclude treaties with the component state. That point had arisen in connexion with the admission of the Ukrainian and Byelorussian Soviet Socialist Republics to membership of the United Nations. Not only the provisions of the Soviet Constitution, but also the agreement of other founder Member States had been necessary for the applications of those two States to be accepted.

23. In short, it would be dangerous to adopt paragraph 2, because international law would then no longer take precedence—everything would depend on the provisions of the constitution of the federal State. That State would then have a considerable advantage over a unitary State, for under cover of such a provision it could introduce into conferences and multilateral treaties a large number of subjects of law in the form of political sub-divisions which it decided to create. Federal States could thus cause serious imbalance by altering the number of parties and votes. That might have particularly serious consequences if an article 5 *bis* relating to general multilateral treaties were added, as proposed in document A/CONF.39/C.1/L.74. The Uruguayan delegation would therefore vote in favour of the Australian proposal to delete paragraph 2 (A/CONF.39/C.1/L.62). If that proposal was not adopted, it would ask for a separate vote on each paragraph of article 5 so that it could vote against paragraph 2.

24. Mr. EL DESSOUKI (United Arab Republic) said he was in favour of retaining article 5, which introduced into the convention an important principle relating to the capacity of a State to conclude treaties. That was a natural corollary of the principle of State sovereignty, which was basic to international law. The amendments concerning points of terminology could be referred to the Drafting Committee.

25. Mr. SUPHAMONGKHON (Thailand) said he did not agree with those representatives who had maintained that article 5 was unnecessary on the pretext that it was obvious that every State had the capacity to conclude treaties, which was a corollary of the principle of State sovereignty. Since the object of the Conference was to codify contemporary international law, which meant to present in written form the rules of international law at present applied, it seemed essential to mention that fundamental principle.

26. It had also been said that article 5 merely repeated what was already included in article 1 and article 2, paragraph 1 *(a)*. That was not so. Article 1 defined the scope of treaty law; article 2, paragraph 1 (*a*), defined the term " treaty "; article 5 proclaimed the right of all States, without exception, to conclude treaties.

27. With regard to article 5, paragraph 2, the right of states members of a federal union to conclude treaties depended on the constitution of the union, which explained the use of the words " may possess a capacity ". The phrase " states members of a federal union " was, perhaps, not felicitous and might lead to misunderstanding, for the constituent units of a federation were not always called " states "; sometimes they were " cantons " or " provinces." The Drafting Committee could examine that point.

28. Mr. VIRALLY (France) said it was open to question whether an article on the capacity of States to conclude treaties was appropriately placed in a part of the convention devoted solely to procedural questions. In view of the difficulty of finding a more suitable position, however, the French delegation was not proposing that the article be moved elsewhere.

29. It might also be asked whether the article was really useful in a convention relating, not to the rights and duties of States, but to the law of treaties. On that point, the French delegation shared the doubts expressed by the representative of the Federal Republic of Germany. It was always preferable to express clearly even things that seemed obvious. Article 5 made the draft somewhat clearer, and the French delegation would therefore support it.

30. If the article was to be retained, however, the wording adopted should be that of the International Law Commission, which seemed perfectly balanced. Consequently, the French delegation would not support any of the proposed amendments. Paragraph 1 was ambiguous, because the Commission had decided not to include a definition of the term " State " in the draft. As a result, the word " State " in that paragraph could mean either a sovereign State, which was too restrictive, since every member state of a federal group would then be denied treaty-making capacity; or every State, whether sovereign or not, which was too extensive, since every member state of a federal union did not have that capacity. A second paragraph was therefore required. In the opinion of the French delegation, the International Law Commission had worded that paragraph extremely aptly by leaving it to the constitutional law of each federal State to attribute treaty-making capacity to the member states and to determine its limits. That was the only formula that reflected established practice, which was, of course, extremely varied. Any attempt to go further

would involve the Conference in the internal law of States and lead to making the practice of some States prevail over that of others. That would obviously be unacceptable to the latter States and would create considerable difficulties in application.

31. Mr. KEBRETH (Ethiopia) said he was in favour of retaining paragraph 1. The capacity to conclude treaties was a fundamental principle which the law of treaties could not afford to ignore. Some speakers had said it was so self-evident that there was no need to mention it, but the Ethiopian delegation did not share that opinion. Experience had shown that certain powerful States had imposed restrictions on weaker States which might have been subjects of international law. Protectorate treaties, for instance, had opened the way to colonialism. The capacity of States to conclude treaties should be stated in a new context and take account of the requirements of the present-day world. It had to be borne in mind that the International Law Commission had touched on certain *jus cogens* aspects of the principle.

32. The Ethiopian delegation was in favour of deleting paragraph 2 for the reasons which had already been stated by many delegations; even if the treaty-making capacity of some constituent units of a federal State was recognized, there would still be too many difficulties in any attempt to apply the provisions of the draft articles. Moreover, the inchoate state of the laws governing many aspects of the treaty-making capacity of those constituent units might give rise to difficult and delicate questions that might involve probing too indiscreetly into the internal affairs of States.

33. Mr. ZEMANEK (Austria) explained that the Austrian delegation's amendment (A/CONF.39/C.1/L.2) was not intended to authorize any interference in the internal affairs of a federal State. Its purpose was to enable any State which was about to conclude a treaty with a state member of a federal union to obtain an assurance from an authority of the union that that state was in fact competent to conclude treaties.

34. If the word " confirmed " caused any difficulty, the Drafting Committee should be asked to substitute an analogous term, taking due account of the ideas expressed in the amendment.

35. He was opposed to the Byelorussian sub-amendment (A/CONF.39/C.1/L.92) to the Austrian amendment, as it involved an interpretation of the constitution of a federal State.

36. Mr. JACOVIDES (Cyprus) said that his delegation supported the amendments by Nepal (A/CONF.39/C.1/L.77/Rev.1) and Australia (A/CONF.39/C.1/L.62) deleting paragraph 2. If the Committee decided to retain that paragraph, however, the wording should be improved, and the amendments by Finland (A/CONF.39/C.1/L.54/Rev.1 and Corr.1) and Austria (A/CONF.39/C.1/L.2) might serve as a basis for drafting a new text.

37. Lastly, he thought that paragraph 1 should be retained, as it brought out a very important principle of international law: that of the sovereign equality of States.

38. Mr. SAMAD (Pakistan) said he was in favour of retaining paragraph 1, even if it was only a repetition of an important principle of international law. As to paragraph 2, he pointed out that the International Law Commission had stated in its commentary that " there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States". Moreover, it was well known that the members of certain federal unions—the Swiss cantons, for example—had the capacity to conclude treaties by virtue of the federal constitution. Consequently, the delegation of Pakistan was in favour of retaining paragraph 2, subject to slight drafting changes.

39. Mr. YAPOBI (Ivory Coast) said he was in favour of retaining the whole of the text of article 5 as drafted by the International Law Commission, which had shown a keen sense of realism. In his opinion, article 5 was the inescapable corollary of article 1. Article 5, paragraph 1 stated the general principle that every State had the capacity to conclude treaties. That general rule was subject to a derogation which was stated in paragraph 2 of the article. Paragraphs 1 and 2 were not contradictory; they were complementary.

40. The present wording might call for some improvement: the Drafting Committee would be able to find satisfactory wording, taking account of the ideas expressed in the Committee.

41. Mr. YASSEEN (Iraq) said that his delegation was in favour of retaining article 5 as it stood.

42. Paragraph 1 was necessary because it specified that all States—and that excluded even implied recognition of the existence of dependent States—had the capacity to conclude treaties. Paragraph 2 was equally necessary because States now existed which were members of a federal union and had the capacity to conclude treaties, a capacity which was recognized within the limits of the federal constitution. The paragraph laid down the international rule that the matter was one for the federal constitution to decide.

43. Mr. MIRAS (Turkey) said that paragraph 1 was not absolutely necessary and should be deleted. Paragraph 2 might be of some use and should be referred to the Drafting Committee, so that its wording could be brought into harmony with the terminology used in the various constitutions of federal unions.

44. Mr. KHLESTOV (Union of Soviet Socialist Republics) proposed that article 5 should be put to the vote paragraph by paragraph.

45. Mr KEARNEY (United States of America) supported that proposal.

It was so decided.

46. The CHAIRMAN put to the vote the amendments to delete paragraph 1.

Those amendments were rejected by 70 votes to 19, with 7 abstentions.

47. The CHAIRMAN put to the vote the amendments to delete paragraph 2.

At the request of the representative of Australia, the vote was taken by roll-call.

Saudi Arabia, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Singapore, South Africa, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Zambia, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Canada, Ceylon, China, Cyprus, Dominican Republic, Ethiopia, Federal Republic of Germany, Greece, Guatemala, India, Ireland, Israel, Italy, Japan, Malaysia, Mexico, Nepal, Netherlands, New Zealand, Norway, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino.

Against: Saudi Arabia, Senegal, Somalia, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Afghanistan, Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Dahomey, Finland, France, Gabon, Guinea, Honduras, Hungary, Indonesia, Iran, Iraq, Ivory Coast, Kenya, Kuwait, Liberia, Madagascar, Mali, Mongolia, Nigeria, Pakistan, Poland, Romania.

Abstaining: Sierra Leone, Spain, Chile, Czechoslovakia, Denmark, Ecuador, Ghana, Holy See, Jamaica, Lebanon.

Those amendments were rejected by 45 votes to 38, with 10 abstentions.

48. The CHAIRMAN said that as a result of those two votes, the amendments by Australia (A/CONF.39/C.1/L.62), Mexico and Malaysia (A/CONF.33/C.1/L.66 and Add.1) and the Republic of Viet-Nam (A/CONF.39/C.1/L.82) and the second part of the amendment by Nepal (A/CONF.39/C.1/L.77/Rev.1) had been rejected.

49. He then put to the vote the sub-amendment by the Byelorussian Soviet Socialist Republic (A/CONF.39/C.1/L.92) to the Austrian amendment.

The sub-amendment was rejected by 42 votes to 17, with 28 abstentions.

50. The CHAIRMAN asked the Committee to vote on the Austrian amendment (A/CONF.39/C.1/L.2).

The amendment was rejected by 35 votes to 29, with 21 abstentions.

51. The CHAIRMAN said that the amendments submitted by Finland (A/CONF.39/C.1/L.54/Rev.1 and Corr.1) and New Zealand (A/CONF.39/C.1/L.59), the first part of the amendment by Nepal (A/CONF.39/C.1/L.77/Rev.1) and the amendment submitted by the Congo (Brazzaville) (A/CONF.39/C.1/L.80) would be referred to the Drafting Committee.[3]

52. Mr. CHAO (Singapore) said that his delegation had voted for the deletion of paragraph 2, the text of which might give rise to difficulties.

The meeting rose at 1.5 p.m.

[3] For resumption of the discussion on article 5, see 28th meeting.

THIRTEENTH MEETING

Thursday, 4 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Proposed new article 5 bis
(The right of participation in treaties)

1. The CHAIRMAN said that the joint authors of the proposal to insert a new article 5 *bis* (A/CONF.39/C.1/L.74) had asked that discussion of it be postponed.

2. Mr. KHLESTOV (Union of Soviet Socialist Republics) said the reason was that it had not yet been decided where the new article should be placed.[1]

Article 6 (Full powers to represent the State in the conclusion of treaties) [2]

3. Mr. DE CASTRO (Spain) said he supported the content of article 6 as drawn up by the Commission but considered that its wording could be made clearer and that was the reason for the Spanish amendment (A/CONF.39/C.1/L.36). Presentation of full powers was a general rule of customary law but in State practice it was not required of persons who performed certain functions. There seemed to be no need to refer to the negotiating stage in that article. His delegation had accordingly added a new paragraph 3 to the effect that failure to produce full powers did not affect the validity of the treaty when it appeared from the circumstances that such production was not considered necessary by the States concerned.

4. Mr. FLEISCHHAUER (Federal Republic of Germany) said that a rule concerning full powers must take account of a wide variety of national constitutional rules and practices and so should be drafted in flexible terms. The Commission's draft of paragraph 2 (*b*) might go beyond the practice of certain States but not be broad enough to cover that of others. A similar situation might arise under paragraph 2 (*a*).

5. There was a close relationship between the rules governing full powers and the rules of internal law on competence to conclude treaties, which was the subject of article 43. But the relationship between article 6 and article 43 was not quite clear. The wording of article 6, paragraph 2, would suggest an incontestable presumption that the persons mentioned there possessed the capacity to conclude treaties; the wording of article 43, however, led to the conclusion that that capacity might be challenged.

[1] At its 80th meeting, the Committee of the Whole decided to defer to the second session of the Conference consideration of all proposals, such as article 5*bis*, to add to the draft convention references to the term " general multilateral treaty ".

[2] The following amendments had been submitted: Spain, A/CONF.39/C.1/L.36; Federal Republic of Germany, A/CONF.39/C.1/L.50; Iran and Mali, A/CONF.39/C.1/L.64 and Add.1; Venezuela, A/CONF.39/C.1/L.68; Hungary and Poland, A/CONF.39/C.1/L.78 and Add.1; Italy, A/CONF.39/C.1/L.83; United States of America, A/CONF.39/C.1/L.90. The Venezuelan amendment was replaced by a joint amendment by Sweden and Venezuela (A/CONF.39/C.1/L.68/Rev.1).

6. The purpose of his delegation's amendment (A/CONF. 39/C.1/L.50) was to protect good faith with regard to the acts performed by the Head of State and by persons who produced full powers from him. It referred to internal law only when any other person claimed constitutional authority to express consent independently of the Head of State. That should not give rise to much difficulty in practice and would avoid the difficulties of the present paragraphs 2 (*a*) and (*b*).

7. Mr. KAZEMI (Iran) said that the International Law Commission had drafted article 6 without regard to the internal laws of States under which the authority to represent a State in the conclusion of treaties was conferred. His delegation and that of Mali had submitted an amendment (A/CONF.39/C.1/L.64 and Add. 1) in order to fill that gap.

8. Mr. TALLOS (Hungary) said that a reference should be made to full powers to represent a State in the negotiation of a treaty, as well as in the adoption or authentication of the text, whence the Hungarian and Polish amendment (A/CONF.39/C.1/L.78 and Add.1) to paragraph 1 and paragraph 2 (*b*) and (*c*). The amendment to paragraph 2 (*c*) was designed also to achieve greater precision. The wording of that sub-paragraph was in line with the wording of General Assembly resolution 257 (III), paragraph 4, but in the present general practice representatives were also accredited to international organizations as a whole. Those amendments were of drafting character and could be referred to the Drafting Committee.

9. Mr. MARESCA (Italy) said that the Italian amendment (A/CONF.39/C.1/L.83) was meant to render the article more comprehensive by referring to diplomatic practice.

10. Mr. BEVANS (United States of America) said that the purpose of the United States amendment (A/CONF. 39/C.1/L.90) was to render the text of the article clearer. He agreed with the statement in the second sentence of paragraph (3) of the Commission's commentary about the production of full powers being the safeguard for the representatives of States of each other's qualifications to represent their State. The provision in paragraph 1 (*b*) was convenient because it would permit dispensing with full powers for the purpose of many treaties, especially those that took the form of an exchange of notes. However, the intention of the parties needed to be ascertained from the circumstances of the case as well as from past practice.

11. In paragraph 2 (*c*) reference should be made to representatives accredited to an international organization or one of its organs.

12. The aim of his delegation's proposal for a new paragraph 3 was to specify that, for any treaty, States might require the production of full powers, even from ministers for foreign affairs. That had been done, for example, in the case of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water.

13. He could support the Venezuelan amendment, but was opposed to the Iranian amendment, since he believed that the Commission had been wise in omitting any reference to the internal law of States. He supported the Hungarian and Polish suggestion to include a reference to the negotiating stage and the Italian proposal to refer to diplomatic practice.

14. Mr. YAPOBI (Ivory Coast) said he supported the Spanish amendment. The Commission's draft was illogical in form because it failed to state first a principle and then exceptions.

15. Mr. KOPAČ (Czechoslovakia) said he had doubts about paragraph 1 (*b*) of the Commission's draft, because he was uncertain how the intention of States would be ascertained. Presumably it would have to be by the competent authority under internal law. Evidently the purpose of that paragraph was to provide for the conclusion of treaties in simplified form, which was usually done by an exchange of notes in negotiations between ministers for foreign affairs. In view of the difficulties that paragraph might involve, he supported the Venezuelan amendment (A/CONF.39/C.1/L.68) to delete it. He was opposed to the Iranian amendment to insert a mention of the internal laws of States.

16. Mr. BLIX (Sweden) said that article 6 was both too rigid and too vague, first because it recognized that there was authority to represent a State exclusively in three cases: when full powers had been produced, when circumstances indicated that the States intended to dispense with full powers, or when the person acting had authority by virtue of his office. There could, however, be other cases where authority must be recognized to exist, e.g. in a case when a Government publicly announced that it authorized an ambassador to conclude an agreement with another State. No full powers might be issued and nothing might be done to indicate that the two States, or one of them, had intended to dispense with full powers. Further, the ambassador might not possess authority merely by virtue of his office; yet, in the circumstances, he must be considered as having been authorized to conclude the agreement.

17. The article was primarily concerned with rules of evidence, but covered only evidence of authority in the form of full powers or the possession of particular functions and offices. Other types of evidence should be admitted also, and accordingly his delegation, together with that of Venezuela, had submitted the amendment in document A/CONF.39/C.1/L.68/Rev.1 to delete the introductory words " except as provided in paragraph 2 " and the word " only " before the word " if " at the end of paragraph 1.

18. Article 6, paragraph 1 (*b*) was too vague because it did not indicate how circumstances would demonstrate an intention to dispense with full powers and he urged its deletion. Admittedly, States commonly concluded agreements, for instance by an exchange of notes, and refrained from asking for full powers. The parties often assumed, without asking for evidence, that their opposite number had authority. Yet in those cases there was nothing to warrant a legal presumption that an ambassador was so authorized. His authority must derive from some action by his government or, conceivably, under internal law; it could not derive from his own action. Under international law, furthermore, the mere exercise of certain functions such as Head of State, Head of Government, or Minister for Foreign Affairs,

did create a legal presumption of the possession of authority to bind a State by treaty.

19. Of course, a person might, without having any of those functions or any full powers, or other tangible evidence, in fact possess authority granted by government action. Another State might choose to rely upon that person and *ad hominem*, if it knew him; and if his acts were not denounced by his own government, the reliance would be justified. On the other hand if he were denounced for having acted without authority, the other State might have to accept the fact that the treaty had been concluded by an unauthorized person. But admittedly, the risk in neglecting to check evidence of authority was not a great one. There were many elements deterring ambassadors from acting without authority. And since he doubted whether States would be ready to agree that every ambassador should be regarded under international law as authorized to bind them by treaty, paragraph 2 should accordingly be left unchanged.

20. If the joint amendment were adopted, small modifications would be needed in article 7, notably the omission of the reference to article 6, which would no longer enumerate exhaustively the cases in which there was authority to represent the State.

21. He supported the Hungarian and Polish amendment (A/CONF.39/C.1/L.78 and Add.1).

22. Mr. CARMONA (Venezuela), speaking as a sponsor of the proposal to delete paragraph 1 (*b*) (A/CONF.39/C.1/L.68/Rev.1), said that it would be dangerous to deduce from " the circumstances " the intention of States to dispense with full powers. Paragraph 1 (*b*), by creating a presumption of authority to conclude a treaty, could have the effect of binding a State without its Government being even aware that a binding commitment was being undertaken on the State's behalf. Several efforts had been made to improve the wording of the provision, in particular by Spain (A/CONF.39/C.1/L.36) and the United States (A/CONF.39/C.1/L.90, para. 2) but he would prefer complete deletion.

23. Mr. RODRIGUEZ (Chile) said that the purpose of article 6 was to safeguard the security of international relations by defining the persons having authority to bind their States. The terms of the article had been carefully drafted to that end, but the language could nevertheless be improved. He therefore commended the Spanish amendment (A/CONF.39/C.1/L.36) to the consideration of the Drafting Committee.

24. He also wished to make a few further drafting points. First, the title of the article was much too narrow in that it referred only to " full powers," whereas the text of the article itself covered not only cases in which full powers were produced, but also those in which the authority to represent the State was derived from the exercise of certain official functions. The text should commence with a statement of the rule now contained in paragraph 2, namely, an enumeration of those officials who represented the State by virtue of their functions. The second paragraph would then specify the requirement of full powers in other cases. The article would conclude with a passage on the lines suggested by Spain (A/CONF.39/C.1/L.36, para. 3) to deal with cases where the production of full powers was not deemed necessary. It would be prudent to confine the provision to the production of full powers and not to refer to the possibility that States might dispense with full powers.

25. He accordingly suggested that the title and text of the article should be reworded to read:

" *Representation of the State in the conclusion of treaties*

" 1. The following are considered as representing their State:

"(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty.

"(*b*) Heads of diplomatic missions, for the purpose of adopting or authenticating the text of a treaty between the accrediting State and the State to which they are accredited.

"(*c*) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ.

" 2. A person shall also be considered as representing a State for the purposes set forth in paragraph 1 (*a*) above if he produces full powers emanating from the competent authorities. However, failure to produce full powers does not avoid the validity of the treaty when it is established, or if it appears from the circumstances, that such production was not considered necessary by the States concerned."

26. Sir Francis VALLAT (United Kingdom) said he supported the Commission's text but suggested that mention should be made in paragraphs 2 (*b*) and 2 (*c*) of the authentication of the text, as was done in paragraph 1. Texts were often initialled by ambassadors as a means of authentication. It was his understanding that the designation " Minister for Foreign Affairs " would be interpreted broadly as including those exercising authority in the field of external relations.

27. The Hungarian and Polish and the United States amendments were worthy of consideration, and should be referred to the Drafting Committee. He was opposed to the Iranian amendment (A/CONF.39/C.1/L.64) because States should not be concerned with the internal law of other States in the present context; nor did he agree with the amendment by Sweden and Venezuela to omit paragraph 1 (*b*).

28. Mr. EL-ERIAN (United Arab Republic) said he supported the International Law Commission's draft article 6, and suggested that such useful drafting amendments as those proposed by Hungary and Poland (A/CONF.39/C.1/L.78 and Add.1) and the United States (A/CONF.39/C.1/L.90) should be given full consideration by the Drafting Committee.

29. In particular, the proposal to introduce in paragraph 2 (*c*) a reference to representatives " to an international organization " in addition to representatives to an organ of such an organization, was in line with current developments. The 1946 Convention on the Privileges and Immunities of the United Nations [3] spoke of repre-

[3] United Nations, *Treaty Series*, vol. 1, p. 15.

sentatives to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations. Similar language was used in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.[4] Since then, the institution of permanent missions had fully developed and a number of international instruments had recognized that development. They included the decision of the Swiss Federal Council of March 1948 concerning the legal status of delegations to what was then the European Office of the United Nations at Geneva, a decision which had extended to those delegations facilities analogous to those afforded to the embassies of foreign countries at Berne, and the Headquarters Agreement between the French Government and UNESCO signed at Paris on 12 July 1954, which specifically covered not only representatives of States members of UNESCO to its organs and conferences, but also members of the Council of UNESCO and permanent representatives to that organization itself.

30. Mr. WERSHOF (Canada) said he would like to draw the attention of the Drafting Committee to a number of points. First, the enumeration in paragraph 1 of the acts which a representative could perform was incomplete. Paragraph 1 (*c*) of article 2, on "full powers," also mentioned " negotiating "—which some amendments now proposed should be covered in article 6—and " any other act " accomplished " with respect to a treaty." It would be useful to cover that last point as well, since in certain circumstances, full powers might be required for such purposes as delivering a notice of denunciation of a treaty.

31. Secondly, the opening clause of paragraph 1 created a presumption that States gave full powers to their representatives, or required full powers from the representatives of other States, for the purpose of adopting or authenticating the text of a treaty. In the practice of bilateral negotiations, States did not usually issue or require full powers for such purposes. In the case of a conference convened to formulate a multilateral treaty, the provisions of article 6 as they stood would seem to require representatives to the conference to produce full powers for the adoption of the text, quite apart from their credentials as representatives to the conference. The difficulty could perhaps be solved by adopting the United States amendment to refer to " the practice of the States concerned " (A/CONF.39/C.1/L.90, para. 2).

32. Thirdly, he supported the Italian amendment (A/CONF.39/C.1/L.83), which was in conformity with Canadian experience on exchanges of notes constituting a treaty. Of course, it was always open to a State to require full powers for a particular exchange of notes to which special importance was attached. The United States proposal for a new paragraph 3 (A/CONF.39/C.1/L.90, para. 4) was relevant to that issue.

33. Lastly, for the reasons given by the United Kingdom representative, the Canadian delegation strongly opposed the proposal to delete paragraph 1 (*b*); indeed it would prefer to see that provision expanded, as proposed in the United States amendment (A/CONF.39/C.1/L.90, para. 2).

34. Mr. BINDSCHEDLER (Switzerland) said he supported in principle article 6 as submitted by the International Law Commission; that text was in conformity with the practice of the vast majority of States and accurately reflected customary international law.

35. There had been considerable discussion in academic circles on the question of the authority to conclude treaties, but there was no need for the Conference to take those theoretical discussions into account. The case was one which called not only for the codification of existing law, but for a step forward in the progressive development of international law.

36. Article 6 should be read in conjunction with the provisions of article 43 on the validity of a treaty when consent to be bound by it had been expressed in violation of a provision of the internal law of that State regarding competence to conclude treaties. Article 43 stated that such a violation could not be invoked as invalidating consent of the State " unless that violation of its internal law was manifest ". At the appropriate time, the Swiss delegation would voice its objections to that final proviso.

37. The essential consideration in article 6 should be to lay down rules that were as clear as possible, and at the same time to create a uniform system for all States, so as to avoid uncertainties which could give rise to misunderstandings; only in that manner would international relations be secure, and mutual trust be maintained between States and between the representatives of States.

38. Consequently, he opposed all proposals to refer back the question of competence to the internal law of the States. That type of *renvoi* invariably led to misunderstandings and opened the door to abuses.

39. With regard to the text of article 6, he supported the International Law Commission's formulation of paragraph 2 (*b*); as a general rule, ambassadors were empowered to negotiate and to adopt a treaty, but not to conclude it. It was true that full powers were often not required from ambassadors in the case of agreements which took the form of an exchange of notes, but it would be going too far to make a general rule of that exception. He was therefore unable to support the Italian amendment (A/CONF.39/C.1/L.83). The problem could in fact be solved by dropping paragraph 1 (*b*) and leaving the matter to be governed by the opening clause of paragraph 1. If it were decided not to delete paragraph 1 (*b*) he favoured the retention of the International Law Commission's text with the United States amendment (A/CONF.39/C.1/L.90, para. 2) which would also largely cover the point raised in the Italian amendment.

40. For the reasons he had already given, he opposed the amendments by the Federal Republic of Germany (A/CONF.39/C.1/L.50) and by Iran and Mali (A/CONF.39/C.1/L.64 and Add.1) to introduce references to internal law; that would only create difficulties and give rise to disputes. He supported the proposals to mention the representatives to international organizations—and not merely to their organs—for the reasons given by the representative of the United Arab Republic.

41. Lastly, he had some doubts regarding the proposed references to the negotiating of treaties; the greater power to adopt the text of a treaty included the lesser

[4] United Nations, *Treaty Series*, vol. 33, p. 261.

power to negotiate. The proposed addition was therefore unnecessary.

42. Mr. JAGOTA (India) said he supported the International Law Commission's article 6, which reflected contemporary international practice. India had concluded several hundred treaties with other countries, and the conclusion of those treaties provided extensive evidence on the matter of full powers, including the cases in which full powers were not requested either by India or by its numerous treaty partners. That experience fully bore out the rules embodied in article 6.

43. In paragraph 1 (*c*) of article 2, it was stated that " full powers " emanated from " the competent authority of a State." That expression must be construed in the light of the international practice of States rather than of the provisions of municipal law. In India, for example, the authority to issue full powers was vested by law in the President; however, where the representative of a foreign State produced full powers emanating from a lesser authority, it might not be necessary for the full powers of the Indian representative in the negotiations to be issued by the President of India himself. He therefore supported the use of the expression " appropriate full powers " in paragraph 1 (*a*) of article 6. That expression would make it possible to take into account State practice in the matter.

44. The essential idea in paragraph 1 (*b*) was that normally full powers were required, but that the States engaged in the negotiations could agree to dispense with full powers if it became apparent that the results of those negotiations could be incorporated in an agreement in simplified form. In every case, the onus was on the negotiators to see that they were qualified to bind their respective States.

45. Article 7 provided a safeguard against the possibility of abuse, by enabling a State to denounce an agreement entered into by an unauthorized person. It was that article which provided the remedy to a violation of any of the provisions of article 6, rather than article 43, which dealt with the invalidity of a treaty arising from a manifest violation of domestic law. In practice, cases of denunciation in the circumstances set forth in paragraph 1 (*b*) of article 6 were very rare. On the other hand, if that paragraph were dropped and no provision made for those circumstances, full powers would in future be required for a very large number of agreements now being concluded in simplified form; an unnecessary burden would thereby be imposed on Ministries of Foreign Affairs, particularly on their legal departments. The deletion of paragraph 1 (*b*) would thus conflict with universal practice.

46. Lastly, he agreed that the amendments by Hungary and Poland (A/CONF.39/C.1/L.78 and Add.1) and the United States (A/CONF.39/C.1/L.90) should be referred to the Drafting Committee.

47. Mr. KOROMA (Sierra Leone) said his delegation could support the Commission's draft of article 6, because it was a satisfactory restatement of general principles of international law and of State practice. On the other hand, it was difficult to take a decision on the article until the definition of " full powers " in article 2, paragraph 1 (*c*), had been approved.

48. With regard to the amendments before the Committee, his delegation considered the Italian amendment (A/CONF.39/C.1/L.83) unnecessary, since treaties in simplified form were normally concluded by one of the persons enumerated in paragraph 2 (*a*). Nor could it support the amendments of the Federal Republic of Germany (A/CONF.39/C.1/L.50) or of Iran and Mali (A/CONF.39/C.1/L.64 and Add.1) which would in practice lead to inadmissible interference in the domestic affairs of States, or the Swedish and Venezuelan amendment (A/CONF.39/C.1/L.68/Rev.1). On the other hand, it did support the United States amendment (A/CONF.39/C.1/L.90) and the Hungarian and Polish amendment (A/CONF.39/C.1/L.78 and Add.1).

49. Mr. BRAZIL (Australia) said that his delegation supported the International Law Commission's text of article 6, which struck a balance between undue rigidity and undue flexibility. The text would not be improved by the deletion of paragraph 1 (*b*), as the Swedish and Venezuelan amendment proposed, and the references to internal law proposed by the Federal Republic of Germany and by Iran and Mali were clearly inappropriate. The Australian delegation had some doubts concerning the Hungarian and Polish proposal (A/CONF.39/C.1/L.78 and Add.1) to insert the word " negotiating " in paragraphs 1 and 2, for article 6 related to the steps taken in connexion with the conclusion of a treaty, not to the initial stages of treaty-making; moreover, it was sometimes hard to judge when negotiation began.

50. Mr. MAKAREWICZ (Poland) said he agreed with the Hungarian representative that the amendment (A/CONF.39/C.1/L.78 and Add.1) submitted jointly by the Polish and Hungarian delegations should be referred to the Drafting Committee. His delegation could support the Italian amendment (A/CONF.39/C.1/L.83), which filled a gap by referring to agreements concluded in the form of an exchange of notes and corresponded to international practice; he would suggest, however, that the words " in conformity with diplomatic practice, in particular " might be deleted. In referring to internal law, the amendments of the Federal Republic of Germany (A/CONF.39/C.1/L.50) and Iran and Mali (A/CONF.39/C.1/L.64 and Add.1) would introduce an element of uncertainty, by necessitating analysis of the domestic law of other countries, and the Polish delegation therefore could not support those proposals. Nor could it agree to the second United States amendment (A/CONF.39/C.1/L.90), because the scope of the word " circumstances " was broader than that of " practice ", and the idea was satisfactorily covered in the International Law Commission's text of paragraph 1 (*b*). The third and fourth United States amendments, however, were acceptable. The Polish delegation could not support the Swedish and Venezuelan amendment (A/CONF.39/C.1/L.68/Rev.1), since it believed that international practice should be taken into account in cases where no full powers were required. Finally, the Spanish amendment (A/CONF.39/C.1/L.36) might be referred to the Drafting Committee.

51. Mr. RUDA (Argentina) said he was in favour of the Commission's approach to article 6, which first stated the general rule with regard to the requirement of full powers and then enumerated some exceptions.

His delegation had some sympathy with the Spanish amendment (A/CONF.39/C.1/L.36), especially paragraphs 1 and 2, but would have preferred a positive statement in paragraph 3, since article 7 dealt with the subsequent confirmation of an act performed without authorization. He agreed with the Swiss representative that the amendments submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.50) and Iran and Mali (A/CONF.39/C.1/L.64 and Add.1), which referred to internal law, would cause considerable difficulties. The addition of the word " negotiating " proposed in the Hungarian and Polish amendment (A/CONF.39/C.1/L.78 and Add.1) depended on the Committee's final decision on the definition of " full powers " in article 2 and on the fate of the French amendment (A/CONF.39/C.1/L.24) to that article, proposing a definition of " adoption of the text of a treaty".

52. Paragraph (6) of the commentary clearly stated the International Law Commission's position with regard to representatives accredited to international organizations, and the Argentine delegation could not support the Hungarian and Polish and the United States amendments to paragraph 2 (*c*). The idea of the Italian amendment (A/CONF.39/C.1/L.83) was satisfactorily covered by the Commission's paragraph 1 (*b*) and therefore seemed unnecessary; the same applied to the new paragraph 3 proposed by the United States (A/CONF.39/C.1/L.90). Finally, he could not support the Swedish and Venezuelan amendment (A/CONF.39/C.1/L.68/Rev.1), for the effect of the deletion of paragraph 1 (*b*) would be to leave no rule governing agreements in simplified form, which were becoming increasingly frequent.

53. Mr. MARESCA (Italy) said he could support the Hungarian and Polish proposal to include the word " negotiating," which seemed to be an essential procedure of treaty-making and was included in the definition of " full powers " in article 2. He would also be able to support the Swedish and Venezuelan proposal that paragraph 1 (*b*) be deleted, for that would remove an element of uncertainty. The Spanish amendment (A/CONF.39/C.1/L.36) seemed to be an improvement on the Commission's text, and the new paragraph proposed by the United States (A/CONF.39/C.1/L.90) would give the article additional flexibility. The amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.50) gave an organic form to the article. Finally, he would not object to having his delegation's own amendment (A/CONF.39/C.1/L.83) referred to the Drafting Committee.

54. Mr. MERON (Israel) said that his delegation was prepared to support the Commission's text, with the possible addition of the United States amendments (A/CONF.39/C.1/L.90). The point raised in the Italian amendment (A/CONF.39/C.1/L.83) was adequately covered by the United States amendment to paragraph 1 (*b*).

55. Mr. CHAO (Singapore) said he could support the Hungarian and Polish and the United States proposals (A/CONF.39/C.1/L.78 and Add.1 and L.90) to include a reference to representatives accredited by States to international organizations; if those amendments were adopted, the last phrase of paragraph 2 (*c*) should then read " in that conference, organization or organ." The Hungarian and Polish proposal to insert the word " negotiating " should be carefully considered in the Drafting Committee in connexion with the definition of " full powers " in article 2. Subject to those amendments, his delegation could support the Commission's text of article 6.

56. Mr. SECARIN (Romania) said that article 6 should be read in conjunction with other articles, especially articles 2 and 7. For the purpose of concluding treaties, States might be represented in three ways: formally, by persons holding the full powers defined in article 2, paragraph 1 (*c*), informally, when both States decided that full powers were not required because other factors provided an adequate basis for mutual confidence, and finally by the persons listed in paragraph 2, by virtue of their functions and legal status under international law. The Commission's text laid down the essential legal norms and was flexible enough to meet the needs of State practice. His delegation could therefore support the article as it stood, but considered that it would be improved by some of the amendments, particularly that of Hungary and Poland (A/CONF.39/C.1/L.78 and Add.1), which brought the article into line with the definition of full powers in article 2.

57. Mr. BLIX (Sweden) said that his delegation appreciated the approach to the drafting of the article in the Spanish amendment (A/CONF.39/C.1/L.36), but could not support paragraph 3 of that amendment, which contained the same ambiguity as the Commission's draft of paragraph 1 (*b*). Nor could it support the amendment of the Federal Republic of Germany (A/CONF.39/C.1/L.50.) because it did not recognize the authority of a Minister for Foreign Affairs to represent a State by virtue of his position, and also because it introduced a reference to internal law in a matter which belonged essentially to the international sphere. He was in favour of the Hungarian and Polish proposal (A/CONF.39/C.1/L.78 and Add.1) to introduce the word " negotiating," but thought that the point made by the Australian representative might be valid; the question might be referred to the Drafting Committee. The Swedish delegation could not support the amendment by Iran and Mali (A/CONF.39/C.1/L.64 and Add.1), which also introduced a reference to internal law, or the Italian amendment (A/CONF.39/C.1/L.83), which did not seem to add anything of substance to paragraph 1 (*b*). The United States amendments should be referred to the Drafting Committee.

58. In reply to the United Kingdom representative's criticism of the Swedish and Venezuelan amendment (A/CONF.39/C.1/L.68/Rev.1), he pointed out that the amendment would not debar States from refraining from requiring full powers for the conclusion of treaties. Its purpose was to eliminate certain paradoxical results: under paragraph 2 (*b*), heads of diplomatic missions were only vested with authority to express the consent of the State to be bound by a treaty in the case of a treaty between the accrediting State and the State to which they were accredited, but under paragraph 1 (*b*) they could acquire that right in respect of other treaties merely by suggesting that they should be concluded in simplified form.

59. Mr. KRISPIS (Greece) said he could support the Swedish and Venezuelan amendment (A/CONF.39/C.1/

L.68/Rev.1), since the production of full powers was a simple practice and represented a factor of order and security in relations between States. A rule on dispensing with full powers was therefore unnecessary. If, however, the majority of the Committee was in favour of retaining paragraph 1 (*b*), the Greek delegation would consider it indispensable to include the new paragraph proposed by the United States (A/CONF.39/C.1/L.90).

60. His delegation was in favour of the form given to the article by the Spanish amendment (A/CONF.39/C.1/L.36), especially where paragraphs 1 and 2 were concerned; paragraph 3 of that amendment would, of course, depend on the decision whether or not to retain the International Law Commission's paragraph 1 (*b*). With regard to the amendments by the Federal Republic of Germany (A/CONF.39/C.1/L.50) and Iran and Mali (A/CONF.39/C.1/L.64 and Add.1), his delegation did not consider that the time was ripe to take official notice of internal law in rules of international law. He could support the Hungarian and Polish amendment (A/CONF.39/C.1/L.78 and Add.1), but considered that the point raised in the Italian amendment (A/CONF.39/C.1/L.83) was already covered by the Commission's text. With regard to the amendment by the Federal Republic of Germany, his delegation would prefer to see Heads of Government and Ministers for Foreign Affairs mentioned expressly, so that they would be covered by the presumption contained in article 6, paragraph 2.

61. Sir Humphrey WALDOCK (Expert Consultant), replying to a question by the Iranian representative, said that the word " conclusion " was used in paragraph 2 (*a*) to mean all acts relating to the conclusion of a treaty which were dealt with in part II of the draft convention.

62. Some of the drafting points that had been raised had related to the opening words of paragraph 1, " Except as provided in paragraph 2 ". He believed that the words could be omitted, as well as the word " only " in the same paragraph; the Commission had arrived at that formulation more or less by accident, as the order of the paragraphs had been changed more than once. The elimination of those words would meet the objections of the Ivory Coast and perhaps those of the Spanish delegation. Nevertheless, he preferred the general structure decided on in the Commission to that of the Spanish amendment (A/CONF.39/C.1/L.36).

63. The debate in the Committee had largely centred on the advisability of retaining paragraph 1 (*b*). He agreed with those representatives who considered that the deletion of the paragraph would leave an important gap in article 6: the main purpose of the article was to show where the risk lay in dispensing with the production of full powers, and if the provision were omitted, a large category of treaties, namely, agreements in simplified form, would not be covered. Perhaps the general formulation of the paragraphs had given rise to some anxiety. In his 1965 draft, he had tried to set out the circumstances more fully, but some Governments in their written comments had raised the question of the established practice of individual States, and the Commission had decided on the general formula in order not to be too exclusive.

64. The Swedish representative had raised the hypothetical case in which the heads of a diplomatic mission concluding a treaty in simplified form would be covered by paragraph 1 (*b*) instead of paragraph 2 (*b*); he believed that the Swedish representative was exaggerating the difficulty, since the criterion in paragraph 1 (*b*) was the intention of the State, not that of the head of the diplomatic mission. In that connexion, the Italian amendment (A/CONF.39/C.1/L.83) seemed to be unnecessary, but the United States amendment to paragraph 1 (*b*) might provide an additional element of coverage.

65. The question of a specific reference to negotiation in paragraphs 1 and 2 had been considered carefully in the Commission, and the text he had submitted in 1965 had contained such a reference, but it had finally been decided to omit it, because negotiation was not really a specific stage of the process of concluding a treaty. He could not quite agree that it was difficult to decide when a negotiation began and ended, since a distinction could be made between negotiations preceding the conclusion procedure and the specific negotiation of the treaty itself. In any event, that negotiation seemed to be fully covered by the reference to adoption and authentication.

66. With regard to the proposals to include a reference to representatives accredited by States to an international organization, the International Law Commission had been informed by the United Nations Secretariat that it did not regard the accrediting of a permanent representative to the Organization as covering full treaty-making powers. Such accreditation covered power to bind the States in concluding treaties only if the instrument of accreditation referred not only to the Organization, but specifically to the organs in which treaties might be concluded or adopted. In view of that information, the Commission thought that the draft would go beyond existing practice in stating the position of permanent representatives as broadly as did the Hungarian and Polish and the United States amendments (A/CONF.39/C.1/L.78 and Add.1 and L.90). Nevertheless, the Committee might consider whether it wished to reflect existing practice or to lay down a rule entailing progressive development of international law in the matter on the lines of those amendments.

67. With regard to paragraph 3 of the Spanish amendment (A/CONF.39/C.1/L.36), he must point out that the phrase " Failure to produce full powers does not affect the validity of the treaty..." ran counter to the entire philosophy of article 6. The question of validity was dealt with in article 43, whereas article 6 was confined to stating where the risk of not producing full powers would lie.

68. In conclusion, he agreed with the many representatives who had objected to including any reference to internal law in the draft.

69. Mr. FLEISCHHAUER (Federal Republic of Germany) said that, since the consensus of opinion in the Committee was against including any reference to internal law, he would withdraw his delegation's amendment (A/CONF.39/C.1/L.50).

70. Mr. MATINE-DAFTARY (Iran) said that, in referring to " internal law," the sponsors of the amendment in document A/CONF.39/C.1/L.64 and Add.1 had been guided by a similar reference in article 43. Nevertheless, they would withdraw the amendement.

71. The CHAIRMAN said he would put the Swedish and Venezuelan amendment (A/CONF.39/C.1/L.68/Rev.1) to the vote.

The Swedish and Venezuelan amendment was rejected by 51 votes to 13, with 23 abstentions.

72. The CHAIRMAN suggested that the amendments submitted by Spain (A/CONF.39/C.1/L.36), Hungary and Poland (A/CONF.39/C.1/L.78 and Add.1), Italy (A/CONF.39/C.1/L.83) and the United States of America (A/CONF.39/C.1/L.90) be referred to the Drafting Committee.

It was so agreed.[5]

The meeting rose at 6.10 p.m.

[5] For resumption of the discussion on article 6, see 34th meeting.

FOURTEENTH MEETING

Friday, 5 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Tribute to the memory of the Reverend Martin Luther King

On the proposal of the Chairman, the members of the Committee observed a minute's silence in tribute to the memory of the Reverend Martin Luther King.

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 7 (Subsequent confirmation of an act performed without authority)[1]

1. Mr. DE CASTRO (Spain) said that the purpose of the Spanish delegation's amendment (A/CONF.39/C.1/L.37) was not only to improve the drafting of the Spanish version in which the word "*efecto*" was repeated with different meanings, but also to supplement the wording of the article by referring to the case in which the powers of the person acting as the representative of a State were defective. For the powers might not only not exist, they might also have a defect. What was involved was not a defect in the State's consent resulting from a limitation imposed by its internal law, which was the case dealt with in article 43, but a defect in the powers themselves, that was to say in the instrument by which a State designated a person to represent it in the conclusion of a treaty.

2. Full powers implied the existence of a relationship between a State and a person for the purpose of performing an act relating to the conclusion of a treaty. That person could not be regarded as properly authorized by the State if he had not received the necessary powers to conclude a treaty—the case dealt with by the International Law Commission—or if those powers were vitiated by fraud. Those two cases certainly concerned the conclusion of treaties, and he thought they should be dealt with together in article 7 without prejudice to consideration of that question in the context of Part V of the draft.

3. He was in favour of the Venezuelan amendment (A/CONF.39/C.1/L.69), which required express confirmation by the State of an act relating to the conclusion of a treaty performed without authority, for tacit confirmation of that act was not covered in article 42, and it was necessary to state the conditions in which such confirmation should be given.

4. Mr. BEVANS (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.56), said he wished to add to the rationale following its text that the State concerned must make its position clear with regard to the validity of the acts of the person claiming to represent it within a reasonable time; otherwise, it could not continue to enjoy the benefits of the treaty.

5. Mr. CARMONA (Venezuela), introducing his delegation's amendment (A/CONF.39/C.1/L.69), said that, in his opinion, an act which was invalid could only be confirmed expressly. The idea of a tacit confirmation or a confirmation inferred from subsequent facts had no legal basis. The interpretation of an act as constituting confirmation was debatable. To leave that interpretation to third parties in case of a dispute would endanger the existing legal system and impair the very principles of international law.

6. He supported the Spanish amendment. He could not, however, support the United States amendment, which prejudged the results of the discussion on article 42, to which the Venezuelan and a number of other delegations intended to submit amendments.

7. Mr. CHAO (Singapore) explained that the amendment submitted by the Singaporean delegation (A/CONF.39/C.1/L.96) dealt with drafting only. The ideas expressed in articles 6 and 7 were closely connected, and article 7 was the logical consequence of article 6.

8. Mr. TSURUOKA (Japan) reminded the Committee that the Japanese Government had stated in its comments (A/CONF.39/5) that the text of article 7 involved danger of abuse; it was for that reason that his delegation had submitted an amendment (A/CONF.39/C.1/L.98).

9. The fact that the article was placed in Part II, which contained the provisions relating to conclusion and entry into force, might give the impression that the question of "subsequent confirmation of an act performed without authority" belonged to the procedure for concluding treaties—which might lead to misunderstandings.

10. The Japanese delegation would submit whatever drafting amendments it considered necessary when Part V came to be discussed.

11. Mr. STREZOV (Bulgaria) said he agreed with the International Law Commission's argument that any act performed by a person who had not received from his State authority to represent it in the conclusion of a treaty was without legal effect. In those circumstances, the State was entitled to disavow that person's act. But as paragraph (3) of the commentary on the article rightly observed, it seemed equally clear that, notwithstanding the representative's original lack of authority,

[1] The following amendments had been submitted: Spain, A/CONF.39/C.1/L.37; United States of America, A/CONF.39/C.1/L.56; Venezuela, A/CONF.39/C.1/L.69; Singapore, A/CONF.39/C.1/L.96; Japan, A/CONF.39/C.1/L.98; Malaysia, A/CONF.39/C.1/L.99.

the State might afterwards endorse his act, and thereby establish its consent to be bound by the treaty. The Bulgarian delegation considered that position fully justified.

12. While recognizing the merits of the Venezuelan amendment (A/CONF.39/C.1/L.69), which was calculated to remove any misunderstanding as to the will of the State concerned subsequently to confirm an act which had originally been invalid, the Bulgarian delegation preferred the International Law Commission's argument that subsequent confirmation might be given explicitly or by implication. Moreover, the confirmation should take effect from the time when the act had been performed without the requisite authority.

13. The Bulgarian delegation was opposed to the Spanish amendment, which it did not consider justified, and to the United States and Japanese amendments.

14. Sir Lalita RAJAPAKSE (Ceylon) said he thought that the idea underlying article 7 was that the act of a person lacking authority but purporting to represent a State was void and would remain void until the competent authority of the State in question confirmed it. The confirmation could be express or implied. Since the Venezuelan amendment would exclude the possibility of implied confirmation, the delegation of Ceylon could not support it.

15. With regard to the English version of the Spanish amendment (A/CONF.39/C.1/L.37), his delegation considered the word " vice " was inappropriate. Furthermore, the expression " shall be remedied " suggested that confirmation by the State for which a person lacking authority had acted was obligatory.

16. With regard to the United States amendment (A/CONF.39/C.1/L.56), the reference to article 42 was not justified, because that article referred to different circumstances, namely, those contemplated in articles 43-47 and 57-59. Moreover, article 42 might itself be amended when the Committee came to discuss it. He thought that in view of the importance of the principle it stated, article 7 should be self-contained. Hence he would support neither the United States amendment nor those of Japan and Singapore.

17. Mr. MUTUALE (Democratic Republic of the Congo) said he found it difficult to support the United States amendment (A/CONF.39/C.1/L.56), which did not seem to him to deal with the same question as article 7. The situation contemplated in that article was lack of authority of the person purporting to represent a State, which had consequently not expressed its consent. The United States amendment referred to a situation in which the consent of the State had been expressed, so it could not apply to article 7. The amendment might be of value in the context of the circumstances to which it referred, but it seemed to contain a contradiction, in that it referred to " an act expressing the consent of a State " performed by a person without authority.

18. The Venezuelan amendment (A/CONF.39/C.1/L.69) introduced a restriction as to the form of confirmation. Its author's aim was apparently to achieve greater legal safety. That result could be obtained by substituting the word " manifestly " for the proposed word " expressly ".

19. The Spanish amendment (A/CONF.39/C.1/L.37) concerned drafting, but the proposed wording was not an improvement on the International Law Commission's text, since it did not bring out as fully either the legal situation contemplated in the article or the legal solution and its moderation. The amendment nevertheless had the merit of extending the circumstances contemplated in article 7 to include the concept of defective powers.

20. Mr. KRISPIS (Greece) thought that the use in the Spanish amendment (A/CONF.39/C.1/L.37) of precise terms such as " defect " or " vice " was a less satisfactory solution than the descriptive method adopted by the International Law Commission. Moreover, the word " defect " had a sufficiently wide meaning to cover the notion of vice.

21. The United States amendment (A/CONF.39/C.1/L.56) was right in referring to " an act expressing the consent of a State," for that was indeed what was involved, and not " an act relating to the conclusion of a treaty," as stated in article 7. As to the reference to article 42 proposed in the United States amendment, he did not think the objection by the representative of Ceylon, that article 42 had not yet been discussed, was justified. If article 42 was amended during the discussion, article 7 could be reviewed in the light of the amendments made, in accordance with the rules of procedure. With regard to the Venezuelan amendment (A/CONF.39/C.1/L.69), since the Committee had not deleted paragraph 1 (*b*) of article 6, as requested by a number of delegations, including his own, logic precluded the addition of the word " expressly " to article 7.

22. The Greek delegation did not support the amendment submitted by Singapore (A/CONF.39/C.1/L.96). In view of the importance of the principle stated in article 7, it would prefer a separate article to be devoted to it. Nor did his delegation support the Japanese amendment (A/CONF.39/C.1/L.98).

23. Lastly, he wished to propose a purely drafting amendment. The expression " representing his State " seemed to him to be open to criticism, because it referred only to the case in which the person lacking authority was a national of the State he purported to represent, whereas he might perfectly well be a foreigner. He therefore suggested the words " the State in question " or simply " a State " instead of " his State ". The point should be referred to the Drafting Committee.

24. Mr. RUDA (Argentina) said that article 7 dealt with an act performed without authority and not with a defect or vice in consent, which would be examined later. It was not a question of nullity, but of the absence of legal effect. An act performed by a person who did not represent a State could not be attributed to that State. Article 7 was in its proper place in the draft. Hence he could not support either the Spanish or the Japanese amendments, though the Drafting Committee might take account of the comment by the Spanish representative concerning the inconsistent repetition of the word " *efecto* " in the Spanish version of the draft article.

25. The United States amendment was wrong in referring to article 42, which dealt with invalidity. Moreover, article 7, as drafted, did not rule out the forms of confirmation described in article 42, sub-paragraphs (*a*) and

(*b*). He was therefore opposed to the United States amendment. He was also opposed to the Venezuelan amendment, for there was no objection to providing for tacit confirmation inferred from the behaviour of the State concerned.

26. As the representative of Singapore had asked that his delegation's amendment be referred to the Drafting Committee, it would be for that Committee to decide on the best wording.

27. In short, he favoured the wording adopted by the International Law Commission.

28. Mr. MANOUAN (Dahomey) said that the case covered by article 7 was that of the non-existence of an act, which should be carefully distinguished from the case covered by article 42. He was therefore opposed to the amendments submitted by the United States, Spain, Japan and Singapore. Moreover, the International Law Commission had said in paragraph (3) of its commentary that a State could " endorse " the act of its representative, or in other words, subscribe to something done independently of it.

29. However, the Commission did not seem to have carried to its logical conclusion the idea expressed in article 2 that, in principle, treaties must be in written form. Since article 7 dealt with a State which was expressing its consent for the first time, it would be logical to require it to do so expressly. His delegation therefore supported the Venezuelan amendment (A/CONF.39/C.1/L.69).

30. Lastly, the comment by the Greek representative on the words " representing his State " was justified, and the delegation of Dahomey therefore supported the oral amendment he had introduced.

31. Miss POMETTA (Switzerland) said that the Swiss delegation approved of the International Law Commission's proposed text for article 7, which had the merit of being simple and clear. Actual instances of acts performed without authority were not very frequent. Although it was right to provide that an act performed without authority was without legal effect, it was equally important in practice to allow the State to confirm that act. The Commission had been well advised to confine itself to saying that the act must be confirmed by the competent authority, without specifying how that was to be done. That was consistent with the procedural simplification aimed at in the draft convention. The Venezuelan amendment appeared to be too restrictive and there was in any case no justification for it where the treaty was already being carried out. Nor could her delegation approve the United States amendment, which would wrongly restrict confirmation to certain acts. The amendments submitted by Singapore, Japan and Spain could be referred to the Drafting Committee.

32. Mr. BLIX (Sweden) thought that the Venezuelan amendment (A/CONF.39/C.1/L.69) made article 7 unnecessarily inflexible. Confirmation implied by the silence of the State in question was recognized in practice.

33. Though he did not wish to press the point, he thought the change of position proposed by Japan was well-advised. It was true that article 7 was closely linked with article 6, but all the cases of invalidity were dealt with in Part V. Although, from the theoretical standpoint, it might be questionable to associate the situation dealt with in article 7 with defects in consent, that solution would be preferable in practice. In any case, article 48 also dealt with acts producing no legal effect. Lastly, the situation referred to in article 7 was not unrelated to that dealt with in article 44.

34. Mr. TARAZI (Syria) said he considered that the International Law Commission had worded article 7 satisfactorily: it had sought to provide for all the situations which could arise in practice, including even the rather rare case of a treaty signed by a person without authority to do so.

35. Some of the amendments submitted related to substance, others to drafting. The United States of America and Japan (A/CONF.39/C.1/L.56 and L.98) had proposed substantive amendments which the Syrian delegation did not support; the situations contemplated in Part V differed from that in article 7, which dealt, not with invalidity, but with acts having no legal effect at the time when they were performed. It was not a question of an act that was vitiated, but of the impossibility of imputing an act to a State.

36. The Spanish amendment (A/CONF.39/C.1/L.37) also related to substance. He was opposed to it because it did not go as far as the formula " without legal effect " adopted by the Commission.

37. The amendments submitted by Venezuela and Singapore (A/CONF.39/C.1/L.69 and L.96) were drafting amendments. The Syrian delegation was opposed to them, because it considered that the principle stated in article 7 was self-contained and should be the subject of a separate article.

38. Mr. HU (China) said that the United States and Venezuelan amendments were an improvement on the original wording. In his opinion, all the amendments submitted to article 7 were drafting amendments and could be referred to the Drafting Committee.

39. Mr. MAKAREWICZ (Poland) said that the Polish delegation was in favour of retaining article 7 as it stood. The Spanish amendment in no way clarified the position. The first part of the United States amendment had the advantage of referring specifically to acts expressing consent to be bound by a treaty, but it must not be forgotten that prior acts relating to the conclusion of a treaty could also create certain obligations for States, as was clear, for example, from article 15. The present wording therefore seemed preferable, since the provision in question should apply to any act relating to the conclusion of a treaty. The reference to article 42 was not appropriate, because that article related solely to the final consent of a State to be bound by a treaty, and not to acts prior to its conclusion. The Venezuelan amendment was acceptable as it improved the wording of the article. It seemed premature to take a decision on the Japanese amendment at that stage; the Drafting Committee ought to be in a position to submit suggestions on the subject when the Committee of the Whole had completed its examination of the draft articles. That also applied to the amendment submitted by Singapore.

40. Mr. MARESCA (Italy) said that article 7 dealt with the approval by a State of an act relating to the conclusion of a treaty. If the person who had performed

the act was authorized to represent the State, then the State was bound. If he lacked the necessary powers, the act in question produced no legal effect unless it was confirmed by the State. That had nothing to do with the question of the essential validity of the act, and the rules applicable to the parties to a treaty could not be stated in article 7. Hence the article was correctly placed in the draft. The wording could be improved, however, in particular by inserting the word " expressly " as proposed in the Venezuelan amendment. The United States amendment, which introduced the phrase " an act expressing the consent of a State to be bound by a treaty," deserved consideration because it showed that the question of the fundamental validity of the act did not arise. The Drafting Committee could take advantage of all the amendments proposed.

41. Mr. ARIFF (Malaysia) thought that article 7 was a natural corollary to article 6. It was essential for a State to be able to confirm subsequently an act relating to the conclusion of a treaty performed by a person who could not be considered as representing the State for that purpose. The examples given by the International Law Commission in its commentary on article 7 clearly showed the need to include an article on that point in the convention. The wording of the article could, however, be improved so as to state the rule with greater force and authority. The Malaysian delegation had accordingly submitted the amendment in document A/CONF.39/C.1/L.99. The fact that an act relating to the conclusion of a treaty was subsequently confirmed expressly or by necessary implication by the competent authority of the State would prevent disputes arising later if another State claimed that the State in question had not confirmed the act.

42. Mr. JAGOTA (India) said that his delegation's views were, on the whole, similar to those expressed by the representatives of Ceylon and Malaysia. Articles 6 and 7 did not appear to relate to the same subjects as were dealt with in Part V (articles 42 and 43). Part V dealt with the validity of a treaty and articles 6 and 7 with the validity of acts performed by the representatives of States. Article 6 required that a person who performed an act relating to the conclusion of a treaty (negotiation, adoption, authentication or signature of a text) should have full powers, and article 7 referred to the consequences of the fact that such a person did not have full powers. In order to bring out those consequences clearly, the article should be so drafted that it also related to what was said in article 42, which was probably the purpose of the United States amendment (A/CONF.39/C.1/L.56). Article 7 should cover all the acts preliminary to the conclusion of a treaty. The objections regarding the validity of the act might come from the other State party to the treaty, so that confirmation should be forthcoming within a reasonable time. The Venezuelan amendment (A/CONF.39/C.1/L.69) might therefore be taken into consideration, with the addition of the words "within a reasonable time". In order to provide for cases in which the objection came from the State which had been represented by a person without proper authority, the wording of article 42, sub-paragraph (*b*) should be taken as a basis, perhaps adding to the text of the Venezuelan amendment the words: "unless by reason of its conduct the State is considered as having acquiesced in the validity of the act performed".

43. The Indian delegation supported the United States amendment in principle, but could not accept the substitution of the words " An act expressing the consent of a State to be bound by a treaty " for the words " An act relating to the conclusion of a treaty ". That amendment would restrict the scope of the article. The problem that arose with regard to article 7 was one of drafting, and the article should be referred to the Drafting Committee for examination in the light of the various amendments submitted. It should not be transferred to Part V, section 2, which dealt with other matters.

44. Mr. ALVAREZ TABIO (Cuba) said he agreed with the Spanish representative that the wording of the Spanish version of the text needed to be improved. He did not, however, approve of the use of the word " vice " in the Spanish amendment (A/CONF.39/C.1/L.37) which might well be replaced by the word " deficiency ". There would then be no confusion with the vices dealt with in article 42.

45. Mr. MWENDWA (Kenya) said that the Japanese proposal (A/CONF.39/C.1/L.98) could only be considered after the Committee had examined all the draft articles. Article 7 seemed necessary in order to overcome any practical difficulties that might arise. It should, however, be very clearly drafted and his delegation would accordingly support the Venezuelan amendment (A/CONF. 39/C.1/L.69).

46. Mr. VIRALLY (France) said he preferred the text drafted by the International Law Commission. The argument advanced by the Japanese representative for tranferring article 7 to Part V, section 2 had some merit, but it seemed that the article was too closely connected with article 6 to be placed elsewhere.

47. The United States amendment (A/CONF.39/C.1/ L.56) seemed too restrictive, since acts expressing the consent of a State to be bound by a treaty were not the only acts which would have no legal effects, in the situation contemplated, unless they were confirmed. The obligations laid down in article 15 must also be taken into account. It would therefore be better not to amend the original text in that way. On the other hand, the reference to article 42 seemed justified. It would be contrary to the principle of good faith for a State to be able to challenge the validity of a treaty long after it had been concluded. That was also the idea behind the Malaysian amendment (A/CONF.39/C.1/L.99). The difference between the two proposals was a matter of drafting. The United States proposal was clearer and more comprehensive. The Drafting Committee should study the matter.

48. The French delegation could not support the Venezuelan amendment, which would make the confirmation of an act performed without authority more difficult, even if the treaty had in fact been applied by the State concerned for some time.

49. Mr. HARRY (Australia) said he appreciated the reasons for which the Japanese delegation had submitted its amendment, but thought that article 7 should not be placed elsewhere. The Australian delegation supported the first part of the United States amendment. There

remained, however, two points to be cleared up in the International Law Commission's draft. First, the question of the time when the confirmed act was operative. He agreed with the Bulgarian representative that it would normally operate *ex tunc*, whether confirmation was express or implied. If a State, when expressly confirming the act performed, stipulated that the effective date should be the date of confirmation, that would amount to a new act. Presumably, the other party to a bilateral treaty or any party to a multilateral treaty could withdraw its consent if it was established that the person claiming authority did not in fact have authority to perform the act in question. Secondly, the Australian delegation considered that confirmation should be possible by clear implication as well as by an express act, and that the article should make it clearer that confirmation could be implied. The Malaysian amendment covered that point, though the word " necessary " was not needed.

50. Mr. BEVANS (United States of America) said that he would not ask for a vote on the second part of his delegation's amendment (A/CONF.39/C.1/L.56) which proposed the addition of the words " subject to the provisions of article 42."

51. The CHAIRMAN put the first part of the United States amendment to the vote.

The amendment was rejected by 54 votes to 18, with 16 abstentions.

52. The CHAIRMAN put the Venezuelan amendment (A/CONF.39/C.1/L.69) to the vote.

The amendment was rejected by 51 votes to 22, with 13 abstentions.

53. The CHAIRMAN put to the vote the amendment submitted by Malaysia (A/CONF.39/C.1/L.99).

The amendment was rejected by 38 votes to 16, with 34 abstentions.

54. The CHAIRMAN suggested that all the amendments relating to drafting should be referred to the Drafting Committee.

It was so decided.[2]

The meeting rose at 1.10 p.m.

[2] For resumption of the discussion on article 7, see 34th meeting.

FIFTEENTH MEETING

Friday, 5 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 8 (Adoption of the text)

1. The CHAIRMAN invited the Committee to consider article 8 of the International Law Commission's draft.[1]

2. Mr. VIRALLY (France), introducing his delegation's amendment to article 8 (A/CONF.39/C.1/L.30), said that it seemed to him to be necessary to refer specifically to restricted multilateral treaties because of the very special nature of that type of agreement. Restricted multilateral treaties represented a special category of regional treaties, in that they established between the participating States obligations and advantages which were so balanced that any change in the contribution of a party, or a party's failure to ratify the treaty, would upset the whole structure of the instrument. The International Law Commission had taken the case of such treaties into account in its drafting of article 17, paragraph 2, on the acceptance of reservations. The two-thirds majority rule applicable to treaties adopted at an international conference could not apply to restricted treaties, where the unanimity rule must prevail.

3. It might be argued that the amendment was unnecessary because article 8, paragraph 2 left a conference free to apply a different rule, but such an argument overlooked the fact that article 8 did not apply only to the drawing up of a new treaty; under article 35 it also applied in principle to the amendment of an existing treaty. Accordingly, if for some reason a restricted treaty contained no amendment procedure, and a two-thirds majority rule applied to restricted multilateral treaties under article 8, paragraph 2, a majority of the parties could impose on a minority conditions that were contrary to their interests. The French amendment was designed to cover such an eventuality.

4. Mr. PINTO (Ceylon) said that his delegation had originally proposed its amendment to article 8 (A/CONF. 39/C.1/L.43) in consequence of the deletion from article 4 of the reference to treaties adopted within international organizations. When Ceylon's amendment to article 4 (A/CONF.39/C.1/L.53) had been rejected, his delegation had considered withdrawing its amendment to article 8, but had decided to maintain it in order to make the enumeration of methods of adoption of a treaty more nearly complete. Since the amendment merely clarified an idea which was already implicit in article 4, it could be regarded essentially as a drafting point.

5. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that his delegation had no comments to make on paragraph 1, and in general approved of the International Law Commission's text. It had submitted its amendment to paragraph 2 (A/CONF.39/C.1/L.51), however, to indicate what type of treaty was adopted at international conferences. Since the French amendment (A/CONF.39/ C.1/L.30) was very close to the Ukrainian amendment in meaning, he suggested that his delegation's text might be altered to read: " The adoption of the text of a general or other multilateral treaty, with the exception of limited multilateral treaties, at an international conference takes place by the vote of two-thirds of the States... ".[2] That text might be referred to the Drafting Committee.

[1] The following amendments had been submitted: France, A/CONF.39/C.1/L.30; Ceylon, A/CONF.39/C.1/L.43; Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.51; Peru, A/CONF. 39/C.1/L.101 and Corr.1; United Republic of Tanzania, A/CONF. 39/C.1/L.103. A sub-amendment to the French amendment was submitted by Czechoslovakia (A/CONF.39/C.1/L.102), and the Ukrainian Soviet Socialist Republic submitted a revised version of its proposal (A/CONF.39/C.1/L.51/Rev.1).

[2] This amendment was circulated as document A/CONF.39/C.1/ L.51/Rev.1.

6. Mr. MYSLIL (Czechoslovakia), introducing his delegation's sub-amendment (A/CONF.39/C.1/L.102) to the French amendment (A/CONF.39/C.1/L.30), said that it was very similar to the revised amendment just proposed by the Ukrainian representative. It was true that the two-thirds majority rule could not apply to restricted multilateral treaties, but that rule was applicable to such general multilateral treaties as the Genocide Convention, the Geneva Conventions for the Protection of War Victims and the International Covenants on Human Rights, as well as the treaties which were neither general nor restricted.

7. Mr. SEATON (United Republic of Tanzania) said that his delegation's amendment to paragraph 2 (A/CONF.39/C.1/L.103) was based on the reasoning in the written comments of Governments and international organizations. Its purpose was to stress that the international conference adopting the text of a treaty was competent to decide to apply a rule other than that of the two-thirds majority.

8. Mr. MARCHAND STENS (Peru) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.101 and Corr.1) in order to clarify the legal purport of the article. Thus, it had provided in paragraph 1 that unanimous consent was required, unless otherwise decided by the parties, when the number of States participating in drawing up the treaty was limited or restricted. Similarly, it had proposed the insertion of the words " at which the number of States participating is substantial", after "general international conference" in paragraph 2, in order to make the provision more flexible by covering as many types of international conference as possible.

9. Mr. BRIGGS (United States of America) said that his delegation supported the International Law Commission's text of article 8. Paragraph 1 laid down the basic unanimity rule which applied to bilateral treaties, and had traditionally applied also to multilateral treaties, whereas paragraph 2 recognized the more recent trend towards the adoption of multilateral treaties at international conferences, where the two-thirds majority rule was applied, unless the conference decided, also by a two-thirds majority, to adopt a different rule.

10. The French amendment (A/CONF.39/C.1/L.30) did not seem to be strictly necessary, since under paragraph 2 of article 8 the conference adopting the treaty could decide by a two-thirds majority to apply the unanimity rule, as it would undoubtedly do in the case of restricted multilateral treaties; that proviso refuted the French representative's argument in connexion with the amendment of treaties, since article 35 provided that the rules laid down in part II applied to agreements to amend a treaty except in so far as the treaty might otherwise provide. Adoption of the French and Ukrainian amendments would have the effect of creating three categories of multilateral treaties to which different rules would be applicable, and that would adversely affect State practice, particularly in the absence of clear definitions of general and restricted multilateral treaties.

11. The International Law Commission had deliberately refrained from defining general and restricted multilateral treaties, for the criterion of a general multilateral treaty as one concerned with general international law and dealing with matters of interest to all States was far too vague, and any attempt to force the wide variety of multilateral treaties into a few rigid categories was obviously unworkable and arbitrary; the same applied to restricted multilateral treaties, of which there were also many categories. The United States delegation therefore could not support the amendments submitted by the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.51), France (A/CONF.39/C.1/L.30) and Czechoslovakia (A/CONF.39/C.1/L.102).

12. Mr. ZEMANEK (Austria) said that, although the commentary to article 8 clearly delimited the scope of paragraph 1, which applied primarily to bilateral agreements and treaties concluded between a few States, no criterion qualifying an international conference emerged from the commentary to paragraph 2. Some such qualification seemed to be essential, however, since States invited to a treaty-making conference automatically abandoned the unanimity rule by accepting the invitation.

13. The amendments submitted by France (A/CONF.39/C.1/L.30), the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.51), and Czechoslovakia (A/CONF.39/C.1/L.102) did not solve the problem, because the terms used in them were too vague; those amendments should be referred to the Drafting Committee. On the other hand, the Austrian delegation could support the Ceylonese amendment (A/CONF.39/C.1/L.43), provided it was made clear that the new paragraph referred to the adoption of a treaty within, not by, an international organization; the existing text implied that the treaties in question were those to which international organizations were parties, and that category of treaties had been expressly excluded from the scope of the convention. Finally, the Tanzanian amendment (A/CONF.39/C.1/L.103) seemed to be unacceptable, because it implied that an international conference could decide by a simple majority to adopt the text of a treaty by a simple majority.

14. Sir Francis VALLAT (United Kingdom) said that he had little to add to the comments made by the United States and Austrian representatives. The International Law Commission's text of article 8 was well designed to meet all needs and was adequately explained in paragraph (2) of the commentary. Unanimity remained the general rule for bilateral treaties and treaties drawn up by a small number of States. It was undesirable to alter the text in order to cover special classes of cases, and amendments put forward with political considerations in mind should be rejected. He preferred the simplicity of the Commission's text.

15. The amendments submitted by France, the Ukrainian Soviet Socialist Republic and Czechoslovakia would cause technical complications. He had not been able to follow the French representative's argument that articles 35 and 36 made the French amendment necessary.

16. The amendments to article 8 could be left pending and a decision reached at a later stage.

17. Mr. KRAMER (Netherlands) said that on the whole he was satisfied with the Commission's text. In the absence of any other rule, treaties should be adopted by the unanimous consent of the parties, and he therefore supported the wording of paragraph 1, but its force was largely diminished by the rule concerning a two-thirds majority in paragraph 2. The wording of the proviso in paragraph 2 was open to improvement and there was some danger in leaving the rule to be decided upon in an *ad hoc* manner.

18. Mr. BINDSCHEDLER (Switzerland) said he supported article 8 but thought that paragraph 2 might be drafted in bolder terms. A two-thirds majority rule opened the way to blocking the adoption of a treaty by a minority and he would have thought that a simple majority would be more practical, but evidently the international community was not ready for such a rule.

19. He was in favour of the French amendment which was in conformity with the idea expressed in paragraph (2) of the commentary, but he could not support the amendment of Ceylon, which seemed to go outside the scope of the draft by dealing with treaties adopted by an international organization. The Tanzanian amendment also was not acceptable.

20. Mr. THIERFELDER (Federal Republic of Germany) said he favoured the International Law Commission's text which was clear and met the requirements of international practice. The Commission had rightly pointed out in paragraph (5) of its commentary that paragraph 2 established a basis upon which the procedural questions could be speedily and fairly resolved.

21. He did not think it feasible to adopt the Ukrainian amendment and thereby introduce the question of general multilateral treaties, and it would certainly give rise to difficulties of application. The two-thirds majority rule should be followed for any kind of treaty, unless the conference decided otherwise, as the present draft article 8 provided. There was no need for the French amendment and he could not support the Czechoslovak amendment.

22. Mr. MARESCA (Italy) said that unanimity must be the rule for the adoption of bilateral treaties and could also be convenient for treaties with a large number of parties, but of course a unanimity rule would confer upon each party a right of veto. The Commission had not referred specifically to general multilateral treaties and had made no distinction between bilateral treaties and those concluded at an international conference. He hoped the Commission's text would be retained.

23. Mr. PINTO (Ceylon) said that all his delegation had had in mind in proposing its amendment was to refer to treaties adopted within an international organization.

24. Mr. KOUTIKOV (Bulgaria) said that despite the United Kingdom representative's opinion that the article should be adopted without change, greater flexibility would be achieved by the incorporation of such amendments as those put forward by France, the Ukrainian Soviet Socialist Republic and Czechoslovakia. They could usefully be considered by the Drafting Committee.

25. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that there had been some misunderstanding about his delegation's amendment which, contrary to what was thought by the United States representative, adhered to the two-thirds rule. The amendment should be considered by the Drafting Committee.

26. Mr. VIRALLY (France) said that his arguments had not been understood and the French amendment should be referred to the Drafting Committee for examination.

27. Mr. YASSEEN (Iraq) said that the general rule set out in paragraph 1 should certainly be retained. Paragraph 2 contained a rule which represented progressive development of international law and was based on international practice, but it might need to be redrafted so that it would accurately reflect that practice, which did not exist in the case of certain types of treaty or of conference; it was in fact followed only at major conferences and it would therefore be desirable to insert the word " general " before the words " international conference ".

28. Mr. KEITA (Guinea) said he supported the rule in paragraph 1, which dealt with conventions of the nature of *intuitu personae*. Paragraph 2 dealt with " *conventions d'adhésion* ". It should be possible to achieve a compromise on the basis of the Czechoslovak amendment.

29. Mr. AMADO (Brazil) said that he would vote in favour of the French and Ukrainian amendments, but if they were rejected he would support the International Law Commission's text.

30. Mr. RUDA (Argentina) said that the statement of the general rule under existing international law, the traditional unanimity rule, contained in paragraph 1, was acceptable.

31. The provisions of paragraph 2, on the other hand, did not constitute a rule of positive international law. They represented progressive development, and were therefore of very great importance and were well suited to multilateral treaties adopted by what the representative of Iraq had appropriately called " general international conferences ".

32. However, there was a whole range of treaties which were neither multilateral treaties concluded in a general international conference nor treaties to which paragraph 1 applied. As was explained in paragraph (3) of the commentary to article 8, the rule in paragraph 1 applied primarily " to bilateral treaties and to treaties drawn up between only a few States ". That intermediate group consisted of treaties drawn up at a conference of a limited number of States, regional or otherwise. Where such a conference was convened by an international organization, it would be covered by article 4; for treaties drawn up at other limited conferences, however, the unanimity rule must be upheld and he accordingly suggested that they should be excluded from the operation of paragraph 2. He consequently favoured the idea embodied in the French amendment (A/CONF.39/C.1/L.30), although not the wording of the amendment. The emphasis should be placed not on the restricted number of parties to the treaty but on the small number of participants in the conference which drew up the treaty.

33. Similarly, he saw no reason to introduce into article 8 the concept of a general multilateral treaty and shared the doubts already expressed on the imprecision of that concept. Moreover, even if it were possible to differ-

entiate between general multilateral treaties and other multilateral treaties, the distinction would be irrelevant to the purposes of article 8 since the rule in paragraph 2 would apply to all multilateral treaties.

34. The concept of a general multilateral treaty was based on a value judgment regarding the importance of the contents of the treaty, whereas the concept of a restricted multilateral treaty was based on the small number of parties to the treaty. It was therefore inappropriate to try to cover both concepts in a single formula and he accordingly could not support the amendments by the Ukrainian SSR (A/CONF.39/C.1/L.51) and Czechoslovakia (A/CONF.39/C.1/L.102).

35. The wording proposed by Peru (A/CONF.39/C.1/L.101 and Corr.1), offered a useful basis for discussion, provided the concluding proviso of paragraph 1 was deleted.

36. Mr. MAGNIN (United International Bureaux for the Protection of Intellectual Property), speaking at the invitation of the Chairman, confirmed in relation to article 8 what he had said about article 4.[3] Since it had been explained to the Conference that the draft convention was a codification of the rules in use for the conclusion of treaties, it was essential to take into consideration the rules in use in the international Unions for the protection of intellectual property, which were administered by BIRPI. Those rules were applied by the States themselves in the Unions, and had been tried and tested over a long period. The Acts of the Unions, in particular, were adopted unanimously. If the States members of the Unions so desired, they were at liberty to adopt a different rule, such as the two-thirds rule laid down in article 8; but they would have to do so unanimously. That was the opposite of draft article 8. He asked the Expert Consultant to confirm that the provisions of that article did not possess the character of *jus cogens* and that they left intact the written or unwritten rules adopted by the States in the international Unions in question.

37. Sir Humphrey WALDOCK (Expert Consultant) said that he could state, in very general terms, that in article 8 the International Law Commission had intended to leave complete freedom to States at conferences to fix their own voting rules.

38. The purpose of article 8 was to set forth a general residuary rule for cases where the States concerned had not agreed on a voting rule before the conference. It was convenient to have such a residuary rule in order to enable the conference to get under way without having to argue on the voting rule to be applied for the purpose of deciding what the voting rules of the conference would be. The Commission had discussed at great length the possibility of subdividing multilateral treaties into two or more categories. Both he himself, as the Commission's Special Rapporteur on the law of treaties, and his predecessor, Sir Gerald Fitzmaurice, had included the concept of a " plurilateral " treaty in some of their drafts, but owing to the very great difficulty experienced in trying to arrive at a definition, the Commission had finally abandoned its efforts to draw any distinction between multilateral treaties.

[3] See 9th meeting, paras. 25-27.

39. The question, however, did not have any great practical bearing on article 8. The case on which attention had been focused in the debate was that of a conference of a small number of States. But if one of the States invited to attend did not approve of the voting rule proposed by the others it could always refuse to participate in the conference. Since the whole purpose of such a conference would be to attract the support of all of the small number of States invited, the objecting State would be in a strong position to influence the choice of voting rules.

40. The CHAIRMAN noted that none of the sponsors of the various amendments had requested a vote and that all of them wished to have their amendments considered by the Drafting Committee. If there were no further comments, he would take it that the Committee agreed to refer article 8 to the Drafting Committee, together with the amendments thereto and the suggestions made during the discussion.

It was so agreed.[4]

Article 9 (Authentication of the text)

41. The CHAIRMAN said that, since no amendments had been submitted to article 9, he assumed that the Committee approved it and desired it to be referred to the Drafting Committee.

It was so agreed.[5]

Proposed new article 9 bis
(Consent to be bound by a treaty)

42. The CHAIRMAN said that Poland and the United States had proposed a new article 9 *bis*, which read:

" *Consent to be bound by a treaty*

" The consent of a State to be bound by a treaty may be expressed by the signature, exchange of instruments constituting a treaty, ratification, approval, acceptance or accession or by any other means if so agreed." (A/CONF.39/C.1/L.88 and Add.1.)

43. Mr. BEVANS (United States of America) said that the new article 9 *bis* recognized that articles 10, 11 and 12, which covered signature, ratification, acceptance, approval and accession did not exhaust the list of means whereby a State could express its consent to be bound by a treaty. In fact, States sometimes resorted to other means of expressing their consent. For instance, many of the bilateral co-operation treaties on the peaceful uses of atomic energy specified that they would become binding on the date of receipt of notification of compliance with all the statutory and constitutional requirements by the States parties. A treaty relating to a large loan usually stated that it would become binding only when the necessary funds had been appropriated by legislation. Examples of that type showed the need to include a provision such as article 9 *bis* in order to cover all possible means of expressing the consent of a State to be bound by a treaty.

[4] At the 80th meeting, the Committee decided to defer consideration of all amendments relating to " general multilateral treaties " and to " restricted multilateral treaties " until the second session of the Conference. Further consideration of article 8 was therefore postponed.

[5] No change was made by the Drafting Committee, and the Committee of the Whole adopted article 9 at the 59th meeting.

44. Mr. NAHLIK (Poland) said that it was desirable to have an introductory article to the whole group of articles 10 to 15. The new article would also serve to indicate that it was possible for States to employ means other than those stated in articles 10 to 12 for the purpose of expressing their consent.

45. Side by side with the traditional procedure of ratification, international law had known for a long time the less formal method of signature without ratification as a means of expressing State consent. In due course, still other informal means had been introduced in response to the practical needs of inter-State relations. In its articles 10 to 12, the International Law Commission, without entering into doctrinal issues, had listed a number of those means, which could be divided into two categories, The first covered those by which a State participated in the treaty-making process from the outset; they were mentioned in articles 10 and 11. The second category comprised accession, whereby a State became party to a treaty originally concluded between other States (article 12). The first category could be further sub-divided into simple or single-stage procedures—signature and initialling—and complex procedures involving two stages, as mentioned in article 11.

46. Those provisions, however, did not cover the whole field. Consent to be bound was often expressed by an exchange of notes. Where those notes were signed, the situation might be covered by article 10. There was, on the other hand, no provision to cover the case of an exchange of *notes verbales*, notes which were not signed or even initialled. Such an exchange had substantially the same legal effect as an exchange of signed notes; it constituted a " treaty " within the meaning of paragraph 1 (*a*) of article 2, being " in written form " and " in two or more related instruments." In order to deal with that case, which was quite common in practice, his delegation had proposed a new article 10 *bis* entitled " Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty " (A/CONF.39/C.1/L.89).

47. But even with that addition, articles 10 to 12 would not exhaust the enumeration of the means employed by States to express their consent. An interesting example of a different method was the 1955 agreement on the permanent neutrality of Austria, resulting from the adoption by Austria of a provision of constitutional law on the subject and the subsequent notification of that constitutional act to other States, which had noted it. Some writers had characterized that procedure as a " *sui generis* " agreement that could be legally construed as an offer followed by several acts of acceptance.

48. Because of the existence of such other methods, and the possibility that State practice might devise yet others in the future, it was desirable to include article 9 *bis*, with its concluding proviso " or by any other means if so agreed".

49. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that the interesting proposal for a new introductory article 9 *bis* should be referred to the Drafting Committee for consideration when it had completed its work on the series of articles dealing with the various modes of expressing consent to a treaty.

50. He noted that, in connexion with articles 10 and 11, a number of amendments had been submitted which dealt in effect with the question of the residuary rule to be applied where the States concerned had not chosen the mode of expression of their consent to be bound by a treaty. In their amendment to article 10, Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2) proposed that in such cases, consent should be deemed to be expressed by signature. On the other hand, the Venezuelan amendment to article 11 (A/CONF.39/C.1/L.71) and the proposal by Switzerland for a new article 11 *bis* (A/CONF.39/C.1/L.87) embodied a totally different solution, namely, that such consent should be deemed to be expressed by ratification.

51. In reality, the choice lay simply between two alternative presumptions—one in favour of signature and the other in favour of ratification. He accordingly suggested that all those amendments should be considered together, instead of taking them up piecemeal in the course of a discussion article by article. That would be a simpler and speedier procedure.

52. Sir Francis VALLAT (United Kingdom) said he would like to ask the Expert Consultant whether the International Law Commission had had any reason for not including an introductory article, such as the proposed article 9 *bis*, which would seem to establish a useful link between the series of articles on the modes of expressing consent and the articles immediately preceding them.

53. Sir Humphrey WALDOCK (Expert Consultant) said that at an early stage in the Commission's work, there had been a proposal for an introductory article. The Commission had also given much thought to the possibility of formulating a residuary rule to the effect that ratification would be necessary to express consent where no other mode of expression was chosen by the States concerned. It had decided, however, not to include any residuary rule and to be content with the statement in articles 10 to 12 of the law on the various modes of expressing consent. In fact, the rules on signature and ratification gave ample scope to the intention of States in the use of one or other of the modes of expression of consent and it was highly unlikely that any case would fall between the rules stated in those articles.

54. In so far as the new article 9 *bis* would serve to state that consent could be expressed in any other manner than in the forms set forth in articles 10 to 12, it would be better placed after those articles. If it were framed as an introductory article in the proposed form, the group of articles as a whole would become inelegant: the same rules on the expression of consent by signature, ratification, approval, acceptance and accession would be stated twice—in the introductory article and again in articles 10 to 12.

55. Mr. WERSHOF (Canada) proposed that consideration of article 9 *bis* be deferred until the end of the discussion of the whole group of articles on expression of consent to be bound, but that the Committee itself consider it before referring it to the Drafting Committee.

56. The CHAIRMAN said that, if there were no further comments, he would take it that the Committee agreed

to postpone consideration of the proposed new article 9 *bis* until it had disposed of articles 10 to 12, and, if need be, of article 13.

It was so agreed.[6]

The meeting rose at 5.40 p.m.

[6] For resumption of discussion, see 18th meeting.

SIXTEENTH MEETING

Monday, 8 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 10 (Consent to be bound by a treaty expressed by signature),[1]

Article 11 (Consent to be bound by a treaty expressed by ratification, acceptance or approval)[2] and

Proposed new article 11 bis[3]

Question of a residuary rule in favour of signature or of ratification

1. The CHAIRMAN observed that several of the amendments before the Committee raised the question whether, when a treaty was silent on the matter, the consent of a State to be bound was expressed by signature (A/CONF.39/C.1/L.38 and Add.1 and 2) or by ratification (A/CONF.39/C.1/L.71, L.87, L.105). He therefore invited the Committee to discuss that question before going on to consider the text of articles 10 and 11.

2. Mr. SMEJKAL (Czechoslovakia), introducing his delegation's amendment to article 10 (A/CONF.39/C.1/L.38 and Add.1 and 2), said that he supported the International Law Commission's endeavour to leave States free to choose between signature and ratification as the means of expressing consent to be bound by a treaty. The text adopted by the Commission would, however, have certain disadvantages in view of existing treaty practice, for owing to the development of relations between States, many treaties were concluded in simplified form and contained no provisions on entry into force. That gap could be filled by the Swiss amendment (A/CONF.39/C.1/L.87) or by the joint amendment submitted by a group of Latin American countries (A/CONF.39/C.1/L.105), but the adoption of those amendments would complicate the procedure in the case of treaties for which ratification was not customary. His delegation therefore considered that as a general rule the consent of a State to be bound by a treaty should be expressed by signature.

3. Mr. CARMONA (Venezuela) reminded the Committee that the International Law Commission had considered it preferable not to include a clause specifying a choice between signature and ratification as the procedure for expressing the consent of a State to be bound by a treaty.

4. After consulting the delegations of the other Latin American countries, the Venezuelan delegation had decided to withdraw its amendment (A/CONF.39/C.1/L.71) in favour of the joint amendment (A/CONF.39/C.1/L.105). In the Latin American countries, as in most African and Asian States, ratification was required by internal law.

5. If any other principle was adopted, those countries would not be able to accept a convention based on the rule that ratification was only the exception.

6. Mr. BINDSCHEDLER (Switzerland) said he understood the reasons why the Czechoslovak delegation had submitted its amendment. The object was to fill a gap. the existence of which the International Law Commission had itself acknowledged in paragraph (4) of its commentary on article 11. The Commission had, however, considered that, as the cases where the conditions under which a State consented to be bound by a treaty could not be established were very rare, the drafting of articles 10 and 11 could be simplified by not stating a residuary rule. However, if the Conference intended to codify the law of treaties, it must fill that gap. It should incorporate in the convention a rule which would apply when a treaty was silent about entry into force or when its provisions on that subject were ambiguous or open to contradictory interpretations.

7. The question was how to fill the gap. The Czechoslovak delegation had come out in favour of signature, a principle which took account of the present practice of many States. But it was also necessary to consider the constitutional difficulties to which the Venezuelan representative had drawn attention. The best course would be to opt for a more cautious solution, which would leave some latitude to the States parties to an agreement, in other words to adopt the principle of ratification. The doubtful cases would be very few and would have no influence on practice. Furthermore, that principle would give States a certain amount of time for reflection in case of doubt.

8. Mr. ALVAREZ (Uruguay) said that the object of the nine-country amendment (A/CONF.39/C.1/L.105) to article 11 was to introduce into the convention a general rule to the effect that, where States did not specify in a treaty the act by which they would consent to be bound, the act required was ratification. The amendment was really a return to the standpoint adopted by the International Law Commission in its 1962 draft, which some members had regarded as a compromise. The 1962 formula had been abandoned by the Commission at its seventeenth session in favour of non-committal wording

[1] The following amendments had been submitted to article 10: Czechoslovakia, Sweden and Poland, A/CONF.39/C.1/L.38 and Add.1 and 2; Venezuela A/CONF.39/C.1/L.70; Italy, A/CONF.39/C.1/L.81; Belgium, A/CONF.39/C.1/L.100; Bolivia, Chile, Colombia, Dominican Republic, Guatemala, Honduras, Mexico, Peru and Venezuela, A/CONF.39/C.1/L.107; Spain, A/CONF.39/C.1/L.108.

[2] The following amendments had been submitted to article 11: Finland, A/CONF.39/C.1/L.60; Venezuela, A/CONF.39/C.1/L.71; Bolivia, Colombia, Chile, Guatemala, Honduras, Mexico, Peru, Uruguay and Venezuela, A/CONF.39/C.1/L.105; Spain, A/CONF.39/C.1/L.109.

[3] Switzerland had proposed a new article 11 *bis* (A/CONF.39/C.1/L.87) reading as follows:

" When the method of expressing consent to be bound cannot be established in accordance with the preceding articles, consent shall be expressed by ratification."

which was merely a way of evading the problem. Many eminent jurists nevertheless considered that the principle of ratification should be adopted in the convention, at least as a residuary rule.

9. There were two main arguments in favour of the precise formulation of a residuary rule. First, it was important for States to know with certainty when, and to what they were bound. Secondly, it was necessary to safeguard the constitutional provisions of States. Although signature could satisfy the first of those requirements, it was far from meeting the second, which was to safeguard the internal system of every State. The only rule which took account, as a residuary rule, of the requirements of the different internal constitutional systems, was the rule requiring ratification.

10. Various arguments had been advanced in the International Law Commission against the principle of ratification. It had been said that if ratification was made obligatory, some States might evade the obligations they had assumed, and that it was inconceivable that a minister or ambassador, who knew his country's requirements for ratification of a treaty, would fail to make them known before signature. The Uruguayan delegation could not support those arguments; for if a State intended to bind itself, either expressly or by implication, recourse to the residuary rule would be unnecessary, while if it did not, the rule would apply. No State wished to bind itself to another State if its obligations were not clear, because that would lead to sterile disputes.

11. It had also been held that ratification was contrary to the interests of States, that it complicated political life and that it accentuated the conflict between the executive and legislative powers. He believed that, on the contrary, ratification introduced into international life an element of order and certainty which made it possible to ensure strict application of the internal law of States.

12. The Uruguayan delegation urged the adoption of the joint amendment to article 11 not only because the principle of ratification was a general norm of international law, but because it had practical advantages which could not be overlooked in the codification and progressive development of international law. The adoption of the amendment would not prevent the retention of article 10 for application to exchanges of notes, a question on which the representative of Czechoslovakia had expressed concern.

13. Mr. NAHLIK (Poland) said that in articles 10 and 11 the Commission had made no provision for cases in which States had not stipulated whether they wished to express their consent to be bound by signature or by ratification. The traditional doctrine of international law had been to presume the need for ratification in such cases; but more recently a number of eminent jurists, such as Fitzmaurice, Blix and Shurshalov, had pronounced against that traditional presumption. The Polish delegation shared their view, for the arguments advanced against that presumption seemed to be the logical consequence of the growth of international co-operation expressed in international agreements on an increasing diversity of topics. The number of such agreements, some of which were very modest in their scope, was constantly increasing, and it was neither necessary nor even possible for all of them to be solemnly ratified by the Head of State or to be approved by Parliament. Furthermore, technical progress in telecommunications made it very unlikely that a negotiator would sign an agreement without being previously informed of any change in his government's intentions.

14. The survey by Mr. Blix, which covered several thousand treaties registered and published in the League of Nations and the United Nations *Treaty Series*, showed that the percentage of treaties requiring ratification was decreasing. The researches of a Polish jurist, Mrs. Frankowska, showed that of 1,000 treaties selected from among those registered and published by the United Nations, about 10 per cent contained no express provision on the mode of conclusion. The parties to all those treaties had been satisfied with signature, and not a single one of them had been made subject to ratification. That was the practice which led the Polish delegation to support the three-State amendment (A/CONF.39/C.1/L.38 and Add.1 and 2) and to oppose the amendment submitted by Switzerland (A/CONF.39/C.1/L.87). On the other hand, the amendment to article 10 submitted by Belgium (A/CONF.39/C.1/L.100) and the Finnish amendment to article 11 (A/CONF.39/C.1/L.60) might make the wording of those articles more precise and should be referred to the Drafting Committee. If the three-State amendment was adopted, the Venezuelan and Italian amendments to article 10 (A/CONF.39/C.1 L.70 and L.81) should be rejected.

15. Mr. FINCHAM (South Africa) said that in contemporary treaty-making practice, the question of the method of expressing consent to be bound by a treaty was nearly always settled in advance by the parties. But a convention of the kind under discussion should nevertheless provide for exceptional cases and lay down a residuary rule. Since treaties were becoming less and less formal, and since there was an increasing number of treaties which, in practice, did not require ratification but were binding on the parties from the moment of signature, it would be easy to provide for ratification in a treaty if it was found necessary.

16. South Africa therefore supported the amendment by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2).

17. Sir Francis VALLAT (United Kingdom) said that he hoped the Conference would support the present wording of articles 10 and 11, which offered a compromise between two sharply divergent views and gave the ultimate pride of place neither to signature nor to ratification. The United Kingdom practice was that where a treaty contained no indication of the method of expressing consent, signature indicated the consent of the State to be bound; if ratification was to be the residuary rule, that would create constitutional difficulties.

18. The task of the Conference was to adopt an international rule which would be generally acceptable in the light of the practices of all States. He thought that when ratification was necessary, express provision for it was generally made in the treaty itself.

19. The articles should be retained in their present form, since they would remind those drafting future treaties

of the need to specify whether consent was to be expressed by signature or by ratification.

20. If the Committee were to select either signature or ratification as the residuary rule, there was a grave risk that neither would obtain a two-thirds majority in plenary, thus leaving a large gap in the convention. He appealed to the Committee to avoid a battle on the issue, and to support the International Law Commission's formulation. However, if the Committee should decide to adopt a residuary rule, it should draw up a separate article stipulating that where the method of expressing consent to be bound could not be established in accordance with articles 10 and 11, consent was expressed by signature.

21. Mr. BOLINTINEANU (Romania) said that the problem was of little practical importance, as the International Law Commission had pointed out in its commentary on article 11. A treaty very seldom omitted to specify the procedure by which a State could become a party to it. The number of treaties concluded by mere signature was continually increasing, so that the present general practice of States seemed to invalidate the argument that ratification was obligatory even if the treaty did not provide for it. In view of the diversity of practice it could be concluded that in some cases States used ratification and in others mere signature. It would therefore be difficult to formulate a general rule requiring either ratification or mere signature. The Romanian delegation was therefore in favour of retaining the formula arrived at by the International Law Commission, the detailed provisions of which appeared to cover all the possible cases quite adequately.

22. Mrs. ADAMSEN (Denmark) said that the wording of article 10 was incomplete, and that a general rule based on the amendment submitted by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2) should be inserted in the convention.

23. Mr. KOUTIKOV (Bulgaria) thought that that amendment was liable to deter representatives of States which, like Bulgaria, attached importance to ratification, or confirmation by the Government, as a mode of expressing the consent of a State to be bound by a treaty. The attitude of the Bulgarian delegation must be determined by Bulgarian Law. It held that ratification should be the rule, and expression of consent by signature the exception, which should always be expressly stipulated.

24. Mr. AL-RAWI (Iraq) said that it was ratification which made treaties binding. The procedure of ratification enabled the State concerned to re-examine the treaty and its effects on the country's interests; thus it could modify the treaty or reject it, even after signature by its representatives. Moreover, the constitutions of most countries required the consent of the legislative power. Ratification should therefore be recognized as a customary rule of international law applicable even if not expressly stipulated in the treaty.

25. There were exceptions to the rule, but only within narrow limits, in particular where speedy execution was required; and ratification was not necessary if the treaty stipulated that States would be bound by signature.

26. Although an increasing number of agreements were being concluded in simplified form, that did not justify making signature the rule for expressing consent.

27. Furthermore, with regard to article 10 of the draft, the delegation of Iraq favoured the deletion of paragraph 1, sub-paragraphs (*b*) and (*c*), which might cause difficulties with regard to interpretation and application. An intention not reflected in any provision of the treaty could have no legal effect. Paragraph 1, sub-paragraphs (*b*), (*c*) and (*d*) and paragraph 2 of article 11 should also be deleted. Lastly, since the draft articles offered no solution for cases in which a treaty contained no provision, either express or implied, that States would be bound by ratification or by signature, his delegation favoured the adoption of a residuary rule to the effect that a treaty required ratification unless it had been decided otherwise.

28. Mr. HARASZTI (Hungary) said he shared the view expressed by the International Law Commission in its commentary to article 11; the result would be substantially the same whether ratification or signature was adopted as the general rule for expression of consent. His delegation considered, however, that a general rule was needed for cases in which the treaty was silent on the subject and the intention of the parties could not be established. That was not a question of principle; the practice of States must be the guide. And as 80 per cent of modern treaties did not provide for ratification, a general rule based on ratification would run counter to the present trend in international affairs. His delegation therefore supported the amendment by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2).

29. Mr. MERON (Israel) said that he could not support the amendment by Czechoslovakia, Sweden and Poland, which introduced a residuary, presumptive rule regarding the expression of the State's consent by signature. A pragmatic enumeration of the methods by which consent was expressed would be preferable. For the same reason, he could not support the proposal to make ratification the general rule. He approved of the International Law Commission's decision to leave the question of ratification to the intention of the parties. It was for the negotiators to decide whether ratification was necessary or not. It was not desirable to introduce doctrinal considerations into the draft alongside practical rules. The best way for countries to safeguard their interests was to include in treaties, when necessary, clauses expressly providing for ratification. In view of the wishes expressed by the advocates of the residuary rule concerning signature, on the one hand, and by the advocates of the residuary rule concerning ratification, on the other, it would be better to accept the International Law Commission's proposal.

30. Mr. THIERFELDER (Federal Republic of Germany) said he was in favour of retaining articles 10 and 11 as drafted by the International Law Commission. It was true that those articles did not establish any applicable rule where the treaty was silent. However, there would be no great harm in failing to seize the opportunity to settle the controversy on whether ratification or signature should be the method expressing consent laid down in a residuary rule, for total silence of a treaty on that question was exceptional. Furthermore, he doubted whether a two-thirds majority for either solution could be obtained at the Conference's second session. If the Committee wished to adopt a residuary rule, however,

his delegation would support the amendment by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2), for the current expansion of international relations called for a simplification of procedures.

31. Mr. BLIX (Sweden) observed that the length of the debate was in inverse proportion to the practical importance of the subject, for the problem under discussion in fact arose very seldom. The doctrinal question did not necessarily have to be settled, and there would be no harm in retaining the International Law Commission's text as it stood. If the question had to be decided, however, his delegation thought it preferable to adhere to the practice of States. Draft articles 10 and 11 did not amount, juridically, to more than a statement that States were free to choose the method by which their consent to be bound by a treaty would be expressed. The articles were useful because they enumerated and defined various methods of expressing the intention of the parties.

32. Only a minority of treaties—multilateral treaties, treaties which under internal law required parliamentary consent and treaties for which a certain solemnity was desired—provided that they would become binding by ratification. Consequently, if the parties had made no express stipulation, it was more than probable that they had intended to express their consent by signature. Could the advocates of ratification as a residuary rule point to a single treaty which had entered into force by ratification although the intention of the parties had not been made clear? A residuary rule such as that proposed by the Swiss representative would not be in conformity with the modern practice of States. Nor could it be argued that such a rule would protect States against negligence on the part of their negotiators or their Governments. If, in any event, it could be expressly stipulated in a treaty that signature would make it binding, it was hard to see what danger there would be in adopting a residuary rule to the effect that consent to be bound by a treaty was expressed by signature when the intention of the parties could not be ascertained. Nor could the argument be advanced that many constitutions required parliamentary approval of certain treaties; for in such cases the parties could stipulate in the treaty that their consent was subject to ratification.

33. Despite the fact that it was a sponsor of the amendment in document A/CONF.39/C.1/L.38 and Add.1 and 2, the Swedish delegation did not attach any particular importance to the way in which a residuary rule on signature was introduced into the draft. It might perhaps be preferable, however, to embody the rule in a separate article. If the new provision did not obtain a two-thirds majority, its disappearance would then leave the articles drafted by the International Law Commission intact, which would not be the case if the rule was inserted in the text of article 10.

34. A brief article on the lines proposed by Poland and the United States (A/CONF.39/C.1/L.88 and Add.1) [4] should, in his delegation's opinion, be inserted before article 10. It would become the principal rule, and articles 10 and 11 would state the most common practical applications. An article 11 *bis* would then state the residuary rule on signature or ratification, whichever the Committee decided.

35. Mr. AMADO (Brazil) said that nowadays it was necessary to act quickly and the methods of expressing consent had become so numerous that ratification, that respectable institution of the previous century, had rather faded away. The opinion of the greatest jurists in the world could not take precedence over actual practice as described by the Hungarian representative. His own country's constitution required ratification, but it would comply with that requirement by including an express provision in the treaties it concluded. He could not support the Latin American joint amendment, and would abstain from voting on it.

The meeting rose at 1 p.m.

[4] i.e. the proposal for a new article 9 *bis*.

SEVENTEENTH MEETING

Monday, 8 April 1968, at 3.10 p.m.

Chairman: Mr. ELIAS *(Nigeria)*

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Question of a residuary rule in favour of signature or of ratification (continued)

1. The CHAIRMAN invited the Committee to continue its consideration of the preliminary issue of the proposals for a residuary rule.

2. Mr. KEITA (Guinea) said that the International Law Commission's text of articles 10 to 12 fully met the needs of contemporary international practice. The choice of one or other residuary rule was largely an academic issue. The International Law Commission's text would provide a good working instrument for States, whose essential duty in the matter was to avoid silence or ambiguity. If, however, a residuary rule had to be included, he would favour a presumption that ratification was necessary, because it would safeguard the requirements of his country's Constitution, article 33 of which specified that the legislature's approval was necessary for certain categories of treaty, including the vast majority of those of any importance.

3. Mr. MATINE-DAFTARY (Iran) said he strongly supported the presumption that, in the absence of evidence to the contrary, ratification and not signature expressed consent. The opposite rule would ignore the prerogatives of the legislature under the constitution of most countries, including Iran.

4. It was difficult to see what could be the scope of application of the provisions of article 10, paragraph 1. He could only think of the case of a treaty which served merely to implement the provisions of a pre-existing treaty, which had itself been ratified and had already entered into force. In a case of that nature, it might be possible for the States concerned to agree that consent to be bound by the implementation treaty would be expressed by mere signature.

5. He was in favour of combining articles 10 and 11 into a single provision which would begin by stating the traditional principle that ratification was required in order to express the consent of the State. The exceptions which could be made by States to that general rule would then be set out.

6. Mr. VIRALLY (France) said it was important not to hinder the development of treaties in simplified form. At the same time, it had to be remembered that State practice in the matter varied widely and it would be wrong to try and impose any solution which some States could not accept for constitutional reasons. Equally, it would be wrong to try to make the rules of international law subject to those of internal constitutional law. States which participated in a negotiation should be aware of their constitutional provisions and should make the necessary arrangements to enable them to enter into international undertakings. It was significant that, in article 43, the International Law Commission had taken a stand against entering into an examination of internal constitutional law.

7. The International Law Commission's method of setting out parallel provisions in articles 10 and 11 did not solve the problem. In order to avoid disputes, it was necessary to make a choice between two principles and that choice should be made not on doctrinal but on practical grounds. The fact that States specified the need for ratification in a certain number of treaties —or conversely, the fact that they expressed their consent by signature in a large number of cases—was irrelevant to the present discussion. The position was that, in the majority of cases, States made an express choice of the method of expressing their consent. The problem before the Committee was that of the presumption to be established for the minority of cases in which that choice was not made by the States concerned. A rule had to be laid down which would give States an awareness, and an assurance, of what the consequences would be of their failure to make an express choice in the matter. The present position under international law was not clear and the convention should attempt to improve that position.

8. In the interests of legal certainty, he supported proposals such as those by Switzerland (A/CONF.39/C.1/L.87) and a group of nine States (A/CONF.39/C.1/L.105) which would create a presumption that consent was given by ratification. Ratification must, however, be construed in accordance with the provisions of article 11, paragraph 2, which equated acceptance and approval with ratification. The point was an important one, because ratification emanated from the Head of State, whereas acceptance and approval emanated from the Minister for Foreign Affairs. Article 11, paragraph 2, thus introduced a desirable element of flexibility.

9. The presumption in favour of ratification would also be subject to provisions of article 10, paragraph 1(*b*), which stated an exception for cases where it was otherwise established that the negotiating States were agreed that signature would express consent. That broad formula would serve to meet all the practical needs of State practice. He could not, however, support the proposal to inject into that sub-paragraph considerations of internal law as was done in the amendment contained in document A/CONF.39/C.1/L.107.

10. Mr. DADZIE (Ghana) said that the advantages which ratification had over signature as a method of expressing State consent included the opportunity which it afforded to take a second look at a treaty as a whole. Ratification also made it possible to take the necessary steps to conform with constitutional requirements before the State bound itself by the treaty.

11. With regard to the various amendments to articles 10 and 11, which his delegation thought should be discussed together, he found the Italian amendment to article 10 (A/CONF.39/C.1/L.81) too limited in scope; its text would not improve the International Law Commission's draft. The same was true of the Belgian amendment to that article (A/CONF.39/C.1/L.100). The Finnish amendment to article 11 (A/CONF.39/C.1/L.60) was of a drafting character and should be referred to the Drafting Committee.

12. His delegation, while accepting the International Law Commission's draft articles 10 and 11 as sufficiently flexible to cover all the situations of State practice with regard to treaty-making, had an open mind as to the possibility of improving that text both in the Committee of the Whole and in the Drafting Committee.

13. Mr. MARESCA (Italy) said that the arguments put forward relating to internal constitutional procedures and the role of the legislature in approving treaties had introduced an element of confusion into the discussion. The issue was not that of determining how the consent of the State was formed in accordance with its constitution, but rather what were the procedural rules for expressing the consent of the State at the international level; the rules now under discussion were not substantive rules but procedural rules of diplomatic law.

14. From that point of view, there was little difference between ratification and signature. Ratification was a more formal method of expressing consent than signature, but a State which gave its consent whether by ratification or by signature did so in full awareness of its own constitutional law. In Italy, a full parliamentary debate had sometimes been held before the executive had been permitted to sign a treaty which did not require any ratification. Parliamentary control under the constitution was thus exercised, irrespective of the method chosen to express the consent of the State at the international level.

15. The International Law Commission had acted wisely when it had simply defined the two procedures of signature and ratification and placed both on the same footing. Admittedly, that method left a gap, but any attempt to fill the gap in the interests of doctrinal considerations would detract from the flexibility of the whole system.

16. Mr. KEBRETH (Ethiopia) said the International Law Commission was to be commended for setting out in articles 10 and 11 direct practical solutions to the problem of evidence of consent. The Commission had avoided taking any doctrinal stand, but at the expense of leaving a gap in the rules. An attempt was now being made to bridge that gap and his delegation favoured the approach adopted by a number of Latin American States in their amendment to article 10 (A/CONF.39/

C.1/L.107) which, while acknowledging the need to retain ratification as the residual rule, recognized that consent in the case of administrative and executive agreements could be expressed by signature. That approach laid the emphasis on the substance instead of on the form of a treaty, and it was the substance which, in his delegation's view, should remain the controlling factor.

17. Mr. MIRAS (Turkey) said that articles 10 and 11 were satisfactory inasmuch as they made specific provision for a number of cases in which signature or ratification served to express consent. It was necessary, however, to include also a general rule to cover cases not provided for in articles 10 and 11. For that purpose, he was in favour of a residual rule which would create a presumption in favour of ratification; such a rule would be consistent with international law in force and would meet the requirements of the Turkish Constitution. He therefore supported the proposal by Switzerland for a new article 11 *bis* (A/CONF.39/C.1/L.87).

18. Mr. KRISPIS (Greece) said that on balance, he favoured the presumption that ratification was necessary to express consent. Ratification, which had survived the age when inconvenient communications made it necessary for the Head of State, before finally consenting to be bound by a treaty, to discuss it in person with his representative on his return, now served other purposes and in particular provided an opportunity for further consideration of the treaty. That was why it had been so constantly practised, and it did not seem practical to abolish it, even to the limited extent of a presumption in favour of signature. The signature rule did indeed make for certainty; but certainty was also a characteristic of ratification, as far as the international aspect was concerned. In fact, ratification had a dual significance: on the internal plane, it related to the compliance with constitutional procedures for the approval of treaties; on the international plane, ratification constituted a declaration to the effect that the State was bound. Made through the proper diplomatic channels, it must be accepted by the other party, which had no right to raise doubts grounded on the constitutional law of the State making the declaration; that point was dealt with in article 43, the last nine words of which provided for an " escape clause " and were of dubious value. Even if the treaty itself stated that it would be effective only on ratification by parliament, the notification of ratification could not be questioned by the State receiving the notification.

19. For those reasons, he supported the amendments by Switzerland (A/CONF.39/C.1/L.87) and by a group of nine Latin American States (A/CONF.39/C.1/L.105).

20. Mr. TODORIĆ (Yugoslavia) said that the success of the Conference depended on the adoption of a solution to the present issue which was likely to command general acceptance. His delegation therefore strongly supported the approach adopted by the International Law Commission, which took into account contemporary practice with regard to ratification and signature while at the same time safeguarding the constitutional position of all countries.

21. Mr. TSURUOKA (Japan) said that he was inclined to favour as a residual rule the formula proposed by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2) which was more in keeping with present international practice, including that of Japan. However, if that proposal were not adopted, his delegation would favour the retention of the International Law Commission's draft as it stood.

22. Mr. OGUNDERE (Nigeria) said that, in their practice, States were not swayed by doctrinal considerations. An arrangement such as that embodied in the International Law Commission's draft articles 10 and 11, which allowed all States room for manœuvre, was therefore preferable to one which raised difficulties for some States. Nigeria had made use of almost all the methods set forth in those articles to express its consent to treaties, and he agreed with the United Kingdom representative that the Commission's formulation was the one most likely to obtain a two-thirds majority at the Conference. Neither signature nor ratification as a residuary rule would attract such a majority.

23. He therefore opposed all the amendments for a residuary rule, whether based on signature, as in document A/CONF.39/C.1/L.38 and Add.1 and 2, or ratification, as in documents A/CONF.39/C.1/L.87 and L.105, and urged the adoption of the Commission's draft articles 10 and 11 which would accommodate all needs, including those of the sponsors of the two sets of amendments to which he had referred.

24. Mr. HARRY (Australia) said that the issue must be examined from the point of view of convenience and certainty. In the great majority of cases, the treaty itself would specify that ratification was required, or alternatively, that it would enter into force upon, or a certain time after, signature. In most remaining cases there would be clear evidence of the intention of the parties in the matter. For the very few other cases, a residuary rule based on signature would be no less certain than one based on ratification. It might even add to security by making it less easy to challenge a treaty signed by one of the parties relying on the other's signature as the expression of its consent. States which did not wish to bind themselves otherwise than by ratification could always make the matter clear, for example in the full powers given to their representatives.

25. He was in favour of articles 10 and 11 as they stood, but if a residuary rule were to be adopted, he would be in favour of a presumption that signature expressed consent.

26. Mr. MOUDILENO (Congo, Brazzaville) said that some hierarchy must be established between ratification and signature. He favoured the Latin American proposal (A/CONF.39/C.1/L.105) in favour of ratification, largely because that procedure ensured that public opinion was fully informed of the treaty undertakings subscribed by the Government on behalf of the State.

27. Miss RUSAD (Indonesia) said that her delegation could accept the International Law Commission's text of articles 10 and 11, which showed no preference for any particular means of expressing consent, but merely stated the current practice in the matter. Her delegation could also support the new article 9 *bis* proposed by

Poland and the United States (A/CONF.39/C.1/L.88 and Add.1) [1] as a useful introduction to articles 10 and 11, and also the new article 11 *bis* submitted by Switzerland (A/CONF.39/C.1/L.87), which stated the residuary rule in a more general way than the other amendments before the Committee.

28. Mr. JAGOTA (India) said that the gap between the scope of articles 10 and 11 should be filled by a prescription, not by a presumption, and that the prescription should be based on ratification, which ultimately signified intention and consent to be bound by a treaty; a prescription based on signature would apply mainly to the growing practice of concluding treaties in simplified form. If it were decided to include no prescription, treaties falling in the gap between the two articles would have no legal effect under article 21, and in that case the parties would be obliged to indicate expressly their choice either of signature or of ratification as a means of bringing the treaty into effect. The practical results of including or omitting the prescription would therefore be the same, but any prescription must be based on ratification.

29. Mr. SMEJKAL (Czechoslovakia) said that, in an important question like the one under discussion, it was desirable to avoid a premature vote. A decision should be deferred until the next meeting in order to facilitate negotiations for a compromise solution, based perhaps on an approach on the lines adopted by the International Law Commission.

30. Mr. CARMONA (Venezuela) said that the time had come for the Committee to take at least a preliminary decision, which would, of course, not become final until the second session of the Conference. The vote should be taken by roll-call.

31. Mr. ALVAREZ (Uruguay) said he thought that a vote might be premature and suggested that it be postponed until the next meeting.

32. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he supported that view.

33. Sir Humphrey WALDOCK (Expert Consultant) said that some speakers appeared to have considered only cases where the treaty was silent on the method whereby consent should be expressed, but both articles contained provisions dealing with the position of the representatives themselves. Under article 10, even although, in principle, the treaty might be binding on signature, an individual representative might indicate that signature would not be binding for his State, but that the treaty would require ratification; and a similar provision recognizing that ratification might be required only in the case of a particular State appeared in article 11.

34. He had originally considered that a residuary rule should be included in the draft and, on balance, had thought that the rule should be based on the need for ratification, but the written comments of Governments had caused the International Law Commission to draft the two articles in their existing form. In considering whether the Commission's text was acceptable, or in preparing a compromise solution, the Committee might take into account the elements of flexibility in paragraph 1(*c*) of article 10 and in paragraphs 1(*c*) and 1(*d*) of article 11.

35. The CHAIRMAN suggested that the vote on the amendment by Czechoslovakia, Sweden and Poland to article 10 (A/CONF.39/C.1/L.38 and Add.1 and 2) and the nine-State amendment to article 11 (A/CONF.39/C.1/L.105) be postponed until the next meeting.

It was so agreed. [2]

Article 10 (Consent to be bound by a treaty expressed by signature)

36. The CHAIRMAN invited the Committee to pass on to consider article 10 and the amendments thereto. [3]

37. Mr. MARESCA (Italy) said that his delegation's amendment to paragraph 1(*c*) (A/CONF.39/C.1/L.81) had been prompted by a wish to introduce an element of greater certainty into the text. If the International Law Commission's text were adopted, the last phrase of paragraph 1(*c*) might be subject to misinterpretation in the course of practical negotiations, and the Italian delegation had thought it wise to introduce the idea of formal manifestation of intention during negotiations. He would have no objection if the amendment were referred to the Drafting Committee.

38. Mr. DENIS (Belgium), introducing his delegation's amendment to paragraph 2 (*a*) (A/CONF.39/C.1/L.100) said that paragraph (4) of the commentary to the article drew attention to the practice of initialling, especially by a Head of State, Prime Minister or Foreign Minister, as the equivalent of full signature. But the wording " when it is established that the negotiating States so agreed " in paragraph 2 (*a*) might give rise to practical difficulties and cast doubts on the actual effect of initialling. In particular, the words " it is established " were so general as to exclude no method of proof, and might conceivably include alleged consent, based on conversations or on any source whatsoever, in certain specified circumstances. The Belgian delegation therefore proposed that the word " expressly " be inserted before " so agreed " at the end of the paragraph, but would not press for a vote on its amendment.

39. Mr. VARGAS (Chile) said that the reason why nine Latin American delegations had submitted an amendment to paragraph 1 of article 10 (A/CONF.39/C.1/L.107) was that, although they had endorsed the Committee's decision to ascribe a generic meaning to the term " treaty ", which now included all denominations of treaty, including administrative and executive agreements and treaties in simplified form, they wished to draw attention to the fact that, whereas other treaties were normally ratified to express the consent of States, signature alone sufficed to commit the State in the case of administrative and executive agreements. The constitutions of most Latin American countries provided that treaties entered into force once they were ratified by the executive after parliamentary approval; in practice, however, unduly strict interpretation of that rule often entailed delay in concluding international agreements, and a solution had been found, without entailing consti-

[1] See 15th meeting, para. 42.

[2] For resumption of discussion, see 18th meeting, para. 6.

[3] For a list of the amendments to article 10, see 16th meeting, footnote 1.

tutional changes, whereby the substance of a treaty was taken into account in deciding whether signature might suffice to bring a purely administrative or executive agreement into force.

40. Paragraph (3) of the commentary to article 2 pointed out that the treaty in simplified form was very common and that its use was steadily increasing, and in its 1962 draft, the International Law Commission had indicated that such treaties might constitute exceptions to the principle of ratification,[4] although it had subsequently decided to eliminate any specific reference to such agreements owing to the difficulty of defining them. The nine-State amendment was designed to remove that difficulty, by including a clear and objective definition of treaties for which ratification would not be required. The sponsors were aware that it was undesirable to refer to internal law in the articles, but had found it necessary to make such a reference, since internal law was the only possible criterion in the case at issue; moreover, the International Law Commission had itself referred to internal law in article 43.

41. Mr. CUENCA (Spain) said that there were reasons not only of form but also of substance for his delegation's amendment (A/CONF.39/C.1/L.108) especially in the case of paragraph 2(*b*). The Commission's paragraph 1(*b*) was unduly rigid, since the words " it is otherwise established " implied formal agreement. In its 1965 text, the Commission had used the more flexible expression " it appears from the circumstances of the conclusion of the treaty ";[5] the Spanish delegation therefore proposed the words " it is clear from the circumstances that the negotiating States were agreed... ". His delegation proposed that the words " in question " should be deleted from paragraph 1(*c*), because the term was ambiguous in Spanish; that point could be referred to the Drafting Committee. His criticism of the Commission's paragraph 1(*b*) also applied to paragraph 2(*a*), and the Spanish delegation had proposed a similar amendment to that paragraph.

42. With regard to paragraph 2(*b*), on signature *ad referendum*, the United States Government in its comments on the draft articles had proposed the addition of the phrase " unless the State concerned specifies a later date when it confirms its signature ",[6] in order to avoid difficulties for negotiating States which had to fulfil certain requirements of internal law before becoming definitely bound by a treaty. Spain was such a country, and considered that signature *ad referendum* provided a satisfactory solution; but on confirming its signature *ad referendum*, a State should be free to declare whether it wished to become a party to the treaty from the time of signature *ad referendum*, or whether from the time of confirmation of that signature. The Special Rapporteur had included that possibility in his 1965 draft, and the Spanish delegation had proposed the reintroduction of the phrase because it was not satisfied with the Commission's reasons for excluding the provision.

43. Mr. CARMONA (Venezuela) said that, although he had withdrawn his delegation's amendment (A/CONF. 39/C.1/L.70) in favour of the nine-State amendment (A/CONF.39/C.1/L.107), he would like to explain the reasons for his original proposal. The addition of paragraph 1(*b*) introduced the subjective element of establishing the agreement of the negotiating States, which was very hard to evaluate, and the same applied to paragraph 1(*c*), for the intention of the contracting States was subject to varying interpretations. Since the controversies that might arise could even lead to disputes before international legal instances, the Venezuelan delegation considered it necessary to delete both sub-paragraphs.

44. Mr. LADOR (Israel) said that he had no objection to the Italian amendment (A/CONF.39/C.1/L.81), which sought to provide a further safeguard, but feared that the words " formally manifested " might give rise to difficulties of interpretation.

45. Just as he was reluctant to become involved in the controversial question concerning residuary rules about signature or ratification, he did not wish to enter into considerations relating to whether or not a treaty was an administrative or an executive agreement under the internal law of a particular State. He therefore could not subscribe to the nine-State amendment (A/CONF. 39/C.1/L.107).

46. The Spanish amendment (A/CONF.39/C.1/L.108) seemed to be primarily of a drafting character. It diverged somewhat from the Commission's draft on the question of the moment when a treaty signed *ad referendum* would enter into force by admitting the possibility of that happening as from the date of notification of the signature. Perhaps the point could be dealt with by the Drafting Committee.

47. Mr. ZEMANEK (Austria) said he doubted whether the phrase " or was expressed during the negotiation " served any purpose. It suggested that a representative was entitled to claim that his full powers authorized him to express his State's consent to be bound. He therefore proposed that the phrase be deleted and would ask for a separate vote on that proposal.

48. He could support the Venezuelan amendment, but not the nine-State amendment, because although administrative and executive agreements were all part of modern State practice, it was undesirable to introduce questions of internal law into the draft. As the initialling of a text was usually only a provisional stage, he could also support the Belgian amendment.

49. Mr. KRAMER (Netherlands) said that paragraph 1(*c*) seemed to suggest that signature implied consent to be bound in spite of evidence indicating that ratification should follow. Cases of that kind had occurred with some Council of Europe agreements, which had been considered by the Secretariat as having been ratified on the date of signature.

50. Sub-paragraph 1(*c*) suggested that a statement during the negotiation could be the equivalent of an expression of consent to be bound, and if the treaty did not contain a provision to that effect, that would be regarded as evidence. The statement would need to be made only if full powers did not authorize the repre-

[4] *Yearbook of the International Law Commission, 1962*, vol. II, p. 163, paragraph (11) of commentary to article 1.

[5] *Yearbook of the International Law Commission, 1965*, vol. II, p. 161, article 11, paragraph 1(*b*).

[6] *Yearbook of the International Law Commission, 1966*, vol. II, p. 348.

sentative to sign the treaty without a reservation as to ratification and would contradict the full powers. A Government would so rarely withdraw in that way the order given in the full powers that there seemed to be no point in providing for it under the general law of treaties.

51. The Italian amendment (A/CONF.39/C.1/L.81) was an improvement, and made the subsequent confirmation in article 7 more or less superfluous. Perhaps the Drafting Committee could consider excluding the possibility of expressing during the negotiations something contradictory to the full powers.

52. He presumed that no Government would accept full powers or an instrument of ratification unless fully signed. Likewise, a treaty should always be fully signed unless it was completely and formally clear that that was not intended. He therefore supported the Belgian amendment (A/CONF.39/C.1/L.100).

53. Mr. FINCHAM (South Africa) said that paragraph 1(*b*) might cause difficulties if signature were to have a binding effect. According to paragraph (3) of the commentary, that was simply a question of demonstrating the intention from the evidence, but it was often anything but simple to establish the subjective elements of intention. In the interests of greater clarity, that paragraph might be redrafted to read " The consent of a State to be bound by a treaty is expressed by the signature of its representative when the negotiating States expressly so agree, whether in the treaty or otherwise".

54. If it were decided to maintain three sub-paragraphs in paragraph 1 of the article, sub-paragraph 1(*b*) might be reworded to read " the negotiating States expressly so agree " and the words " was expressly stated during the negotiations " might be substituted for the words " was expressed during the negotiation " in sub-paragraph 1(*c*). Those changes might meet the difficulty mentioned by the Italian representative; similar modifications would have to be introduced in articles 11 and 12.

55. He could not support the nine-State amendment, since he was convinced that the draft should not contain references to the internal law of States; that was something which was often difficult to determine.

56. Though he was in sympathy with the Belgian amendment (A/CONF.39/C.1/L.100), he considered that it did not go far enough.

57. Mr. BLIX (Sweden) said he could not support the Italian amendment (A/CONF.39/C.1/L.81), which would only permit a signature expressing the State's consent to be bound if that intention had been formally manifested during the negotiations.

58. If the proposal by Poland and the United States (A/CONF.39/C.1/L.88 and Add.1) for a new article 9 *bis* were adopted, the unusual case dealt with in paragraph 1(*a*) would have been covered.

59. He could not support the nine-State amendment (A/CONF.39/C.1/L.107), because States should not be required to study the internal law of other States in order to determine whether a treaty was an administrative or executive agreement; such a task was difficult enough for national lawyers and would be much more so for foreigners.

60. The Spanish amendment (A/CONF.39/C.1/L.108) could be referred to the Drafting Committee.

61. The CHAIRMAN said he would first put to the vote the nine-State amendment (A/CONF.39/C.1/L.107).

The nine-State amendment was rejected by 60 votes to 10, with 16 abstentions.

62. The CHAIRMAN put to the vote the Austrian oral amendment to delete the words " or was expressed during the negotiation," in paragraph 1(*c*).

The Austrian amendment was rejected by 37 votes to 10, with 30 abstentions.

63. The CHAIRMAN said he assumed that the remaining amendments could be referred to the Drafting Committee.

It was so agreed.[7]

Proposed new article 10 bis (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty)

64. The CHAIRMAN invited the Committee to consider the new article 10 *bis* (A/CONF.39/C.1/L.89) proposed by Poland, which read:

" *Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty*

" The consent of States to be bound by a treaty embodied in two or more related instruments is expressed by the exchange of such instruments, unless the States in question otherwise agreed."

65. Mr. NAHLIK (Poland) said that his delegation's proposal for a new article 10 *bis* was a logical complement to its proposal for a new article 9 *bis* (A/CONF.39/C.1/L.88). Articles 10, 11 and 12 in the Commission's draft did not cover all the methods whereby a State could express its consent to be bound, and notably the most frequent of them, namely, an exchange of notes, not necessarily signed, where that exchange alone expressed the consent of the parties. That process was quite distinct from the exchange of ratifications or other documents referred to in article 13, which was only the final stage in a two-stage procedure.

66. Mr. JIMENEZ DE ARECHAGA (Uruguay) said he supported the Polish proposal, which constituted a rule of progressive development.

The meeting rose at 6.5 p.m.

[7] For resumption of the discussion on article 9, see 59th meeting.

EIGHTEENTH MEETING

Tuesday, 9 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Proposed new article 10 bis (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty) *(continued)*[1]

1. Mr. BEVANS (United States of America) said he supported the Polish proposal (A/CONF.39/C.1/L.89)

[1] For text, see 17th meeting, para. 64.

for a new article 10 *bis* dealing with treaties embodied in two or more related instruments. Many agreements were, in fact, concluded by an exchange of notes, and some by *notes verbales* without signature. The draft convention did not cover that case and the gap should be filled.

2. Although the word "instruments" in the Polish proposal seemed too formal, particularly for *notes verbales*, it was in line with the terminology defined in article 2 of the draft. The text proposed by the Polish delegation might call for a few drafting changes, but its substance should be approved.

3. Mr. BINDSCHEDLER (Switzerland) objected that the Polish amendment would not achieve the desired result, for legal reasons. It seemed to be based on a confusion between a State's consent, which was a unilateral act whereby it agreed to be bound by a treaty, and the entry into force of a treaty. Consent was given by signature or initialling; it could not be expressed by a material act such as an exchange of instruments. It was the entry into force of the treaty that was determined by the exchange of instruments, though the date of entry into force might also be that of the later instrument, if they were not dated identically, or might be laid down in the agreement itself. The Polish amendment would be more appropriate in the context of article 21 of the draft. The Swiss delegation could not support it in its present form.

4. Mr. CARMONA (Venezuela) thought the amendment would be acceptable if a clear distinction was made between secondary or procedural questions and matters of substance; for it would be dangerous to allow the proposed procedure for substantive questions. The Drafting Committee could be asked to make that distinction in the text.

5. The CHAIRMAN put to the vote the Polish proposal for the insertion of a new article 10 *bis*, on the understanding that the Drafting Committee would make the necessary drafting changes.

The Polish proposal (A/CONF.39/C.1/L.89) was adopted by 42 votes to 10, with 27 abstentions.

Question of a residuary rule in favour of signature or of ratification (resumed from the previous meeting)

6. The CHAIRMAN invited the Committee to consider the amendments in documents A/CONF.39/C.1/L.38 and Add.1 and 2, L.87 and L.105, which called for the insertion of a residuary rule requiring signature or ratification. The delegations concerned had met in order to work out a compromise formula, and he asked those delegations to report on the result of their consultations.

7. Mr. SMEJKAL (Czechoslovakia) said that despite the extremely constructive attitude of all concerned, it had been impossible, as might have been foreseen, to reconcile the positions taken by those in favour of signature and those in favour of ratification. But the talks had enabled delegations to discuss in detail certain aspects of the various amendments and had, in his opinion, confirmed that, owing to the wide divergence of views, only a solution involving no presumption could secure sufficiently wide agreement.

8. Consequently, the Czechoslovak delegation, in agreement with the co-sponsors, withdrew its amendment (A/CONF.39/C.1/L.38 and Add.1 and 2) and accepted the solution adopted in article 10 of the International Law Commission's draft.

9. The CHAIRMAN said that the sponsors of the Latin American joint amendment (A/CONF.39/C.1/L.105) had asked for a vote on it.

10. Mr. ALVAREZ (Uruguay) proposed that the Committee should first vote on the principle of including in the draft a residuary rule requiring ratification, instead of voting separately on the Latin American amendment and the Swiss amendment (A/CONF.39/C.1/L.87). If the principle was approved, it could be formulated by the Drafting Committee.

11. In reply to a question by Mr. JAGOTA (India), the CHAIRMAN explained that if the principle was not adopted, the Swiss and Latin American amendments would be regarded as rejected.

12. Mr. KRISPIS (Greece) and Mr. BINDSCHEDLER (Switzerland) supported the voting procedure proposed by the Uruguayan representative.

13. Mr. VIRALLY (France), explaining the vote to be cast by the French delegation, said he still thought that a rule establishing the principle of ratification would settle any difficulties that might arise in practice. But after the attempts at compromise and the withdrawal of their amendments by some delegations, it seemed clear that the adoption of such a rule would give rise to strong objections. The French delegation therefore considered that it would be better to adhere to the solution adopted by the International Law Commission.

14. The CHAIRMAN invited the Committee to vote on the principle of inserting a residuary rule in favour of ratification.

At the request of the Uruguayan representative, the vote was taken by roll-call.

The representative of the Republic of Korea, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Republic of Korea, South Africa, Spain, Switzerland, Syria, Turkey, United Arab Republic, Uruguay, Venezuela, Zambia, Bolivia, Chile, Colombia, Dominican Republic, Ethiopia, Gabon, Greece, Guatemala, Guinea, Iran, Iraq, Kuwait, Liechtenstein, Mexico, Peru.

Against: Republic of Viet-Nam, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sweden, Thailand, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Australia, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Central African Republic, Ceylon, Congo (Democratic Republic of), Cyprus, Czechoslovakia, Dahomey, Denmark, Federal Republic of Germany, Finland, France, Ghana, Holy See, Hungary, Ireland, Italy, Ivory Coast, Jamaica, Japan, Kenya, Lebanon, Liberia, Madagascar, Mali, Monaco, Mongolia, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Portugal.

Abstaining: United Republic of Tanzania, Yugoslavia, Afghanistan, Algeria, Argentina, Brazil, China, Congo (Brazzaville), Cuba, Ecuador, India, Indonesia, Israel, Malaysia, Morocco, Philippines.

The principle of inserting a residuary rule in favour of ratification was rejected by 53 votes to 25, with 16 abstentions.

Article 11 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) *(resumed from the 16th meeting)*

15. The CHAIRMAN invited the Committee to consider article 11.[2]

16. Mr. CASTRÉN (Finland) explained that his amendment (A/CONF.39/C.1/L.60) made no substantive change in article 11. It merely changed the order of the sub-paragraphs and improved the drafting. The amendment could be referred to the Drafting Committee; if it was accepted, the text of article 10 should also be revised.

17. Mr. CUENCA (Spain) said that his delegation's amendment (A/CONF.39/C.1/L.109) dealt mainly with a point of drafting.

18. Paragraph 2 of the present text of article 11 stated that " The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification". He could not see the advantage of dividing the article into two paragraphs, one dealing with expression of consent by ratification and the other with expression of consent by acceptance or approval; nor could he understand why conditions similar to those which applied to ratification were mentioned in connexion with acceptance or approval.

19. There was no denying that ratification was the traditional procedure by which a State expressed its consent to be bound by a treaty; but in recent years acceptance and approval had been given the sanction of practice as new procedures enabling States to become parties to a treaty, so that they performed the same function as ratification.

20. The expression " conditions similar to " might give a false impression of the real value of the two new procedures. If the three procedures performed the same function, they should be placed on an equal footing, as proposed in the Spanish amendment.

21. The Spanish delegation considered that the terms of article 11, paragraph 1(*b*) were too rigid because they required that the existence of an agreement at the time of the negotiations should be established, whereas that agreement might not have been established by a formal act. The text of article 12 of the International Law Commission's 1965 draft[3] was more appropriate. The reference to agreement in paragraph 1(*b*) might perhaps call for some modification of article 6, because in that article the powers of the negotiators, in the absence of special full powers, related only to the adoption of the text. The express agreement referred to in articles 10 and 11 would thus go beyond the scope of the full powers provided for in article 6.

22. Mr. COLE (Sierra Leone) said he approved of article 11 in principle, but he did not understand why the International Law Commission had made a distinction between ratification, on the one hand, and acceptance or approval, on the other. The Drafting Committee might consider whether it would not be preferable to group the three notions together in a single paragraph.

23. Mr. ALCIVAR-CASTILLO (Ecuador) pointed out that the Ecuadorian delegation, when introducing its amendment to the definition of a treaty (A/CONF.39/C.1/L.25), had stressed the need to refer clearly in that definition to the basic elements for the validity of a treaty; but except for capacity, those elements were not stated clearly enough in the draft.

24. An examination of articles 10, 11, 12 and 13 confirmed that view. Those articles referred to the formal elements required for the validity of a treaty: signature, ratification, acceptance, approval, accession and exchange or deposit of instruments. The word " consent " also appeared in those articles and the members of the International Law Commission had certainly meant to use it in its true sense; but it would be preferable to specify the meaning in order to avoid any ambiguity for the sake of future interpretation of the legal rules being drafted.

25. Consent with the meaning of " consensus ", that was to say the concurrence of wills with a view to performing a contractual act, was a basic element in the essential validity of a treaty, whereas articles 10, 11, 12 and 13 related to formal validity. The grounds for invalidation of a treaty differed in the two cases and could not be merged.

26. Consequently, the Ecuadorian delegation wished to ask the Drafting Committee to clarify the interpretation of the articles he had mentioned. It also requested that its statement should be mentioned in the report of the Committee of the Whole.

27. The CHAIRMAN observed that the amendments submitted raised points of drafting and proposed that they should be referred to the Drafting Committee.

It was so decided.[4]

Article 12 (Consent to be bound by a treaty expressed by accession)[5]

28. Mr. MYSLIL (Czechoslovakia) said that the amendment submitted by the Czechoslovak delegation raised a question of principle, which also arose in connexion with other amendments, and especially with regard to article 5 *bis* (A/CONF.39/C.1/L.74).[6] As the Committee had decided to defer consideration of that general question, the Czechoslovak delegation proposed that the Committee should not discuss its amendment until it had taken a decision on the principle involved.

It was so decided.

[2] For a list of the amendments to article 11, see 16th meeting, footnote 2. The joint amendment by a group of Latin American States (A/CONF.39/C.1/L.105) had been rejected as a result of the vote recorded in the preceding paragraph. The Venezuelan amendment (A/CONF.39/C.1/L.71) had been withdrawn.

[3] *Yearbook of the International Law Commission, 1965*, vol. II, p. 161.

[4] For resumption of the discussion on article 11, see 61st meeting.

[5] An amendment to article 12 had been submitted by Czechoslovakia (A/CONF.39/C.1/L.104).

[6] See 13th meeting, paras. 1 and 2.

29. The CHAIRMAN suggested that the Committee should approve the existing text of article 12 and refer it to the Drafting Committee.

It was so decided.

30. Replying to a question by Mr. KOVALEV (Union of Soviet Socialist Republics), the CHAIRMAN explained that article 12 in its present form had been approved subject to subsequent reconsideration in the light of the Czechoslovak amendment.

31. Mr. ALVAREZ (Uruguay) asked at what stage the Committee would be called upon to vote on the question raised by the Czechoslovak delegation.

32. The CHAIRMAN said that negotiations were in progress, and the question would be referred to the Committee as soon as they had been concluded.[7]

Proposed new article 9 bis (Consent to be bound by a treaty) *(resumed from the 15th meeting)*

Proposed new article 12 bis (Other methods of expressing consent to be bound by a treaty)

33. The CHAIRMAN pointed out that the proposed new articles 9 *bis*[8] and 12 *bis* dealt with similar matters. Article 12 *bis* had been proposed by Belgium (A/CONF. 39/C.1/L.111) and read as follows:

"*Other methods of expressing consent to be bound by a treaty*

"In addition to the cases dealt with in articles 10, 11 and 12, the consent of a State to be bound by a treaty may be expressed by any other method agreed upon between the contracting States."

34. Mr. DE TROYER (Belgium), introducing the Belgian delegation's amendment, said that articles 10, 11 and 12 referred to the traditional methods by which States expressed their consent. In contemporary practice, however, other methods of expressing consent to be bound by a treaty were accepted, and some 30 per cent of the agreements concluded by Belgium in 1964 contained clauses stipulating procedures not covered by those articles. Thus there was a gap there, which ought to be filled. Some progress had already been achieved through the adoption of the Polish amendment (A/CONF. 39/C.1/L.89),[9] which provided for the consent of a State to be expressed by an exchange of letters or notes. But there was a whole series of bilateral and even multilateral agreements which stipulated that consent should be established, not by an instrument of ratification, but merely by notification, which might, for example, take the form of a letter from an ambassador or a statement by the Minister for Foreign Affairs of the country becoming a party to the agreement. As it was impossible to enumerate every possible case, the new article should not be too detailed. The broad wording used in the Belgian amendment could also cover the class of agreements in simplified form with exchanges of letters or notes referred to in the Polish amendment, though those agreements had such special features that it did not seem inappropriate to devote a separate article to them. The Belgian delegation realized that its amendment did not solve the problem of treaties which gave no indication of the form of consent. That defect could be remedied simply by adding at the end of the amendment the words "In the absence of any indication of the intention of the States concerned, consent is expressed by ratification" or "In the absence of any indication of the intention of the States concerned, consent is expressed by signature".

35. The CHAIRMAN said that the question had already been discussed in connexion with the new article 9 *bis*, and he had suggested either inserting a new article or adding a paragraph to article 12. The Committee might wish to approve in principle the proposal contained in the two amendments relating to articles 9 *bis* and 12 *bis*, respectively, and to refer the matter to the Drafting Committee.

It was so decided.[10]

Article 13 (Exchange or deposit of instruments of ratification, acceptance, approval or accession)[11]

36. Mr. MAKAREWICZ (Poland) introduced his delegation's amendment (A/CONF.39/C.1/L.93/Rev.1). Draft article 13 specified the moment when the consent of a State to be bound by a treaty was established. That provision was necessary because the expression of consent to be bound by a treaty and the establishment of a State's consent on the international plane did not necessarily coincide. There were, in fact, two separate acts. It therefore seemed necessary to recast article 13 so as to express a general presumption as to the moment when consent to be bound by a treaty was established on the international plane.

37. In his opinion, draft article 13 did not deal with the exchange or deposit of the instruments it referred to, but with the time when consent was established. Hence the title seemed to be at variance with the content of the article. The article also gave the impression that instruments of ratification should be subject to notification in accordance with sub-paragraph (*c*). However, that provision reflected the practice that it was the fact of ratification, acceptance, etc. which had to be notified, not the instruments as such. The Polish delegation hoped that its suggestions, which related mainly to points of drafting, would help to improve the text of the article.

38. Mr. McKINNON (Canada) explained why his delegation had submitted an amendment to article 13 (A/CONF.39/C.1/L.110). It often happened that, for administrative reasons, a State stipulated in an instrument of ratification or accession that such ratification or accession would take effect at a date other than that on which the instrument was deposited. The insertion of the words "or instrument" proposed in the Canadian amendment allowed for the practice followed by certain

[7] At the 80th meeting the Committee decided to defer consideration of all amendments relating to "general multilateral treaties" until the second session of the Conference. Further consideration of article 12 was therefore postponed.

[8] For the text of the new article 9 *bis* (A/CONF.39/C.1/L.88 and Add.1) proposed by Poland and the United States of America, see 15th meeting, para. 42.

[9] i.e. article 10 *bis*.

[10] For resumption of discussion, see 59th meeting, under article 9 *bis*.

[11] The following amendments had been submitted: Poland, A/CONF.39/C.1/L.93/Rev.1; Canada, A/CONF.39/C.1/L.110.

States in that respect. The amendment could be referred to the Drafting Committee.

39. The CHAIRMAN observed that the two amendments to article 13 related to drafting and proposed that they be examined by the Drafting Committee.

It was so decided.

Article 14 (Consent relating to a part of a treaty and choice of differing provisions)

Article 14 was approved and referred to the Drafting Committee.[12]

The meeting rose at 12 noon.

[12] For the Drafting Committee's report, see 61st meeting.

NINETEENTH MEETING

Tuesday, 9 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force)

1. The CHAIRMAN invited the Committee to consider article 15 of the International Law Commission's draft.[1]

2. Mr. GUSTAFSSON (Finland) said that the purpose of the amendment in document A/CONF.39/C.1/L.61 and Add.1-4 was to confine the obligation of good faith to cases where the rule *pacta sunt servanda* might have wider application. The difficulty created by sub-paragraph (*a*) was that it called for the use of subjective criteria to determine what acts would tend to frustrate the object of a treaty. The provision was too far-reaching and ought to be dropped. Until the content of a treaty was known, it would be too early to allege that an action to frustrate it was possible.

3. If, however, sub-paragraph (*a*) were retained, it should be laid down that a State which had agreed to enter into negotiations could be released from its obligations if it withdrew from the negotiations. It would be contrary to the interests of negotiating States if the obligation laid down in article 15 were binding on a State when the other party was unwilling to continue.

4. Mr. CARMONA (Venezuela) said that sub-paragraph (*a*) laid down a new principle of international law. It was impossible to anticipate what the results of negotiations would be, and the freedom of States to reach agreement must not be fettered. Acceptance of sub-paragraph (*a*) might inhibit negotiations and act as a deterrent.

5. Mr. BINDSCHEDLER (Switzerland) said that sub-paragraph (*b*) and (*c*) of the International Law Commission's text were acceptable and conformed to general rules of international law, but the rule in sub-paragraph (*a*) was new and seemed to go beyond the scope of codification. It would undoubtedly restrict the freedom of States and might render them less inclined to enter into negotiations. The rule ought to be rendered more flexible and that was the purpose of the Swiss amendment (A/CONF.39/C.1/L.112) which added the condition " and the principle of good faith so requires." He hoped that that modification might render it more acceptable to the majority.

6. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that article 15 was well balanced and his delegation had no desire to alter it in a radical way. The purpose of its amendment (A/CONF.39/C.1/L.114) was to facilitate the practical application of the article and to cover the situation when a Government decided not to continue negotiations. From that moment it would be released from its obligations.

7. Mr. ARIFF (Malaysia) said his delegation fully appreciated that while negotiating States must be restrained from frustrating the object of a treaty prior to its entry into force, it felt that there must be some limit to the imposition of such restraint. To impose on a State an obligation to refrain from acts tending to frustrate the object of a treaty, while the treaty was still in the making and while negotiation was still in progress, was asking too much. The terms of sub-paragraph (*a*) were too rigorous and might tie the hands of parties to negotiations. He was therefore in favour of dropping that sub-paragraph and clarifying the meaning of the article in a recast sub-paragraph (*a*), as was done in his delegation's amendment (A/CONF.39/C.1/L.122).

8. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said it was necessary to stipulate that States were under an obligation not to frustrate, distort or restrict the object of a treaty prior to its entry into force. That was the sense of his delegation's amendment (A/CONF.39/C.1/L.124).

9. Sir Francis VALLAT (United Kingdom) said his delegation's amendment (A/CONF.39/C.1/L.135) proposed the deletion of the whole article because, though it agreed with the underlying principle that States in their treaty relations and in negotiations should act in good faith, the principle was difficult to formulate and there was little State practice to offer guidance. He fully agreed with the criticism brought against sub-paragraph (*a*), since it would be difficult to determine what acts tended to frustrate the object of a treaty and the provision would be virtually impossible to apply in practice. To require that a State which had entered into negotiations or signed a treaty should not take any step contrary to the text of the treaty would severely curtail the sovereign rights of that State. There seemed, moreover, to be some inconsistency between sub-paragraphs (*a*) and (*b*) inasmuch as, once the negotiations had been

[1] The following amendments had been submitted: Belgium, Federal Republic of Germany, Finland, Guinea and Japan, A/CONF.39/C.1/L.61 and Add.1-4; Greece and Venezuela, A/CONF.39/C.1/L.72 and Add.1; Switzerland, A/CONF.39/C.1/L.112; Byelorussian Soviet Socialist Republic, A/CONF.39/C.1/L.114; Malaysia, A/CONF.39/C.1/L.122; Republic of Viet-Nam, A/CONF.39/C.1/L.124; Australia, A/CONF.39/C.1/L.129; United Republic of Tanzania, A/CONF.39/C.1/L.130; Argentina, Ecuador and Uruguay, A/CONF.39/C.1/L.131 and Add.1; United States of America, A/CONF.39/C.1/L.134; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.135; Congo (Brazzaville), A/CONF.39/C.1/L.145.

concluded and the treaty had not yet been signed, States were free to act as they chose.

10. Mr. HARRY (Australia) said he shared the doubts about article 15 expressed by the United Kingdom representative. Of course States should act in good faith at all stages of the treaty-making process, but it would not be clear to what classes of acts article 15 was meant to apply until the character and content of the treaty were known and its text had been authenticated. Because of the difficulty of interpreting the word " tending ", his delegation had proposed (A/CONF.39/C.1/L.129) that the phrase " which would frustrate " be substituted for the phrase " tending to frustrate ".

11. Mr. BISHOTA (United Republic of Tanzania) said that under the terms of draft article 15(*c*) a State which had expressed its consent to be bound by a treaty was exempt from the obligation laid down in article 15 if the entry into force of the treaty was unduly delayed. His delegation's amendment (A/CONF.39/C.1/L.130) would give at least the same exemption. It had to be borne in mind that many treaties took a long time to come into force and sometimes never did.

12. Mr. DE LA GUARDIA (Argentina) said that the purpose of the joint amendment submitted by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1) was to make the text of sub-paragraph (*c*) more precise; it also took account of the provision contained in article 17, paragraph 5.

13. Mr. KEARNEY (United States of America) said that his delegation's amendment (A/CONF.39/C.1/L.134) was more or less the same as that of the Australian delegation. The element of intent was not sufficiently brought out in the words " tending to." In that respect, the 1965 draft approved by the Commission, which contained the words " calculated to frustrate," had been superior.

14. He was in favour of the deletion of sub-paragraph (*a*).

15. Mr. CRISPIS (Greece) said that the purpose of article 15 was to establish an obligation, even if the treaty did not come into existence. Such an obligation, being a prior effect of the treaty, was rather a strange concept, especially in the case of sub-paragraph (*a*), and the consequences of derogation from article 15, i.e. in principle, international responsibility, seemed to be too severe.

16. While sub-paragraphs (*b*) and (*c*) could be regarded, though with some hesitation, as progressive development of international law, the rule in sub-paragraph (*a*) might be termed a sweeping development of international law. Sub-paragraph (*a*) contained a far-reaching rule which it would be difficult to incorporate into modern international law, and might create serious problems, such as, for example, how to determine when negotiations in fact started and ended, or whether a "dialogue of the deaf" or "talks about talks"—in other words preliminary discussions as to whether and how to negotiate—were negotiations under article 15. It could make States wary of entering into negotiations at all. He was therefore in favour of deleting sub-paragraph (*a*), as was proposed in document A/CONF.39/C.1/L.72. He viewed with sympathy the Swiss amendment (A/CONF.39/C.1/L.112) and the Australian and United States amendments (A/CONF.39/C.1/L.129 and L.134), which were similar in character.

17. Mr. JAGOTA (India) said he was in favour of keeping sub-paragraphs (*b*) and (*c*) in the form proposed by the International Law Commission; they imposed obligations on States to act in good faith even when a treaty was not in force, because the treaty had acquired a provisional status by virtue of negotiations having been concluded, and the States concerned had taken steps either to authenticate the text of the treaty or to express their consent to be bound by its provisions. The principle of interim good faith in those matters was an accepted one, both in doctrine and in practice.

18. The rule contained in sub-paragraph (*a*) was, however, a new one and did not derive from doctrine, case law or practice and the Committee needed to exercise great caution. It would mean that a State had to assume an obligation not to frustrate the object of a treaty during the negotiating stage. The wording of the rule was too vague and might result in hindering rather than promoting successful negotiations.

19. If sub-paragraph (*b*) were accepted it would have to be brought into line with articles 9 *bis* and 12 *bis* and redrafted to read " It has signed the treaty but has not yet expressed its consent to be bound by it, until it shall have made its intention clear not to become a party to the treaty ".

20. Mr. FUJISAKI (Japan) said that his delegation was not indifferent to the reasoning and the motives behind article 15. However, his delegation was of the view that the article was controversial and difficult to apply; that was especially true of sub-paragraph (*a*). For those reasons, his delegation was prepared to support the United Kingdom amendment to delete the whole article (A/CONF.39/C.1/L.135).

21. Mr. IRA PLANA (Philippines) said that it was necessary to take into account the fact that, in the circumstances envisaged in sub-paragraph (*c*), a State could properly withdraw from the treaty, which was not yet in force. A State which had expressed its consent to be bound by the treaty could change its mind pending the entry into force of the treaty.

22. Mr. DADZIE (Ghana) said that his delegation could support sub-paragraphs (*b*) and (*c*).

23. With regard to the period before the adoption of the text and the entry into force of the treaty, however, the provisions of sub-paragraph (*a*) ran counter to the sovereign rights of the negotiating States during the period of negotiations. The commentary contained no adequate explanation in support of that sub-paragraph. If the expression " object of a proposed treaty " referred to the *res* or physical subject-matter of the treaty, the purpose of the provision would be clear; the " object " would then be something that was already in existence before the negotiations had begun. But as he still had doubts, he would like to ask the Expert Consultant to clarify the Commission's intention in introducing sub-paragraph (*a*) and, if possible, to cite authorities in support of its formulation; the Expert Consultant might also help to explain the meaning of the term " frustration " in connexion with sub-paragraph (*a*).

24. Subject to the Expert Consultant's explanations, he suggested that the Drafting Committee be asked to consider using, in the introductory phrase, the expression " likely to frustrate " instead of " tending to frustrate."

25. Mr. KEITA (Guinea) said that he supported the underlying purpose of article 15, which was to ensure that fair dealing and good faith prevailed in inter-State relations. He could not support, however, the retention of sub-paragraph (*a*), because it was a rule of international law that, until consent to be bound was duly expressed, a negotiating State retained its complete freedom. Moreover, it was difficult to see what the object of the agreement could be at a time when negotiations were only beginning. It was not customary for mere negotiations to give rise to legal obligations. The novel solution embodied in sub-paragraph (*a*) could lead to abuses even greater than those which it was intended to remove. He failed to see how it was possible to lay down sanctions against the negotiating States and make provision for their responsibility, in respect of an object which they had not yet defined. In the circumstances, it would be almost impossible to apply the provisions of sub-paragraph (*a*), since there would be no means of establishing the fraudulent intention of a State with regard to an object still undefined.

26. On practical grounds, therefore, as well as for reasons of principle, he favoured sub-paragraphs (*b*) and (*c*) but supported the proposal to delete sub-paragraph (*a*).

27. Mr. MARESCA (Italy) said that the provisions of article 15 constituted a commendable effort to introduce an element of ethics and diplomatic fair dealing into inter-State relations. Sub-paragraphs (*b*) and (*c*) stated rules of law. Sub-paragraph (*a*), on the other hand, laid down what might be called a useful rule of social behaviour which went beyond strict questions of law. He accordingly opposed the United Kingdom amendment to delete article 15 and the various proposals to delete sub-paragraph (*a*), but supported the amendments by Switzerland (A/CONF.39/C.1/L.112) and the Byelorussian Soviet Socialist Republic (A/CONF.39/C.1/L.114) to improve the wording of that sub-paragraph so as to make it less rigid.

28. Miss RUSAD (Indonesia) said she supported the proposals to delete sub-paragraph (*a*), which did not take into account the freedom of States to change their intentions regarding a proposed treaty in the course of the negotiations.

29. She had serious misgivings regarding sub-paragraph (*b*). A treaty which was subject to ratification but which was not yet ratified had no legal force; she therefore failed to see how its terms could be enforced against one of the signatories in the manner set forth in that sub-paragraph.

30. As for sub-paragraph (*c*), its wording was vague, especially the concluding words " not unduly delayed." An effort had been made by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1) to clarify the meaning by laying down a specific period of twelve months, though it was difficult to see why a period of twelve months should be chosen rather than any other.

31. She accordingly supported the United Kingdom amendment to delete the whole of article 15, but if that amendment were rejected, she would request that separate votes be taken on the three sub-paragraphs (*a*), (*b*) and (*c*).

32. Mr. RIPHAGEN (Netherlands) said he strongly opposed the proposals to delete sub-paragraph (*a*) and still more the proposal to delete the whole article. It was a matter of some importance that the future convention on the law of treaties should stress the principle of good faith, which was a principle of law, accepted and recognized throughout the world. That principle implied obligations which arose from the very contact of States before any treaty relations were established.

33. He noted that there was no general objection to the provisions of sub-paragraphs (*b*) and (*c*), which were concerned with the later stages of the treaty-making process. However, the principle of good faith was just as valid and necessary at the negotiating stage. If it was accepted that a treaty which was not yet in force could have some effects, there was no reason why those effects should begin only at the time of signature. Where the negotiating States had a common object in mind, the act of one of them which frustrated that object was contrary to the principle of good faith.

34. If, in the course of the negotiations, it became clear to one of the negotiating States that there was no possibility of arriving at an agreement, that State was, in good faith, under an obligation to bring the negotiations to an end if it wished to regain its freedom of action with regard to the object of the proposed treaty.

35. The text of article 15 expressed all those ideas fully. The only point which remained to be clarified was that all the obligations set forth in article 15 were governed by the principle of good faith, both as regards the circumstances under which they came into being and as regards the extent of the obligations. That clarification could be made by inserting in the first line, after the words " A State is obliged " the words " under the principle of good faith." The purpose of the Swiss amendment (A/CONF.39/C.1/L.112) was precisely to introduce a reference to that principle, but it did so only with respect to sub-paragraph (*a*), whereas the principle governed all the provisions of article 15, the wording of which should reflect that fact.

36. With regard to the various amendments that had been proposed, his delegation considered that the Byelorussian amendment (A/CONF.39/C.1/L.114) unduly widened the obligations under article 15(*a*) by not requiring that the States should have agreed to seek regulation by a negotiated treaty. The first part of the Australian amendment (A/CONF.39/C.1/L.129) did not improve the text, since it would remove the reference to intention, which was an essential element with regard to good faith. The United States amendment (A/CONF. 39/C.1/L.134) was open to the same objection.

37. He did not favour the Tanzanian amendment (A/CONF.39/C.1/L.130) to add at the end of sub-paragraph (*a*), the words "unless such negotiations are unduly protracted"; the unamended text was preferable. Negotiations could be ended by a State unilaterally if it felt that they were not leading to an agreement.

38. Lastly, he did not favour the proposal (A/CONF. 39/C.1/L.131) to specify a period of twelve months in sub-paragraph (*c*). It was not possible to formalize the

principle of good faith by specifying a definite time-limit; everything would depend on the circumstances of each case.

39. Mr LUKASHUK (Ukrainian Soviet Socialist Republic) said that, although a number of speakers in the debate regarded the rule proposed by the International Law Commission in sub-paragraph (*a*) as an interesting innovation, the majority did not seem prepared to accept it in the form in which it was drafted. The Commission itself had recognized that there was no general rule on the subject and that the obligation in question did not arise from participation in negotiations or from agreement on the text of the treaty; sub-paragraph (*a*) could therefore be regarded as progressive development of international law.

40. His delegation could support the Byelorussian amendment (A/CONF.39/C.1/L.114), which would improve the text of sub-paragraph (*a*). Incidentally, the Drafting Committee should note that the wording of the title of article 15 differed considerably in the official languages of the Conference; in his opinion, the categorical wording in Russian, which carried the connotation of the extinction of the object of a treaty, was the most satisfactory.

41. Finally, his delegation could not support the United Kingdom proposal (A/CONF.39/C.1/L.135) to delete the article, since sub-paragraphs (*b*) and (*c*) had a perfectly sound basis in positive international law. Moreover, no provision of the article was prejudicial to the sovereign right of a State to withdraw from the treaty at any time before it finally became binding.

42. Mr. NAHLIK (Poland) said it was most important to maintain the substance of article 15, in which the International Law Commission expressed the idea that the principle of good faith should guide States at every stage of the treaty-making process. His delegation therefore could not support the United Kingdom proposal (A/CONF.39/C.1/L.135) to delete the article or any of the proposals to delete sub-paragraph (*a*). On the other hand, it could support the Byelorussian amendment (A/CONF.39/C.1/L.114) because it clearly delimited the scope of sub-paragraph (*a*). Sub-paragraph (*c*) did not clarify the position of States which had expressed their consent to be bound by the treaty in cases where the requisite number of ratifications or accessions had not been reached. But the amendment by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1 and 2) to fix a time-limit of twelve months seemed too rigid; the matter should be pondered further, perhaps in the Drafting Committee.

43. Mr. DE BRESSON (France) said that, although his delegation sympathized with the International Law Commission's wish to stress that the principle of good faith should preside over treaty relations, it had some reservations concerning all the paragraphs of article 15.

44. With regard to sub-paragraph (*a*), the extent to which the object of the treaty was known before negotiations were completed was legally disputable, and the obligations to which the States should subscribe at that stage were therefore questionable. From the practical point of view, too, the provision was inexpedient, for if freedom of action was restricted right from the point of entering into negotiations, States might hesitate to take such a step, thus hampering international treaty relations.

45. Sub-paragraph (*b*) seemed to be contradictory, since the most obvious way for a State to make clear its intention not to become a party to the treaty was for it to frustrate the object of the treaty.

46. Although his delegation had no objection to the principle set out in sub-paragraph (*c*), to introduce the notion of undue delay would make the paragraph very difficult to apply. The amendment by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1), which fixed a specific time limit, illustrated the problem rather than solved it. Consequently, the French delegation tended to agree with the United Kingdom delegation that the best solution would be to delete the article; if that course seemed to be too radical for the majority of the Committee, only sub-paragraph (*c*) should be retained, subject to drafting changes to facilitate its application.

47. Mr. GÖR (Turkey) said that, since cases where a State frustrated the object of a treaty prior to its entry into force occurred as a result of lack of good faith, it was appropriate to include a reference to the principle of good faith somewhere in the convention, perhaps in article 23 (*Pacta sunt servanda*).

48. Sub-paragraph (*a*) of article 15 imposed certain restrictions on the negotiating States. Negotiations were usually entered into with the intention of accommodating mutual interests through the diplomatic process, but the paragraph restricted the freedom essential to that process by establishing a rule which went beyond the codification of the law of treaties. It also implied a retroactive extension of consent to be bound by a treaty, which extended the scope of articles 10, 11 and 12. The Turkish delegation therefore supported the proposals to delete sub-paragraph (*a*).

49. Sub-paragraph (*b*), which contained two distinct time elements, was extremely vague, and would enable a State to delay the final conclusion of a treaty indefinitely, thus frustrating the interests of the other parties, and sub-paragraph (*c*) was inappropriate for similar reasons. Accordingly, if the Committee could not accept the deletion of the whole article, sub-paragraph (*a*) should be deleted and sub-paragraphs (*b*) and (*c*) should be referred to the Drafting Committee for improvement.

50. Mr. ZEMANEK (Austria) said that, although his delegation upheld the ideas underlying sub-paragraphs (*b*) and (*c*), it considered that sub-paragraph (*a*) went far beyond existing rules of international law. In the few international cases where frustration of the object of a treaty had been determined, the obligation not to frustrate the object had been upheld only at the stage between signature and ratification; those were the results reached by the respective tribunals in the cases of *Ignacio Torres* v. *The United States*[2] and *Megalidis* v. *Turkey*,[3] and in the *Case concerning Certain German Interests in Polish*

[2] Moore, *Arbitrations*, iv, pp. 3798-3803.

[3] *Recueil des décisions des tribunaux arbitraux mixtes*, pp. 386-398; 1927-8, No. 272.

Upper Silesia[4] by the Permanent Court of International Justice. It might be argued that imposing the obligation at an earlier stage might be desirable from the point of view of the progressive development of international law, but it should be borne in mind that, after entering into negotiations, a State might be prevented from taking measures which another negotiating State wanted to avoid, merely because the latter refused in bad faith to bring the negotiations to an end. The Austrian delegation therefore supported the proposals to delete sub-paragraph (*a*) and, if they were rejected, would support the Swiss amendment (A/CONF.39/C.1/L.112), which at least introduced a reference to good faith into sub-paragraph (*a*). Lastly, his delegation could support the amendments submitted by Australia (A/CONF.39/C.1/L.129) and the United States (A/CONF.39/C.1/L.134) which introduced some necessary clarifications into the article.

51. Mr. FATTAL (Lebanon) said his delegation considered it undesirable to retain article 15, for five reasons. First, the Expert Consultant had said that the convention should not refer to negotiations, because they fell outside the scope of the law of treaties; and yet negotiations were mentioned in sub-paragraph (*a*). Secondly, sub-paragraph (*a*) established an *a priori* obligation for States entering into negotiations, which might cause States to hesitate to enter into negotiations in the settlement of disputes. Thirdly, article 69 stated that the provisions of the convention were without prejudice to any question that might arise in regard to a treaty from the international responsibility of a State, and yet the problem of State responsibility was raised in article 15. Fourthly, sub-paragraph (*b*) was contradictory, as a number of speakers had already pointed out. Finally, the wording of sub-paragraph (*c*) was so vague as to render it inapplicable in practice.

52. The purpose of article 15 seemed to be to codify the rules set out in sub-paragraphs (*b*) and (*c*), and to extend international law through sub-paragraph (*a*); but such codification could not be carried out without destroying the whole system of the draft. If it was considered necessary to formulate the principle of good faith, that should be done in article 23.

53. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation had become a co-sponsor of the Finnish proposal (A/CONF.39/C.1/L.61 and Add.1-4) to delete sub-paragraph (*a*) which, as drafted by the International Law Commission, had no support in international law or practice and was hardly advisable from the point of view of progressive development of international law. It was to be feared that a general provision on the obligation not to frustrate the object of a treaty during negotiations would diminish the willingness of States to enter into negotiations. At the present stage, the obligation should be left to special agreement between the negotiating States.

54. The difficulties which many delegations experienced with the wording of sub-paragraphs (*b*) and (*c*) seemed to lie in the fact that those paragraphs codified principles of good faith rather than strictly legal obligations, and that their application might therefore give rise to difficulties. His delegation's final position on those sub-paragraphs would depend on the success of attempts to improve the wording.

55. Mr. CHANG CHOON LEE (Republic of Korea) said that his delegation could support the United Kingdom proposal (A/CONF.39/C.1/L.135) to delete article 15, an article which was liable to give rise to unnecessary controversies in international relations. For example, the legal effect of sub-paragraph (*b*) was so uncertain that its application would be extremely difficult.

56. His delegation would appreciate an explanation from the Expert Consultant of the exact legal obligation of States under article 15, particularly in view of the provisions of article 69 concerning State responsibility.

57. Mr. DENIS (Belgium) said that, although the legal obligation entailed under sub-paragraph (*b*) might be based on the retroactive effect of an obligation which had come into force, that could not apply to the obligation created by sub-paragraph (*a*), for it was based solely on negotiations, which might not lead to a result.

58. That basis was different from the former and was less solid. Moreover, it contained some dangerous ambiguities, since, by definition, if negotiations led to no result, the reason was that each of the parties had wanted something different, and it was indeed questionable to what kind of obligation sub-paragraph (*a*) would be applicable. The Belgian delegation could therefore support the proposal to delete sub-paragraph (*a*); if that proposal were rejected, it would support the Swiss amendment (A/CONF.39/C.1/L.112).

59. Mr. MATINE-DAFTARY (Iran) said that the International Law Commission's proposed innovation, which sought to introduce a reference to the principle of good faith in international relations, not only exceeded the scope of the convention, but was neither practical nor realistic. From the practical point of view, if a Government opened negotiations for the conclusion of a treaty, but public opinion was mobilized against the treaty, it was doubtful whether the Government could be held responsible for frustrating the object of the treaty. Similarly, if a Government fell during the negotiations, and the succeeding Government did not wish to conclude the treaty, could the State be held responsible for frustrating the object of the treaty? His delegation could not, therefore, support the retention of sub-paragraph (*a*).

60. Sub-paragraph (*b*) seemed to be unnecessary, since a State which had signed a treaty subject to ratification could at any time express its intention not to become a party, and it seemed superfluous to refer to frustration of the object of the treaty in that connexion.

61. With regard to sub-paragraph (*c*), it should be remembered that a number of multilateral treaties adopted in the General Assembly of the United Nations had been signed by the requisite number of States, but that years had passed before they had been ratified. The best course would be to delete the whole article.

62. Mr. KOUTIKOV (Bulgaria) said that article 15 obviously had a useful place in the convention and that his delegation could not therefore agree to its deletion. It considered, however, that the Byelorussian amendment (A/CONF.39/C.1/L.114) considerably improved the wording of sub-paragraph (*a*), and should

[4] *P.C.I.J.* (1926), Series A, No. 7.

be referred to the Drafting Committee. Although the intentions of the Swiss amendment (A/CONF.39/C.1/L.112) were praiseworthy, it might be preferable to omit an express reference to the principle of good faith, which should be presumed in international relations, subject to proof to the contrary. The Tanzanian amendment (A/CONF.39/C.1/L.130) had the disadvantage of introducing an element of uncertainty concerning the concept of undue delay, whereas the Argentine, Ecuadorian and Uruguayan amendment (A/CONF.39/C.1/L.131 and Add.1) had the shortcoming of undue rigidity. The best course would be to refer all the amendments to sub-paragraphs (*b*) and (*c*) to the Drafting Committee.

63. Mr. YAPOBI (Ivory Coast) said he could not agree with those speakers who had advocated the deletion of sub-paragraph (*a*). Although the principle of good faith in treaty relations had not been formulated before, it was implicit in all treaty-making, for no international agreement had any value without underlying good faith. The International Law Commission was therefore to be commended for proposing a bold new rule in the progressive development of international law.

64. Nor could he agree with the argument that the object of the treaty was not known at the stage of negotiation, for the parties always undertook to negotiate with a specific purpose in mind. Furthermore, he could not understand how it could be argued that a State's sovereignty would be in any way infringed by a statement of the principle of good faith; on the contrary, if that concept prevailed, none of the abuses to which speakers had referred would arise. His delegation considered that the amendments designed to clarify the text should be referred to the Drafting Committee, but that proposals to delete sub-paragraph (*a*) or the article as a whole should be rejected.

65. Mr. USTOR (Hungary) said his delegation was in favour of retaining all the provisions of article 15, which stated the basic requirement of good faith in treaty relations. That was a fundamental principle of positive international law, which was violated by a State acting in bad faith. The International Law Commission's wording of the article merely drew the necessary conclusions from the basic principle. The freedom of the negotiating State had been invoked in connexion with sub-paragraph (*a*), and it had been argued that States were not bound by a treaty before it had entered into force; but while it was true that a State was free to discontinue negotiations, it had no right fraudulently to undermine the success of negotiations. His delegation could support the Byelorussian amendment (A/CONF.39/C.1/L.114) and had sympathy with the amendments submitted by Switzerland (A/CONF.39/C.1/L.112) and the United States (A/CONF.39/C.1/L.134), which might be referred to the Drafting Committee, together with other amendments designed to improve the Commission's text; it could not, however, support any of the amendments which proposed the deletion either of the article or of sub-paragraph (*a*), and did not consider that the Argentine, Ecuadorian and Uruguayan amendment (A/CONF.39/C.1/L.131 and Add.1) provided a solution of the difficult problem of the time element in sub-paragraph (*c*).

The meeting rose at 6.5 p.m.

TWENTIETH MEETING

Wednesday, 10 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force) *(continued)* [1]

1. Mr. ALVAREZ (Uruguay) said that he well understood the intention of the International Law Commission, which had wished to establish in article 15 the principle of good faith in international relations—a principle stated in Article 2 (2) of the United Nations Charter.

2. The task of the Conference on the Law of Treaties was to prepare a draft convention acceptable to the great majority of States, so it must eliminate controversial points as far as possible. The participants were not only jurists, but also political representatives of States, whose task was to formulate acceptable solutions of a general nature. In that connexion, political considerations were no less important than legal solutions.

3. Article 15 of the draft gave rise to numerous objections and created many more problems than it could solve. That had been the opinion of some members of the International Law Commission as early as 1965. From a general standpoint, the article entered a field in which there was no general norm of international law, and it placed multilateral and bilateral treaties on an equal footing. To assimilate them in that way could not be regarded as correct, if only because of the nature and scope of such treaties, which could call for different treatment according to which category they were in.

4. Moreover, the text of the article contained a number of controversial expressions which were susceptible of various subjective interpretations and could lead to many disputes. What, for instance, was the scope of the expression " acts tending to frustrate the object of a proposed treaty "? Would it apply both to legislative acts adopted in accordance with a State's constitution and to acts executing judicial decisions based on positive legal rules? Article 15 might also mean that when the executive power was negotiating, the other powers of the State would be restricted in their action, contrary to constitutional provisions for, in order not to involve the international responsibility of the State, those organs would have to refrain from legislating or passing judgement on questions under negotiation by the executive. Again, the words " until it shall have made its intention clear not to become a party to the treaty " in sub-paragraph (*b*) might lead to misunderstanding, for they did not state whether the intention could be manifested tacitly or by implication. In addition, the expression " provided that such entry into force is not unduly delayed " could be interpreted according to the situation and the interests of the parties; a delay could be regarded as undue not only in view of the

[1] For a list of the amendments submitted, see 19th meeting, footnote 1.

circumstances, but also because of the viewpoint of the parties.

5. Sub-paragraphs (*a*) and (*b*) created for States which had agreed to negotiate and sign a treaty *ad referendum* a marginal legal obligation which indirectly infringed their exclusive competence and brought it into conflict with the international rules and obligations envisaged.

6. In Uruguay, treaties had to be approved by Parliament before entering into force, and that would raise an extremely difficult constitutional problem.

7. The United Kingdom proposal (A/CONF.39/C.1/L.135) was very valuable, and the fact that it called for the deletion of article 15 in no way implied rejection of the principle of good faith.

8. The joint amendment submitted by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1), which aimed to replace a subjective and relative concept by an objective and absolute norm, was merely a suggestion for the Drafting Committee, which could of course alter the specified period of twelve months.

9. Mr. MAIGA (Mali) said he was opposed to the amendments deleting article 15, sub-paragraph (*a*). In his delegation's view, that paragraph stated a new norm which was a decisive factor in the progressive development of contemporary international law.

10. He did not think that article 15 would constitute a dangerous derogation from the principle *pacta sunt servanda* or that it might be interpreted in bad faith because the object of a treaty might not be clearly apparent during the negotiations. On the contrary, he thought the object was known even before the negotiations began.

11. Article 15 did not limit sovereignty; it was merely an application of the principle of good faith. Its originality lay in the fact that good faith was required at the beginning of the negotiations, not after the conclusion of the treaty, as was usually the case. The purpose of the article was to establish as international law a new concept of the economic, social and moral order in conformity with the provisions of the United Nations Charter. He was therefore in favour of retaining article 15, subject to some drafting changes.

12. Mr. YASSEEN (Iraq) said he was in favour of retaining article 15, subject to a few drafting changes.

13. The rule in sub-paragraph (*a*) constituted progressive development of international law and was an application of the principle of good faith. It did not limit the sovereignty of States and did not impose any heavy obligation on them, since they remained free to continue or not to continue the negotiations. It merely stated what the conduct of States should be during the negotiations.

14. Sub-paragraph (*b*) raised the problem of abuses. A State could decline to ratify a treaty but, in so doing, it should not act in such a way as to cause international difficulties or tension between the signatory States of the treaty. In any case, a State would recover its freedom of action in the matter upon expressing its intention not to become a party to the treaty.

15. Sub-paragraph (*c*) stated a rule of positive law; in his view, the proviso which it contained was very useful, but he considered it unnecessary to specify a definite period in that sub-paragraph, as proposed in the amendment submitted by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1).

16. Mr. CUENCA (Spain) stressed the importance of the principle of good faith, without which no society could exist. The International Law Commission's commentary on article 23, which stated the rule *pacta sunt servanda*, devoted much attention to good faith. To ensure good faith during negotiations was to promote the elements of order and co-operation which should govern international relations. International co-operation required that a negotiating State should be protected against acts performed by other States which might frustrate the object of the proposed treaty. The security of a negotiating State also required that the other party should adopt a positive attitude. The principle of good faith reflected a moral necessity, and it must be safeguarded if the aim was to pass from an international law dominated by the will of the strongest to one based on co-operation and friendship among States.

17. Sub-paragraph (*a*) of article 15 had been criticized on the ground that it was hard to state the principle of good faith precisely. The text submitted by the International Law Commission seemed to be satisfactory in that respect, however, subject perhaps to certain changes, in particular those proposed in the Swiss amendment (A/CONF.39/C.1/L.112) and the Byelorussian amendment (A/CONF.39/C.1/L.114).

18. The Conference should not only codify international law, but also contribute to its progressive development. It should therefore assume its responsibilities and take a decision on the problem before the Committee. The need for international co-operation and friendship among peoples should take precedence over the unlimited freedom of the State. Hence there should be no hesitation in affirming the principle of good faith as an element of order and security.

19. Consequently, the Spanish delegation could not support the amendments deleting either article 15 as a whole or sub-paragraph (*a*) of that article.

20. Mr. BIKOUTHA (Congo, Brazzaville) said he agreed in principle with the arguments for deleting sub-paragraph (*a*) put forward by a number of delegations and with the amendments to that effect. The text of that sub-paragraph was a somewhat dangerous innovation in international law. It seemed to mean that the obligation of a State arose at the time when it notified other States of its intention to negotiate. The consequence of literal application of that text would be that many States would hesitate to take the first steps to settle their disputes. It was true that the words " while these negotiations are in progress " seemed to correct that impression, but they only appeared to do so. It would be better to bring out the International Law Commission's real intention, namely, that the obligation stated in sub-paragraph (*a*) took effect while negotiations were in progress, not when it had been agreed to start them. That difference in meaning might be of great importance. His delegation had therefore submitted an amendment (A/CONF.39/C.1/L.145) which might provide an acceptable compromise if the Committee decided to retain sub-paragraph (*a*).

21. Sir Humphrey WALDOCK (Expert Consultant) said he wished to reply to the representative of Ghana, who had asked him to clarify the intention of the International Law Commission with respect to sub-paragraph (*a*), to say what authority or precedent there was, if any, for the principle stated in it and to explain what the Commission had meant by the expression " acts tending to frustrate the object of a proposed treaty ".

22. He traced the course of the Commission's work on article 15, which showed that it had studied the matter very thoroughly and had been fully aware of the difficulties involved. His first report in 1962 had not contained any provision regarding good faith during negotiations. An article dealing with the legal effects of signature, on the other hand, had contained a paragraph placing a signatory State under an obligation of good faith during a certain period.[2] He had drawn at that time on authorities and precedents confined to the case of a signatory State which had not yet ratified. But he had considered that he could, *a fortiori*, include a similar obligation in the articles relating to ratification, accession, acceptance and approval.

23. The International Law Commission had then decided to amalgamate the several good faith provisions in a single article and to extend the obligation of good faith to States taking part in the negotiation of a treaty.

24. Only nine Governments had sent in comments, and he had concluded that he could interpret the reaction or silence of Governments to mean that the paragraph relating to good faith during negotiations should be deleted. But as some of its members had come out strongly in favour of the provision, the International Law Commission had decided to retain it in the form in which it appeared in the text now under discussion.

25. The Commission's report did not bring out very fully the reasons why it had extended the obligation of good faith to the negotiating stage. As he understood it, the Commission had not based itself on any specific authority or precedent, and would not wish to maintain that the principle stated in article 15, sub-paragraph (*a*) was a rule of customary international law. Whether its proposal should be regarded as progressive development or as codification of the law was a matter of opinion. The Commission's choice had probably been dictated mainly by consideration of the precise scope of the obligation of good faith in the conclusion of treaties. It had not wished to deprive States of their freedom of action. During negotiations each of the parties expected a certain minimum of fair dealing on the part of the other. A State remained free to break off negotiations; only acts of bad faith were excluded.

26. He explained to the representative of Ghana that the expression " acts tending to frustrate the object of a proposed treaty ", used in the English text, was based on a well-established notion in English law. It meant that the treaty was rendered meaningless by such acts and lost its object. It had been suggested that the phrase " acts rendering impossible the conclusion of a proposed treaty " should be used, but that expression, which was stronger than the words used by the International Law Commission, seemed to go too far. He gave the example of a State which, during negotiations concerning the limit of territorial waters, undertaken in connexion with the exploitation of mineral resources, exhausted the reserves whose existence had been the original reason for the negotiations. Such conduct would come within the scope of article 15, sub-paragraph (*a*).

27. Replying to a question by the representative of the Republic of Korea on the legal nature of the responsibility arising under sub-paragraph (*a*), he explained that it was hard to conceive of the existence of responsibility when a State which performed the acts referred to in sub-paragraph (*a*) broke off negotiations. But if, on the other hand, that State continued the negotiations and concluded the treaty, there arose a real problem of responsibility, which could not be solved by the treaty itself, since it had effect only with respect to acts subsequent to its entry into force. Furthermore, the acts in question might fall short of real fraud. There was, therefore, a deficiency which sub-paragraph (*a*) might perhaps be able to make good. All the provisions of the convention had not, however, been conceived as necessarily giving rise to responsibility, and article 15 was valuable quite apart from that problem.

28. Lastly, the drafting of the article gave rise to a number of difficulties, especially sub-paragraph (*a*), which it might perhaps be better to make into an express general provision on good faith. The Commission had deleted the express reference to good faith, as it had believed the matter to be self-evident.

29. The CHAIRMAN said he would give the floor to four speakers who had asked to explain their votes before the voting. He reminded the Committee that, under rule 39 of the rules of procedure, the Chairman could " permit representatives to explain their votes, either before or after the voting ". In future, he would prefer explanations of votes to be given after the voting. Once the list of speakers had been closed, he thought it desirable that only speakers on the list should speak before the voting.

30. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said he was speaking in order to inform the Committee that his delegation had decided to withdraw the part of its amendment (A/CONF.39/C.1/L.114) relating to sub-paragraph (*a*) of article 15.

31. Many representatives seemed to wish the sub-paragraph to be deleted. In a spirit of co-operation the Byelorussian delegation would support that solution.

32. On the other hand, it maintained its amendment to the title and to the introductory sentence of article 15; but it thought that that part of the amendment could be referred to the Drafting Committee.

33. Mr. SAMAD (Pakistan), explaining his delegation's vote, said that the statement of the principle of good faith was a sound provision; the article should not be deleted. His delegation would vote for the retention of sub-paragraph (*a*) and for the retention, subject to small drafting changes, of sub-paragraphs (*b*) and (*c*). It was against setting a definite period, as proposed by Argentina, Ecuador and Uruguay (A/CONF.39/C.1/L.131 and Add.1).

34. Mr. JACOVIDES (Cyprus), explaining his delegation's vote, said that the principle of good faith was

[2] *Yearbook of the International Law Commission, 1962*, vol. II, p. 46, article 9, para. 2(*c*).

the foundation of international law, as confirmed by the United Nations Charter itself. The International Law Commission had done well to place the emphasis on good faith, subject, of course, to the terms of Article 103 of the Charter, under which, in the event of a conflict with obligations under any other international agreement, obligations under the Charter would prevail. The delegation of Cyprus shared the doubts expressed as to the legal content of sub-paragraph (*a*), in particular with regard to its application in time and to its scope. Sub-paragraphs (*b*) and (*c*), on the other hand, did not raise similar difficulties. Those considerations would determine the vote of the delegation of Cyprus.

35. Mr. AMADO (Brazil) said he had already spoken against article 15 during the International Law Commission's debates. In his opinion, the Conference could not go so far as to adopt an article which did not contain a rule of international law, but only expressed what several speakers had been unable to call anything but a " principle ". The Conference had not been convened to compile principles, but to codify rules of international law.

36. Of course, he would wish the principles stated in article 15 to be respected, just as he wished that there would be no more war, no more cancer, and that perfection could be achieved on earth.

37. Many of those now urging the retention of article 15 might perhaps regret the consequences later.

38. The Brazilian delegation would accordingly vote for the deletion of article 15 if a vote was taken on that proposal. But it would prefer the article to be referred to the Drafting Committee, which might perhaps be able to simplify its text and thus make it acceptable.

39. Mr. FRANCIS (Jamaica) said that good faith was as important during the negotiating stage as after the adoption of a treaty. But good faith during negotiations was much more a matter of international relations in general than of treaty law proper. Consequently, where the obligations of States were concerned, a very clear distinction should be made between the roles of good faith at the two stages. Sub-paragraph (*a*) was not sufficiently precise on that point, however, and the Jamaican delegation would therefore vote for its deletion. It hoped that the Drafting Committee could work out satisfactory wording for sub-paragraphs (*b*) and (*c*).

40. The CHAIRMAN reminded the Committee that the United Kingdom representative was not pressing for a vote on his amendment to delete article 15 (A/CONF. 39/C.1/L.135); it could therefore be referred to the Drafting Committee.

41. Mr. KHLESTOV (Union of Soviet Socialist Republics) thought that that procedure would create serious difficulties for the Drafting Committee, which, without any guidance from the Committee of the Whole, would not know how to deal with such an amendment.

42. Sir Francis VALLAT (United Kingdom) explained that the purpose of his delegation's amendment was to draw attention to the many practical difficulties which might follow from the present wording of article 15. The intention was not to seek an immediate vote on the question of good faith, a principle which his delegation whole-heartedly supported, as he had already emphasized during the debate; but everything depended on the wording the Drafting Committee arrived at. A vote should not be taken on the article until the Committee of the Whole had the new wording before it.

43. Mr. SEATON (United Republic of Tanzania) thought that the task of the Drafting Committee was to present in an acceptable form the principles approved by the Committee of the Whole. It was not for the Drafting Committee to take a decision on the retention or deletion of an article. He objected to the practice whereby the authors of amendments could ask for them to be referred to the Drafting Committee when they feared rejection. The proposal in question should either be put to the vote or withdrawn by its sponsor.

44. Sir Francis VALLAT (United Kingdom) asked the Chairman to put his delegation's amendment to the vote. Article 15 was unacceptable in its existing form and the United Kingdom delegation would vote for its deletion.

45. The CHAIRMAN put the United Kingdom amendment (A/CONF.39/C.1/L.135) to the vote.

At the request of the United Kingdom representative, the vote was taken by roll-call.

Italy, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Japan, New Zealand, Norway, Philippines, Republic of Korea, Republic of Viet-Nam, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, Australia, Brazil, Canada, China, Indonesia.

Against: Italy, Ivory Coast, Jamaica, Kenya, Kuwait, Liberia, Liechtenstein, Madagascar, Malaysia, Mali, Mauritius, Mexico, Monaco, Mongolia, Morocco, Netherlands, Nigeria, Pakistan, Peru, Poland, Portugal, Romania, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Yugoslavia, Zambia, Algeria, Argentina, Austria, Belgium, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, Ceylon, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Ecuador, Ethiopia, Finland, Gabon, Ghana, Guatemala, Guinea, Holy See, Hungary, India, Iraq, Ireland, Israel.

Abstaining: Afghanistan, Chile, Federal Republic of Germany, France, Greece, Iran.

The United Kingdom amendment was rejected by 74 votes to 14, with 6 abstentions.

46. Mr. BARROS (Chile), explaining his vote, said that the Chilean delegation certainly did not reject the principle of good faith, or the idea expressed in article 15. Nevertheless, the drafting of the article was not satisfactory; that was particularly true of the Spanish version, the scope of which, for example, differed from that of the French text. The Chilean delegation had therefore abstained, since a vote against the amendment might have been interpreted to indicate acceptance of the existing text.

47. The CHAIRMAN called for a vote on the deletion of article 15, sub-paragraph (*a*).[3]

At the request of the Austrian representative, the vote was taken by roll-call.

France, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: France, Ghana, Greece, Guinea, India, Indonesia, Iran, Ireland, Jamaica, Japan, Kenya, Liberia, Malaysia, Mauritius, Monaco, Mongolia, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Sierra Leone, Singapore, Somalia, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Afghanistan, Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Chile, China, Colombia, Czechoslovakia, Federal Republic of Germany, Finland.

Against: Gabon, Guatemala, Holy See, Hungary, Iraq, Italy, Ivory Coast, Kuwait, Liechtenstein, Madagascar, Mali, Mexico, Netherlands, Nigeria, Pakistan, Peru, Poland, San Marino, Saudi Arabia, Senegal, South Africa, Spain, Switzerland, Yugoslavia, Zambia, Algeria, Bolivia, Ceylon, Congo (Democratic Republic of), Cuba, Dahomey, Ecuador, Ethiopia.

Abstaining: Israel, Morocco, Romania, Thailand, Tunisia, United Republic of Tanzania, Argentina, Central African Republic, Congo (Brazzaville), Cyprus, Denmark.

The proposal to delete article 15, sub-paragraph (a), *was adopted by 50 votes to 33, with 11 abstentions.*[4]

48. Mr. ALVAREZ (Uruguay) said that in voting for the deletion of sub-paragraph (*a*), his delegation had not been voting against the principle of good faith; it had only wished to intimate that it could not accept the terms in which that sub-paragraph was drafted.

49. Mr. GON (Central African Republic) said that the principle of good faith should apply both during the negotiating stage and at a later stage in the conclusion of a treaty. But in view of the ambiguous wording of sub-paragraph (*a*) his delegation had preferred to abstain from voting.

50. Mr. KRISPIS (Greece) said that his delegation's vote in favour of deleting sub-paragraph (*a*) should not be interpreted to mean that the Greek delegation was against the principle of good faith.

51. Mr. EL-ERIAN (United Arab Republic), explaining his vote, said that his delegation supported the principle stated in sub-paragraph (*a*), but had been unable to vote for the retention of that sub-paragraph because, as it stood, it raised too many problems.

52. The CHAIRMAN invited the Committee to vote on sub-paragraph (*b*) and (*c*).

53. Mr. GÖR (Turkey) suggested that the simplest procedure would be for the Committee to vote on the retention or deletion of those sub-paragraphs. If they were retained, they could be referred to the Drafting Committee.

54. The CHAIRMAN suggested that the Committee should approve sub-paragraphs (*b*) and (*c*) in principle and refer them to the Drafting Committee with the various amendments.

It was so decided.[5]

55. Mr. DE BRESSON (France) explained why his delegation had felt bound to vote against article 15, sub-paragraph (*a*). That sub-paragraph might have legal consequences which it was difficult to foresee and which might be dangerous for the future of international relations. Many delegations wished to retain and to affirm the principle of good faith in the conduct of States during international negotiations. The French delegation was not opposed to that idea, which could be taken into consideration by the Drafting Committee, as the Expert Consultant had suggested. With regard to sub-paragraphs (*b*) and (*c*), the French delegation had already said that it was not opposed to the principles on which those sub-paragraphs were based, but much work was still needed to improve their wording.

Title of Part II, Section 2

56. The CHAIRMAN proposed that the Committee refer to the Drafting Committee the Hungarian amendment (A/CONF.39/C.1/L.137) deleting the words " to multilateral treaties " in the title of Part II, Section 2.

It was so decided.[6]

The meeting rose at 1 p.m.

[3] The deletion of article 15, sub-paragraph (*a*) had been proposed in the amendments contained in documents A/CONF.39/C.1/L.61 and Add.1-4, L.72 and Add.1, L.122 and L.129.

[4] As a result, the amendments proposing a revision of the wording of sub-paragraph (*a*) (A/CONF.39/C.1/L.112, L.130 and L.145) were not put to the vote.

[5] For resumption of the discussion on article 15, see 61st meeting.

[6] At the 28th meeting, the Chairman of the Drafting Committee announced that his Committee had decided to defer consideration of the titles of the parts, sections and articles.

TWENTY-FIRST MEETING

Wednesday, 10 April 1968, at 3.25 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations)

1. The CHAIRMAN invited the Committee to consider articles 16 and 17 together, and said that he would call first on delegations which had proposed amendments to both articles, then on those which had submitted amendments to article 16 and finally on those which had proposed amendments to article 17.[1]

[1] The following amendments had been submitted:

To article 16: Republic of Viet-Nam, A/CONF.39/C.1/L.125; Colombia and United States of America, A/CONF.39/C.1/L.126 and Add.1; Federal Republic of Germany, A/CONF.39/C.1/L.128; Peru, A/CONF.39/C.1/L.132; Japan, Philippines and Republic of Korea, A/CONF.39/C.1/L.133 and Add.1 and 2; Poland, A/CONF.39/C.1/L.136; Ceylon, A/CONF.39/C.1/L.139; Spain, A/CONF.39/C.1/L.147. Amendments were subsequently submitted by China

2. Mr. KHLESTOV (Union of Soviet Socialist Republics), introducing his delegation's proposal (A/CONF. 39/C.1/L.115) to combine articles 16 and 17, said that the situation with regard to reservations had changed considerably in the past thirty years. In current practice, multilateral conventions were often concluded by over a hundred States with widely differing social and political structures and legal systems, so that, although the object and purpose of the treaty might be common to all States, considerable differences might arise in respect of secondary provisions. The formulation of reservations was a satisfactory method of eliminating those difficulties and enabling large numbers of States to participate in international multilateral treaties, thus promoting widespread international co-operation. Practice had shown that such reservations did not impair the integrity of the treaty. The right to formulate reservations, moreover, derived from the sovereign right of States to defend the peculiarities of their individual legal systems.

3. In practice, reservations were formulated by all categories of States. A number of Asian and African countries entered reservations against colonial clauses appearing in certain agreements; for instance, when acceding to the Genocide Convention in 1963, Algeria had stated that it could not accept article XII of the Convention and that it considered that all the provisions of the instrument should apply to non-self-governing territories,[2] while Indonesia had formulated a similar reservation to the 1961 Single Convention on Narcotic Drugs.[3] The Latin American countries had used reservations to protect their sovereign rights; for example, Colombia had formulated a reservation on signing the Geneva Convention on the Territorial Sea and the Contiguous Zone, stating that, under article 98 of the Colombian Constitution, authorization by the Senate was required for the passage of foreign troops through Colombian territory, and that, by analogy, the same reservation applied in connexion with the passage of foreign warships through Colombian territorial waters.[4] Reservations had been made for the purpose of defending economic interests: thus, Iran had formulated a reservation to article 4 of the Geneva Convention on the Continental Shelf, with respect to the laying or maintenance of cables or pipelines on its continental shelf.[5] Similarly, Guatemala, Chile, the United Arab Republic, and other States had entered reservations with respect to treaties where disputed territories were involved. Reservations had also been formulated in connexion with the compulsory jurisdiction of the International Court of Justice, and a number of countries had used reservations to protect their internal law with regard to the 1948 Convention setting up the Inter-Governmental Maritime Consultative Organization,[6] which required them to amend their internal legislation where necessary. In none of those cases could reservations be regarded as impairing the integrity of the treaties involved.

4. In line with recent developments in the law on reservations, the International Court of Justice had rejected the thesis, upheld by the legal experts of the League of Nations, that the consent of all the contracting States was required to make a reservation valid. The Court's conclusion in respect of the Genocide Convention was that any State was entitled to formulate a reservation,[7] and the International Law Commission, in its text of articles 16 and 17, confirmed that trend.

5. Nevertheless, the Commission's text was rather cumbersome and occasionally contradictory, and the Committee should endeavour to draft provisions which reflected the principles on which modern practice was based. In its proposed single article, the Soviet Union delegation began by stressing the right of all States to formulate reservations and the consequent right of any contracting State to object to a reservation. Sub-paragraph (*a*) of the Commission's article 16 seemed to be unnecessary, since cases where reservations were prohibited by the treaty were extremely rare. Moreover, retention of the sub-paragraph would have the effect of laying down a rule which formed an exception, thus restricting the power of States to make reservations. Sub-paragraph (*b*) also seemed unnecessary as well as restrictive of the sovereign rights of States. Furthermore, it contradicted paragraph 1 of the Commission's article 17. Since article 16, sub-paragraph (*b*), precluded the formulation of a reservation other than those specified in a treaty, whereas article 17, paragraph 1, stated that reservations authorized by the treaty required no subsequent acceptance by the other contracting States, reservations not specified in the treaty might be held to be admissible, but to require acceptance by the other contracting States.

6. Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations. Since the constituent instruments of international organizations were international multilateral treaties within the meaning of articles 1 and 4, his delegation could not agree with the view, expressed in paragraph (20) of the commentary to the articles, that the integrity of the instrument might be impaired unless the reservation was accepted by the organization in question; the reservation would in any case be subject to the test of compatibility with the object and purpose of the treaty.

7. Mr. BRIGGS (United States of America), introducing his delegation's amendments to articles 16 and 17, said that the International Law Commission's articles restated the law on reservations in the light of modern conditions.

(A/CONF.39/C.1/L.161) and Malaysia (A/CONF.39/C.1/L.163), and Japan, Philippines and the Republic of Korea submitted a revised version of their proposal (A/CONF.39/C.1/L.133/Rev.1).

To article 17: Austria, A/CONF.39/C.1/L.3; Czechoslovakia, A/CONF.39/C.1/L.84 and L.85; Syria, A/CONF.39/C.1/L.94; Switzerland, A/CONF.39/C.1/L.97; France and Tunisia, A/CONF. 39/C.1/L.113; United States of America, A/CONF.39/C.1/L.127; Ceylon, A/CONF.39/C.1/L.140; Spain, A/CONF.39/C.1/L.148; Thailand, A/CONF.39/C.1/L.150. Amendments were subsequently submitted by China (A/CONF.39/C.1/L.162) and Australia (A/CONF.39/C.1/L.166).

Amendments to replace articles 16 and 17 by a single article were submitted by the Union of Soviet Socialist Republics (A/CONF. 39/C.1/L.115) and subsequently by France (A/CONF.39/C.1/L.169 and Corr.1).

[2] See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (United Nations publication, Sales No.: E.68.V.3), p. 59.

[3] *Ibid.*, p. 128.

[4] *Ibid.*, p. 320.

[5] *Ibid.*, p. 333.

[6] *Ibid.*, pp. 261-264.

[7] *I.C.J. Reports, 1951*, p. 15.

The United States delegation appreciated the endeavour of the Soviet Union delegation to combine the two articles, and saw considerable merit in some of the USSR suggestions, although its proposed text left out some essential provisions.

8. In its amendment to article 16 (A/CONF.39/C.1/L.126 and Add.1), his delegation proposed the deletion of sub-paragraph (*b*), which set out the unduly rigid rule that, where a treaty authorized specified reservations, no other reservations could be made. It was difficult for negotiators to anticipate all the reservations which a particular State might find necessary if it was to become a party to the treaty. The United States amendment to sub-paragraph (*c*) had been introduced because it was uncertain whether the traditional reference to the object and purpose of the treaty covered the concept of the nature and character of the treaty; that concept had been referred to as a separate criterion in determining the possibilities of making reservations by the International Court of Justice in the Genocide Convention case, referred to in paragraph (4) (*d*) of the commentary.

9. In its amendment to paragraph 2 of article 17 (A/CONF.39/C.1/L.127), the United States had proposed a similar reference as a separate criterion. It would be possible to redraft the paragraph to read " When the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties ", thus omitting any reference to criteria. The Drafting Committee might consider that suggestion. Since, however, the Commission's draft of the paragraph set out two criteria for identifying such treaties, the United States delegation considered that the character of the treaty should be added. In particular, the criterion of a limited number of States seemed to ignore the character of the treaty, for a treaty to which a large number of States were parties might be of such a nature that a reservation would be permissible only if accepted by all the parties.

10. In view of the Committee's decision to exclude international organizations from the scope of the convention and to retain article 4, it might be questioned whether paragraph 3 should also be retained. The United States considered that the clause should be kept, since the provisions of article 4 on constituent instruments of international organizations could not be applied before the establishment of the organization, and paragraph 3 would have the effect of postponing acceptance of reservations until an organization was in a position to consider them. The purpose of the United States amendment to paragraph 3 was to provide that any contracting State might object to a reservation to the constituent instrument of an international organization, even if the reservation had been accepted by the competent organ of that organization. Although some of those reservations might be of such a nature as to require application by all parties in their relations with the reserving State, others might not be of such a character and might be regarded as highly objectionable to other States.

11. The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in sub-paragraph (*c*) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of sub-paragraph (*c*) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.

12. The United States amendment to sub-paragraph 4 (*a*) was merely designed to clarify an ambiguity in the Commission's text; acceptance of a reservation by another contracting State, which, under sub-paragraph 1 (*f*) of article 2 might or might not be a party to a treaty, could not constitute the reserving State a party to the treaty unless the treaty became binding on both States. The point should be referred to the Drafting Committee.

13. Finally, the purpose of the United States amendment to paragraph 5 was to provide some flexibility for the drafters of a treaty. The Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months.

14. The United States delegation would not ask for a vote on any of its amendments except its proposal to extend the incompatibility test laid down in article 16 to the acceptance of or objection to a reservation under paragraph 4 of article 17.

15. Mr. PINTO (Ceylon), introducing his delegation's amendments to article 16 (A/CONF.39/C.1/L.139) and article 17 (A/CONF.39/C.1/L.140), said that the purpose of the former was to replace the International Law Commission's text by the simple rule that a State might formulate a reservation if, and to the extent that, the terms of the treaty concerned so provided. That proposal in itself contained nothing new, but it carried with it a rule of interpretation, namely, that if the treaty did not provide for reservations, it should be presumed that the intention of the parties had been not to admit reservations. That rule of interpretation should not be construed as an attempt to restrict the sovereign right of States to make reservations; it merely sought to ensure that, if States wished to exercise that right, they should do so at the time of negotiation, and make provision for reservations in the treaty. The residuary rules in article 17 provided a system for regulating the procedures and relationships arising out of such reservations.

16. It might be argued that such a rule was inconsistent with the provisions of the International Law Commission's article 16, but the Ceylonese delegation considered that that text did not lay down any rule, but merely stated a factual situation. The article proposed by his delegation, on the other hand, did not run counter to any established rule of international law, and had a number of advantages: it could remove doubts as to whether reservations were permitted when the treaty made no express provision to that effect; it could encourage States to consider carefully at the time of negotiation whether and to what extent reservations should be permitted and how they should be dealt with; taken together with the residuary rules in article 17, it could ease the burden on depositaries

by providing them with clear instructions on the processing of reservations; and it would help to maintain a greater degree of uniformity and order in treaty relationships.

17. The Ceylonese delegation had submitted its amendments because it did not consider article 16 satisfactory and also because of the very nature of the draft convention: since the Conference was engaged in laying down rules which were likely to remain in force for many years to come, it must try to ensure that only positive and progressive rules were embodied in the instrument. It was not always enough to state the law as it stood; the Conference must be prepared to lay down guidelines for the future.

18. Mr. CUENCA (Spain), introducing his delegation's amendments to article 16 (A/CONF.39/C.1/L.147) and article 17 (A/CONF.39/C.1/L.148), said that the flexible procedure embodied in articles 16 to 20 was satisfactory and met the needs of contemporary practice. The purpose of his amendments was to give a more precise expression to the rules embodied in the articles.

19. Paragraph 2 of its amendment to article 16 would replace the " object and purpose " of the treaty by the " nature, object or purpose " of the treaty as the criterion for the compatibility test. That more precise language would be less open to arbitrary interpretation—a matter of great importance, since article 16 governed the operation of all the subsequent articles on reservations. His delegation insisted on that point because it could not accept the contention that there existed an unlimited right to make reservations. Reservations introduced an element of relativity and subjectivity into treaty relations and must therefore be made subject to objective criteria, so as to limit the absolute freedom of States in the interests of international co-operation; and multilateral treaties constituted the technical instruments of that co-operation.

20. In paragraph 1(*b*) of its amendment to article 16, his delegation proposed that no reservations be permitted to a treaty which was the constituent instrument of an international organization, in order to protect that type of treaty at the beginning of its existence. A careful examination of the discussions in the Sixth Committee at the fifteenth session of the General Assembly on the question of reservations to the constituent instrument of the Inter-Governmental Maritime Consultative Organization indicated that the integrity of a constituent instrument would not be adequately safeguarded by the provisions of article 17, paragraph 3, as they stood. Those provisions would admit reservations at the inception of the organization, when its organs were not yet in operation. If the reserving States were themselves in a majority among those who had ratified the constituent instrument, they would be able to decide in the competent organ in favour of the acceptance of their own reservations. The result would be to bring about an amendment of the constituent instrument by the indirect means of reservations.

21. For those reasons, his delegation also proposed (A/CONF.39/C.1/L.148) that article 17 should specify that a reservation to the constituent instrument of an " existing international organization " required the acceptance of the competent organ of that organization. It was only when an organization was already in existence that reservations could be admitted. The position during the existence of the organization was radically different from that which obtained at its inception. The acceptance of the reservations would then be a matter for a collegiate decision rather than for the application of the flexible procedure embodied in the International Law Commission's articles on reservations.

22. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation's amendment to article 16 (A/CONF.39/C.1/L.125) was of a drafting character and could be referred to the Drafting Committee. He supported the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2).

23. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation proposed the deletion of sub-paragraph (*b*) of article 16 for the reasons given by the Soviet Union and United States representatives. That paragraph would not promote the progressive development of international law and constituted a restriction on the freedom of States. It also failed to clarify the rules on reservations. It should be noted, for example, that in their optional declarations under Article 36, paragraph 2, of the Statute of the International Court of Justice, States had made reservations which were quite different from those expressly permitted in the article and that those declarations had been accepted without any objection to the reservations which they contained.

24. He agreed with the Soviet Union and United States representatives that there was a contradiction between article 16 and article 17, paragraph 1, which would have to be eliminated.

25. Mr. CALLE Y CALLE (Peru) said that in recent years the traditional rigid criterion of unanimous consent to a treaty had given way to a more flexible conception of the compatibility test. All States possessed the sovereign right to make reservations at the stage of signature or ratification, accession or approval. Article 16 mentioned three cases where that right was subject to limitation. There was a fourth kind of inadmissible reservation, namely reservations which in a general and indeterminate manner made the acceptance of a treaty subject to internal laws. Reservations of so broad and indefinite a character did not satisfy the notion of compatibility and were tantamount to a negation of the consent to be bound. Consequently, his delegation had proposed the insertion of a new sub-paragraph in article 16 (A/CONF.39/C.1/L.132).

26. Mr. TSURUOKA (Japan), introducing his delegation's proposed amendment to article 16 (A/CONF. 39/C.1/L.133 and Add.1 and 2), said that it contained three main points. First, it proposed to transfer the provision concerning compatibility with the object and purpose of the treaty to the introductory part of article 16, since the criterion of compatibility should be applicable to all cases, and not only to the cases where the treaty was silent on reservation, irrespective of whether a reservation was or was not prohibited by the treaty.

27. The second point was of a more substantive nature. The question of reservations to multilateral treaties was

one of the most difficult and controversial subjects in contemporary international law and had given rise to controversy in academic circles and problems in the practice of States. His delegation appreciated that the International Law Commission had made commendable efforts to frame a satisfactory rule, but the solution proposed by the Commission was not entirely satisfactory. In its written comments in 1964,[8] his Government had taken exception to the rules proposed by the Commission and had advocated the retention of the traditional unanimity rule. States had no inherent right to put forward whatever reservation they pleased. An international agreement was almost always the result of a compromise between conflicting interests, and if the balance could be upset, through the loophole of reservations, the whole system established under the treaty might fall to the ground. The parties were entitled to protect the integrity of an agreement. It should also be borne in mind that the rules being proposed in the draft were residual and applicable only when the treaty was silent.

28. Believing as it did that that basic approach to the question of reservations was the right one, the delegation of Japan was at the same time aware of the fact that the Conference provided a unique opportunity for working out a satisfactory formula acceptable to the great majority of States. That was why it had decided to submit its amendment, in the hope of improving the formula proposed by the International Law Commission.

29. The purpose of the Japanese amendment was to make the compatibility test an objective and workable one. The Commission, while adopting the principle of compatibility as the basic criterion, had not succeeded in raising that principle to the status of an effective rule of law. Under the terms of article 16, paragraph 1(*c*), a State might formulate a reservation incompatible with the object of the treaty and therefore in law invalid, yet that reservation could be accepted by another contracting State under article 17, paragraph 4, and upheld as a legitimate reservation. In order to avoid such a result, a system should be created under which the views of the parties on the question of compatibility should be ascertained. Under the system his delegation proposed, a reservation must be communicated to all the contracting States; after the expiry of a specified period, which he tentatively suggested might be three months, if objections had then been raised by a majority of the contracting States, the reservation would fall to the ground. That system would have the merit of applying a collegiate decision without unduly complicating the procedure.

30. Mr. MAKAREWICZ (Poland) said that the rule stated in sub-paragraph (*b*) of article 16 should be confined to cases where the treaty authorized only specified reservations, as proposed in his delegation's amendment to that sub-paragraph (A/CONF.39/C.1/L.136).

31. He supported the Soviet Union amendment (A/CONF.39/C.1/L.115).

32. Mr. VEROSTA (Austria) said that a reservation could only be accepted once the competent organ had been properly constituted. That should be made clear in article 17, but perhaps, as the article was already lengthy, the content of his delegation's amendment (A/CONF.39/C.1/L.3) should be incorporated in a separate article.

33. Mr. SMEJKAL (Czechoslovakia) said that no treaty relationship existed between a State objecting to a reservation and a State making the reservation. The former had the right to decide whether the treaty was in force between them. It would be remembered that the Czechoslovak, Soviet Union, Iranian, Tunisian and other Governments had put forward reservations to the Convention on the Territorial Sea and the Contiguous Zone[9] and to the Convention on the High Seas[10] concerning provisions about the immunity of ships and the definition of piracy. Those reservations had been objected to by the United Kingdom Government[11] and, as a consequence, the Conventions were not in force between it and the Governments which had made the reservations.

34. The Czechoslovak amendment to article 17 (A/CONF.39/C.1/L.84) could be referred to the Drafting Committee.

35. Mr. NACHABE (Syria) said that the traditional doctrine had given the maximum effect to objections to reservations to multilateral treaties. Thus, it had been enough for one State to raise an objection for the treaty to cease to be in force, not only between the objecting State and the State which had made the reservation but between all the parties. However, an evolution had taken place which had been fostered by the Advisory Opinion of the International Court of Justice in 1951 on the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, when it had replied as follows to question 1: "That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention".[12]

36. The Commission had rightly taken that evolution into account in article 17, paragraph 4(*b*), and article 19, paragraph 3, but perhaps it had not laid sufficient stress on the fact that separability of treaty provisions was allowed by article 41. There was no need for a reservation which related only to one or two provisions of a treaty to be extended to all of them. That was particularly true of general multilateral treaties of common interest to the international community, in which the widest possible participation was desirable. For example, supposing a multilateral convention on the elimination of racial discrimination were drawn up which contained an article providing for the compulsory submission of disputes to the International Court of Justice and a State made a reservation to that article, it would be wiser to restrict that reservation to the article alone so

[8] *Yearbook of the International Law Commission, 1966*, vol. II, p. 303.

[9] See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (United Nations publication, Sales No.: E.68.V.3), pp. 320 and 321.

[10] *Ibid.*, pp. 325 and 326.

[11] *Ibid.*, pp. 323 and 328.

[12] *I.C.J. Reports, 1951*, p. 29.

that all the remaining provisions of the treaty remained in force.

37. In its amendment to article 17 (A/CONF.39/C.1/L.94), his delegation had sought to bring out the primacy of the will of the State which had formulated the objection and which had the last word. If it considered that a reservation to certain provisions deprived the treaty of all meaning and that it would therefore be useless to maintain the treaty in force between itself and the reserving State, it could indicate its intention to put an end to the treaty as a whole and that intention must prevail.

38. Mr. CUENDET (Switzerland) said that the Swiss delegation supported the system formulated by the Commission. The amendments which had been submitted would serve to clarify the text.

39. The intention of article 17, paragraph 1, was to exclude from the procedure for accepting reservations those reservations which were permitted by the treaty. The provision was logical and necessary, but it was not clearly worded and might give rise to differences of opinion on whether a reservation was impliedly authorized or not. The decision on that point would rest with each State party to the convention and could easily lead to considerable legal uncertainty. Moreover, the present wording reduced the scope of the procedure for the acceptance of reservations laid down in paragraph 4, which in fact would operate only in the case of the reservations referred to in article 16, sub-paragraph (*c*), namely, those contrary to the object and purpose of the treaty. The flexibility of the International Law Commission's system was realistic and in conformity with the present trend of international law. But, except in cases where the reservation was provided for in the treaty, it seemed necessary to permit each State to form an opinion with regard to it. His delegation proposed (A/CONF.39/C.1/L.97) the deletion of the words " or impliedly " in article 17, paragraph 1.

40. His delegation also proposed that article 17, paragraph 3, be deleted. That paragraph dealt with a situation when a constituent instrument had not yet come into force, so that no organs existed to approve the reservations, or else, if the constituent instrument had come into force, with conditions of entry to an organization, rather than with reservations and it would be better not to deal with the former question in the present draft.

41. Lastly, the Swiss delegation proposed the insertion of the words " and unless the reservation is prohibited by virtue of article 16, sub-paragraphs (*a*) and (*b*) ", at the end of the introductory phrase to article 17, paragraph 4. That would maintain the Commission's system. The fate of reservations contrary to sub-paragraphs (*a*) and (*b*) should be determined. They could not be accepted by other States and it must also be made absolutely clear that, as the Commission intended, it was States themselves which should decide whether or not a reservation was compatible with the object and purpose of a treaty. It would be perfectly plain that the procedure in paragraph 4 of the amended text would apply to two categories of reservations, those which were not prohibited in article 16(*a*) and (*b*) and those contemplated in article 16(*c*).

42. Mr. ABED (Tunisia), introducing the amendment by his delegation and that of France to article 17 (A/CONF.39/C.1/L.113), said that its purpose was to introduce greater clarity and precision into the provisions of the article in order to avoid interpretations which could lead to disputes in the application of treaties, or delay their coming into effect.

43. In paragraph 1, it was proposed to delete the words " or impliedly ". The provisions of that paragraph were very important, since they specified that a reservation " expressly or impliedly " authorized by the treaty did not require any subsequent acceptance by the other contracting States. The concept of an " implied " acceptance was difficult to elucidate and interpret; the question would arise of who was to determine the existence and scope of such implied acceptance. The deletion of those words would make for a more precise rule, and would encourage the parties to express unequivocally in the treaty their intentions on the subject of reservations.

44. As for paragraph 2, its wording was extremely vague and imprecise; moreover, it could lead to an excessively restrictive interpretation of the article as allegedly covering only multilateral treaties, to the exclusion of bilateral treaties. In fact, bilateral treaties had been among the first to give rise to reservations. It was true that, in that case, the making of a reservation and its acceptance amounted in effect to a modification of the treaty, but the parties sometimes resorted to that procedure as a means of overcoming difficulties created by internal constitutional procedures for the acceptance of treaties. Signature of the treaty was thus not delayed and the desired changes were obtained without having to reopen the negotiations. The amendment therefore proposed that a reference to bilateral treaties be introduced in paragraph 2, the language of which had been made simpler and clearer.

45. Lastly, it was proposed to delete paragraph 3 as superfluous. There was no need to state the obvious fact that a reservation to the constituent instrument of an international organization required the acceptance of the organization. Also, if the paragraph were retained, it would give rise to difficulties regarding the interpretation of the expression " competent organ " of the organization.

46. Mr. SUPHAMONGKHON (Thailand), introducing his amendment to article 17 (A/CONF.39/C.1/L.150), said that he found generally acceptable both the underlying ideas and the substance of the rules embodied in articles 16 and 17. However, in its efforts to ensure flexibility and to cover as many cases as possible, the International Law Commission had drafted article 17 in a manner which made some of its provisions difficult to apply. The main purpose of his amendment was to remedy those difficulties.

47. In paragraph 1, he proposed the deletion of the words " or impliedly " which would introduce an element of uncertainty in the application of the general rule embodied in that paragraph and would make the interpretation of the rule extremely difficult, especially in borderline cases. The reference to implied authorization in the treaty might conceivably be interpreted as covering the provisions of sub-paragraph (*c*) of article 16 on the compatibility test; a reservation which was impliedly authorized in the treaty would thus not need to comply with the compatibility test. It was necessary to exclude such an interpretation, since a party should always be able to object that a reserv-

ation was incompatible with the object and purpose of the treaty unless the reservation was expressly authorized by the treaty; the application of the compatibility test should remain in the hands of the parties.

48. In paragraph 4, he proposed that the opening proviso, " In cases not falling under the preceding paragraphs ", be replaced by: " Subject to the preceding paragraphs ", which provided a better link with the first three paragraphs, particularly paragraph 1. Lastly, he proposed that paragraph 5 should become the concluding sub-paragraph of paragraph 4; the twelve-month period would then be applicable in all cases where no objection was made to a reservation.

49. Except for the amendment to paragraph 1, all those proposals were of a drafting character and could be referred to the Drafting Committee.

50. Mr. TABIBI (Afghanistan) said that his delegation was in general agreement with the basic principles contained in draft articles 16 and 17, which reflected contemporary State practice with regard to reservations.

51. The institution of reservations had been acquiring increasing importance ever since the General Act of Brussels of 1890, the reservation of China to the Treaty of Versailles in 1919, and the rejection of the Austrian reservation to the 1925 Opium Convention. The need to ensure the universality of international treaties, combined with the increase in the number of States, and still more in the number and variety of treaties, made it impossible to apply the old unanimity rule; reservations had become a necessity, particularly for the smaller nations.

52. United Nations organs, such as the International Court of Justice in its 1951 Advisory Opinion in the case of the Genocide Convention and the General Assembly in 1952 and 1959, had made a thorough study of reservations and had arrived at conclusions which derived from State practice in the past half century and were reflected in the International Law Commission's draft articles 16 and 17.

53. He therefore broadly supported the draft of the two articles and did not favour amendments that might disturb the flexible provisions it contained. He could, however, accept amendments to improve the wording. He accordingly wished to give his first reaction to some of the proposed amendments.

54. He was prepared to support the Austrian amendment (A/CONF.39/C.1/L.3) and also the amendment by France and Tunisia (A/CONF.39/C.1/L.113) to paragraphs 1 and 2 of article 17, but not the proposal to delete paragraph 3 since that would hamper the smooth operation of international agreements; and he of course opposed the similar proposal by Switzerland (A/CONF. 39/C.1/L.97). The Drafting Committee should be asked to consider the Czechoslovak amendments (A/CONF. 39/C.1/L.84 and L.85), the Syrian amendment to paragraph 4 of draft article 17 (A/CONF.39/C.1/L.94), which was not contrary to the provisions of that draft and which could promote participation in international treaties, and the amendments by the Republic of Viet-Nam (A/CONF.39/C.1/L.125), Spain (A/CONF.39/C.1/L.147 and L.148) and Thailand (A/CONF.39/C.1/L.150).

55. On the whole he supported the USSR amendment (A/CONF.39/C.1/L.115), but could not support either the United States amendments (A/CONF.39/C.1/L.126 and Add.1 and L.127) or the amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.128), which would create problems for the making of reservations and hinder the wider application of international treaties. Nor could he support the amendment by Peru (A/CONF.39/C.1/L.132), because it introduced considerations of internal law into the matter of reservations to international treaties.

56. The International Law Commission's draft, despite its admitted shortcomings, represented the best possible compromise formula for the time being, and he hoped that the authors of the many amendments, which in some cases covered more or less the same ground, would bear that fact in mind when, as he hoped, they met to formulate joint amendments in order to facilitate the work of the Committee.

57. Mr. REGALA (Philippines), speaking as a joint sponsor of the Japanese amendment (A/CONF.39/C.1/L.133 and Add.1 and 2), said that, apart from the reasons adduced by the Japanese representative, it was a settled principle of international law that a State which entered into a treaty had the power freely to make reservations.

58. As now drafted, paragraph 4 of article 17 was not clear. The purpose of the amendment by Japan, the Philippines and the Republic of Korea was to introduce, by way of an additional provision in article 16, a time-limit upon the expiry of which the reservation would be without effect if objections had been raised by a majority of the contracting States on the ground that the reservation was incompatible with the object and purpose of the treaty. His delegation was not committed to the set period of three months and would be prepared to accept a time limit of six months or even a year, provided some definite deadline was specified.

59. Mr. SEPULVEDA AMOR (Mexico) said he warmly supported the flexible principle embodied in the International Law Commission's draft articles 16 and 17. The harmful effect of reservations on the integrity of the treaty should not be over-emphasized. The integrity of the treaty could be maintained provided a sufficient number of States were parties to the treaty and accepted most, or preferably all, its fundamental clauses. The integrity of the treaty was materially affected only if a large number of States formulated a reservation touching the very essence of the treaty. Far from ignoring that point, the International Law Commission had clearly specified that reservations could only be formulated if they were compatible with the object and purpose of the treaty. Its flexible system, based on that compatibility test, made it easier for some States to express their final consent to be bound by a treaty and thereby promoted participation in multilateral treaties. An adequate balance was thus established between the respect due to the interests of States and the need to promote international co-operation, bearing in mind that the whole purpose of the negotiation of a multilateral agreement was to arrive at the conclusion of a treaty.

60. He was in favour of paragraph 4(*b*) of article 17, which made it possible for the objecting State to avoid entering into treaty relations with the reserving State and would enable States to adjust the degree to which they would enter into treaty relations with each other.

61. He was also in favour of paragraphs 2 and 3 of article 17 on treaties between a limited number of States and treaties which were constituent instruments of international organizations.

62. That being said, he must draw attention to the absence of a definition of the instrument envisaged in paragraph 2(*b*) of article 27. In fact, interpretative declarations of that type were common in practice. Such a declaration did not amount to a reservation and its purpose was generally to overcome certain difficulties arising from internal constitutional provisions on treaty-making. It was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations. The consequences of objection by one or more parties to the treaty, but not all the parties, to an interpretative declaration made by one State, should also be examined. The point should certainly be covered, because the view had been propounded in academic circles that an interpretative declaration had all the characteristics of a reservation, a theory to which reference was made in the International Law Commission's commentary to the draft articles, notably in paragraph (11) of its commentary to article 2. If it was accepted that such declarations often had their own special features, then separate provision must be made for them.

63. With regard to article 17, particularly paragraph 4, it was important to determine the legal consequences of a subsequent judicial decision declaring a reservation incompatible with the object and purpose of the treaty. There were two possible solutions. One was that an obligation should be placed upon the reserving State to withdraw its reservation; should it fail to do so, it would be precluded from becoming a party to the treaty. The other solution was for the treaty in its entirety to be deemed to cease to be in force exclusively in the relations between the reserving and objecting States.

64. In paragraph 4(*a*), it was important to consider the practical situation which would arise for a reserving State in the not infrequent case in which no other State had expressly accepted its reservation. The provision for a twelve-month time-limit contained in paragraph 5 of article 17 would settle the problem after the expiry of that period. The question still arose, however, of determining the position during that twelve-month period in the case to which he had referred. The provisions of the draft did not make it clear whether the reserving State was or was not a party to the treaty during that period. The point must be covered in order to avoid a legal vacuum, and the Czechoslovak amendment (A/CONF.39/C.1/L.84) could contribute to a solution to the difficulty.

65. He had drawn attention to those gaps in articles 16 and 17 without submitting any formal amendments but requested that his remarks be taken into consideration by the Drafting Committee.

66. Mr. RUIZ VARELA (Colombia) said he supported the United States amendments to articles 16 and 17 (A/CONF.39/C.1/L.126 and Add.1 and L.127). In the matter of reservations to multilateral treaties, there had been a traditional and marked divergence between the rules accepted within the Pan American system and the practices followed by the League of Nations and, more recently, by the Secretariat of the United Nations, a divergence to which the commentary on the draft articles referred. There was, however, every indication that the International Law Commission's formula would make it possible to overcome the difficulties which had arisen in the matter by providing a flexible formula offering equitable and well-founded solutions to the problems involved. The Commission had achieved considerable success in reconciling the two different systems and the various trends and practices in what was an extremely difficult matter. One example was that of the provisions of paragraph 1 of article 17, which did not require the unanimous acceptance of a reservation on the part of the other contracting States unless the treaty itself so required. Moreover, paragraphs 4(*a*) and 4(*b*) of the same article appeared to him to embody two of the substantive rules of the Pan American system.

67. On the problem of reservation to bilateral treaties, he noted the Commission's remarks in the second and third sentences of paragraph (1) of its commentary.

68. Despite its merits, the flexible formulation embodied in articles 16 and 17 could be still further improved by introducing greater precision into them as proposed in the United States amendments. In particular, the amendment to sub-paragraph (*b*) of article 16 (A/CONF. 39/C.1/L.126 and Add.1) would eliminate an unnecessary repetition; sub-paragraph (*a*) already precluded a reservation which was prohibited by the treaty and would therefore cover the case where a treaty authorized only certain "specified reservations". The proposed amendment to sub-paragraph (*c*) of article 16 (A/CONF.39/C.1/L.126) would serve to avoid uncertainties in the interpretation of the meaning of the concept of "object" of the treaty.

69. He also supported the United States amendments to article 17 (A/CONF.39/C.1/L.127) which would also serve to introduce greater legal precision into the text of that article.

70. Mr. SINCLAIR (United Kingdom) said that in the past his Government had been a strong advocate of the traditional unanimity doctrine, under which a reservation, in order to be valid, must be accepted by all the other interested States. That doctrine was based on the concept of the integrity of the terms of a treaty which had been freely negotiated by the prospective parties, and it provided an unambiguous answer to the question whether a State which had submitted an instrument of ratification or accession, accompanied by a reservation, had become a party to the treaty generally, rather than simply in relation to those contracting States which had accepted the reservation.

71. The question of whether and, if so, to what extent reservations to multilateral conventions should be admitted raised fundamental problems concerning the quality and extent of the obligations undertaken or to be undertaken by the contracting parties. It could be assumed that exhaustive attempts would have been made at the stage of negotiation to find formulae which would command the broadest possible support among the negotiating States, and the question arose whether the structure and meaning of the treaty as a whole should be distorted in relations between the contracting parties by reservations involving acceptance by the reserving State of lesser obligations than those contained in the treaty. During the negotiations, sacrifices would unquestionably have been made by the representatives of

most of the negotiating States, and the resulting treaty was usually an amalgam of conflicting interests and views. In principle, therefore, there was considerable force in the view that reservations introduced after such complex procedures should require the acceptance of all the contracting parties before the reserving State could be regarded as a party to the treaty.

72. The United Kingdom recognized that the traditional unanimity rule might in modern times be a counsel of perfection, since it had been rendered less practicable by the great expansion of the membership of the international community in recent years. Furthermore, the system applied by the Secretary-General of the United Nations since 1952 for new multilateral treaties deposited with him was much more flexible, as the International Law Commission had pointed out in paragraph (8) of its commentary. The practical effect of that system was that a State which had deposited an instrument of ratification or accession accompanied by reservations was considered to be a party to the treaty at least by the majority of States which did not object to the reservations. But even that more flexible system fell far short of the asserted sovereign right to make unlimited reservations, which the USSR representative had advocated. The United Kingdom delegation believed that no State possessed such an unlimited right and consequently would oppose the proposal to delete sub-paragraph (*a*) of article 16 and could not support the proposal to delete sub-paragraph (*b*). The parties were always entitled to agree among themselves that no reservations should be permitted to a particular treaty or that only specified reservations should be accepted.

73. Although the ideal solution to the problem of reservations was to ensure that the treaty itself dealt with the question, practical experience showed that, more often than not, the treaty was silent on the matter, not necessarily because the negotiating States had ignored the question of reservations, but usually because they had been unable to reach an agreed solution. The content of a reservations article would undoubtedly raise precisely those questions of substance and of principle which had been disputed during the negotiations leading to the adoption of the text: State A might wish to ensure that reservations were permissible to articles X and Y, State B might insist that reservations should be admitted to articles K and Z, whereas State C might object strongly to the admissibility of reservations to some or all of those articles. As a result, the negotiating States might reluctantly decide to dispense with a reservations article, so as not to disturb the delicate balance of interests they had reached in formulating the treaty. That was why the Conference was obliged to legislate for situations where a treaty made no positive provision with respect to reservations.

74. With regard to the Commission's text of articles 16 and 17, he wished to draw particular attention to the combined effect of article 16, sub-paragraph (*c*), and article 17. Sub-paragraph (*c*) provided that, in cases where the treaty was silent with regard to reservations, a reservation might be formulated unless it was incompatible with the object and purpose of the treaty. That compatibility test reflected the Advisory Opinion of the International Court of Justice in the Genocide Convention case, but the mere statement of the test raised questions which were not fully answered in the Commission's proposals. At first sight, the compatibility test seemed to be objective, but it might be asked whether a reservation which was objectively incompatible with a treaty could be accepted by another contracting State under sub-paragraph 4(*a*) of article 17; if so, the effect of the compatibility test in sub-paragraph (*c*) of article 16 might be nullified. It was to be presumed that a State which was prepared to accept another State's reservation considered that reservation to be compatible with the treaty, even though the majority of the other contracting States disagreed with that assessment. If that was a correct interpretation of the combined effect of sub-paragraph (*c*) of article 16 and paragraph 4 of article 17, then clearly the compatibility test might prove in practice to be devoid of any real substance.

75. The International Law Commission's proposals seemed to give too much latitude to the formulation of reservations which could have the effect of destroying the integrity of the treaty. Paragraph (21) of the commentary appeared to confirm the assumption that, under sub-paragraph 4(*b*) of article 17, an objection could be made to a reservation on grounds other than the incompatibility of the reservation with the object and purpose of the treaty. It would therefore be desirable to clarify the text on that point.

76. The United Kingdom delegation considered that those issues should be thoroughly explored and, in particular, that some real content must be given to the compatibility test in sub-paragraph (*c*) of article 16. There was an obvious need for some kind of machinery to ensure that the test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty. His delegation had not so far submitted any specific proposals on the topic but hoped that its suggestion for controlling machinery to ensure that the test was properly applied would be borne in mind during subsequent debates. It would be helpful if the Committee were to concentrate first on questions of principle arising out of the draft articles and the various amendments submitted; the topic was so complex that any hasty decision would be inadvisable.

The meeting rose at 6 p.m.

TWENTY-SECOND MEETING

Thursday, 11 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations) *(continued)* [1]

1. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) stressed the importance of reservations, which made it

[1] For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.

possible for a large number of States to participate in a treaty and at the same time made it possible for their interests to be taken into account. Reservations could be defined as declarations by which States accepted a treaty as a whole, but specified certain provisions by which they would not be bound. The principle involved was that of the sovereign equality of States, without which there could be no real negotiations; for the majority tended to prevail over the minority and, in order to re-establish equality between the parties, the minority must be granted the right to make reservations. Hence reservations played an important part in the development of international co-operation. In its Advisory Opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had held that a State had the right to formulate and maintain a reservation; that such action did not mean that the State was no longer a party to the Convention; and that in the event of an objection to a reservation, the Convention nevertheless entered into force.[2] Article 17 of the draft, however, provided that if a State objected to a reservation, the treaty would not enter into force as between the objecting and reserving States. In that provision, the draft did not take account of the principle of the progressive development of international law or of contemporary practice. The delegation of the Ukrainian SSR therefore supported the amendment submitted by the USSR (A/CONF.39/C.1/L.115), which would undoubtedly help to strengthen, through multilateral agreements, the links between States having different economic and social systems.

2. The United States amendment to article 16 (A/CONF. 39/C.1/L.126) showed certain deficiencies and contradictions. The word " character " was too vague. The notion of " object and purpose ", which had been mentioned by the International Court of Justice, should be retained.

3. The United Kingdom representative had argued that too many reservations destroyed the integrity of a treaty; but that argument should be rejected, for the fact that there were many reservations would not have any untoward consequence provided they were not contrary to the object and purpose of the treaty. An example was provided by the 1907 Convention respecting the Rights and Duties of Neutral Powers in Maritime War:[3] the numerous reservations to that Convention had led to the institution of fifteen different systems of agreements, but the object of the Convention had been respected and it had been able to play a positive role. The same could be said of the International Telecommunication Convention of 1959,[4] to which there had been twenty-nine reservations. The United Kingdom representative had also raised the question who would decide whether a reservation was incompatible with the object and purpose of a treaty or not. On that point, it was only necessary to refer to current practice; experience had shown that no authority was competent to take such a decision, which lay within the exclusive competence of States.

4. The amendments in documents A/CONF.39/C.1/L.31, L.84, L.97 and L.113 were interesting and should be examined by the Drafting Committee.

5. The Ukrainian delegation supported the Czechoslovak and Syrian amendments (A/CONF.39/C.1/L.85 and L.94), which were very similar.

6. Mr. BOLINTINEANU (Romania) thought that in drafting articles 16 and 17 the International Law Commission had set out from a realistic concept based on the practice of States and capable of contributing to its development in accordance with the requirements of contemporary international relations. The modern community of nations needed the contributions of all its members and the wide range of international relations posited the principle of co-operation as governing the rights and obligations of all States. That principle was reflected in the growth and diversification of the forms of international co-operation, among which multilateral treaties were assuming increasing importance.

7. The purpose of the institution of reservations was to facilitate the application of such treaties by enabling States to become parties to them even if they could not accept some of their provisions. It would be advisable to adopt a flexible system, which had already crystallized in State practice; it was a system of that kind which the International Law Commission had recommended and which the Committee's discussions had, on the whole, endorsed.

8. In the Romanian delegation's opinion, States had, in principle, the right to make reservations to a multilateral treaty, and the right to accept reservations or object to them. On the basis of those principles, which followed from the sovereignty of States, the idea of some machinery or system of control which would replace the discretion of States could not be entertained. Nor would such machinery meet practical needs, since the reservations formulated were not, as a general rule, prejudicial to the object and purpose of the treaty. For a State which did not agree with the object and purpose of a treaty did not consent to be bound by it. For similar reasons, his delegation could not accept the idea that a majority of the States parties to a treaty could invalidate the consent of a reserving State to become a party.

9. The Romanian delegation was in favour of the suggestions for improving the drafting of articles 16 and 17. Its view was that, where no contrary intention was expressly stated, an objection to a reservation should be understood to mean only that as between the reserving State and the objecting State the provisions of the treaty to which the reservation referred would apply only to the extent provided by the reservation and that, consequently, the remainder of the treaty would enter into force as between those States. In other words, the mere fact that an objection was raised should not create a presumption that the objecting State intended to prevent the whole treaty from entering into force as between it and the reserving State. If the objection were intended to prevent the entry into force of the treaty as a whole, a presumption should be ruled out by the express statement of a contrary intention by the objecting State. In view of those considerations, the

[2] *I.C.J. Reports, 1951*, pp. 29 and 30.

[3] *British and Foreign State Papers*, vol. 100, pp. 448-454.

[4] Geneva: International Telecommunication Union.

Romanian delegation supported the proposals to that effect submitted in several amendments.

10. Article 17, paragraph 3, raised the question whether the rules governing reservations should include a provision on treaties which were the constituent instruments of international organizations; where such treaties were concerned, the right to pronounce on a reservation would no longer be vested in each State party to the treaty, but in the competent organ of the organization, whose decision might sometimes take the form of a vote by a simple majority of its member States or even of an act by the Director-General without participation by the member States. That problem would require a thorough study, which could not be undertaken by the Committee of the Whole. The best course would be to delete article 17, paragraph 3.

11. Mr. VIRALLY (France) said that in view of the extreme complexity and technical nature of the problem of reservations, the French delegation would be guided by three considerations, which it believed to be absolutely decisive, namely: flexibility, because it was necessary to meet all the needs that arose in practice; simplicity, because practice must be given clear and firm guidance; and respect for the will of States and their sovereign equality. Those were the considerations which had led the French delegation to submit jointly with the Tunisian delegation the amendments to article 17 in document A/CONF.39/C.1/L.113. The same considerations also led it to endorse the system adopted by the International Law Commission in its draft, though it had some reservations regarding the wording of the articles concerned. The system seemed good precisely because it introduced into the machinery of reservations a high degree of flexibility, which met the needs of contemporary practice and was well adapted to the historic development of treaty law and, in particular, of multilateral treaties. The system had been very carefully worked out. Perhaps, however, the International Law Commission had produced too scientific and subtle a text, which might confuse rather than guide States wishing to know how they should proceed.

12. It was for that reason that the French delegation was greatly attracted by the idea put forward by the USSR delegation and taken up by other speakers who wished to combine articles 16 and 17 in a single article. The division into two articles was a source of confusion, as was shown by the Committee's decision to discuss the two articles together. The two articles should therefore be combined in a single article which, in the French delegation's opinion, should deal with the two points constituting the two aspects of the problem: the situation of a State seeking to become a party to a treaty while formulating a reservation and the situation of the States already parties to the treaty vis-à-vis that approach.

13. As to the first point, the French delegation was prepared to recognize the right of any State which fulfilled the necessary requirements for becoming a party to a treaty to formulate reservations. But that right must be exercised subject to respect for the rights and the will of the States which had drawn up the treaty during negotiations that were often long and difficult. It should not be possible to use the right to make a reservation in order to distort a treaty or to destroy the balance of the concessions it granted. A reservation incompatible with the object and purpose of a treaty was inadmissible, and that was equally true of reservations prohibited by a treaty. Moreover, in that matter the convention could not prevail over the provisions of a treaty establishing such a prohibition.

14. As to the second point, that was to say the attitude of the other contracting States, the French delegation wished to stress at the outset that acceptance and objection were the obverse and reverse sides of the same idea. A State which accepted a reservation thereby surrendered the right to object to it; a State which raised an objection thereby expressed its refusal to accept a reservation.

15. There were only three situations to be considered. The first was that in which the reservation was expressly authorized by the treaty. It was unnecessary to state that such a reservation did not require acceptance, but it should be stated that it could not be the subject of an objection. There should be no doubt on the matter, however, and the reservation should be expressly authorized by the treaty. The second situation was that in which the provisions of a treaty formed a single whole, to be accepted or rejected in its entirety. That was the case of restricted multilateral treaties and bilateral treaties. As the joint French and Tunisian amendment showed, that second situation could be dealt with in a couple of lines. The third situation covered all reservations which did not fall into either of the first two categories. The right to formulate a reservation was symmetrically balanced by the right to raise an objection. That right must, however, be exercised within a certain period to be specified in the convention.

16. Nothing more need be added to the article. In particular, no special provision need be made for the constituent instruments of international organizations, since that case was dealt with in article 4 and in the special rules of each organization relating to the admission of members.

17. Lastly, there remained the question of the effects of an objection, which was dealt with in article 17, paragraph 4(*b*). In the French delegation's opinion, that question had nothing to do with the article, which dealt only with the exercise of the right to make reservations or to raise objections to them. The question of the effects of an objection should be considered together with that of the legal effects of reservations, which were dealt with in article 19. It was, in fact, already taken up in paragraph 3 of that article. He would therefore say no more on the subject at that stage.

18. Mr. ALCIVAR-CASTILLO (Ecuador) said he would confine himself to a few remarks on the amendments relating to the question of reservations.

19. The Peruvian amendment (A/CONF.39/C.1/L.132) had been prompted by the concern of the Latin American countries, which had had bitter experience in that matter. The code of private international law known as the Bustamante Code had been ratified by Governments subject to its not being incompatible with internal law. But it had been impossible to apply it in practice. The Ecuadorian delegation would therefore vote for the Peruvian amendment.

20. The Czechoslovak and Syrian amendments (A/CONF. 39/C.1/L.85 and L.94) provided that an objection should not prevent a treaty from entering into force as between the objecting State and the reserving State unless the objecting State explicitly expressed that intention. The Ecuadorian delegation was in favour of that idea, which seemed more logical than the idea expressed in the original text.

21. He also considered that a reservation should not be incompatible with the object and purpose of a treaty, but the question arose who should decide whether it was incompatible. That task could hardly be entrusted to an international body: it was for States themselves to take the decision. In that respect, the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2) seemed to fill a gap, and the Ecuadorian delegation would support it.

22. Mr. AL-RAWI (Iraq) said that the principle of unanimous acceptance of reservations could not apply to general multilateral treaties owing to the large number of States that were parties to them.

23. States were free to choose the other parties to a treaty and to determine the scope of its provisions. A State could only assume contractual obligations which it had freely accepted. By virtue of the principle of reciprocity of obligations, the obligations of the party with respect to which the reservation was made were reduced to the same extent as those of the reserving State; that was the effect of article 19, paragraph 1(*b*).

24. The admissibility of reservations was an essential rule which counter-balanced the two-thirds majority rule laid down in article 8, paragraph 2.

25. The Iraqi delegation understood article 16, sub-paragraph (*c*) to mean that the reservation must not conflict with the object and purpose of the treaty, and consequently must not be contrary to its fundamental principles.

26. He was in favour of retaining articles 16 and 17 as they stood, subject to a few drafting changes.

27. Mr. BLIX (Sweden) observed that several delegations had proposed fairly similar changes and it was therefore desirable that they should submit joint amendments.

28. He did not think that articles 16 and 17 should be combined in a single article. The arrangement adopted by the International Law Commission was perfectly logical, for article 16 stated the cases in which reservations were prohibited and article 17 those in which they were authorized.

29. He was not sure whether the rule in article 16, sub-paragraph (*b*), had been borne out by practice. Consequently, since States were free to rule out explicitly reservations other than those authorized by the treaty, he supported the amendments submitted by the USSR (A/CONF.39/C.1/L.115), the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1), Spain (A/CONF.39/C.1/L.147) and the Federal Republic of Germany (A/CONF.39/C.1/L.128) deleting that sub-paragraph.

30. Article 17, paragraph 2, contained the remains of the old unanimity rule. The disintegration of that rule was not a matter to be deplored. It could only apply in a community where the number of States parties to a treaty was relatively small. Nevertheless, there were still cases in which the rule was indispensable. The criterion adopted in paragraph 2 for applying the rule was too inflexible, and it might be asked whether a single concrete case could be found that satisfied all the prescribed conditions. The Swedish delegation considered that in the absence of express provisions to the contrary, the mere fact that a small number of States had participated in the negotiations should be regarded as a sufficient reason for applying the unanimity rule. It therefore supported the amendment to article 17, paragraph 2, submitted by the United States of America (A/CONF.39/C.1/L.127).

31. He was opposed to the amendments submitted by Switzerland (A/CONF.39/C.1/L.97) and the USSR (A/CONF.39/C.1/L.115), which would simply delete article 17, paragraph 3, because the present wording had certain advantages. The Austrian amendment to that paragraph (A/CONF.39/C.1/L.3) should be referred to the Drafting Committee.

32. The procedure laid down in article 17, paragraph 4, for authorized reservations should not apply to prohibited reservations. Article 16 provided no machinery for determining whether a reservation was prohibited by a treaty or was incompatible with its object and purpose, and that omission might be a source of disputes. A State could object to a reservation on the ground either that it was expressly prohibited by the treaty or that it was inadmissible because it was incompatible with the object and purpose of the treaty. But the application of the compatibility rule might cause difficulties. In his opinion, the International Law Commission's solution was hardly satisfactory. The Swedish delegation therefore supported the United Kingdom representative's oral proposal at the previous meeting that the Conference should examine the possibility of setting up some machinery for determining whether or not a reservation was compatible with the object and purpose of a treaty. The system proposed by Japan was no more than an attempt at solving the problem.

33. The United States amendment (A/CONF.39/C.1/L.127) had the merit of making it clear that the procedure for acceptance of admissible reservations prescribed in article 17, paragraph 4(*c*), did not apply to reservations prohibited under article 16.

34. He supported the amendments submitted by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF.39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150), which would delete the words " or impliedly " in article 17, paragraph 1.

35. Under the terms of article 17, paragraph 4(*b*), an objecting State might inadvertently prevent a treaty from entering into force between a reserving State and itself. That would be regrettable, but it would be possible to remedy the situation subsequently. On the other hand, if the amendments proposed by Czechoslovakia (A/CONF.39/C.1/L.85), Syria (A/CCNF.39/C.1/L.94) and Thailand (A/CONF.39/C.1/L.150) were adopted, an objecting State might inadvertently allow a treaty to enter into force between a reserving State and itself, and it would then no longer be possible to remedy the situation. Moreover, the International Law Commission's

formula might have the advantage of dissuading States from formulating reservations.

36. As the other Czechoslovak amendment (A/CONF. 39/C.1/L.84) referred to " a general multilateral treaty or other multilateral treaty " it obviously did not exclude any multilateral treaty of any kind. It would be preferable, however, to refer only to a " multilateral treaty ", especially as a concept of a " general multilateral treaty " was difficult to define.

37. Lastly, the reference to a " restricted multilateral treaty " in the French and Tunisian amendment (A/CONF.39/C.1/L.113) did not seem calculated to make the application of article 17, paragraph 2, any easier than would the expression " limited number of the negotiating States " in the International Law Commission's text.

38. Mr. OSIECKI (Poland) noted with satisfaction that the International Law Commission's draft recognized the principle of reservations and was based largely on the Advisory Opinion of the International Court of Justice regarding the reservations to the Genocide Convention.

39. The institution of reservations was of great importance for contemporary international relations, which were characterized by the co-existence of States with different socio-economic and political systems. The viewpoints of those States were not always the same, and it was essential that, when an agreement on principle had been reached, it should be possible to conclude the proposed treaty and make its scope as wide as possible.

40. The Polish delegation therefore supported those amendments which would make the system of reservations less rigid; in particular, it supported the amendment of the USSR (A/CONF.39/C.1/L.115), which had the great advantage of simplifying and clarifying the provisions on reservations by combining articles 16 and 17 in a single article.

41. His delegation was opposed to the amendment by the United States and Colombia to article 16 (A/CONF. 39/C.1/L.126 and Add.1) and to the United States amendment to article 17 (A/CONF.39/C.1/L.127), which would replace the criterion of " object " by that of " character ", because it saw no reason to depart from the International Law Commission's text.

42. In principle, he was in favour of deleting article 16, sub-paragraph (*b*), which he found too inflexible, and accordingly supported the amendments submitted by the USSR (A/CONF.39/C.1/L.115), the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128). If that sub-paragraph were retained, however, it should be improved on the lines proposed in the Polish amendment (A/CONF.39/C.1/L.136).

43. The USSR amendment did not cover the case of treaties which prohibited all reservations. That situation was very rare, and was already partly covered by paragraph 4 of the amendment, which excluded reservations to treaties whose object and purpose did not admit of any reservation and to treaties concluded between a limited number of States. On the latter point, the USSR amendment was in accord with the amendment to article 17 proposed by France and Tunisia (A/CONF. 39/C.1/L.113). However, he did not see the point of the reference, in the latter amendment, to a " bilateral treaty ", to which the institution of reservations could not apply in any case. On the other hand, his delegation was in favour of deleting article 17, paragraph 3, and therefore supported that part of the French and Tunisian amendment, for the case of international organizations was adequately covered by article 4.

44. The Polish delegation considered that the presumption should be in favour, first of the acceptance of reservations, and secondly, of the establishment of a contractual relationship between the reserving State and the objecting State. It therefore supported all the amendments which would produce that result, in particular those by Czechoslovakia (A/CONF.39/C.1/L.85) and Syria (A/CONF. 39/C.1/L.94), the wording of which might fit in better with article 19.

45. On the other hand, his delegation could not support paragraph 2 of the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2). In the system of reservations adopted by the International Law Commission, every State was free to decide whether it accepted a reservation and, consequently, whether it wished to enter into relations with the reserving State. That decision was a matter for the State alone; it could not depend on a majority decision, for that would be contrary to the principle of the sovereign equality of States.

46. Some of the amendments raised drafting points and should be referred to the Drafting Committee.

47. Mr. HARRY (Australia) said that all States had the right to formulate reservations which they would like the parties to the treaty to accept. However, States which were parties to a treaty and had therefore accepted the obligations stipulated in it had the right, individually or collectively, to defend the treaty against reservations which they considered incompatible with it or simply undesirable.

48. The unanimity rule was in fact the expression of the sovereign right of States to choose whether or not they would be bound to other States by a treaty—whether or not they would be parties to a treaty under which the obligations of the parties differed. The Australian delegation believed that the unanimity rule should not lightly be abandoned or even modified.

49. It supported the United States proposal to substitute the word " character " for the word " object " in article 16, sub-paragraph (*c*). If article 16 was to include a class of reservations which were prohibited by implication, his delegation would support the Polish proposal to insert the word " only " between the words " authorizes " and " specified " in article 16, sub-paragraph (*b*). The convention should nevertheless make it absolutely clear that the purported reservations of the class referred to in article 16(*c*) were not susceptible of being accepted by the parties.

50. Article 17, paragraph 1, referred to a second class of reservations, namely, those expressly or impliedly authorized by a treaty. The Australian delegation considered that it would be better to deal separately with reservations which were expressly permitted and therefore needed no acceptance.

51. With regard to reservations impliedly authorized by a treaty, namely, those which were not incompatible

with the character or purpose of the treaty and were neither expressly prohibited nor expressly permitted, no difficulty arose if all the parties accepted those reservations or objected to them.

52. The case of bilateral treaties raised no problem, because either party could accept or object to a reservation.

53. The Australian delegation supported the United States amendment to article 17, paragraph 2 (A/CONF. 39/C.1/L.127), since it considered that in the case of a " restricted " multilateral treaty, a reservation should require acceptance by all the parties.

54. His delegation recognized that for some general multilateral treaties the unanimity rule was not required, and reservations in moderation might not be contrary to the character or purpose of the treaty. For that class of treaty, a simple rule and a control mechanism were still necessary. Generally speaking, the Australian delegation did not regard reservations as a virtue in a treaty. In small doses, they might not do any great harm, but over-indulgence should be avoided.

55. The Japanese delegation had proposed a not unreasonable test for determining whether or not a reservation was compatible with the character or purpose of a treaty. Something on those lines might be of value.

56. Lastly, his delegation considered that a reserving State should not be able to become a party to a treaty unless two-thirds of the contracting States expressly or impliedly accepted the reservation or stated when objecting to it that the other provisions of the treaty should enter into force for the reserving State.

57. Mr. MARTYANOV (Byelorussian Soviet Socialist Republic) thought that the provisions of Part II, Section 2 of the draft articles, on reservations, would contribute to international co-operation by enabling the greatest possible number of States with different economic and social systems to become parties to treaties. The possibility of formulating reservations facilitated the accession of States to treaties by introducing greater flexibility in international relations, as the contemporary practice of States confirmed. For instance, thanks to reservations, many young Asian and African States were able to defend their political and economic interests, and hence their sovereignty. That problem arose, for example, in connexion with the compulsory jurisdiction of the International Court of Justice.

58. In that context, the provisions drafted by the International Law Commission were not sufficiently flexible, particularly the wording of article 16, sub-paragraph (*a*). Some of the proposed amendments would mitigate that disadvantage. That was the merit of the amendment submitted by the USSR (A/CONF.39/C.1/L.115), which also simplified and clarified the provisions relating to reservations. For example, under article 17 of the draft, an objection to a reservation prevented the entry into force of the treaty. Paragraph 2 of the USSR amendment did not have that effect, and his delegation would therefore vote in favour of it.

59. On the other hand, his delegation, which favoured more contractual relationships between States, could not accept the view supported, in particular, by the representatives of the United Kingdom and Australia, that reservations should be controlled by a majority.

60. Mr. DADZIE (Ghana) said that the question of reservations was one of the most controversial. It was a complex and uncertain part of treaty law, which had so far been treated pragmatically, both in the text-books and in State practice. Codification should aim primarily at bringing certainty into the law, but great caution was needed.

61. There had been fundamental disagreements in various international political bodies including the General Assembly of the United Nations. The topic had even been referred to the International Court of Justice. Those disagreements had permeated the work of the International Law Commission on the articles concerned.

62. The Commission had tried, in those articles, to achieve a compromise based on the flexibility of the reservations system. The Ghanaian delegation approved of the draft articles, though it recognized that there was room for improvement.

63. The interrelationship of the provisions of articles 16 and 17 justified combining them in a single article, for the legal effect of a reservation depended largely on its acceptance or rejection by other States.

64. His delegation considered that the amendments submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.125) and Poland (A/CONF.39/C.1/L.136) and the part of the United States amendment (A/CONF.39/C.1/L.127) relating to article 17, sub-paragraph 4(*a*) were drafting amendments which could be referred to the Drafting Committee.

65. Turning to the amendments which he regarded as substantive, he said he had not been convinced by the arguments of the representative of the Federal Republic of Germany for deleting article 16, sub-paragraph (*b*). It was true that at first sight the International Law Commission seemed to have inserted that provision in article 16 *ex abundanti cautela*, but State practice showed that the sub-paragraph served a purpose. More often than not, multilateral treaties, and even some bilateral treaties, contained articles to which the parties were not permitted to formulate reservations. Conversely, such treaties might authorize reservations to specified articles. One example was the 1966 Protocol to the 1951 Convention relating to the Status of Refugees.[5] The Ghanaian delegation thought that article 16, sub-paragraph (*b*) introduced the requisite certainty by strengthening the provisions which operated against undue freedom in the matter of reservations.

66. The United States proposal to substitute the words " character or " for " object and " in article 16, sub-paragraph (*c*) would make the text ambiguous. The character of a treaty might arise from its purpose, but it might also arise from mere formal characteristics. The Ghanaian delegation was keeping an open mind on that amendment, however. The amendments submitted by Switzerland (A/CONF.39/C.1/L.97) and by France and Tunisia (A/CONF.39/C.1/L.113) would delete the words " or impliedly " in article 17, paragraph 1. That might remove an apparent inconsistency between articles 16 and 17.

[5] For the text of this Protocol, see *Official Records of the General Assembly, Twenty-first Session, Supplement No. 11A* (A/6311/Rev.1/Add.1), part one, para. 2.

67. The Czechoslovak amendment to article 16, paragraph 1 (A/CONF.39/C.1/L.84) was consequent on the proposal to insert in the draft convention an article 5 *bis* on the right of all States to become parties to treaties (A/CONF.39/C.1/L.74).

68. The solution proposed in the Syrian amendment (A/CONF.39/C.1/L.94) would create a complex situation with regard to the application of treaties. In the past, reservations had been valid only if they were accepted unanimously. If they were not, the reserving State could not become a party to the treaty. The modern rule was more flexible, and a reserving State could become a party, but an objecting State could not be forced to enter into relations with the reserving State and it could terminate the treaty with respect to the reserving State.

69. Although the second Czechoslovak amendment (A/CONF.39/C.1/L.85) had the advantage of introducing an element of certainty into treaty relations, it created an obligation which was probably too onerous for an objecting State, which must declare not only that it objected, but also that it did not wish the treaty to enter into force between it and the reserving State. The delegation of Ghana preferred the International Law Commission's solution.

70. He supported the principle that reservations must be compatible with the object and purpose of the treaty. The Commission had not, however, provided any mechanism for determining the compatibility or incompatibility of a reservation with the object of a treaty. He agreed with the United Kingdom representative that the test should be an objective one; to leave the matter to the caprice of States might lead to abuses. The reservations made by some States to Article 2(7) of the United Nations Charter—the domestic jurisidiction clause—had practically voided that article of its substance. To set up an independent body to determine compatibility or to entrust the task to an existing body such as the International Court of Justice was not an effective solution either, for that body would be able to intervene only when the matter had become justiciable.

71. The Ghanaian delegation was therefore in favour of a collegiate system, under which the reserving State would only become a party if the reservation was accepted by a given proportion of the other States concerned.

72. For the same reasons, his delegation thought that the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2) was worthy of consideration and should form the basis for a working paper which might get the Committee out of its present impasse. In that connexion, he would study the proposal just made by the Australian representative.

73. Mr. SPERDUTI (Italy) said that his delegation was, in principle, in favour of articles 16 and 17 as drafted by the International Law Commission. With regard to article 16, the Italian delegation supported some of the drafting amendments before the Committee. It was in favour of the Polish amendment (A/CONF.39/C.1/L.136), because it brought out clearly that where a treaty authorized only specified reservations, a State could not formulate reservations which did not fall within that category. The Italian delegation was accordingly opposed to the amendments which would delete article 16, sub-paragraph (*b*).

74. He was against the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.125) deleting from article 16, sub-paragraph (*c*) the words " In cases where the treaty contains no provisions regarding reservations ". For where a treaty did contain provisions regarding reservations, the case of incompatible reservations was already settled by those provisions, since such reservations were in the category of prohibited reservations. Hence sub-paragraph (*c*) was justified only in cases where the treaty contained no provisions regarding reservations.

75. The Italian delegation did not support the Ceylonese amendment (A/CONF.39/C.1/L.139) because it limited the possibility of making reservations. It supported the substance of the Peruvian amendment (A/CONF.39/C.1/L.132), but considered it unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty. It was not in favour of the USSR amendment (A/CONF.39/C.1/L.115), which would give States an unconditional right to formulate any reservation whatsoever, with the sole exception of reservations incompatible with the object of the treaty.

76. Article 17, paragraph 2 might give rise to difficulties of interpretation, for lack of precise criteria. The International Law Commission had adopted the idea of a limited number of States, combining it with that of the object and purpose of the treaty. The Italian delegation did not think that a solely quantitative criterion could be adopted, as the French and Tunisian delegations proposed. The United States amendment (A/CONF.39/C.1/L.127) added to the International Law Commission's two criteria the further criterion of the character of a treaty; but whereas the Commission's two criteria were cumulative, the United States amendment proposed alternative criteria. The Italian delegation preferred the Commission's solution. Of the other suggestions in the United States amendment, he found item E acceptable.

77. Since several delegations had proposed it, he would support the deletion of article 17, paragraph 3—on reservations to treaties which were the constituent instruments of international organizations. That question should be given further study later, with a view to separate regulation. If the paragraph was deleted, it should be specified in article 17 that the provisions of Section 2 were not applicable to such treaties. If the paragraph was retained, it should at least be supplemented as suggested in the Austrian amendment (A/CONF.39/C.1/L.3).

78. Several of the amendments were designed to reverse the formulation of article 17, paragraph 4(*b*) in one way or another. The Italian delegation considered the International Law Commission's formula more consistent with the requirements of logic and equity, in particular in the case of reservations which the objecting State considered incompatible with the object of the treaty.

79. The determination of incompatibility was the most serious problem raised by the articles. The amendment in document A/CONF.39/C.1/L.133 and Add.1 and 2 was an attempt to solve it. The United Kingdom representative had proposed a study of machinery for determining the compatibility or incompatibility of a reservation with the object of a treaty. The Italian delegation hoped that very serious efforts would be made in that direction.

The meeting rose at 1 p.m.

TWENTY-THIRD MEETING

Thursday, 11 April 1968, at 3 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 16 and 17 of the International Law Commission's draft.[1]

2. Mr. HU (China) said that his amendment to article 16 (A/CONF.39/C.1/L.161) was to replace the words " formulate a reservation ", in the introductory clause, by the words " make reservations ". The verb " to formulate " was not appropriate in the context and should be replaced by a more suitable term. He did not insist on the use of the verb " to make " but would leave the choice of term to the Drafting Committee. His amendment would involve a consequential change in the title of the article.

3. With respect to the same article, he supported the proposal to introduce into the compatibility test the concept of the character (A/CONF.39/C.1/L.126 and Add.1) or the nature (A/CONF.39/C.1/L.147) of the treaty. He also supported the proposals to delete sub-paragraph (*b*), the amendment by the Republic of Viet-Nam to drop the opening words of sub-paragraph (*c*) (A/CONF.39/C.1/L.125), and the redraft of the article by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2), especially its proposed new paragraph 2.

4. His delegation's amendment to article 17 (A/CONF. 39/C.1/L.162) was for the addition at the end of paragraph 3 of a sentence similar to that proposed by Austria (A/CONF.39/C.1/L.3). That new sentence would fill a gap in paragraph 3 of the article which, as it stood, presupposed that when a reservation was made the competent organ was already in existence; that, however, would not always be the case. Of course, if paragraph 3 were deleted, a course which he would not oppose, his amendment would no longer be necessary.

5. With regard to the various amendments which had been proposed to article 17, he supported only those to delete the words " or impliedly " from paragraph 1, and the United States amendment (A/CONF.39/C.1/ L.127) to replace the words " and the object and purpose " by the words " or the character or purpose " and to insert in the opening phrase of paragraph 4 the words " and unless the reservation is prohibited by virtue of article 16 ".

6. Mr. SARIN CHHAK (Cambodia) said it was important to uphold the principle of the integrity of treaties and reservations, even if they did not run counter to the object and purpose of a treaty, could still distort its meaning or alter its scope. But that did not mean that an unduly rigid attitude need be adopted, since that would disregard practical needs. Some countries, particularly developing countries, were not willing to accept certain treaties in their entirety. A more flexible approach, particularly now that the practice of reservations had become extremely common, would enable them to participate in more treaties and play a proper part in international co-operation. Reservations could also have the advantage of enabling a treaty to be adapted to changing circumstances. A reservation was based on the desire of reserving State to adapt the treaty to its own needs, but it could also be based on developments resulting from changing circumstances in general.

7. The making of reservations must be subjected to certain limitations and, in that respect, the provisions of article 16 afforded sufficient safeguards. The balanced text prepared by the International Law Commission was satisfactory and he also supported the Syrian amendment (A/CONF.39/C.1/L.94) which would usefully supplement it.

8. Mrs. ADAMSEN (Denmark) said that she would confine her remarks to the question of reservations to treaties between a limited number of States. Her country was a party to numerous treaties of that type and was certain to sign many more in the future. It was therefore a matter of great importance to her delegation that the future convention on the law of treaties should include a rule to the effect that a reservation to that type of treaty required acceptance by all the parties. She would consequently oppose the proposals for the deletion of paragraph 2 of article 17 made by Ceylon (A/CONF. 39/C.1/L.140) and Spain (A/CONF.39/C.1/L.148). She would, on the other hand, support the United States amendment which was designed to improve the text of that paragraph (A/CONF.39/C.1/L.127). The Drafting Committee might consider rewording article 17 to make it clear that, for treaties with a limited number of parties, the acceptance of reservations must always be express; it should not be implied from the mere absence of any objection, as was provided by the present text of paragraph 5. Subject to that remark, her delegation supported generally the International Law Commission's text of articles 16 and 17 and considered that it would not be advisable to disturb the general pattern. She would, however, welcome any proposals to clarify the meaning of the two articles, especially the relationship between sub-paragraph (*c*) of article 16 and paragraph 4 of article 17; such clarification might perhaps be achieved by providing some machinery to assist in the determination of the compatibility of a reservation with the object and purpose of the treaty.

9. Mr. HARASZTI (Hungary) said that the liberal practices of a certain number of States with regard to reservations had become more widespread since 1951, when the International Court of Justice had delivered its Advisory Opinion on reservations to the Genocide Convention. The International Law Commission's text took into account recent developments in international practice and constituted a useful basis for the future convention.

10. The wording could, however, be improved and his delegation would be prepared to support any amendments which, without affecting the compatibility test, afforded

[1] For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.

States a broader measure of freedom to make reservations, such as the USSR amendment (A/CONF.39/C.1/L.115) and the proposal by several delegations to delete sub-paragraph (*b*) of article 16, which was a mere survival of the outmoded doctrine of the integrity of treaties.

11. Since the negotiating States were always free to include in the treaty a clause prohibiting reservations, sub-paragraph (*a*) of article 16 was superfluous. None of the rules set forth in articles 16 to 20 were of an imperative character, so that the provisions of the treaty itself on the subject of reservations would prevail in any case. But although he thus supported the proposal to delete sub-paragraph (*a*), he would not oppose its retention if the majority wished to keep its provisions *ex abundanti cautela*.

12. He opposed the United States proposal to replace, with respect to the compatibility test, the concept of the " object and purpose " of the treaty by a reference to the " character or purpose " of the treaty. It was easy to see how the object of a treaty could be frustrated, but the notion of the character of a treaty was infinitely more vague, as was conclusively demonstrated by the fact that a similar amendment by Spain (A/CONF.39/C.1/L.147) actually proposed not that the concept of the " nature " of the treaty should replace that of the " object " of the treaty, but that the two should be combined. The expression " object and purpose " had, moreover, been taken by the International Law Commission from the language used by the International Court of Justice itself. He also opposed the amendment by Ceylon (A/CONF.39/C.1/L.139), which would limit the right of States to make reservations by permitting reservations only " to the extent that the treaty so provides ". A provision of that type would have the effect of precluding reservations altogether where the treaty was silent on the subject.

13. He supported those proposals (A/CONF.39/C.1/L.84, L.94 and L.115) which, while retaining the rule in paragraph 4(*b*) of article 17, would reverse the presumption embodied in the concluding proviso; it was more appropriate to consider that the objecting State would clearly express its views if it did not wish to enter into treaty relations with the reserving State. That reversal of the presumption would not affect in any way the right of the objecting State to refuse to enter into treaty relations with the reserving State if it considered the reservation incompatible with the object and purpose of the treaty. Treaty relations would thus be promoted without detracting in any way from the sovereignty of States.

14. Mr. CHAO (Singapore) said that, although his delegation considered that the right of reservation was essential in modern treaty relations, it believed that that right should be properly circumscribed. It was not entirely satisfied with the criterion of compatibility with the object and purpose of the treaty, which the International Law Commission had used in its draft. That criterion had been the subject of a great deal of criticism since it had first been formulated by the International Court of Justice in the Advisory Opinion on the Genocide case.

15. His delegation therefore supported the amendments by Ceylon to article 16 (A/CONF.39/C.1/L.139) and article 17 (A/CONF.39/C.1/L.140), which took into account the principle of consent, the sovereign rights of States and the need to safeguard the integrity of the treaty. Those amendments would make it possible to avoid the difficulties arising out of the application of article 17, paragraph 2, would dispense with the need to set up the controlling machinery suggested by the United Kingdom representative, and would overcome the problems raised by the Swedish delegation. The Ceylonese amendment to article 17 might be further improved if the new sentence proposed by the Austrian delegation for addition to paragraph 3 (A/CONF.39/C.1/L.3) were added at the end of paragraph 1 of the redraft proposed by Ceylon.

16. If the Ceylonese amendments were not adopted, the delegation of Singapore would support the Commission's text, with some amendments. It agreed that the words " or impliedly " should be deleted from article 17, paragraph 1, especially since that deletion would eliminate the contradiction between that paragraph and sub-paragraph (*b*) of article 16, to which the USSR representative had drawn attention. The United States amendments to paragraphs 2 and 5 of article 17 (A/CONF.39/C.1/L.127) and the Polish amendment to sub-paragraph (*b*) of article 16 (A/CONF.39/C.1/L.136) were useful improvements. Finally, the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2) deserved consideration, since the adoption of some mechanism along the lines proposed would solve many of the problems raised by the compatibility test.

17. Mr. HAYES (Ireland) said his delegation accepted the fact that recent developments and practice had by and large led to the replacement of the traditional unanimity rule by a system enabling States to become parties to treaties subject to reservations which were not accepted by all the other parties. The draft articles quite properly took account of that practice.

18. Ireland would not object to the combination of articles 16 and 17 proposed by the USSR (A/CONF.39/C.1/L.115), provided the distinction between the rules set out in the two articles was not thereby blurred. His delegation considered that article 16 contained absolute rules and that consequently, if a State purported to become a party to a treaty subject to a reservation which conflicted with those rules, its attempt to become a party would have no legal effect unless the reservation was withdrawn. Moreover, although in most such cases the other parties would make formal objection to such a reservation, their failure to do so would not constitute the reserving State a party to the treaty; in fact, to state the position even more emphatically, tacit or even express acceptance of a reservation conflicting with the rules in article 16 would not make the reserving State a party to the treaty in relation to any other State, even an accepting State. Although it appeared from the last sentence of paragraph (17) of the commentary that the International Law Commission had not intended the rules in question to have that effect, the Irish delegation considered that the Committee should strive towards that end, perhaps by adopting the United States amendment to article 17, paragraph 4 (A/CONF.39/C.1/L.127).

19. That of course raised the question of how compatibility was to be determined in practice: the Commission had recognized that difficulty in the fourth sentence of paragraph (10) of its commentary. Although his delegation would not oppose any practicable and generally acceptable solution, it would prefer some form of independent adjudication to the introduction into the convention of a principle which would permit a reservation to be disallowed on the basis of collegiate disapproval.

20. As he had already said, his delegation considered that the rules in article 16 should be absolute and should not be capable of being overridden by the use of the procedures set out in article 17, paragraph 4; it took the view, however, that sub-paragraph (*b*) of article 16 should be deleted, as a number of delegations had proposed. For similar reasons, his delegation could not support the amendments which proposed that, under article 17, paragraph 4(*b*), an objection to a reservation should not prevent a treaty from applying between the reserving State and an objecting State unless the latter expressed the opposite intention; the Commission's formulation of the provision was preferable, for the reasons stated by the Swedish representative.

21. Mr. KOUTIKOV (Bulgaria) said that his delegation would support the USSR proposal (A/CONF.39/C.1/L.115) to amalgamate articles 16 and 17, since that would make the text simpler, more flexible and easier to interpret and apply. Moreover, most of the shortcomings of the Commission's article 17 would be eliminated if the USSR amendment were adopted. If it were decided to retain two separate articles, however, the Bulgarian delegation hoped that the Commission's text would be amended on the lines proposed by Czechoslovakia (A/CONF.39/C.1/L.84) and Syria (A/CONF.39/C.1/L.94); the Drafting Committee should be asked to study all the amendments with a view to eliciting their positive elements, paying particular attention to the French and Tunisian proposals (A/CONF.39/C.1/L.113). Finally, the Bulgarian delegation could not support paragraphs 3 and 4(*b*) and (*c*) of article 17, since those provisions ran counter to the modern liberal trend in reservation matters.

22. Mr. ARIFF (Malaysia), introducing his delegation's amendments to article 16 (A/CONF.39/C.1/L.163), said that his delegation had no objection to the substance of the Commission's draft, but wished to see a clearer and more concise text, and had accordingly submitted new texts for sub-paragraphs (*b*) and (*c*), which could be referred to the Drafting Committee.

23. His delegation considered that the introduction, in the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2), of a time-limit for objections was a useful addition to the Commission's sub-paragraph (*c*).

24. Mr. KRISPIS (Greece) said that his delegation could support the International Law Commission's clear, simple and flexible draft, subject to a few amendments. If sub-paragraph (*b*) of article 16 were retained, his delegation would support the Polish amendment (A/CONF.39/C.1/L.136), but if the provision were deleted, sub-paragraph (*a*) should be altered to read: "Reservations are prohibited by the treaty", otherwise sub-paragraph (*a*), as at present worded, would contain what was now sub-paragraph (*b*).

25. The Greek delegation supported the proposal by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF.39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150) to delete the words "or impliedly" from article 17, paragraph 1, and considered that the word "and" between "object" and "purpose" in article 17, paragraph 2 and in sub-paragraph (*c*) of article 16 should be replaced by "or". If article 17, paragraph 3, were retained, his delegation would support the amendments to that paragraph by Austria (A/CONF.39/C.1/L.3) and China (A/CONF.39/C.1/L.162). Finally, it would support the Syrian amendment (A/CONF.39/C.1/L.94) to article 17, paragraph 4(*b*).

26. Mr. BOULBINA (Algeria) said that the abandonment of the unanimity rule, the multiplicity of international relations and the substitution of the two-thirds majority for the unanimity rule led directly to the admissibility of reservations, as a means of preventing situations from arising where the minority could not safeguard their legitimate interests in accordance with the principle of the sovereign rights of States. Reservations could not lead to a distortion of the basic provisions of a treaty, since they most often related to matters of detail which had a particular importance for a given State, but did not have the same importance within the general framework of the treaty. The development of international co-operation made it essential that the largest possible number of States should become parties to multilateral treaties. It was better to have a treaty with a large number of reserving parties than to have a treaty with only a few parties or no treaty at all.

27. The Algerian delegation could support the amendments submitted by Syria (A/CONF.39/C.1/L.94), Czechoslovakia (A/CONF.39/C.1/L.85), and the USSR (A/CONF.39/C.1/L.115) to paragraph 4(*b*) of article 17. On the other hand, it could not support the presumption in the Ceylonese amendment (A/CONF.39/C.1/L.139) that reservations were not permissible if the treaty was silent on the question. Nor could it support the proposals submitted by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) to delete the words "or impliedly" from paragraph 1 of article 17. It could, however, support the proposals to delete sub-paragraph (*b*) of article 16, submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.128) and the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1). Lastly, it could support the proposal in the French and Tunisian amendment and the Swiss amendment to delete paragraph 3 of article 17. The Austrian amendment (A/CONF.39/C.1/L.3) did not solve the problem, but merely stated it in a different way, and in any case, the question seemed to be adequately covered by article 4.

28. The CHAIRMAN suggested that the debate on articles 16 and 17 be adjourned in order to allow the authors of amendments an opportunity for consultation with a view to the amalgamation of their proposals. Meanwhile, the Committee would pass on to consider article 18.

It was so agreed.[2]

[2] For resumption of the discussion on articles 16 and 17, see 24th meeting.

Article 18 (Procedure regarding reservations) [3]

29. Mr. GRISHIN (Union of Soviet Socialist Republics) said that his delegation's amendment (A/CONF.39/C.1/L.116), proposing the deletion of the words " an express acceptance of a reservation ", was directly connected with its proposals for a new text for articles 16 and 17 (A/CONF.39/C.1/L.115), which deliberately omitted any reference to express written acceptance of reservations, but only provided that an objection, like the reservation itself, should be submitted in written form. Both amendments were based on the presumption that expression of acceptance was tacit, although that did not preclude oral or written expression.

30. The non-compulsory nature of acceptance was confirmed by the practice of many States; thus, in one of its memoranda to the Secretary-General of the United Nations, the United Kingdom had stated that an acceptance might be regarded as received if the parties to a multilateral treaty, having been informed of a reservation made on signature, ratification or accession, did not directly express either acceptance or non-acceptance. Moreover, practice showed what absurd situations compulsory written acceptance might lead to: the reservations of Panama, the United States and Spain to the International Sanitary Convention of 1912 had only been received eight years later, and acceptance of the United States reservation on ratifying the 1919 Convention of Saint Germain amending the General Act of the 1890 Brussels Conference on the Slave Trade had not been received until 1934. The Soviet Union was in favour of codifying existing rules of international law, but did not believe in codifying practices which were not useful or progressive. His delegation would not press its amendment to a vote, but hoped that it would be referred to the Drafting Committee.

31. Mr. TALLOS (Hungary), introducing his delegation's amendments to paragraphs 2 and 3 of article 18 (A/CONF.39/C.1/L.138), said that although paragraph 2 of the International Law Commission's text implied that, if a reservation was not confirmed on the date of ratification it was considered invalid, his delegation had thought it advisable to clarify the text by stating the rule expressly. Similarly, although the Hungarian delegation agreed in principle with the Commission's text of paragraph 3, it believed that that wording might be erroneously interpreted to mean that objection after confirmation of the reservation did itself require confirmation; it had therefore tried to clarify the text. It had also included a reference to express acceptance of a reservation, to show that such express acceptance did not require confirmation: if, however, the USSR amendment were accepted, that part of the Hungarian amendment would lose its point. Both his delegation's amendments might be referred to the Drafting Committee.

32. Mr. CUENCA (Spain), introducing his amendment to article 18 (A/CONF.39/C.1/L.149), said that it was designed to improve the formulation of the procedural rules set forth in the article.

33. In paragraph 1, it was proposed to delete the adjective " express " before the word " acceptance "; the qualification was unnecessary in the context and was, moreover, not consistent with the provisions of article 17 on the tacit acceptance of a reservation resulting from the absence of objection. In the same paragraph a reference had been introduced to " other States which are parties " to supplement the concept of " other States entitled to become parties "; that change would cover the case in which the treaty was in force, so that there were already States parties to it.

34. His amendment contained a new paragraph 2 which, in the case where there was a depositary, applied to the matter of reservations the rules laid down in article 72, especially paragraph 1(*e*), and article 73. The new paragraph 2 accordingly set forth the duty of the depositary to make all communications with regard to reservations. Of course, the depositary was not entitled to express a view on the validity or admissibility of a reservation, or even called upon to draw the attention of the States concerned to any anomaly in the reservation. Those were matters within the exclusive competence of the States which were parties, or entitled to become parties, to the treaty.

35. His amendment also contained a new paragraph 3 which would require the communication of a reservation to specify the effects that would flow under paragraph 4 of article 17 from the failure to express an objection to the reservation. As a matter of good faith, the State making the communication must warn the States to which it was made that the failure to object would, after the expiry of a period of twelve months, be deemed to constitute acceptance of the reservation. The purpose of his amendment was not to encourage objections, but simply to try to avoid the twelve-month period being allowed to elapse through an oversight by the Ministry of Foreign Affairs of the State that was notified of the reservation.

36. Lastly, as a matter of mere drafting, his delegation proposed to merge the closely interconnected paragraphs 2 and 3 into a single paragraph renumbered 4.

37. Mr. PINTO (Ceylon) said that article 18 in the form submitted by the International Law Commission was acceptable generally, but he did not think that an objection to or acceptance of a reservation required confirmation and for that reason his delegation had submitted an amendment to paragraph 3 (A/CONF.39/C.1/L.151).

38. Mr. McKINNON (Canada) said that the phrase " entitled to become parties to the treaty " might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase " negotiating States and contracting States " as proposed in his delegation's amendment (A/CONF.39/C.1/L.158).

39. The same rule should apply to the communication of reservations as applied to the withdrawal of reservations, under article 20.

40. Mr. KEARNEY (United States of America) said he supported the amendments proposed by Canada and Ceylon but could not endorse the Spanish amendment to delete the word " express ", which served a useful purpose and made the text more precise. Paragraphs 2

[3] The following amendments had been submitted to article 18: Union of Soviet Socialist Republics, A/CONF.39/C.1/L.116; Hungary, A/CONF.39/C.1/L.138; Spain, A/CONF.39/C.1/L.149; Ceylon, A/CONF.39/C.1/L.151; Canada, A/CONF.39/C.1/L.158.

and 3 of the Spanish amendment related to depositary functions and should be considered together with the provisions on that subject. He supported the Hungarian amendment.

41. Mr. VEROSTA (Austria) said that the opening words of paragraph 2, " If formulated on the occasion of the adoption of the text or upon signing the treaty ", conflicted with the provisions of article 16 and should therefore be deleted.

42. The CHAIRMAN suggested that, subject to the decision on articles 16 and 17, article 18 might be referred to the Drafting Committee.

It was so agreed.[4]

Organization of the work of the Conference

43. Mr. TABIBI (Afghanistan) said that, despite the Chairman's efforts to induce the Committee to work faster, the bulk of the draft still remained to be discussed and at the present rate of progress there was little chance of getting through it by 24 May. Something drastic would therefore have to be done, and consideration might be given to the possibility either of establishing another committee of the whole to consider certain parts of the draft, or of setting up a working group to sound delegations on their views and try to reconcile differences of opinion. It would be remembered that, at the first Conference on the Law of the Sea, held at Geneva, no fewer than five committees had been set up.

44. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he agreed that the Conference must work faster and he fully supported the idea of establishing a second committee of the whole; when the General Assembly, at its twenty-first session, had discussed the Conference's method of work, his delegation had advocated two committees of the whole. As an alternative, a working group might perhaps be set up to consider part V of the draft. In the meantime all delegations should do their best to submit amendments as early as possible.

45. Mr. DADZIE (Ghana) said he agreed with what had been said by the representative of Afghanistan and favoured the creation of a small group to consult delegations informally and prepare recommendations for consideration by the Committee of the Whole.

46. Mr. SINCLAIR (United Kingdom) said that his delegation had also favoured two committees of the whole but had been overruled in the General Assembly. Delegations which had made their arrangements on the basis of there being only one committee might now find it difficult to service two committees. The idea of a working group on part V might well be acceptable, but, before it could be established, it must have the benefit of a preliminary general discussion in the Committee of the Whole.

47. Mr. KEARNEY (United States of America) said that, while he was prepared to support the suggestion for establishing a second committee of the whole, he was not certain that the physical facilities were available.

48. He did not favour the Soviet Union representative's suggestion for establishing a special group on part V, as it could not do useful work without first hearing the views of the Committee of the Whole on a very complex set of articles. Moreover such a procedure would hardly be democratic.

49. Mr. DE BRESSON (France) said he did not think it would be possible to establish a second committee of the whole, as that would be contrary to rule 47 of the rules of procedure. In any case it would create difficulties for some delegations, and perhaps there would not even be a room available in which a second committee could meet. Working groups could only function usefully if a prior discussion had been held in the Committee of the Whole at which each delegation had had the opportunity of expressing its views.

50. Mr. WATTLES (Secretary of the Committee) said that the possibilities of holding extra meetings were set out in the Secretary-General's memorandum on methods of work and procedures of the first session of the Conference (A/CONF.39/3), which had been approved at the third plenary meeting on the recommendation of the General Committee. The Austrian authorities and the Secretariat had taken into account the General Assembly's decision to establish one Committee of the Whole, and there was not a large enough room available for a second, since the other would be occupied as from next week by the United Nations Industrial Development Organization. After 22 April it might be possible to hold extra meetings of the Committee of the Whole and working groups as an additional team of interpreters would then be available, but no summary records could be kept of meetings of working groups, whose discussions would consequently have to be informal. He presumed that delegations would wish the discussion on each article to be held in the Committee of the Whole first, before the article was referred to a working group.

51. Mr. TABIBI (Afghanistan) said that there was nothing to prevent the Conference from amending its rules of procedure. Clearly the Secretariat must consider what would happen if the Conference failed to deal with all the draft articles by the end of its session.

52. Mr. SUPHAMONGKHON (Thailand) said that perhaps the whole question of the organization of work might be referred to the General Committee.

The meeting rose at 5.35 p.m.

TWENTY-FOURTH MEETING

Tuesday, 16 April 1968, at 10.55 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations) *(resumed from the 23rd meeting)* [1]

1. Sir Humphrey WALDOCK (Expert Consultant) said that the scheme of articles 16 and 17 was based on the

[4] For resumption of the discussion on article 18, see 70th meeting.

[1] For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.

consensual character of treaties. A reservation was, *ex hypothesi*, something other than that which had been agreed by the negotiating States. It had therefore seemed to the International Law Commission that there were two main questions: first, under what conditions could a State wishing to become a party to a treaty claim to formulate a reservation? Secondly, what form and degree of acceptance by the other negotiating States were required for the reserving State's participation in the treaty?

2. In answering those questions, the Commission had had to take account of three different approaches to the problem: some States, putting the stress on sovereignty, favoured the maximum freedom both to formulate reservations and for the reserving State to become a party to the treaty; others, stressing the principle of the integrity of the convention, appeared to favour limitation of the freedom to formulate reservations and a strict approach to the degree of acceptance; others, again, while not advancing any doctrine of an inherent right to make reservations, favoured a flexible system of acceptance or rejection of reservations by the other negotiating States individually.

3. It was, therefore, not only for logical reasons, but also because of the divergent views of States that the Commission had dealt with reservations in two separate articles. In doing so, it had sought to establish a balance between the interests of the reserving State and those of the other negotiating States, and it was perhaps because that balance had been achieved that the divergent views had not manifested themselves too sharply during the present debate.

4. He therefore believed that the amalgamation of articles 16 and 17 in a single article might upset the balance aimed at, by blurring the principles involved in those two articles.

5. The deletion of article 16, sub-paragraph (*a*), would have the same unfortunate result, since it would eliminate the reference to the right of States to insist on the integrity of a particular convention.

6. The deletion of article 16, sub-paragraph (*b*), had been called for because, it was argued, the presumption proposed by the Commission, that a treaty which allowed certain reservations implied that it prohibited others, did not necessarily represent the intentions of the parties in all cases. The formula proposed by the Polish delegation, namely, to limit the sub-paragraph to cases in which the treaty authorized only specified reservations, was a possible solution. The outright deletion of the sub-paragraph would leave a gap in the system, unless the reservations prohibited under the Polish proposal were accepted as falling indirectly under the prohibition contained in sub-paragraph (*a*). That was certainly so in fact, but the Committee of the Whole might prefer to state the rule in black and white.

7. Turning to the relationship between article 16, sub-paragraph (*c*), and article 17, and to the proposal to delete sub-paragraph (*c*), he said that the International Law Commission had certainly intended to state an objective criterion for the compatibility of a reservation with the object and purpose of a treaty; and the debate seemed to have shown that the principle of that criterion now met with very general acceptance. The question which then arose was that of the method of application: by collegiate decision or by decision of each of the other contracting States individually.

8. The Commission had adopted the principle of a collegiate decision, in differing forms, for two categories of treaty: those for which the integrity of the treaty was an essential condition of the consent of each party and those which were constituent instruments of international organizations. For all other treaties, the question would be settled by individual decision between two contracting States, as it was under the flexible bilateral system applied in the Organization of American States.

9. Suggestions had been made, notably by the delegations of Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2) for the adoption of some system of collegiate objection on the ground in article 16, sub-paragraph (*c*), and having effect *erga omnes*. His view was that proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations.

10. It was true that, although the International Law Commission had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended on the judgement of States. But that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided.

11. The Committee should bear in mind that under the system adopted by the International Law Commission, no State was obliged to accept the entry into force of a treaty as between itself and a reserving State whose reservation it regarded as incompatible with the object of the treaty; that States were free to adopt different rules in advance by inserting express provisions in the treaty; and that the flexible system would apply only to treaties for which the principle of the integrity of the treaty was, *ex hypothesi*, less significant.

12. The reversal of the presumption established by article 17, sub-paragraph 4(*b*), would also upset the balance of the two articles under consideration by favouring greater freedom in the matter of reservations. Furthermore, as he had already pointed out, States did not readily object to reservations. If they did raise an objection, however, it was probably preferable, and consistent with the intention of an objecting State in most cases, to reserve their position with regard to the entry into force of the treaty between themselves and the reserving State.

13. It had been proposed that the word " formulate " in article 16 should be replaced by the word " make ". The International Law Commission had rejected the word " make " because it might imply that the State concerned had the right to participate in the treaty on the basis of the reservation. The Commission had preferred the word " formulate " as being more non-committal having regard to the balance it sought.

14. Lastly, the words " or impliedly " in article 17, paragraph 1, seemed to have been retained in the draft

articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations.

15. Mr. SMALL (New Zealand) said he thought that despite the reassuring remarks of the Expert Consultant, the scheme of articles 16 and 17 afforded a considerable amount of freedom in the matter of reservations. The divergent views expressed in the debate raised a question, not of directly conflicting values, but of degree: they related solely to the extent to which it was possible to ensure the maximum freedom in the matter of reservations and thus encourage wider participation in treaties, but without impairing the contractual obligations themselves. The Peruvian delegation had drawn attention in its amendment (A/CONF.39/C.1/L.132) to the dangers of the highly general and indeterminate reservation which seemed the archetype of the reservations that a very liberal system might well tend to produce to a greater and greater extent.

16. From a small country's point of view, the lack of provisions on the settlement of disputes in many multilateral treaties and the fact that only a few countries recognized the jurisdiction of the International Court of Justice in regard to the interpretation of treaties, combined with a subjective system of judging reservations, resulted in a situation far removed from the rule of law which was the remedy of small countries.

17. He feared that the abuse of reservations might ultimately have repercussions on States' conduct in executing even those provisions of the treaty which had not been the subject of reservations. Over a period, the worth of the treaty relationship itself could be subverted.

18. The New Zealand delegation was therefore in favour of setting up machinery for the acceptance of reservations and supported, in particular, the proposals of Sweden, Australia, the United Kingdom and Japan. As much time as could be spared during the Conference should be devoted to studying the proposals which had been put forward or any other possible arrangements.

19. Mr. GON (Central African Republic) said he found the International Law Commission's text satisfactory. He supported the proposal to delete the words " or impliedly " in article 17, paragraph 1, however, because the distinction between reservations authorized impliedly and reservations incompatible with the object of the treaty would give rise to difficulties.

20. Reminding the Committee of the resolution (A/CONF.39/C.1/2) which, at the 11th meeting, it had recommended the Conference to adopt, he said that the whole question of international organizations should be dealt with elsewhere and he therefore supported the deletion of article 17, paragraph 3. If that paragraph was retained, however, it should at least be supplemented as proposed in the Austrian amendment (A/CONF.39/C.1/L.3); otherwise, it was not clear how a reservation could be accepted by the competent organ of an organization which in principle did not yet exist.

21. Lastly, he was in favour of reversing the presumption in article 17, paragraph 4(*b*), for once the principle stated in article 16, sub-paragraph (*c*) had been accepted, namely, that a reservation must not be incompatible with the object and purpose of the treaty, the States concerned had agreed on the essential point.

22. Mr. EL DESSOUKI (United Arab Republic) said that the text of the International Law Commission's draft articles on reservations was balanced, effective and consistent with the needs of a developing international community. The importance of the principle of the integrity of treaties should not be exaggerated. If the negotiating States feared that reservations to certain provisions would really endanger the integrity of the treaty, they would probably prohibit reservations to those provisions by an express clause in the treaty.

23. In his delegation's view, the rules stated in articles 16 and 17 applied to reservations as defined in article 2(*d*) of the convention, and consequently did not relate to declarations which neither excluded nor varied the legal effect of certain provisions of a treaty.

24. Commenting on the amendments to articles 16 and 17, he said that those submitted by Czechoslovakia (A/CONF.39/C.1/L.84 and L.85), Poland (A/CONF.39/C.1/L.136) and Malaysia (A/CONF.39/C.1/L.163) were purely drafting amendments. The amendments submitted by the USSR (A/CONF.39/C.1/L.115), Ceylon (A/CONF.39/C.1/L.139 and L.140) and Spain (A/CONF.39/C.1/L.147 and L.148) were intended only to simplify the text. Those two groups of amendments raised no difficulties.

25. The other amendments involved changes of substance on which the delegation of the United Arab Republic had not yet formed a definite opinion. It hoped that the authors of those amendments would meet and try to reconcile their views. In any event, the Committee should guard against taking any hasty decision.

26. Sir Lalita RAJAPAKSE (Ceylon) said he would withdraw his amendments (A/CONF.39/C.1/L.139 and L.140), which had obviously not met with the approval of the majority of the Committee, and associate himself with those who urged that some appropriate means be found for objectively determining the compatibility of a reservation with the object and purpose of a treaty.

27. Mr. JAGOTA (India) said that the question of reservations dealt with in articles 16 and 17 had long been controversial, particularly since 1948, and had been considered in turn by the General Assembly, the International Court of Justice and the International Law Commission. The principal question relating to multilateral treaties was whether emphasis should be placed on maintaining the integrity of the treaty, which had often been concluded after long negotiations, or whether States must be given freedom to accept a treaty with certain reservations. In the first case, the danger was that States might never become parties to the treaty and hence that it might never come into force. In the second case there might be uncertainty as to who was a party to the treaty and what were the reciprocal obligations of the contracting States. It was generally recognized that States must be free to formulate reservations, but that freedom must be subject to such safeguards which would ensure that the reservations did not frustrate the object or purpose of the treaty. The number of multilateral treaties concluded had increased considerably, and in view of the practice which had gradually evolved, unanimity could not be the basis for adopting the text of a treaty. It would therefore be unrealistic to emphasize unanimity for the acceptance of reservations,

on the theory that the text of a treaty was authentic and final and represented the considered views of all the negotiating States.

28. The Indian delegation was satisfied with the compromise text arrived at by the International Law Commission. Article 16 specified the three categories of prohibited reservations, corresponding to the three possibilities open to the negotiating States when a treaty was concluded. At that time the States could either prohibit reservations wholly or partly, permit reservations to certain specified articles, or remain silent on the subject. Article 17 dealt with the modalities of permissible reservations, which were divided into two categories. Those in the first category (paragraphs 1, 2 and 3) were subject to régimes of their own. To be valid, such reservations must not fall within the category of reservations prohibited under article 16. The second category of reservations was dealt with in paragraph 4, which applied only to reservations that were not prohibited, and no special régime was established for them. Sub-paragraphs (*a*) and (*b*) showed the extent of flexibility in the formulation and acceptance of reservations. Sub-paragraph (*c*) specified when the act expressing the consent of a State to be bound by a treaty containing a reservation became effective. That clause was necessary because of the flexibility of the system established in sub-paragraphs (*a*) and (*b*).

29. His delegation accepted the principle and the scheme embodied in articles 16 and 17, but the wording of the articles gave rise to certain difficulties concerning matters of substance.

30. The distinction between the prohibited and the permitted reservations was not clear, though the two articles in question clearly showed that that distinction existed. Whereas the reservations permitted under the terms of article 16(*c*) must be compatible with the object and purpose of the treaty, the criterion of compatibility did not apply either to article 16(*b*) or to reservations impliedly authorized under article 16(*a*). For the latter reservations, acceptance by the other contracting States was not required under article 17, paragraph 1. Such reservations seemed to be those referred to in article 16(*b*) and those which did not fall under article 16(*a*). On the other hand, the compatible reservations authorized under article 16(*c*) might be subject to acceptance or objection under the terms of article 17, paragraph 4. The basis of that discrimination was not clear. With regard to authorized reservations, it might be argued that the negotiating States had already accepted the compatibility of the reservations with the object and purpose of the treaty, which was not the case if the treaty was silent on reservations. But what was the situation with regard to impliedly authorized reservations? Two questions then arose: should the criterion of compatibility apply only to article 16(*c*) or to all reservations, and should the distinction between impliedly authorized reservations and compatible reservations be dropped, making article 17, paragraph 1, apply only to expressly authorized reservations, so that impliedly authorized reservations came within the scope of article 17, paragraph 4?

31. The second observation the Indian delegation wished to make related to the criterion of compatibility under article 16(*c*). What was an incompatible reservation and who would determine incompatibility? What would happen if a dispute arose? The question would be particularly complicated owing to the provision in article 17, paragraph 4(*c*) to the effect that ratification or consent by the reserving State was effective as soon as one other contracting State had accepted the reservation. A dispute about the compatibility of a reservation might arise between a State objecting to it and a State accepting it. The question of compatibility had been taken up in the Advisory Opinion delivered by the International Court of Justice in 1951. The Court had not been very sure about how the question could be settled, but it had clearly set out the limitations of the applicability of the criterion of compatibility.

32. The difficulties arising from that position had not been solved in articles 16 and 17 of the draft. One possible solution might be that suggested by the representative of Japan, namely, that if an objection on the ground of incompatibility was raised by a contracting State and a majority of the contracting States supported that objection within three months of the communication of the reservation, the consent of the reserving State to be bound by the treaty would be without legal effect. The occasions on which a reservation could be made and the effect of an objection on the ground of incompatibility must, however, be clearly set out. A reservation might be made at the time of signature, and it could then be communicated to the States which had signed the treaty. Objections raised by a signatory State would be merely provisional. If the reservation was made at the time of ratification, it could be communicated to all the States concerned and should have no effect if one-third—rather than one-half—of such number of States as would bring the treaty into force raised objections to the reservation on the ground of its incompatibility. If a reservation was made after the treaty had entered into force, it could be communicated to all the States parties and should have no effect if one-third of the States parties to the treaty at the time of the deposit of the reservation had raised objections on the ground of incompatibility within three months from the date on which they had been notified of the reservation. Those rules should be included in article 16(*c*), so as to make it clear that they were not linked to article 17, paragraph 4(*c*). Thus an objection made to a reservation on the ground of incompatibility would fall under article 16(*c*), so that the consent of the reserving State would be without legal effect and that State would not be able to become a party to the treaty unless it withdrew its reservation or made it compatible with the object and purpose of the treaty. On the other hand, article 17, paragraph 4(*c*), which required acceptance by only one State, would only apply when the reservation had not been objected to on the ground of incompatibility.

33. It seemed that article 17, paragraph 2, could be deleted, since the negotiating States could take an appropriate decision, either prohibiting the formulation of reservations, or authorizing reservations to certain specified clauses, or providing that even the specified reservations must be accepted by all the contracting States. Those States would be able to take that decision in accordance with article 16(*a*), article 16(*b*), and article 17, paragraph 1.

34. Article 17, paragraph 2, raised another fundamental question. It applied to a treaty involving a limited

number of negotiating States. In that case the reservation must be accepted by all the parties. It might be asked what was meant by a " limited number ". Who was to determine whether the object and purpose of the treaty required that a reservation be accepted by all the parties? As it stood, article 17, paragraph 2, would raise problems having regard to article 16(*c*) and the basis for its distinction from article 17, paragraph 4 would not be readily apparent.

35. His delegation was not convinced that article 17, paragraph 3, need be retained.

36. To sum up, if the distinction between prohibited reservations and permitted reservations were made perfectly clear, if the distinction between impliedly authorized reservations and compatible reservations were dropped, if determination of incompatibility of reservations and sanctions against their abuse were provided for, and if article 17, paragraphs 2 and 3 were deleted, articles 16 and 17 would be simpler and would achieve the intended purpose.

37. It was against that background that the Indian delegation would take its position with regard to the proposed amendments. The USSR amendment (A/CONF.39/C.1/L.115) combined articles 16 and 17. Paragraph 1, which stated the circumstances in which a State could make reservations, did not mention the prohibited or impliedly prohibited reservations referred to in article 16, sub-paragraphs (*a*) and (*c*). It might perhaps be necessary to mention those prohibitions, for instance by adding at the end of paragraph 1 of the amendment the words " except when reservations are prohibited expressly or impliedly by the provisions of the treaty ". As to paragraph 2 of the USSR amendment, the Indian delegation preferred the wording of article 17, paragraph 4(*b*) as it stood. Paragraph 3 of the amendment was acceptable to the Indian delegation. Paragraph 4, which was similar to article 17, paragraph 2, could be deleted. The amendment did not state when the consent of a reserving State became effective and it did not deal with the question of incompatibility. Provisions on those points should be added.

38. The amendment submitted by the delegations of Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add. 1 and 2) was acceptable to the Indian delegation and could be redrafted in the light of its comments.

39. The Swiss amendment (A/CONF.39/C.1/L.97) was also acceptable, as were the amendments to article 17, paragraphs 1 and 3 proposed by France and Tunisia (A/CONF.39/C.1/L.113). The Indian delegation accepted the United States amendment to article 17, paragraph 4 (A/CONF.39/C.1/L.127).

40. Mr. KRISHNADASAN (Zambia) said that his delegation was uneasy about article 16, sub-paragraph (*c*). If a treaty contained no provisions concerning reservations, there were two possibilities: the intention of the parties was either that a State maintaining reservations should not become a party to the treaty or that reservations should be valid only for the parties which did not object to them. The incompatibility criterion stated in sub-paragraph (*c*) seemed to divide the provisions of a multilateral treaty into two classes: those which were and those which were not part of the object and purpose of a treaty. Normally, however, all the provisions were part of the object and purpose of a treaty, otherwise they would not have been included in it. But even if such a distinction were possible, the criterion would be subjective, because it would be States themselves which would make the distinction, and that would be contrary to a basic aspect of the law of treaties, namely, the identity of the parties. Furthermore, it was difficult to define precisely what was meant by " the object and purpose of the treaty ".

41. In paragraph (17) of its commentary to articles 16 and 17, the International Law Commission had pointed out that article 16, sub-paragraph (*c*) had to be read in close conjunction with the provisions of article 17 regarding acceptance of an objection to reservations. Moreover, article 17, paragraph 4(*c*) was important for determining when a State could be regarded as being bound by a treaty. It was that sub-paragraph, however, which was causing his delegation concern, for it was sufficient for a single contracting State to have accepted a reservation for the reserving State to be considered a party to a multilateral treaty. Even if the " compatibility theory " were accepted, the question arose how it could be satisfactorily applied. The Zambian delegation supported the suggestion made by some speakers that a system be adopted whereby a reserving State would not become a party to a treaty unless its reservation were accepted by a certain proportion of the other contracting States. In his opinion, an element of objectivity should be introduced into article 16, sub-paragraph (*c*) in order to safeguard the integrity of multilateral treaties.

42. Mr. RUDA (Argentina) said that reservations to multilateral treaties raised the problem of reconciling two important trends: the growth of international relations and respect for the sovereign equality of States. A formula preserving the balance between those two trends had to be found. The theory of the unanimous acceptance of reservations was no longer acceptable in modern times; everything pointed to the need to adopt a flexible system. It was better that a State should consent to part of a treaty rather than lose all interest in it. The Inter-American system had adopted a rule which had proved most effective, as it promoted relations between States with very diverse interests. The International Law Commission's draft articles were based on the Inter-American experience and the Argentine delegation accordingly approved of them.

43. Paragraph 1 of the USSR amendment (A/CONF.39/C.1/L.115) altered the original text inasmuch as the criterion applied was no longer the existence or absence of a prohibition of reservations, but the character of the reservation, which was likely to create difficulties. The same applied to the amendment submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.125). As to paragraph 2 of the USSR amendment, the Argentine delegation preferred the International Law Commission's text. According to the Soviet Union text, the treaty would remain in force between the objecting State and the reserving State unless a contrary intention was expressed by the objecting State; that would be going too far in applying the principle of flexibility and might create unduly complex relations between States. That comment also applied to the amendments in documents A/CONF.

39/C.1/L.85 and L.94. On the other hand, the Argentine delegation had no objection to paragraphs 3 and 4 of the USSR amendment.

44. The proposal by the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1) to substitute the words " character or " for " object and " would impair the clarity of article 16.

45. The Argentine delegation supported the Polish amendment (A/CONF.39/C.1/L.136) as it made article 16, sub-paragraph (*b*) easier to understand. Paragraph 1 of the amendment in document A/CONF.39/C.1/L.133 and Add.1 and 2 reproduced the idea of the Soviet Union amendment, but added nothing to the clarity of the original text. As to paragraph 2 of that amendment, he saw no need to give a majority of States the power to determine whether a reservation was compatible with the object and purpose of a treaty. That procedure would not be in conformity with the principle of the sovereign equality of States.

46. The deletion of the words " or impliedly " proposed in the amendment to article 17, paragraph 1, by France and Tunisia (A/CONF.39/C.1/L.113) would make the text clearer. On the other hand, the Argentine delegation could not accept the amendment to paragraph 2 by those two delegations, which contained the words " restricted multilateral treaty ". The words " limited number of the negotiating States " should be retained. Article 17, paragraph 3, should also be retained; the text proposed by the International Law Commission seemed satisfactory, but consideration might be given to the Austrian amendment (A/CONF.39/C.1/L.3), which made the meaning clearer, and to the Spanish amendment (A/CONF.39/C.1/L.148).

47. The Argentine delegation unreservedly approved of paragraph 4, which was based on the Pan-American rule. It was not in favour of the amendments to that paragraph submitted by Switzerland (A/CONF.39/C.1/L.97) and the United States (A/CONF.39/C.1/L.127), but it supported the United States amendment to paragraph 5, inserting the words " unless the treaty otherwise provides ".

48. Mr. BEVANS (United States of America) said he approved of the amendment submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.125) and hoped it would receive consideration if the proposal by the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1) to delete article 16, sub-paragraph (*b*), was adopted. That deletion was justified, since it was impossible, at the negotiating stage, to foresee all the reservations which might subsequently be found necessary. Consequently, the United States delegation also supported the amendment submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.128), which likewise deleted article 16, sub-paragraph (*b*).

49. The amendment submitted by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add. 1 and 2) contained a far more effective formulation of the incompatibility rule than that adopted by the International Law Commission, but the word " character " should be included in the rule. The proposed mechanism could, however, raise a number of difficulties. For example, if only four States had consented to be bound by a treaty, and a fifth State ratified the treaty with a reservation, the acceptance of the reservation by three of the contracting parties would make the reservation admissible. The reservation would thus be accepted even if a hundred contracting parties which subsequently ratified the treaty were to regard the reservation as incompatible with its object and purpose. If a solution could be found for that problem and for others which would become apparent when the system was studied, the United States delegation would give sympathetic consideration to a proposal for a collegiate system.

50. His delegation could support the Polish amendment (A/CONF.39/C.1/L.136) if its meaning was in fact that suggested by the representative of Argentina, and if it was reworded to make that meaning clear. He was opposed to sub-paragraph (*b*) of article 16, because if negotiators intended to prohibit all reservations except those they specified, they should state that intention expressly.

51. The relationship between articles 16 and 17 was not clear either from the text proposed by the delegation of Ceylon (A/CONF.39/C.1/L.139)—now withdrawn—or from the International Law Commission's draft.

52. The beginning of paragraph 1 of the Spanish amendment to article 16 (A/CONF.39/C.1/L.147) clearly formulated the various concepts contained in the original draft; being a drafting amendment, it should be referred to the Drafting Committee. The wording of paragraph 1(*a*) of the Spanish amendment seemed much more precise than that of the corresponding sub-paragraph of the International Law Commission's text; the words " prohibited by the treaty itself " showed that the treaty must contain a specific provision prohibiting the reservation. Paragraph 1(*b*) of the Spanish amendment seemed to be the counterpart to article 17, paragraph 3. The United States delegation fully approved of the inclusion of the word " nature " in the amendment, since the structure within which the object and purpose of a treaty were to be achieved was a vital element often overlooked in the consideration of reservations.

53. He could not support the Malaysian amendment to article 16, sub-paragraph (*b*) (A/CONF.39/C.1/L.163), which seemed to embody the same limiting concept as the corresponding sub-paragraph of article 16 of the draft. The United States delegation approved of the amendments submitted by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) deleting the words " or impliedly " in article 17, paragraph 1. It was opposed, however, to the proposal by France and Tunisia to introduce the words " restricted multilateral treaty " in article 17, paragraph 2, and to the Czechoslovak proposal (A/CONF.39/C.1/L.84) to include a reference to a " general multilateral treaty " in article 17.

54. The United States delegation could agree to the deletion of article 17, paragraph 3, as proposed by Switzerland and by France and Tunisia, provided that paragraph 2 of that article was expanded as proposed by the United States and that a new paragraph 3 on the following lines was inserted:

> " 3. When a treaty is a constituent instrument of an international organization, it shall be deemed to

be of such a character that, pending its entry into force and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides."

55. Such a new provision might prove necessary to protect the interests of signatory States. States negotiating the constituent instrument of an international organization should be recognized as competent to agree to reservations by unanimous consent, without awaiting the establishment of the organization. It was because of the restrictive character of the wording of article 17, paragraph 3, that the United States delegation was opposed to the amendments submitted by Austria (A/CONF.39/C.1/L.3) and China (A/CONF.39/C.1/L.162).

56. The United States delegation could support the Swiss amendment (A/CONF.39/C.1/L.97) to article 17, paragraph 4, if the substance of its own proposal regarding paragraph 2 was adopted. Sub-paragraph (*b*) of the new paragraph 2 of article 17 proposed by Ceylon was too rigid and might have precluded a State from having treaty relations with another State to whose reservation it had objected.

57. The new wording proposed by Spain in document A/CONF.39/C.1/L.148 was an outstanding example of clear drafting, but it omitted the substance of article 17, paragraph 2, which was of great importance. His delegation supported the amendment to article 17, paragraph 4, submitted by Thailand (A/CONF.39/C.1/L.150) but suggested adding the words " and the provisions of article 16 ". It also supported the amendment by Thailand to article 17, paragraph 5.

58. He was opposed to the amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.85), Syria (A/CONF.39/C.1/L.94) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), which would reverse the rule stated in article 17, paragraph 4(*b*), since those amendments might place small States at a disadvantage. The United States delegation found the present wording of paragraph 4(*b*) satisfactory.

59. He would be glad to support any proposal combining articles 16 and 17 in a single article if he found the wording of the new article satisfactory. The amendment submitted by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115) combined the two articles, but the new version seemed far less precise than the International Law Commission's wording. The proposed article did not contain sufficient substantive concepts and was also too rigid to meet the needs of States in regard to multilateral treaties. It might prevent negotiators from reaching agreement on provisions concerning reservations which had long been formulated to meet special needs. That would be contrary to General Assembly resolution 598 (VI) adopted as a result of the Advisory Opinion of the International Court of Justice concerning the Genocide Convention. The Soviet Union amendment made the mistake of trying to apply to all treaties the criteria laid down by the Court with respect to the Genocide Convention only. In paragraph (3) of its commentary on articles 16 and 17, the International Law Commission had stated that in replying to the General Assembly's questions " the Court emphasized that they were strictly limited to the Genocide Convention ". The solution to the reservations problem must be found in the " special characteristics " of a treaty; in his view, that idea should be embodied in article 16, sub-paragraph (*c*), and in article 17, paragraph 2.

60. In conclusion, the United States delegation considered that the incompatibility rule should be supplemented and expanded so as to meet the practical needs of treaty-making and to become a more useful guide for the various types of treaty. The Spanish amendment (A/CONF.39/C.1/L.147) was a positive step in that direction.

61. Mr. TSURUOKA (Japan) said that his delegation had revised the wording of its amendment to take account of the comments of various representatives. The new proposal (A/CONF.39/C.1/L.133/Rev.1) did not change the substance of the original amendment.

62. The International Law Commission had, above all, succeeded in bringing out the principle of compatibility with the object and purpose of a treaty as the cardinal principle to be applied to the question of admissibility of a reservation. The Japanese delegation fully agreed with that approach, but did not think it had been carried to its logical conclusion. It had therefore proposed the application of an objective and workable test to the question of the compatibility of reservations with the object and purpose of a treaty. Many difficulties might arise if that question was left to each contracting party to decide subjectively. Under the régime proposed in the International Law Commission's draft, States could become parties to a treaty with as many reservations as they wished, so long as at least one other contracting State accepted the reservations, and much of the significance of the treaty might be lost. Thus it was vitally important to secure an objective test of compatibility.

63. His delegation regarded the collegiate system as the best means of securing an objective judgement on the compatibility of a reservation. The object and purpose of a treaty were really determined by the intention of its authors, or of the parties to it, as the case might be; hence the question could be better judged by the States concerned than by an independent body. Nevertheless, it would be inadvisable to allow each of the States concerned to form a separate judgement, since that would be tantamount to leaving it to States to decide the matter subjectively. A multilateral treaty could not always be dissolved into a collection of bilateral treaties. It would create rules applicable to the parties as a whole.

64. After studying various views expressed in the Committee, the Japanese delegation had come to the conclusion that the period prescribed in the joint amendment had better be lengthened to twelve months. Further extensions would not be appropriate, as that would leave the legal status of a reserving State unstable for too long a period. As to the right to take part in an objective judgement of the compatibility, his delegation still considered that that right should not be granted to States which were merely entitled to become parties to the treaty. To make that judgement, they should also have committed themselves formally to becoming parties.

65. Mr. SMEJKAL (Czechoslovakia) said that despite the efforts made by negotiators to reach compromises, multilateral treaties might not be accepted by certain States, for the most varied reasons.

66. Contemporary developments militated in favour of reservations rather than against them. Although reservations restricted the effects of treaties, they helped to strengthen international relations by enabling States to ratify treaties they would have been unable to ratify without a reservation. Moreover, by virtue of the principle of sovereignty, States had the right to make reservations and to object to them. Some reservations were inadmissible, because they were incompatible with the object which the contracting parties had set themselves. But objections to reservations which were perfectly compatible with the object of a treaty were also inadmissible. In that connexion, his delegation would remind the Committee of the opinion delivered by the International Court of Justice in 1951 in favour of the reservations formulated by Czechoslovakia to the Genocide Convention. The criterion applied in deciding whether reservations were incompatible with the object and purpose of a treaty was frequently subjective, but it was subjective for both the reserving State and the State making the objection. The Czechoslovak delegation believed that in that matter the parties to the treaty were the best judges and that they themselves should determine the legal consequences of article 17 in the light of their own positions. There was no need for arbitration machinery, which might raise a number of difficulties.

67. He hoped that no delegation wished to revert to the out-of-date theory of unanimity. The system of legal consequences of reservations and objections to reservations formulated by the International Law Commission in article 17, paragraph 4, should be the only basis for discussion. The development of law in recent years had shown the need to improve the system proposed by the Commission. That was the aim of the amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.85), Syria (A/CONF.39/C.1/L.94) and the USSR (A/CONF. 39/C.1/L.115).

68. He regarded the existing wording of articles 16 and 17 as perfectly satisfactory provided that his delegation's amendment was accepted.

69. He could not support the Peruvian amendment (A/CONF.39/C.1/L.132), which would limit the sovereign right of States to formulate reservations, or the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133/Rev.1), which introduced a system based on the majority rule.

70. The amendment submitted by Ceylon (A/CONF.39/C.1/L.139) would have limited the possibility of formulating reservations, and the Czechoslovak delegation would not have been able to support it. It was not, however, opposed to the amendments which would delete article 16, sub-paragraph (*b*).

71. He could accept the Austrian amendment (A/CONF. 39/C.1/L.3) if paragraph 3 of article 17 was retained. His delegation could also support the amendments submitted by Switzerland (A/CONF.39/C.1/L.97) and Poland (A/CONF.39/C.1/L.136), and certain parts of the United States amendment (A/CONF.39/C.1/L.127) which related to drafting.

72. Mr. HARRY (Australia) said that his delegation's amendment (A/CONF.39/C.1/L.166) could be regarded as additional to the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133/Rev.1). The latter, however, provided for machinery to decide only a preliminary question, namely, whether a reservation was inherently incompatible with the character and purpose of a treaty. Under the terms of that amendment, even if a reservation was found to be compatible, States could raise an objection to it under article 17, paragraph 4. The Australian proposal was designed to provide an automatic mechanism by which it could be established that a reservation, even though inherently incompatible with the treaty, was regarded as acceptable by a substantial proportion of the negotiating States and by other States if they had become contracting parties.

73. The Australian proposal would relax the unanimity rule for those general multilateral treaties where participation by a large number of States was desirable. A majority of two-thirds—the same majority as could have expressly approved a reservation had it been proposed during the negotiation of the treaty—should be able to approve it after the authentication of the text.

74. It should be noted that the two-thirds majority could consist entirely or largely of States which gave "passive" approval. It could also consist of or include States which had objected to the reservation, provided that those States had decided that the treaty should nonetheless enter into force for the reserving State. That system would also overcome the difficulty referred to by the representatives of the United States and Japan, since it would not include all the States entitled to become parties, but only those which were negotiating States and those which had expressed their consent to be bound by the treaty. In short, the "college" would consist of those States which could have expressly approved the reservation during the negotiations, plus those States which had agreed to be bound by the treaty.

75. In the event of acceptance by two-thirds of the "college", a reservation would be regarded as having been accepted by all the negotiating States and by those other States which had expressed their consent to be bound. In other words, the situation would be the same as it would have been if the reservation had been expressly authorized in the treaty or if, under the old system, all the parties had accepted it.

76. That machinery would make it possible to simplify article 19 and to maintain the certainty and integrity of treaties.

77. Mr. WERSHOF (Canada) said he wished to ask the Expert Consultant three questions. First, if a reservation was prohibited under article 16, sub-paragraph (*a*) or (*b*), had it been the intention of the International Law Commission to prevent a contracting State from accepting the reservation under article 17, paragraph 4(*a*)? He thought the answer would be in the affirmative. Second, if a reservation was not authorized within the meaning of article 17, paragraph 1, but was not prohibited or incompatible under article 16, would it be open to a contracting State to object to the reservation on other grounds under article 17, paragraph 4(*b*)? He assumed that question would also be answered in the affirmative. Third, in the view of the Expert Consultant, was paragraph C of the United States amendment (A/CONF.39/

C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?

The meeting rose at 1.10 p.m.

TWENTY-FIFTH MEETING

Tuesday, 16 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 16 and 17 of the International Law Commission's draft.[1]

2. Sir Humphrey WALDOCK (Expert Consultant), replying to the questions put by the Canadian representative at the previous meeting, said his answer to the first question was that a contracting State could not purport, under article 17, to accept a reservation prohibited under article 16, paragraph (*a*) or paragraph (*b*), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.

3. The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (*c*), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes. Each contracting State remained completely free to decide for itself, in accordance with its own interests, whether or not it would accept the reservation.

4. The third question was, would the addition of the words "and unless the reservation is prohibited by virtue of article 16" to the opening words of article 17, paragraph 4, as proposed in the United States amendment (A/CONF.39/C.1/L.127), be consistent with the Commission's intention? The answer was again Yes, since it would in effect restate the rule already laid down in article 16. It would not however carry the solution of the reservation problem any further and would still leave unsettled the question of who would decide whether a reservation was or was not incompatible with the object and purpose of the treaty.

5. Mr. VIRALLY (France), introducing the French amendment to articles 16 and 17 (A/CONF.39/C.1/L.169 and Corr.1), which would combine the two into one article, said that its main purpose was to simplify and clarify the text. His delegation approved of the system of reservations devised by the International Law Commission, but thought it was too complicated and involved; it needed to be made more easily applicable.

6. The question of the legal effects of reservations was not dealt with in the amendment, since that was a matter which properly belonged to article 19; the amendment was accordingly confined to the formulation and acceptance of or objection to reservations. Account had been taken in paragraph 3 of certain amendments concerning reservations to bilateral or restricted multilateral treaties, but without giving any definition of the latter since that should be placed in article 2. In fact his delegation had submitted an amendment to that effect (A/CONF.39/C.1/L.24). It would have no objection to using the phrase "plurilateral treaty" if the phrase "restricted multilateral treaty" were found unacceptable.

7. Mr. CUENDET (Switzerland) said that his delegation had submitted an amendment (A/CONF.39/C.1/L.97) which, in its opinion, went to the heart of the problem; he would confine his remarks to its two crucial aspects. The first was the question of the right to make a reservation, as formulated in the USSR amendment (A/CONF.39/C.1/L.115). In his view, the express formulation of that right introduced no change whatsoever into the working of the system proposed by the International Law Commission; it was merely a question of drafting. The Expert Consultant had explained the nature of the compromise worked out by the Commission and the importance of reconciling the difference between the upholders of the unilateral right to make reservations and the proponents of the consensual concept, whereby the validity of a reservation would depend on agreement between the contracting States. His delegation accepted the neutral formula as worked out by the Commission, first, because it represented a compromise between the two schools of thought, and secondly and principally, because it offered legal security and enabled the parties to know exactly where they stood.

8. It was from that standpoint that his delegation had examined the amendments relating to the second aspect, that of the procedure for the acceptance of reservations. There were two theses: one defended by the Swedish delegation, that reservations incompatible with the object and purpose of a treaty could not be accepted by the other States, and the other, which was the position of his own delegation, that such incompatibility could not be determined in practice except by a subjective procedure, in other words, that each State must itself apply its own criterion of incompatibility. It was not an entirely satisfactory solution, but in the absence of any form of collegiate machinery, it was the only one which enabled the legal consequences of a reservation to be established with perfect certainty.

9. The Japanese delegation, with those of the Philippines and the Republic of Korea, had proposed (A/CONF.39/C.1/L.133/Rev.1) a system for providing an objective definition of compatibility, and his delegation could accept some machinery of that type. The difficulty of that system, however, was that the reservation was to be accepted only by the States which were parties to the convention at the time when the reservation was made. States which became parties later would have to accept those decisions, even if they were much more numerous. The system proposed by Australia (A/CONF.39/C.1/L.166) presented a similar drawback, that of entrusting the examination of reservations to States which might possibly never become parties to the convention. His

[1] For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.

delegation certainly supported the idea of some collegiate machinery, but felt that some other solution must be found than that put forward in the Japanese and Australian amendments.

10. With regard to the amendment submitted by France, his delegation must make a reservation with regard to reservations prohibited by the treaty.

11. Mr. KEBRETH (Ethiopia) said that during the past few years the general conception of reservations had become much less rigid, and indeed since 1962 the trend had been towards the adoption of a flexible system such as that reflected in the International Law Commission's draft of articles 16 and 17, which took account of all interests and rejected both an unlimited freedom to make reservations and the requirement of unanimous consent for the maintenance of the integrity of treaty provisions.

12. Two general propositions had now gained currency. The first was the presumption that a reservation might be formulated if it was not prohibited by the treaty and was not incompatible with its object and purpose. The second was that contracting States might accept any reservation to a general multilateral treaty, even if it were prohibited or incompatible with the object of a treaty, so that acceptance by individual contracting States rather than admissibility seemed to be the criterion in article 17, paragraph 4. Reservations could be objected to on grounds other than incompatibility.

13. The Soviet Union amendment (A/CONF.39/C.1/L.115) departed considerably from the underlying idea of the Commission's text and was not acceptable. It took no cognizance of the idea of a prohibited reservation, which was the point of departure of the flexible system, and reversed the presumption that an objection precluded the entry into force of a treaty between the objecting and the reserving State. That would tip the balance in favour of unlimited freedom to make reservations. Similarly, he could not accept the Syrian amendment (A/CONF.39/C.1/L.94).

14. The United States amendment (A/CONF.39/C.1/L.127) usefully sought to establish a link between articles 16 and 17, and to eliminate the contradictions between them, but the amendment to paragraph 4 needed clarification as it did not specify whether the prohibition was that set out in both sub-paragraph (*a*) and (*b*) of article 16, and whether the compatibility test was excluded.

15. Perhaps it would be advisable to adopt the Swiss amendment if the provision concerning the compatibility test were left out. He fully appreciated the reasons why the delegation of the Federal Republic of Germany advocated the omission of sub-paragraph (*b*) in article 16 because of the lack of State practice and the latent contradiction between articles 16 and 17, but that could in some measure be eliminated by deleting the words " or impliedly " in article 17, paragraph 1.

16. The presumption that if a treaty permitted certain types of reservation, others were not permitted, was a good rule, but the Polish amendment (A/CONF.39/C.1/L.136) was not acceptable, because it sought to reverse that presumption.

17. He could not support the amendments by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133/Rev.1) and Australia (A/CONF.39/C.1/L.166) because they represented an effort to return to the rigid system of the unanimity rule. It was puzzling that, although the Australian representative claimed that his amendment was complementary to that of Japan, it made no mention of the compatibility test. That would presumably mean that objections on grounds other than incompatibility could be raised, which would have the consequence of requiring a two-thirds majority for the acceptance of reservations and allowing objections on broader grounds than incompatibility.

18. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that it would greatly simplify matters if tacit assent could be allowed as a method of accepting reservations. He would have thought it consistent with practice and in the interests of the stability of treaties to maintain the presumption that, in the absence of an expressed intention to the contrary, a treaty was in force between the objecting and reserving State. Reservations were usually made on individual articles of a secondary nature, which did not affect the integrity of the treaty as a whole. Of course, it was always open to the objecting State which believed that a reservation was incompatible with object of the treaty to declare that it was not bound by the whole instrument. If it were presumed that a treaty was not in force between the objecting and the reserving State, that would create much undesirable uncertainty.

19. He had been surprised at the Japanese and Australian amendments, which would have the consequence of enabling half the contracting States to a treaty to decide whether or not it was in force between all the contracting States. Such a system was illogical and at variance with recognized principles of international law. He was strongly opposed to giving a limited group such powers.

20. He could support the French and Tunisian amendments (A/CONF.39/C.1/L.113) to paragraphs 2 and 3 of article 17, but not the United States amendment (A/CONF.39/C.1/L.127) to paragraph 2, since the concept of " the character " of a treaty was far too vague.

21. Mr. ALVAREZ (Uruguay) said that the International Law Commission had produced a remarkable piece of work in articles 16 and 17, and a successful compromise between different systems and views that was very well suited to the needs of the international community. He was in substantial agreement with that text and would be against any amendments that sought to change it radically. He viewed with sympathy certain drafting amendments such as those submitted by Poland and by France and Tunisia, but they could be referred direct to the Drafting Committee.

22. He feared that the real merits of the Peruvian amendment to article 16 (A/CONF.39/C.1/L.132) had not been understood. It was a frequent practice among Latin American States to formulate reservations in very general terms, regarding any provisions of a treaty which might directly or indirectly conflict with the constitution or internal law. Such reservations were inadmissible because of the uncertainty they created, which made it impossible to determine which treaty provisions were binding on the reserving State. In the last resort, they made that State at all times the sole and absolute judge of what were its international obligations. The Peruvian amendment would put an end

to that practice, which was based on an obsolete conception of sovereignty. Contrary to what had been said by some representatives, it did not aim at introducing domestic provisions into the draft articles, but at excluding them and he would accordingly vote in favour of it.

23. The CHAIRMAN said he would first put to the vote the proposals of substance relating to article 16, beginning with the amendments for the deletion of sub-paragraph (*a*) and (*b*) of the article.

The USSR amendment (A/CONF.39/C.1/L.115) to delete sub-paragraph (a) *was rejected by 70 votes to 10, with 3 abstentions.*

The USSR amendment (A/CONF.39/C.1/L.115), the United States and Colombian amendment (A/CONF.39/C.1/L.126 and Add.1) and the amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.128) to delete sub-paragraph (b) *were rejected by 53 votes to 23, with 12 abstentions.*

24. The CHAIRMAN said that the amendments by Poland (A/CONF.39/C.1/L.136) and Malaysia (A/CONF.39/C.1/L.163) to sub-paragraph (*b*) would be referred to the Drafting Committee. He would now put to the vote paragraph 2 of the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133/Rev.1), for a new paragraph 2 to article 16 incorporating sub-paragraph (*c*) and establishing a collegiate system for the acceptance of reservations.

The amendment (A/CONF.39/C.1/L.133/Rev.1, para. 2) was rejected by 48 votes to 14, with 25 abstentions.

25. Mr. BEVANS (United States of America), explaining his vote, said that, although his delegation favoured the collegiate system, he had abstained because he did not favour the formulation proposed in document A/CONF.39/C.1/L.133/Rev.1, especially the concluding words, " shall be without legal effect ".

26. The CHAIRMAN said he would now put to the vote the amendments by the Republic of Viet-Nam and Peru.

The amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.125) was rejected by 54 votes to 7, with 16 abstentions.

The amendment by Peru (A/CONF.39/C.1/L.132) was rejected by 44 votes to 16, with 26 abstentions.

27. The CHAIRMAN said that the drafting amendments to sub-paragraph (*c*) by the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1), Spain (A/CONF.39/C.1/L.147) and Malaysia (A/CONF.39/C.1/L.163), together with the amendment by China to the introductory phrase (A/CONF.39/C.1/L.161) would be referred to the Drafting Committee.

28. Mr. ZEMANEK (Austria) pointed out that paragraph 1(*b*) of the amendment by Spain (A/CONF.39/C.1/L.147) involved a point of substance.

29. Mr. MARTINEZ CARO (Spain) said he would withdraw that part of his amendment.

30. The CHAIRMAN said he would now put to the vote the amendments of substance relating to article 17.

Paragraph 1

The amendment to delete the words " or impliedly " in paragraph 1, proposed by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF.39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150) was adopted by 55 votes to 18, with 12 abstentions.

31. The CHAIRMAN said that the drafting amendments to paragraph 1 submitted by Czechoslovakia (A/CONF.39/C.1/L.84) and Spain (A/CONF.39/C.1/L.148, para. 1) would be referred to the Drafting Committee.

Paragraph 2

The amendment by Spain to delete paragraph 2 (A/CONF.39/C1/L.148) was rejected by 79 votes to 2, with 5 abstentions.

32. The CHAIRMAN said that the amendments to paragraph 2 submitted by France and Tunisia (A/CONF.39/C.1/L.113) and the United States (A/CONF.39/C.1/L.127, part A) would be referred to the Drafting Committee.

Paragraph 3

The amendments to delete paragraph 3 proposed by Switzerland (A/CONF.39/C.1/L.97) and France and Tunisia (A/CONF.39/C.1/L.113) were rejected by 50 votes to 26, with 11 abstentions.

The United States amendment to paragraph (A/CONF.39/C.1/L.127, part B) was adopted by 33 votes to 22, with 29 abstentions.

33. The CHAIRMAN said that the amendments to paragraph 3 submitted by Austria (A/CONF.39/C.1/L.3), Spain (A/CONF.39/C.1/L.148) and China (A/CONF.39/C.1/L.162) would be referred to the Drafting Committee.

Paragraph 4

34. Mr. HARRY (Australia) said that, in view of the vote against the collegiate system in connexion with article 16, he would withdraw his amendment to article 17 (A/CONF.39/C.1/L.166).

35. The CHAIRMAN said he would now invite the Committee to vote on the principle that the treaty entered into force between the reserving State and the objecting State unless the objecting State expressly declared to the contrary; that was the principle involved in amendments by Czechoslovakia (A/CONF.39/C.1/L.85), Syria (A/CONF.39/C.1/L.94) and the USSR (A/CONF.39/C.1/L.115).

36. Mr. KHLESTOV (Union of Soviet Socialist Republics) said it should be clearly understood that the vote would be taken not on the actual wording of any of those amendments, but on the principle of the reversal of the presumption embodied in paragraph 4(*b*) of article 17.

The principle was rejected by 48 votes to 28, with 8 abstentions.

37. Mr. VIRALLY (France) explained that he had taken part in the vote on the amendments to paragraph 4, despite the fact that, in document A/CONF.39/C.1/L.169 and Corr.1, his delegation had proposed the deletion of paragraph 4, because as he had explained, its proposal to transfer the provisions of that paragraph to article 19 was only a matter of drafting.

38. The CHAIRMAN said that the drafting amendments to paragraph 4 by Switzerland (A/CONF.39/C.1/L.97), the United States (A/CONF.39/C.1/L.127, parts C and D), Spain (A/CONF.39/C.1/L.148, para. 2) and Thailand

(A/CONF.39/C.1/L.150), would be referred to the Drafting Committee.

Paragraph 5

39. The CHAIRMAN said that the drafting amendments to paragraph 5 by the United States (A/CONF.39/C.1/L.127, part E), Spain (A/CONF.39/C.1/L.148) and Thailand (A/CONF.39/C.1/L.150) would be referred to the Drafting Committee.

40. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his proposal to combine articles 16 and 17 (A/CONF.39/C.1/L.115) should also be referred to the Drafting Committee.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Committee agreed to refer articles 16 and 17 to the Drafting Committee together with all amendments, to either article or both, which had not been either rejected or withdrawn.

It was so agreed.

Article 19 (Legal effects of reservations) [2]

42. Mr. SMEJKAL (Czechoslovakia) said that since his amendment to article 19 (A/CONF.39/C.1/L.86) was connected with his amendment to paragraph 4(*b*) of article 17 (A/CONF.39/C.1/L.85), there was no necessity for him to explain it.

43. Mr. NACHABE (Syria) said that his delegation's amendment to paragraph 3 of article 19 (A/CONF.39/C.1/L.95) had been submitted for the same reasons as its amendment to paragraph 4(*b*) of article 17 (A/CONF.39/C.1/L.94). Its effect would be to carry even further the progress marked by the International Law Commission's paragraph 3 over the earlier version of that same provision, namely paragraph 2(*b*) of the former article 20 of the 1962 draft.[3]

44. Mr. KHLESTOV (Union of Soviet Socialist Republics) said there was no necessity for him to introduce his amendment to paragraph 3 of article 19 (A/CONF.39/C.1/L.117), since it was connected with his delegation's proposal relating to articles 16 and 17 (A/CONF.39/C.1/L.113).

45. The CHAIRMAN said the three amendments by Czechoslovakia (A/CONF.39/C.1/L.86), Syria (A/CONF.39/C.1/L.95) and the USSR (A/CONF.39/C.1/L.117) must be regarded as withdrawn, in view of the rejection by the Committee of the main proposals to which they were related.

46. Sir Lalita RAJAPAKSE (Ceylon), introducing his amendment to insert a new paragraph 4 in article 19 (A/CONF.39/C.1/L.152), said that the purpose of the new provision was to remove doubts which had been raised from time to time on the question whether a ratification subject to a reservation could be counted towards the number of ratifications required for entry into force of the treaty.

47. The question was of a formal rather than of a substantive character. It was necessary to lay down some rule in order to fill a gap in the present draft. His proposal was that a ratification subject to reservation should serve for the limited purpose of counting the number of consents required for entry into force. If the majority of the Committee, however, held the opposite view, the contrary rule could be adopted. It was not of any great importance which of those two positions was taken but it was essential to decide the point which had arisen. Whatever decision was taken would be without prejudice to any judgement regarding the validity of a reservation or the relationships which might flow, after the treaty entered into force, from a ratification subject to reservation.

48. Mr. SAULESCU (Romania), introducing the amendment submitted by his delegation and those of Bulgaria and Sweden (A/CONF.39/C.1/L.157 and Add.1), said that its purpose was to reformulate paragraph 1 of article 19 in more precise terms. The present wording adopted an analytical approach and dealt separately with the effects of a reservation in relation to the reserving State and those in relation to the other parties to the treaty. The amendment would eliminate the unnecessary repetition in the present wording, and replace it by more concise language; it would also make the provisions of paragraph 1 more precise by replacing the words "established with regard to another party" by "established with regard to any other party". That wording received support from the third sentence of paragraph (1) of the commentary to article 19 which said, "A reservation operates reciprocally between the reserving State and any other party, so that it modifies the treaty for both of them in their mutual relations to the extent of the reserved provisions".

49. Mr. WERSHOF (Canada) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.159) was to remove an ambiguous phrase which might lead to misinterpretation. The notification procedure in article 18 would obviously not be carried out by the reserving State itself; the reservation, and acceptances or objections to it would be communicated by the depositary to the States entitled to become parties to the treaty. It was clear that all the States thus entitled should receive the communication, but in cases where the depositary might erroneously fail to send the notification to a State, it was surely not the intention of the article to invalidate the reservation in respect of all the States which had received the communication. The Canadian amendment was designed to obviate that difficulty and could be referred to the Drafting Committee.

50. Mr. VIRALLY (France) said that his delegation's amendment (A/CONF.39/C.1/L.170) was a logical consequence of its proposal to amalgamate articles 16 and 17 (A/CONF.39/C.1/L.169), and was designed to amplify the International Law Commission's article 19 in two respects. In the first place, the French delegation considered that the legal effects of the distinct categories of reservations referred to in the Commission's article 17, paragraphs 1, 2 and 4 should also be specified in article 19. Secondly, it seemed logical to incorporate the substance

[2] The following amendments had been submitted: Czechoslovakia, A/CONF.39/C.1/L.86; Syria, A/CONF.39/C.1/L.95; Union of Soviet Socialist Republics, A/CONF.39/C.1/L.117; Ceylon, A/CONF.39/C.1/L.152; Bulgaria, Romania and Sweden, A/CONF.39/C.1/L.157 and Add.1; Canada, A/CONF.39/C.1/L.159; France, A/CONF.39/C.1/L.170; China, A/CONF.39/C.1/L.172; Hungary, A/CONF.39/C.1/L.177.

[3] *Yearbook of the International Law Commission, 1962*, vol. II, p. 176.

of article 17, paragraph 4, in article 19, in order to specify the legal effects of acceptance of and objections to reservations. The amendment was not substantive, and could be referred to the Drafting Committee; in any case, its fate depended on that body's decision with regard to the French proposal to combine articles 16 and 17 (A/CONF.39/C.1/L.169).

51. Mr. HU (China) said that his delegation considered the International Law Commission's text generally acceptable; its amendments (A/CONF.39/C.1/L.172) were consequently purely formal and could be referred to the Drafting Committee. It had proposed the deletion of the phrase " with regard to another party " from the opening sentence because that sentence should cover sub-paragraphs (*a*) and (*b*), whereas sub-paragraph (*a*) concerned only the reserving State. It had also proposed replacing, in sub-paragraph (*b*), the words " for such other party " by the words " for the accepting State " because that clause applied only to the relationship between the reserving State and the accepting State.

52. Mr. USTOR (Hungary) said that his delegation had been prompted to submit its amendment to paragraphs 1 and 2 (A/CONF.39/C.1/L.177) by the favourable comments that a number of delegations had made on its amendment to article 2, paragraph 1(*d*) (A/CONF.39/L.23). At the 6th meeting, the Austrian representative had proposed an oral sub-amendment to that text, which had been accepted, and the joint text was now being considered by the Drafting Committee. One or two delegations had criticized the Hungarian proposal on the ground that, according to the commentary to article 2, the International Law Commission wished to consider interpretative declarations as reservations only if such declarations purported to exclude or to vary the legal effect of certain provisions in their application to a particular State. The Expert Consultant had admitted that the question required thorough examination, but had recommended caution in the matter.

53. The Hungarian delegation hoped that acceptance of its amendment to article 19 would clarify situations which sometimes arose in connexion with interpretative declarations. It fully agreed with the principle that a reservation was a statement which purported to exclude or to vary the legal effect of certain provisions of a treaty, but did not regard that principle as an objective test: an interpretative declaration might be regarded by one State as rendering the true meaning of a treaty and by another as distorting that meaning. It would therefore be useful to assimilate those declarations to other kinds of reservations and to extend to them the provisions of the draft convention. Since the Hungarian amendment to article 2 was before the Drafting Committee, its amendments to article 19 might also be referred to that body.

54. Mr. EEK (Sweden) said that his delegation had become a co-sponsor of the Bulgarian and Romanian amendment (A/CONF.39/C.1/L.157 and Add.1) because it improved the text of article 19 without altering its substance. The Canadian proposal (A/CONF.39/C.1/L.159) seemed compatible with the three-State amendment.

55. Mr. STREZOV (Bulgaria) said that the main purpose of the three-State amendment was to stress the bilateral bond that the reservation machinery created between the reserving and the accepting State. That had been done by amalgamating sub-paragraphs (*a*) and (*b*) of paragraph 1.

56. Sir Humphrey WALDOCK (Expert Consultant), referring to the Hungarian representative's statement, said he could confirm that he had issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations; for example, article 12 of the Convention on the Continental Shelf [4] contained an indirect prohibition of reservations to its first three articles, and certain States had made interpretative declarations in respect of those provisions. He would therefore appeal to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter.

57. Mr. MALITI (United Republic of Tanzania) said that, although the Ceylonese amendment (A/CONF.39/C.1/L.152) mentioned matters relating to article 19, it might be more appropriately placed in article 21, since it dealt with entry into force.

58. Mr. SPERDUTI (Italy) said he endorsed that view.

59. Mr. SINCLAIR (United Kingdom) said he thought that the Ceylonese amendment was a useful clarification, although its content might be implicit in article 17. His delegation had no strong views on whether the clause, if accepted, should be added to article 19, or to article 21; it would appreciate the Expert Consultant's views on the proposal.

60. With regard to the Hungarian amendment (A/CONF.39/C.1/L.177), the United Kingdom delegation had already expressed its serious doubts concerning the advisability of including a reference to interpretative declarations when discussing article 2.

61. Mr. ROSENNE (Israel) said that he too would like to hear the Expert Consultant's opinion on the Ceylonese proposal; he thought that the new paragraph, if accepted, should appear in Section II of the draft, though not necessarily in article 19. He regarded the three-State amendment (A/CONF.39/C.1/L.157 and Add.1) as an improvement on the Commission's text.

62. Sir Humphrey WALDOCK (Expert Consultant) said that the point raised by the Ceylonese delegation had been considered in the International Law Commission, but that no corresponding provision had been included in article 19, because it had been thought that the idea was implicit in the wording of the article: the use of the words " A reservation established with regard to another party " made it clear that if the reservation was accepted, the reserving State was a party to the treaty for general purposes. The Drafting Committee might, however, consider whether an additional clarification might not be useful.

63. The CHAIRMAN suggested that article 19 and the amendments thereto be referred to the Drafting Committee.

It was so agreed. [5]

[4] United Nations, *Treaty Series*, vol. 499, p. 318.

[5] For resumption of discussion, see 70th meeting.

Article 20 (Withdrawal of reservations) [6]

64. Mr. ZEMANEK (Austria) said that his delegation, together with that of Finland, had submitted its amendments (A/CONF.39/C.1/L.4 and Add.1) in the belief that, since article 18 provided that a reservation must be made in writing, the same requirement should apply to withdrawal of the reservation. That formality would no doubt add to the security of treaty relations. The proposal for a new paragraph was designed to dispel possible doubts concerning the withdrawal of reservations; when a treaty had not entered into force between two States because one of them had objected to a reservation made by the other, and had not indicated that the treaty should nevertheless enter into force between them, there should be no obstacle to the entry into force of the treaty between the States in question once the reason for the objection had been removed.

65. Mr. CUENDET (Switzerland) said that his delegation's amendment (A/CONF.39/C.1/L.119) could be referred to the Drafting Committee, since it merely entailed the deletion of the superfluous phrase " or it is otherwise agreed " from paragraph 2. The provision in that paragraph, that a reservation could be withdrawn only when notice of it had been received, should not be further qualified than by stating the exception " unless the treaty otherwise provides ". Indeed, in the last sentence of paragraph (2) of its commentary, the International Law Commission allowed some latitude for States requiring a short interval of time in which to bring their internal law into conformity with the situation resulting from the withdrawal of a reservation. The amendment might relate to provisions other than article 20, and the Drafting Committee might consider other cases where it would apply.

66. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation had submitted its sub-amendment (A/CONF.39/C.1/L.167) to the Austrian and Finnish amendment (A/CONF.39/C.1/L.4 and Add.1) in order to reflect a minor point on which the USSR delegation disagreed with the Austrian and Finnish text. It wished to make clear that, if a State believed that a reservation was contrary to the object and purpose of the treaty and declared that it did not wish to be bound vis-à-vis the reserving State, the treaty would not be operative between those two States. That sub-amendment could, of course, be referred to the Drafting Committee.

67. Mr. BEVANS (United States of America) said that his delegation's amendment (A/CONF.39/C.1/L.171) merely raised two drafting points. Where paragraph 1 was concerned, States other than the accepting State might object to the withdrawal of reservations, and his delegation had therefore proposed a reference to " other States ". It had also proposed the insertion of the word " written " before the word " notice " in paragraph 2 on the understanding that, for example, a telegram would be counted as written notice.

68. Mr. USTOR (Hungary) said that the Hungarian amendment (A/CONF.39/C.1/L.178) was self-explanatory and was identical with the first part of the Austrian and Finnish amendment.

69. Mr. WERSHOF (Canada) pointed out that, although under article 18 a reservation, an acceptance of a reservation and an objection to a reservation must be communicated to " the other States entitled to become parties to the treaty ", under article 20, the withdrawal of a reservation became operative only when notice of it had been received by " the other contracting States ". Perhaps the Expert Consultant could explain whether there was any reason why the wording of the two articles should be entirely different.

70. Sir Humprey WALDOCK (Expert Consultant) said that article 20, paragraph 2, referred to the time when the withdrawal became operative. At that stage, the reservation would have been operative only in respect of the contracting States, and that would naturally apply to its withdrawal. The point raised by the Canadian representative might become pertinent if the article ultimately contained a general provision on the communication of withdrawal of reservations.

71. Mr. KRISPIS (Greece) said he thought that article 20 should provide for the communication of notice of withdrawal to all the States entitled to become parties to the treaty. Since, under article 18, reservations would be communicated to all such States, it was natural, and indeed essential, that the withdrawal of reservations should also be brought to their knowledge.

72. The CHAIRMAN suggested that article 20 and the amendments thereto be referred to the Drafting Committee.

It was so agreed. [7]

The meeting rose at 5.55 p.m.

[7] For resumption of discussion, see 70th meeting.

TWENTY-SIXTH MEETING

Wednesday, 17 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (*continued*)

Article 21 (Entry into force) [1]

1. Mr. WERSHOF (Canada), introducing the Canadian amendment to article 21 (A/CONF.39/C.1/L.123), reminded the Committee that the reasons for it had already been explained [2] during the discussion of his delegation's amendment to article 13 (A/CONF.39/C.1/L.110), namely that a State might sign an instrument of accession or

[6] The following amendments had been submitted: Austria and Finland, A/CONF.39/C.1/L.4 and Add.1; Switzerland, A/CONF.39/C.1/L.119; United States of America, A/CONF.39/C.1/L.171; Hungary, A/CONF.39/C.1/L.178. The Union of Soviet Socialist Republics submitted a sub-amendment (A/CONF.39/C.1/L.167) to the amendment by Austria and Finland.

[1] The following amendments had been submitted: Canada, A/CONF.39/C.1/L.123; Republic of Viet-Nam, A/CONF.39/C.1/L.175; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.186; Congo (Brazzaville), A/CONF.39/C.1/L.188; Chile, A/CONF.39/C.1/L.190.

[2] See 18th meeting, para. 38.

acceptance on a given date, stipulating, however, that its consent would become effective at a later date. Although the amendment was not merely a question of drafting, the Canadian delegation would agree that it should be referred to the Drafting Committee after discussion by the Committee of the Whole.

2. Mr. PHAN-VAN-THINH (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/C.1/L.175), observed that to bind a State as early as the negotiation stage might entail some dangers. That appeared to have been the view of the Committee of the Whole in deciding, at its 20th meeting, to delete article 15, sub-paragraph (*a*). The text of article 21 should therefore be brought into line with the new text of article 15.

3. Mr. VARGAS (Chile) said that his delegation's amendment (A/CONF.39/C.1/L.190) was only of relative importance, since normally the treaty itself provided for the manner of its entry into force. The text of article 21, paragraph 2, might create serious difficulties, because it required the unanimous consent of the negotiating States, and if only one of those States subsequently failed to give its consent to be bound by the treaty, that would be enough to prevent the treaty from coming into force. The situation would be even more serious if the treaty was subject to ratification. What would become of a treaty negotiated or even signed by several States which was not subsequently ratified by all those States? If the treaty did not contain any provision relating to its entry into force, and if the present text of article 21, paragraph 2, was adopted, the treaty would not be able to enter into force.

4. Inter-American conferences had concluded almost a hundred multilateral treaties, but only three of them had been ratified by all the signatory States. Yet many of those treaties were in force because no rule as strict as that in article 21, paragraph 2, had been applied to them. The two-thirds rule had been held to be adequate in many international conventions. In any event, that rule could not cause any difficulty, because, under article 21, paragraph 3, the treaty would enter into force for negotiating States which had not yet declared their consent to be bound by it, only after the date when their consent had been established.

5. Mr. SINCLAIR (United Kingdom) said that the only purpose of his delegation's amendment (A/CONF.39/C.1/L.186) was to make the International Law Commission's text clearer. It was generally accepted that when the text of a treaty was adopted, certain provisions had legal effects which were impliedly accepted by the countries concerned even if the treaty was not formally in force. The provisions were those dealing with the processes of ratification, accession, acceptance, approval, the functions of the depositary and reservations. Sir Gerald Fitzmaurice had included a clause to that effect in his first report,[3] and it was reproduced in roughly similar terms in the United Kingdom amendment. The existing text might be interpreted too rigidly to suit certain States.

6. Mr. MOUDILENO (Congo, Brazzaville) drew attention to the fact that the text of his delegation's amendment (A/CONF.39/C.1/L.188) should be altered; his delegation was not requesting that article 21, paragraph 1, should be deleted, but merely that its wording should be changed. The present text of paragraph 1 stated in a single sentence that a treaty should contain provisions on the manner and the date of entry into force and that a treaty should enter into force on that date and in that manner. But priority should be given either to the fact that the treaty should enter into force as laid down by the parties or that the contracting parties should prescribe the manner and date of entry into force. Those conditions should be prescribed in the treaty, since if they were clearly stipulated, entry into force would result directly from them.

7. Mr. ROSENNE (Israel) said that his delegation supported the United Kingdom amendment (A/CONF.39/C.1/L.186) listing certain elements in the process of concluding treaties. It would, however, be desirable also to mention the question of reservations. If the Committee of the Whole decided to adopt the principle in the amendment, the Drafting Committee would then have to decide whether its substance should be incorporated in article 21 or in a separate article.

8. Mr. BEVANS (United States of America) said he supported the United Kingdom amendment and the Israel representative's suggestion.

9. Mr. RUEGGER (Switzerland) said he approved the principle underlying the United Kingdom amendment. The importance of the point had already been brought out during the preparatory work by Sir Gerald Fitzmaurice. He would however like to ask the Expert Consultant whether the use of the words " legal effect " in the penultimate line of the amendment was possible. He himself considered that the legal effects of any clause in a convention could come into being only after ratification, and so he would prefer the words " shall be observed " to be substituted for the words " have legal effect ".

10. Mr. KRISPIS (Greece) said he supported the United Kingdom amendment, but regretted that he could not support the Chilean amendment, as he considered that if the parties really wished the treaty to enter into force as soon as consent to be bound by it had been established for two-thirds of the negotiating States, they would be able to state that expressly in the treaty and it would then enter into force in accordance with article 21, paragraph 1.

11. Mr. VIRALLY (France) said that the United Kingdom amendment usefully supplemented the text of article 21 and should be adopted. Its wording, however, raised some difficulties. He would like to hear the Expert Consultant's reply to the question asked by the Swiss representative before deciding whether the new paragraph should be referred to the Drafting Committee.

12. The authors of a treaty often failed to define the conditions for its entry into force and, in that case, their silence should be construed as meaning that acceptance by all the negotiating States was necessary. If any other rule was to be applied, it should be stated expressly in the treaty and would, therefore, come under article 21, paragraph 1. The French delegation was therefore opposed to the Chilean amendment.

13. Mr. CASTRÉN (Finland) said he supported the United Kingdom amendment and considered that the

[3] *Yearbook of the International Law Commission, 1956*, vol. II, p. 113, article 30.

Committee of the Whole should discuss the Canadian amendment.

14. The Finnish delegation was in favour of paragraph 2 of the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.175), but could not support paragraph 1, since it referred to the States parties to the treaty, whereas, to be consistent with the terminology used in the draft, that expression could not be employed before the treaty entered into force.

15. Mr. BADEN-SEMPER (Trinidad and Tobago) said he was in favour of the United Kingdom amendment but considered that the Committee of the Whole should accept the principle of that amendment and then refer the text to the Drafting Committee for redrafting. The Drafting Committee should consider whether signature should be a pre-condition for the existence of legal effects of certain provisions of a treaty, and whether the various procedural elements which produced legal effects before ratification should be enumerated.

16. Sir Humphrey WALDOCK (Expert Consultant) explained that on several occasions he had raised in the International Law Commission the question he had been asked by the Swiss representative. In his view, the source of the legal validity of the final clauses lay not in the treaty itself, but in the consent given when the text of the treaty was adopted. If the Committee adopted the principle embodied in the United Kingdom amendment, the Drafting Committee would have to find a satisfactory wording.

17. Mr. YASSEEN (Iraq) observed that the United Kingdom amendment was the expression of an existing rule of international law. That rule was entirely logical, because without it, the final clauses concerning the ratification or the entry into force of a treaty could not be applied. The basis for the rule was to be found in international custom.

18. The amendment would be improved by redrafting and there he supported the Swiss representative's suggestion. The new paragraph 4 proposed in the amendment stated that certain provisions had legal effect prior to the entry into force of the treaty, but it did not specify when they became effective, whether at the time the treaty was adopted or at the time of signature. That should be made clear, so that delegations could take a definite stand on the amendment.

19. The CHAIRMAN put to the vote the first proposal in the amendment in document A/CONF.39/C.1/L.188, namely to delete article 21, paragraph 1.

That proposal was rejected by 75 votes to 1, with 12 abstentions.

20. Mr. MOUDILENO (Congo, Brazzaville) said that the second part of his delegation's amendment was of a purely drafting nature. It was merely an attempt to adopt the most logical order. He believed that the emphasis should be placed first on the principle whereby the manner of entry into force of a treaty was provided for in the treaty itself. The Drafting Committee might therefore be left to find the best way to express it, if need be.

It was so decided.

21. The CHAIRMAN put the Chilean amendment to the vote.

The Chilean amendment (A/CONF.39/C.1/L.190) was rejected by 64 votes to 9, with 15 abstentions.

22. The CHAIRMAN said he took it that the Committee approved of the principle stated in the amendment submitted by the United Kingdom (A/CONF.39/C.1/L.186), subject to any changes to be made in the wording of the new paragraph. He proposed, therefore, that the amendment should be referred to the Drafting Committee, together with the amendments by Canada (A/CONF.39/C.1/L.123) and the Republic of Viet-Nam (A/CONF.39/C.1/L.175).

It was so decided.

Article 22 (Entry into force provisionally) [4]

23. Mr. BEVANS (United States of America) said that his delegation had proposed (A/CONF.39/C.1/L.154 and Add.1) the deletion of article 22 for three reasons. First, article 22 merely affirmed a procedure which was possible in the absence of the article. Article 21, paragraph 1, already provided that a treaty entered into force " in such manner " as the negotiating States might agree. Secondly, article 22 failed to define the legal effects of provisional entry into force and could give rise to difficulties of interpretation with respect to other articles of the convention, notably those on observance and termination of treaties. Thirdly, it left unanswered the question how provisional force might be terminated. The article was therefore neither necessary nor desirable.

24. If, however, article 22 was to be retained, the United States delegation would wish to have it amended as follows: first, the words " be applied " should be substituted for " enter into force " in the introductory clause of paragraph 1, the words " shall be applied " for " shall enter into force " in paragraph 1, sub-paragraph (*a*), and " application " for " entry into force " in paragraph 2. Secondly, a paragraph on the termination of the provisional application of the treaty should be added along the following lines:

> " Provisional application of a treaty or part of a treaty may terminate as agreed by the States concerned or upon notification by one of those States to the other State or States that it does not intend to become definitively bound by the treaty. "

25. Mr. REGALA (Philippines), introducing his delegation's amendment (A/CONF.39/C.1/L.165), said that the change suggested in it was simple and of no great importance. Paragraph 2 could be deleted, because if the treaty as a whole could be applied provisionally by virtue of paragraph 1, *a fortiori* only a part of the treaty could be applied provisionally. His delegation's amendment might be referred to the Drafting Committee. He did not support the proposal to delete the whole of article 22.

26. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that the usefulness of article 22 had still to be proved,

[4] The following amendments had been submitted: United States of America, Republic of Korea and Republic of Viet-Nam, A/CONF.39/C.1/L.154 and Add.1; Philippines, A/CONF.39/C.1/L.165; Republic of Viet-Nam, A/CONF.39/C.1/L.176; Yugoslavia and Czechoslovakia, A/CONF.39/C.1/L.185 and Add.1; Greece, A/CONF.39/C.1/L.192; India, A/CONF.39/C.1/L.193. Amendments were subsequently submitted by Belgium, A/CONF.39/C.1/L.194; Bulgaria and Romania, A/CONF.39/C.1/L.195; Hungary and Poland, A/CONF.39/C.1/L.198.

whereas its disadvantages were obvious. States might commit themselves hastily under the pressure of circumstances without weighing all the difficulties that the subsequent ratification of their commitments might encounter. In the case of commitments of national and international importance, it would be better to avoid provisional application. The result would be greater certainty and security. If the Committee could not accept the deletion of article 22, however, it should at least alter the wording as suggested in the amendment submitted by his delegation (A/CONF.39/C.1/L.176). Further, the expression " in some other manner " in paragraph 1, sub-paragraph (*b*), should be changed because it was too broad.

27. Mr. TODORIC (Yugoslavia), introducing the amendment by his delegation and that of Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1), said that he too thought it would be better to speak of provisional application rather than entry into force provisionally. Further, it was essential to provide how that situation should end, according to whether the definitive entry into force took place or not. Lastly, the situation differed in the case of bilateral and multilateral treaties.

28. If the Committee agreed to make a distinction between the provisional application of a treaty and its entry into force, the title of the article would also have to be changed and would become: "Application provisionally ", and the article might be transferred to Part III, Section 2. In any event, the article should be retained, as it was in conformity with international practice and was useful legally, as implied in paragraph (3) of the International Law Commission's commentary.

29. Mr. CARMONA (Venezuela) said that he was not in favour of deleting article 22. He was not overlooking the fact that treaties must go through a ratification procedure, but he thought that entry into force provisionally corresponded to a widespread practice based upon the urgency of certain agreements. A recent example was the Agreement of 1960 establishing the Organization of Petroleum Exporting Countries.[5] The States concerned had decided to apply provisionally the treaty signed at Baghdad. Provisional application had not caused the least difficulty and the treaty had subsequently entered into force.

30. As the United States delegation itself appeared to think, the probable difficulties were of two kinds. First, Governments hesitated to commit themselves without complying with the procedure prescribed by internal law unless they were certain that ratification would not give rise to any political difficulty. Secondly, on the international plane, it was necessary to provide for the express consent of States to the provisional application of a treaty.

31. In any case, it would be regrettable if the convention represented a retrograde step in relation to present practice, since provisional application met real needs in international relations. Article 22 should therefore be retained. The use States made of that procedure would depend on circumstances and upon their internal laws. That possibility was provided for in the Venezuelan Constitution, for example.

[5] United Nations, *Treaty Series*, vol. 443, p. 247.

32. Sir Lalita RAJAPAKSE (Ceylon) observed that although circumstances might require the application of a treaty provisionally, attention should also be given to limiting the period of provisional application. After a specified date, provisional application would cease until ratification. Article 22 did not contain any provision in that regard nor with respect to the effects of acts performed during the provisional application.

33. The Ceylonese delegation supported the amendment by Yugoslavia and Czechoslovakia (A/CONF.30/C.1/L.185 and Add.1) as it considered it better, from the formal point of view, to combine the two paragraphs into a single paragraph.

34. There was no great difference between the terms " be applied " and " enter into force ". The latter had no doubt been used because the article had been placed in Section 3, relating to the entry into force of treaties.

35. In any event, he endorsed the use of the term " be applied ". The amendment in document A/CONF.39/C.1/L.185 and Add.1, as well as his own delegation's suggestion that the scope of the provisions of article 22 should be defined, were matters of drafting and might be referred to the Drafting Committee. Lastly, he did not support the deletion of article 22 proposed by the United States delegation.

36. Mr. MYSLIL (Czechoslovakia) said he did not wish to make a formal proposal, but he thought the Drafting Committee's attention should be drawn to the need to distinguish between the entry into force and entry into operation of a treaty. Although the dates of those two events often coincided, entry into operation sometimes took place later, for example, one month or three months after the exchange or deposit of the instruments of ratification or accession. A date of entry into operation subsequent to the date of entry into force was more often specified in multilateral treaties. Such postponement of entry into operation had legal consequences: whereas a State might be considered to be free to renounce its obligations between the date of entry into force and the date of entry into operation of the treaty, after the entry into operation of the treaty it could only do so in accordance with the provisions of the treaty or the rules of international law.

37. The Yugoslav amendment (A/CONF.39/C.1/L.185) indicated a possible solution. The Czechoslovak delegation had co-sponsored that amendment with the agreement of the Yugoslav delegation. The term used should be " provisional application ", and not " entry into force provisionally ", because there could hardly be two entries into force.

38. Lastly, the Czechoslovak delegation did not agree to the deletion of article 22, because it would leave an unsatisfactory gap in the convention.

39. Mr. TSURUOKA (Japan) said he supported the United States amendment to delete article 22.

40. The legal nature of provisional entry into force was not sufficiently clear. In practice, provisions of a treaty were sometimes applied before the entry into force of the treaty. The Japanese delegation doubted, however, whether the practice could be sanctioned as a distinct legal institution. In most cases, what really took place was that the executives of the contracting States assumed

parallel undertakings to apply the provisions of the treaty within the limits of their respective competences. Hence it might not be proper to classify the practice as a variant of entry into force.

41. In any case, whatever the legal nature of such practices, the Japanese delegation regarded them as already covered by article 21, paragraph 1.

42. Mr. DENIS (Belgium) said that there was a gap to be filled in article 22, which did not explain how provisional entry into force was terminated when a State knew that it would not ratify the treaty. There was no question in that case of applying the provisions of article 53 of the draft relating to denunciation of treaties, because a State could not denounce a treaty to which it was not yet party. It should therefore suffice to terminate provisional application if the State concerned manifested its wish not to become a party to the treaty. That was the purport of the amendment submitted by the Belgian delegation (A/CONF.39/C.1/L.194). The Committee would note that the wording used in the amendment was based on terms employed in draft article 15, which had already been approved by the Committee in principle.

43. Mr. MARESCA (Italy) said he supported the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1), which considerably improved the original wording, in that confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion. Mere physical application did not involve entry into force. The deletion of paragraph 2 therefore followed logically from the formula proposed in paragraph 1. The Italian delegation also approved of the Belgian amendment (A/CONF.39/C.1/L.194), which was a logical consequence of a particular situation and had the advantage of using a formula already employed in a previous article.

44. Mr. ROSENNE (Israel) said he was tempted at first sight to agree to the deletion of article 22, which raised many difficulties. But, although deletion seemed the simplest solution, it did not solve the problem, because the deletion of the article would fail to take account of existing practice, which had its merits. If the Committee decided to delete the article, it should state in its report to the plenary Conference that the deletion did not affect established practice. If the article was retained, the proposal by Yugoslavia and Czechoslovakia would form a satisfactory basis for its wording, because it was really the application of the treaty rather than its entry into force which was concerned. The word " provisionally " introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word " provisionally " referred to time and not to legal effects. That would complicate the drafting of the article. If the Committee decided in favour of the notion of application, the question would arise as to the place at which article 22 should appear in the convention. In short, his delegation favoured the retention of the article, which should be referred to the Drafting Committee. It could not yet express its view on the Belgian amendment (A/CONF.39/C.1/L.194) because the text had not yet been circulated.

45. Mr. VIRALLY (France) thought that the existence of a well-established practice, the value of which had been fully demonstrated, made it necessary for the convention to safeguard the freedom of States to agree that the treaty could enter into force provisionally until such time as they were able to give final confirmation. The deletion of article 22 might therefore raise more problems than it would solve, and it would be preferable to retain it. Its existing wording nevertheless created difficulties, in that the notion of provisional entry into force was difficult to define legally. It would be preferable to recognize existing practice rather than adopt a particular position on the point. In that respect, the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) seemed satisfactory, but its adoption would raise the question of whether it was possible to wait indefinitely for States to express their final consent to the treaty. Provision should be made for States to withdraw as soon as they had decided against participation in the treaty. The French delegation therefore supported the Belgian amendment (A/CONF.39/C.1/L.194).

46 Mr RUEGGER (Switzerland) said he understood the doubts expressed by delegations as to whether article 22 should really appear in the convention. On reflection, however, the Swiss delegation had decided that contemporary practice necessitated the presence of such an article, since a practice which had become current in several spheres, and particularly in that of trade agreements, could not be overlooked. But the question was an awkward one, because it cut across the dividing line between international law and internal law. There was also the question of the limits to the power of a Government and that of the power of individuals to bind a State provisionally.

47. His delegation thought a distinction should be made between provisional application and provisional entry into force. It would therefore support the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1), which could however be extended to include the words " in whole or in part " after the word " applied ". If the Yugoslav and Czechoslovak amendment was rejected, his delegation could accept the wording proposed by the International Law Commission. At first sight the Belgian amendment (A/CONF.39/C.1/L.194) seemed acceptable, but his delegation could not give its opinion until the text had been circulated.

48. Mr. SINCLAIR (United Kingdom) said that the wording and content of article 22 had caused difficulty during the discussion. The United Kingdom delegation itself saw no particular reason not to delete it, but it should be recognized that article 22 represented the existing practice of States in many spheres. It would therefore be preferable to retain it, provided that the difficulties in question were solved.

49. The Yugoslav and Czechoslovak amendment seemed justified, because it was the application rather than the entry into force of the treaty that was contemplated. In principle, the United Kingdom delegation could support the Belgian amendment, but it would not commit itself until it had studied the text.

50. With regard to the expression " have in some other manner so agreed ", it might be more correct to say " have otherwise so agreed ", since States might have agreed in the treaty itself that it would enter into force or be applied provisionally when a particular event took

place or when it had been ratified by only a few contracting States, and not when it had been ratified by all the contracting States.

51. Mr. BEVANS (United States of America) said he did not think the retention or deletion of article 22 would make the slightest difference to existing practice, although the retention of the article might cause confusion in foreign affairs departments. For example, some countries regarded treaties, and even international law, as forming part of their internal law, and the inclusion of article 22 would introduce a new element into international law which would override their internal practice. Such difficulties could perhaps be solved by a disclaimer such as " Nothing in the present provisions shall prevent the provisional application of treaties ".

52. Mr. YASSEEN (Iraq) said he favoured the retention of article 22. He preferred the wording of the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) because it was clearer and would result in the deletion of a paragraph which did not seem essential. He could not, however, agree to the replacement of the words " may enter into force provisionally " by the words " may be applied provisionally ". From the legal point of view, the situation was the same as when the treaty entered into force. The only difference was in the time factor. In article 22, entry into force was provisional.

53. The Indian amendment (A/CONF.39/C.1/L.193) improved the wording of paragraph 1.

54. Mr. KRISPIS (Greece) explained that the object of the amendment submitted by his delegation (A/CONF.39/C.1/L.192) was to combine paragraphs 1 and 2 of article 22 so as to state the rule in more precise form, and to combine sub-paragraphs (*a*) and (*b*) of paragraph 1 in order to bring the drafting of the paragraph into line with that of paragraph 1 of article 21.

55. The Greek delegation approved of the change proposed by the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1), which preserved the idea of provisional application. It might be advisable to add some words in an appropriate place in the article about the duration of the provisional application, as had been rightly suggested during the discussion.

56. With regard to the deletion of article 22, his delegation thought that its presence in, or absence from, the convention would in no way alter existing practice. It would therefore abstain in the vote on the deletion. If the article was retained, it would like its amendment to be referred to the Drafting Committee.

57. Mrs. THAKORE (India) explained that her delegation's amendment (A/CONF.39/C.1/L.193) concerned matters of drafting and could therefore be referred to the Drafting Committee. The first change seemed necessary if articles 9 *bis* and 12 *bis* were adopted. The reason for the second change was that, in view of the definition of the term " contracting State " given in article 2, paragraph 1(*f*), it was preferable not to use the words " contracting States " in the context in question, because pending ratification a State was not a contracting State. Those words might be replaced by the words " States concerned " which were also to be found in the International Law Commission's commentary to article 22.

58. The Indian delegation supported the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1).

59. Mr. KOUTIKOV (Bulgaria) said that article 22 contained the essentials for solving a situation which seldom arose. He could vote in favour of it. It gave the impression, however, that its authors had intended to distinguish between provisional entry into force as provided in the treaty and provisional entry into force as otherwise provided. That impression was confirmed by the following sentence in paragraph (1) of the International Law Commission's commentary to the article: " Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question ". Possibly the article merely gave that impression, but it was better to be precise. The Bulgarian delegation, jointly with the Romanian delegation, would submit an amendment [6] on that point to make it clear that the will of States was a decisive factor, whether entry into force was provided for in the treaty or elsewhere. That amendment would only relate to paragraph 1 and could be referred to the Drafting Committee.

60. The amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) offered a version of the article as seen from a different standpoint, both practically and theoretically. That amendment and the Indian amendment (A/CONF.39/C.1/L.193) could be considered by the Drafting Committee.

The meeting rose at 1 p.m.

[6] See document A/CONF.39/C.1/L.195.

TWENTY-SEVENTH MEETING

Wednesday, 17 April 1968, at 5.30 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 22 (Entry into force provisionally) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 22 of the International Law Commission's draft.[1]

2. Mr. CASTRÉN (Finland) said that his delegation was in favour of retaining article 22 in its entirety, and was opposed to the deletion of paragraph 2. It could support the amendments submitted by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1), Belgium (A/CONF.39/C.1/L.194) and India (A/CONF.39/C.1/L.193). On the other hand, it could not support the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.176), for the same reasons as it had advanced at

[1] For a list of the amendments submitted, see 26th meeting, footnote 4.

the 26th meeting [2] against that delegation's amendment to article 21 (A/CONF.39/C.1/L.175).

3. Mr. MAKAREWICZ (Poland), introducing the amendment submitted jointly by his delegation and that of Hungary (A/CONF.39/C.1/L.198), said that it had already been pointed out in the Polish Government's comments on article 22 (A/CONF.39/6/Add.1) that the article did not seem to provide for termination of what was essentially a provisional state of affairs and, consequently, was not covered by article 51. In view of the general agreement with the Yugoslav and Czechoslovak proposal to substitute the term " provisional application " for " entry into force provisionally " (A/CONF.39/C.1/L.185 and Add.1), which they fully supported, the Polish and Hungarian delegations had included that term in their amendment. Sub-paragraph (*c*) of the new paragraph they proposed (A/CONF.39/C.1/L.198) brought out clearly the difference between termination of the provisional application of a treaty and termination under article 51.

4. Mr. SARIN CHHAK (Cambodia) said his delegation was in favour of the principle set out in article 22, which was justified by current practice and met the needs of States. In practice, provisional application of a treaty had few disadvantages, since States very seldom withdrew from a treaty between signature and ratification, acceptance, approval or accession. His delegation was in favour of the International Law Commission's text, but if the majority did not support that wording, he would vote for the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1).

5. Mr. POP (Romania) said that, in drafting its realistic text of article 22, the International Law Commission had taken into account the fact that, in State practice, some treaties were applied provisionally pending ratification, acceptance or approval, and also the need to meet the actual requirements of States by setting up machinery through which delays in ratification, approval or acceptance could be avoided in cases where immediate application was necessitated by the urgency of the content of the treaty. The practice was often used by Romania, particularly in trade and transport agreements.

6. His delegation considered that the Hungarian and Polish amendment (A/CONF.39/C.1/L.198) and the Belgian amendment (A/CONF.39/C.1/L.194) improved the Commission's text. It also considered that sub-paragraphs (*a*) and (*b*) should be amalgamated, and had therefore joined the Bulgarian delegation in sponsoring an amendment to that effect (A/CONF.39/C.1/L.195). His delegation could support the Yugoslav and Czechoslovak proposal (A/CONF.39/C.1/L.185 and Add.1) to replace the expression " may enter into force provisionally " by " may be applied provisionally ".

7. Mr. ARIFF (Malaysia) said that article 22 raised some problems of practical application, since it tended to encroach upon the true functions of articles 11 and 12, which clearly indicated ratification, acceptance, approval and accession as the methods whereby a State declared its consent to be bound by a treaty. The option which article 22 gave a State to avoid compliance with the usual machinery and to fall back on the clause on provisional entry into force might ultimately render the traditional forms of consent null and void. Moreover, there seemed to be nothing to prevent a State from delaying formal ratification of a treaty indefinitely on the pretext that the treaty had entered into force provisionally. Indeed, in the course of negotiations States were sometimes reluctant to introduce into the treaty a clause on provisional entry into force for fear of constitutional difficulties and because the negotiators often lacked authority to agree to such flexible arrangements. On the other hand, there were some sound arguments in favour of retaining article 22: it was often expedient to avoid the unnecessary delay entailed by going through the traditional channels, and the advantages of the treaty could be obtained much sooner. Accordingly, his delegation was on the whole in favour of retaining paragraph 1 of the article, but paragraph 2 seemed to entail unnecessary complications, particularly if the treaty was a long one and part of it entered into force provisionally, whereas the rest remained inoperative until the traditional procedures had been performed. His delegation could support the Greek amendment (A/CONF.39/C.1/L.192), with the exception of the phrase " in whole or in part ".

8. Mr. SUPHAMONGKHON (Thailand) said he agreed with the view that it was unnecessary to retain paragraph 2 of article 22 but considered that, in order to remove all possible doubts, it might be advisable to amalgamate the two paragraphs, as was proposed in the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1). The Thai delegation also supported the proposal by those delegations to replace the words " enter into force " by " be applied ". Nevertheless, it considered that the wording of the amendment might be improved by changing the first eight words to read "A treaty or any part thereof " and by replacing the words " it shall be applied provisionally " in sub-paragraph (*a*) by " it shall be so applied ". The amendments by Belgium (A/CONF.39/C.1/L.194) and by Hungary and Poland (A/CONF.39/C.1/L.198) seemed to contain some useful elements.

9. His delegation would appreciate some explanation from the Expert Consultant concerning the use of the word " accession " in sub-paragraph (*a*). It could visualize States, having concluded a treaty, agreeing to apply it provisionally pending ratification, acceptance or approval, but it was not quite clear how accession could be preceded by provisional application, since the States concerned would not be contracting parties before accession.

10. Mr. HARRY (Australia) said that his delegation had at first sight considered article 22 to be unnecessary in view of the existence of article 21, and had believed that the International Law Commission had perhaps not quite fully reflected modern State practice in the matter. In any case, it had thought that the Commission's text would need considerable redrafting. The Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1) might help, though it would not solve all the problems.

11. The debate had, however, considerably clarified the issues, and in the opinion of his delegation there were now only two gaps to be filled. First, there was the question of the number of acceptances, approvals or accessions needed to bring the treaty into force and to end the state of provisional application: perhaps that gap

[2] Para. 14.

could be filled by inserting the words " the requisite number of " before " contracting States " in sub-paragraph (*a*). A second problem was the one raised in the Belgian amendment (A/CONF.39/C.1/L.194), concerning the right of a contracting State party to the subsidiary agreement on provisional application to withdraw from that subsidiary agreement. The Hungarian and Polish amendment (A/CONF.39/C.1/L.198) might fill that gap, but it would perhaps be better to follow the Belgian amendment in stating the provision in residual terms, and to preface the new paragraph with the phrase " Unless otherwise provided or agreed ". His delegation would like to hear the Expert Consultant's views on that question.

12. Mr. SEVILLA-BORJA (Ecuador) said that his delegation wished to have it placed on record that articles 21 and 22 related to the formal aspect of the entry into force of treaties; the fact that a treaty had entered into force did not necessarily mean that it was valid in law. Entry into force only created a presumption regarding that validity, and the presumption did not preclude the invocation of grounds of voidability or grounds for nullity or termination.

13. The Ecuadorian delegation had considered it appropriate to make that statement despite the clarity of the International Law Commission's text, in order to avoid in the future any interpretation of articles 21 and 22 which might depart from the true meaning of the rules therein embodied, and for that reason it requested that its opinion be reflected in the report of the Rapporteur of the Committee of the Whole.

14. He supported the amendment by Yugoslavia and Czechoslovakia to article 22 (A/CONF.39/C.1/L.185 and Add.1), because the reference to " provisional application " had a more legal connotation and was more accurate than " entry into force provisionally ".

15. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission, and especially its Drafting Committee, had discussed at length the choice between the expressions " provisional application " and " entry into force provisionally ", as well as the placing of article 22 in the general scheme of the draft articles.

16. The Commission had finally decided to refer to " entry into force provisionally " because it understood that the great majority of treaties dealing with the institution under discussion expressly used that term. Subsequent evidence had corroborated that impression. Moreover, to the Commission's knowledge, the use of the expression had not given rise to any difficulty from any quarter.

17. From the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty. Of course, the necessity to use the term " treaty " to describe the international instrument in question raised some difficulty. However, since most treaties spoke of " entry into force provisionally ", the Commission had decided that, on balance, it was desirable to use that term, notwithstanding the problems which it undoubtedly raised.

18. Another reason why it was desirable to speak of " entry into force provisionally " was that it was very common for that institution to be used in cases where there was considerable urgency to put the provisions of the treaty into force. In those cases, ratification sometimes never took place, because the purpose of the treaty was actually completed before it could take place. Clearly such acts must have a legal basis, and for that reason reference should be made to entry into force provisionally.

19. The suggestion, which had been made in the course of the present discussion, that the provisions of article 22 should be transferred to that part of the draft which dealt with the application of treaties raised the problem that the provisions in question would speak of the application of a treaty which had apparently not come into force.

20. The other main question which had been raised during the discussion was that of making provision for the termination of a treaty which had entered into force provisionally. The International Law Commission had discussed that question and in its earlier drafts had actually made provision for termination. Later, however, it had felt it inelegant to talk of termination in connexion with such a treaty. Moreover, it had arrived at the conclusion that the contents of any provision on the subject of termination would either go without saying, or would be covered by article 51 on the termination of treaties by agreement. However, he wished to make it clear that, except for the minor question of juridical elegance, the International Law Commission would certainly not have objected to the substance of a proposal such as that contained in the amendment by Hungary and Poland (A/CONF.39/C.1/L.198).

21. The reference to accession had been included in article 22 as a measure of caution; it was quite common to make a multilateral treaty open to signature for only a short period of, say, six months, after the expiry of which it would be open only to accession, acceptance or approval.

22. Mr. BEVANS (United States of America) said he would request that the amendment by his delegation and those of the Republic of Korea and the Republic of Viet-Nam to delete article 22 (A/CONF.39/C.1/L.154 and Add.1) be not put to the vote. That request was made on the understanding that article 22 would not effect any change in internal law governing the entry into force of treaties. When he had submitted his amendment, he had sought to avoid confusion on that point with regard to international instruments which were " treaties " under domestic law and subject to specific procedures before coming into force or being applied.

23. On the understanding which he had expressed, he would now be prepared to support the amendment by Yugoslavia (A/CONF.39/C.1/L.185 and Add.1), combined with the amendment by Belgium (A/CONF.39/C.1/L.194).

24. Mr. JAGOTA (India) said that the United States proposal to delete article 22 had been made because of the possibility that provisional entry into force would conflict with constitutional limitations, but he would have thought that article 22 was only a variant of article 21, and the provisional entry into force would be the same as full entry into force, in which case there should be no differ-

ence as between the two articles so far as constitutional limitations were concerned.

25. Sir Humphrey WALDOCK (Expert Consultant) said that the procedure in article 22 took place by virtue of special consent embodied either in the main text of the treaty or in a separate agreement, often a treaty in simplified form. It was a special procedure which most constitutions now recognized, even those with very strict provisions.

26. The CHAIRMAN said he would invite the Committee to vote first on the amendments by the Philippines (A/CONF.39/C.1/L.165) and by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1, paragraph 2) to delete paragraph 2 of article 22.

The deletion of paragraph 2 of article 22 was rejected by 63 votes to 11, with 12 abstentions.

27. The CHAIRMAN invited the Committee to vote on paragraph 1 of the Yugoslav and Czechoslovak amendment.

Paragraph 1 of the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) was adopted by 72 votes to 3, with 11 abstentions.

28. The CHAIRMAN invited the Committee to vote on the principle of including a new paragraph 3 on the termination of the provisional entry into force or provisional application of a treaty as proposed by Belgium (A/CONF.39/C.1/L.194) and by Hungary and Poland (A/CONF.39/C.1/L.198).

The principle was adopted by 69 votes to 1, with 20 abstentions.

29. The CHAIRMAN said that the amendments adopted, together with the drafting amendments by the Republic of Viet-Nam (A/CONF.39/C.1/L.176), Greece (A/CONF.39/C.1/L.192), India (A/CONF.39/C.1/L.193 and Bulgaria and Romania (A/CONF.39/C.1/L.195), would be referred to the Drafting Committee.[3]

The meeting rose at 6.15 p.m.

[3] For resumption of the discussion on article 22, see 72nd meeting.

TWENTY-EIGHTH MEETING

Thursday, 18 April 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Texts proposed by the Drafting Committee

1. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement concerning the titles of the parts, sections and articles, and to introduce the text of articles 3, 4 and 5 adopted by the Drafting Committee (A/CONF.39/C.1/3).

Titles of parts, sections and articles

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had come to a general decision regarding the titles of the parts, sections and articles, which was recorded in the footnote to its report (A/CONF.39/C.1/3). The Drafting Committee had thought it advisable to defer consideration of those titles, because their wording would necessarily depend on the eventual content of the articles themselves.

Article 3 (International agreements not within the scope of the present articles) [1]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that a further general decision by the Drafting Committee, to which effect was given in the wording it had adopted for article 3, concerned sub-paragraphs which did not form a grammatically complete sentence. In the printed text of the International Law Commission's draft articles, including that of article 3, those sub-paragraphs began with a capital letter. The Drafting Committee considered, however, that for grammatical reasons it would be preferable for them to begin with a small letter.

4. The text for article 3 adopted by the Drafting Committee read:

"*Article 3*

"The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

"(*a*) the legal force of such agreements;

"(*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject, in accordance with international law, independently of the Convention;

"(*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties."

5. The text reproduced, in sub-paragraphs (*a*) and (*b*), the International Law Commission's text, with slight drafting changes which improved the wording. The Drafting Committee had not accepted the proposals to delete the words "independently of these articles"; it had considered those words necessary in order to show that the rules stated in the convention could apply, not as articles of the convention, but on other grounds, because they had another source: for example, custom.

6. On the other hand, the Drafting Committee had thought fit to accept the Mexican amendment (A/CONF.39/C.1/L.65) introducing the words "in accordance with international law". Those words had, however, been inserted before the words "independently of these articles", not in place of them, as proposed. The effect of adding those words was to clarify the text and emphasize that article 3 permitted the application not only of the old rules which had been codified, but also of new rules drawn up to promote the progressive development of international law, so that if a new custom grew up on the basis of the articles which stated new rules, that custom would apply.

[1] For earlier discussion of article 3, see 6th and 7th meetings.

7. Sub-paragraph (*c*) was new. The Drafting Committee had added it to the text of the draft in order to clarify a point, as appeared to be desired by certain delegations. The aim was to show more clearly the scope of the convention, particularly with regard to trilateral or mixed international agreements, the parties to which included not only States, but also other subjects of international law. It had been thought advisable not to exclude all such agreements from the scope of the convention. Where such agreements were concerned, the convention should govern relations between States, but not relations between other subjects of international law or between them and States. The object of sub-paragraph (*c*) was to state in explicit and non-controversial terms a conclusion which might have been reached by a reasonable interpretation of the text of the original article.

8. Mr. JAGOTA (India) said he could not remember the Drafting Committee having received any precise instructions concerning the insertion of sub-paragraph (*c*), for the discussion in the Committee of the Whole had been inconclusive. In the case of a mixed agreement, it might not be easy to determine the rights and obligations between States on the one hand, and between States and organizations on the other. The inclusion of sub-paragraph (*c*) might therefore introduce an element of ambiguity and confusion. In the absence of details, it seemed that sub-paragraph (*c*) was incompatible with sub-paragraph (*b*) and that the subject-matter of sub-paragraph (*c*) was already dealt with in sub-paragraph (*b*) of the International Law Commission's text. Moreover, when sub-paragraph (*c*) was read in conjunction with the opening sentence, a contradiction appeared, for after agreements concluded between States and other subjects of international law had been excluded from the scope of the convention, sub-paragraph (*c*) stated that the convention could apply to those agreements.

9. Mr. YASSEEN, Chairman of the Drafting Committee, said that sub-paragraph (*b*) dealt with an entirely different question from sub-paragraph (*c*). Sub-paragraph (*b*) showed that the rules laid down in the convention could apply to mixed agreements, that was to say to agreements to which other subjects of international law were parties, if those rules could apply, not as articles of the convention, but as custom or as principles of international law. The Drafting Committee had considered that the inclusion of the words " in accordance with international law " next to the words " independently of the Convention " would emphasize that new customs could come into being on the basis of the articles which stated new rules and that such customs should be observed.

10. Sub-paragraph (*c*) might be said to be a complement to the general rule set forth in the introduction. It explained that even in the case of mixed international agreements, relations between States, but only relations between States, were subject to the convention. Relations between States and international organizations or other subjects of international law, especially the complex and indivisible relations involving both States and other subjects of international law, could not be subject to the convention.

11. Mr. FRANCIS (Jamaica) said he did not think the opening sentence and sub-paragraph (*c*) were incompatible, because the opening sentence referred to " international agreements concluded between States and other subjects of international law ", whereas sub-paragraph (*c*) referred to " relations " between States and other subjects of international law. That distinction precluded any possible misunderstanding.

12. Mr. SUY (Belgium) said he would prefer the words " *à l'application de celle-ci* " in the French text of sub-paragraph (*c*) to be replaced by the words " *à l'application de la Convention* ".

13. The CHAIRMAN invited the Committee of the Whole to approve the text of article 3 submitted by the Drafting Committee.

The text was approved.

Article 4 (Treaties which are constituent instruments of international organizations or are adopted within international organizations) [2]

14. Mr. YASSEEN, Chairman of the Drafting Committee, introduced the text of article 4 adopted by that Committee. It read as follows:

"*Article 4*

" The present Convention applies to any treaty which is the constituent instrument of an international organization or to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization."

15. The Drafting Committee had not thought it advisable to alter the International Law Commission's text, or to accept the proposed amendments. It should be explained, however, that it had taken the view that the term " rules " in article 4 applied both to written rules and to unwritten customary rules. That being so, the United Kingdom representative had agreed to withdraw his delegation's amendment (A/CONF.39/C.1/L.39) on the understanding that the term in question applied only to legal rules and could not be extended to rules that did not have the character of legal rules. Consequently, article 4 did not apply to mere procedures which had not reached the stage of mandatory legal rules.

16. Another general question arose in connexion with article 4: it concerned certain institutions such as GATT and the United International Bureaux for the Protection of Intellectual Property (BIRPI), which did not strictly speaking have the structural characteristics of international organizations. The Drafting Committee had decided to consider that question, not in connexion with article 4, but when it took up article 2, particularly sub-paragraph (i) concerning the term " international organization ".

17. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that his delegation would support article 4 as adopted by the Drafting Committee. As however the article was of substantial importance as a precedent for dealing with other questions connected with the draft articles and with their application in the future, he wished to make a few comments.

18. The meaning of article 4 was that the convention would apply to the constituent instruments of international organizations, and to treaties adopted within those

[2] For earlier discussion of article 4, see 8th, 9th and 10th meetings.

organizations, subject to the rules laid down by the organizations. If therefore an organization laid down rules which differed from the provisions of the convention, it was not the norms of the convention that would apply, but the rules of the organization. Those rules would become *lex specialis*.

19. The question naturally arose whether, under article 4, all the provisions of the convention must give way to the special provisions adopted by an international organization. That question should be decided by reference to the applicable rules of treaty law. Those rules were stated in article 37, which had not yet been considered by the Committee of the Whole.

20. The conclusion to be drawn from article 37 was that the rules of the organizations would apply in accordance with article 4, provided, first, that their application did not affect the rights and obligations of the other parties to the convention on the law of treaties, and secondly, that the exceptions did not relate to those provisions of the convention departure from which would be incompatible with its purpose.

21. The fact was, however, that the draft articles contained two kinds of rules: some were merely dispositive, while others were peremptory. Not only international organizations, but States were entitled to depart from the dispositive norms; but they were not entitled to depart from the peremptory norms, otherwise they would affect the rights and interests of the other parties, and that would be incompatible with the purposes of the convention.

22. The dispositive norms of the convention were those of a procedural nature and related to the process by which a treaty operated and was concluded. A State, whether acting inside or outside an international organization, was entitled by mutual agreement to depart from those norms.

23. The peremptory norms were, for example, the principle *pacta sunt servanda*, the provisions relating to third States and the provisions of Part V, and departure from those norms was inadmissible, whether inside or outside an organization.

24. He therefore wished to emphasize that article 4 could only apply in the case of purely dispositive rules.

25. Mr. ROSENNE (Israel) said he preferred the text submitted by the International Law Commission. He asked that the article be put to the vote and said that his delegation would abstain.

26. Mr. PINTO (Ceylon) said he had already described to the Committee of the Whole the problems which, in his opinion, were raised by the original draft article. He would not revert to them, for the Drafting Committee might possibly have found the best formula. Nevertheless he would like to know the Drafting Committee's opinion on one point. Both the International Law Commission's text and that of the Drafting Committee expressed the idea that the convention applied subject to the relevant rules of the organization. What would happen if a treaty adopted within an international organization was itself, wholly or partly, the constituent instrument of a new organization? Which rules would apply in that case, those of the old or those of the new organization?

27. Mr. YASSEEN, Chairman of the Drafting Committee, said that the question had not been discussed by that Committee and he did not think he was entitled to express his personal opinion on it.

28. The CHAIRMAN put to the vote the text of article 4 submitted by the Drafting Committee.

The article was adopted by 84 votes to none, with 7 abstentions.

29. Mr. MARTINEZ CARO (Spain) said that although his delegation had submitted an amendment (A/CONF. 39/C.1/L.35/Rev.1) to article 4, it had voted in favour of the Drafting Committee's text, for it wished the articles of the convention to be adopted by the largest possible majority. However, any interpretation the Spanish delegation gave to that article would, of course, take account of the comments it had made in the Committee of the Whole.

30. Mr. BLIX (Sweden) said that his delegation had abstained from voting for the reasons it had given during the discussion. In his opinion, the article was pointless, because most of the rules in the convention were residuary rules, so that international organizations could derogate from them. On the other hand, neither States nor organizations could derogate from the peremptory rules.

31. Mr. KEBRETH (Ethiopia) said he had abstained from voting because his delegation did not approve of the words " without prejudice to any relevant rules of the organization ".

32. Mr. TSURUOKA (Japan) said his delegation had abstained from voting for the reasons which it had clearly explained during the discussion in the Committee of the Whole.

Article 5 (Capacity of States to conclude treaties) [3]

33. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text of article 5 adopted by the Drafting Committee read:

"*Article 5*

" 1. Every State possesses capacity to conclude treaties.

"2. Members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down."

34. For various reasons the Drafting Committee had not thought it advisable to add the words " which is a subject of international law " to paragraph 1 of article 5, and had decided to retain the original wording of the paragraph. The Drafting Committee had decided to delete the word " States " in paragraph 2 because, during the discussion in the Committee of the Whole, some representatives had pointed out that the members of a federal union were not always called States and the Drafting Committee had taken the view that the deletion of that word, while making the text more acceptable, would not affect the meaning of the paragraph. The Drafting Committee had decided against inserting the expression " political sub-divisions ", because it had no precise legal meaning and was a political term. The Drafting Committee had not adopted the proposal to insert the words " or the other constituent

[3] For earlier discussion of article 5, see 11th and 12th meetings.

instruments of the union " after the words " is admitted by the federal constitution ", because it considered that the words " federal constitution " should be widely interpreted and that they applied not only to constitutions contained in a single document, but also to constitutions consisting of separate and successive acts. Lastly, the Drafting Committee had kept the term " federal union " as it considered it to be more flexible that " federal State ".

35. Mr. SINCLAIR (United Kingdom) asked that a separate vote be taken on paragraph 2.

36. Mr. ROSENNE (Israel) suggested that the Committee should vote first on paragraph 2 and then, if that paragraph 2 was adopted, on the text as a whole.

37. Mr. SINCLAIR (United Kingdom) and Mr. KRISPIS (Greece) supported that suggestion.

38. Mr. MOUDILENO (Congo, Brazzaville) proposed that paragraph 1 be put to the vote before paragraph 2.

39. The CHAIRMAN put to the vote the proposal by Congo (Brazzaville) that paragraph 1 be voted on first.

The proposal was rejected by 43 votes to 35, with 10 abstentions.

40. The CHAIRMAN put article 5, paragraph 2, to the vote.

At the request of the representative of the United States of America, the vote was taken by roll-call.

Saudi Arabia, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Saudi Arabia, Senegal, South Africa, Switzerland, Syria, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia, Afghanistan, Algeria, Argentina, Austria, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador, France, Gabon, Guatemala, Guinea, Holy See, Hungary, Indonesia, Iran, Iraq, Ivory Coast, Kenya, Kuwait, Lebanon, Liberia, Liechtenstein, Madagascar, Mali, Monaco, Mongolia, Morocco, Nigeria, Poland, Romania.

Against: Sierra Leone, Singapore, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Zambia, Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Denmark, Dominican Republic, Ethiopia, Federal Republic of Germany, Greece, India, Ireland, Israel, Italy, Jamaica, Japan, Malaysia, Mauritius, Mexico, Netherlands, New Zealand, Norway, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino.

Abstaining: Thailand, Trinidad and Tobago, United Republic of Tanzania, Bolivia, Congo (Democratic Republic of), Finland, Ghana, Pakistan.

Paragraph 2 was adopted by 46 votes to 39, with 8 abstentions.

41. Mr. COLE (Sierra Leone) said that when the Committee had voted, at its 12th meeting, on the deletion of paragraph 2 of article 5 his delegation had abstained; but since then it had reconsidered its position and had decided to vote in favour of deleting the paragraph, because the majority required under rule 36(1) of the rules of procedure had not been obtained on the first occasion.

42. Mr. MYSLIL (Czechoslovakia) said that his delegation had found it possible to vote in favour of paragraph 2, because it was convinced that the Drafting Committee had been successful in improving the former wording of the paragraph and in disposing of certain amendments. In his view, paragraph 2 did not prejudice present or future federal arrangements as established in the constitutions of the respective countries.

43. Mr. FRANCIS (Jamaica), explaining his delegation's vote, said that, having abstained when the deletion of paragraph 2 was first voted on by the Committee of the Whole, it had just voted against the retention of the paragraph. The problem raised by the paragraph mainly concerned federal States, whose unanimous agreement was necessary for its adoption. He hoped that the paragraph would be amended so that it could be accepted by all federal States.

44. The CHAIRMAN put article 5, paragraph 1, to the vote.

At the request of the representative of the Republic of Viet-Nam, the vote was taken by roll-call.

Ecuador, having been drawn by the Chairman, was called upon to vote first.

In favour: Ecuador, Ethiopia, Federal Republic of Germany, Finland, France, Gabon, Ghana, Greece, Guatemala, Guinea, Holy See, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Liechtenstein, Madagascar, Malaysia, Mali, Mauritius, Mexico, Monaco, Mongolia, Morocco, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Romania, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sweden, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Australia, Austria, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, Ceylon, Chile, China, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic.

Against: Republic of Viet-Nam.

Abstaining: Italy, Netherlands, Portugal, Republic of Korea, United Kingdom of Great Britain and Northern Ireland, United States of America, Belgium, Canada.

Paragraph 1 was adopted by 85 votes to 1, with 8 abstentions.

45. Mr. SINCLAIR (United Kingdom), explaining his delegation's vote, said that he had no objection in principle to the substance of paragraph 1, but did not see any need for it in a convention on the law of treaties.

46. Mr. KRISPIS (Greece) said he doubted whether paragraph 1 could be regarded as a legal rule, but his delegation had voted in favour of it because it served to introduce paragraph 2, which had just been adopted.

47. The CHAIRMAN put article 5 as a whole to the vote.

At the request of the representative of the United Kingdom of Great Britain and Northern Ireland, the vote was taken by roll-call.

Chile, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: China, Congo (Brazzaville), Costa Rica, Cuba, Czechoslovakia, Ecuador, Ethiopia, Finland, France, Gabon, Guatemala, Guinea, Holy See, Hungary, Indonesia, Iran, Iraq, Ivory Coast, Kenya, Kuwait, Lebanon, Liberia, Liechtenstein, Madagascar, Mali, Monaco, Mongolia, Morocco, Nigeria, Pakistan, Poland, Romania, Saudi Arabia, Senegal, South Africa, Switzerland, Syria, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Afghanistan, Algeria, Argentina, Austria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic.

Against: Federal Republic of Germany, Greece, Italy, Japan, Netherlands, New Zealand, Norway, Philippines, Republic of Korea, Republic of Viet-Nam, San Marino, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Australia, Belgium, Canada.

Abstaining: Chile, Congo (Democratic Republic of), Denmark, Dominican Republic, Ghana, India, Ireland, Israel, Jamaica, Malaysia, Mauritius, Mexico, Peru, Sierra Leone, Singapore, Spain, Sweden, Trinidad and Tobago, Venezuela, Zambia, Brazil, Ceylon.

Article 5 was adopted by 54 votes to 17, with 22 abstentions.

48. The CHAIRMAN invited the Committee to resume its discussion of the draft articles adopted by the International Law Commission.

Article 23 (Pacta sunt servanda) [4]

49. Mr. ALCIVAR-CASTILLO (Ecuador), introducing the joint amendment (A/CONF.39/C.1/L.118) of which his delegation was a co-sponsor, said that the *pacta sunt servanda* rule was a rule of general international law and was not an integral part of *jus cogens*, since it admitted of exceptions. It was doubtful whether the Preamble to the United Nations Charter reflected that rule; its third paragraph had a different purpose. On the other hand, it was obvious that Article 2(2) of the Charter was based on the *pacta sunt servanda* rule, but its application was subject to the fulfilment by Members of the United Nations of the obligations assumed by them in accordance with the Charter. In addition, paragraph 2 introduced the element of good faith, which the International Law Commission had said to be inherent in the rule stated in article 23 of the draft.

50. As the Ecuadorian delegation had already had occasion to say in the Sixth Committee of the General Assembly, good faith was a part of the premises of every contractual act and any defect in those premises was, so to speak, congenital. Article 2 of the Charter, like article 23 of the draft, wrongly treated good faith as a quality pertaining to the performance of a treaty rather than to its conclusion. Article 23 established a simple rebuttable presumption, but it made no provision for the production of evidence to the contrary. Lastly, the expression " in force " referred back to articles 21 and 22 and hence related only to the formal aspect of validity, leaving aside substantive validity and validity in time.

51. The purpose of the joint amendment (A/CONF.39/C.1/L.118) was to make good those deficiencies.

52. Mr. ALVAREZ TABIO (Cuba), introducing his delegation's amendment (A/CONF.39/C.1/L.173), said that the expression " every treaty in force " left some questions open. Some representatives linked that expression to the provisions on the entry into force of treaties which preceded article 23. They considered that " every treaty in force " meant every treaty concluded in conformity with the formal requirements set out in Part II of the draft. But if that was so the words were superfluous, for it was obvious that no State could be required to fulfil obligations deriving from a treaty that was not in force. The use of the expression " in force ", far from strengthening the text, weakened it.

53. It was clear from the International Law Commission's commentary that it had intended the provision to cover every treaty satisfying not only the formal conditions set out in Part II, but the provisions of all the other draft articles, in particular those in Part V—which the Cuban delegation found excellent. Thus the expression " every treaty in force " also meant every treaty not invalidated by a defect. The *pacta sunt servanda* rule could therefore apply only to treaties conforming to the overriding principles of *jus cogens*, to which consent had been freely given.

54. Any defect in the conclusion of a treaty rendered it void *ab initio*, so that it could not be considered to be in force.

55. Making the *pacta sunt servanda* rule subject to good faith established a link with Article 2 of the United Nations Charter. The consequences of that link were important. In the first place, the application of the *pacta sunt servanda* rule was limited by good faith, and could not be carried to absurd lengths. Secondly, only obligations that were in conformity with the provisions of the Charter need be fulfilled in good faith, since otherwise the result would be contrary to morality and to law.

56. The *pacta sunt servanda* rule was intended to ensure the stability of law; not stability at any price, but stability based on justice. A treaty cloaked in false legality to conceal an unlawful aim was a kind of offence and could not be covered by the *pacta sunt servanda* rule any more than a treaty to which a State's consent had been obtained unjustly or by coercion. The *pacta sunt servanda* rule should henceforth be made to serve peoples who had suffered and were still suffering from the abuses to which it had given rise and which justified their apprehensions and reservations about it.

57. If the expression " every treaty in force " only covered the formal conditions to be fulfilled by treaties, it would be superfluous. If the authors of the article had intended it to refer also to the substantive conditions, it was inadequate and ambiguous. It should therefore be specified, as the Cuban delegation proposed, that the rule applied only to treaties in conformity with the provisions of the convention. The Cuban delegation thought that

[4] The following amendments had been submitted: Bolivia, Czechoslovakia, Ecuador, Spain and United Republic of Tanzania, A/CONF.39/C.1/L.118; Cuba, A/CONF.39/C.1/L.173; Pakistan, A/CONF.39/C.1/L.181; Congo (Brazzaville), A/CONF.39/C.1/L.189; Thailand, A/CONF.39/C.1/L.196.

its amendment could be referred to the Drafting Committee.

58. Mr. SAMAD (Pakistan) said he was glad to see that no representative had requested the deletion of the *pacta sunt servanda* rule. Introducing his delegation's amendment (A/CONF.39/C.1/L.181), he said that emphasis should be placed on the pre-eminence of international law, which rested on the principle that treaties must be performed in good faith. That rule was confirmed by the United Nations Charter.

59. States sometimes invoked their internal laws to evade their international obligations, and the purpose of the amendment by Pakistan was to curb that practice by expressly stating the principles of good faith and of the pre-eminence of international law.

60. Mr. MOUDILENO (Congo, Brazzaville) said that his delegation's amendment (A/CONF.39/C.1/L.189) was on the same lines as the amendments in documents A/CONF.39/C.1/L.118 and L.173, and the choice between them was only a question of finding the best wording. The International Law Commission had laid down the principle with quite Roman vigour. But although the formalism of Roman law allowed the expression " every treaty in force " to be supplemented by implication, in modern law it was necessary to fill it out and emphasize the process giving rise to the obligation to perform a treaty. Only treaties which resulted from a lawful process of creation must be performed.

61. The lawfulness of the process of concluding a treaty was so important that an explicit reference to it was justified, even if some might find it repetitious. The Congolese delegation was willing to have its amendment referred to the Drafting Committee.

62. Mr. SUPHAMONGKHON (Thailand) said that the sole purpose of his delegation's amendment (A/CONF. 39/C.1/L.196) was to make a minor drafting change in the English text. The definition of a " party " in article 2, sub-paragraph (g) showed that it meant a State for which a treaty was in force; consequently the words " to it " after the word " parties " in the English text were unnecessary.

63. He was not satisfied with the expression " must be performed " in the English text. There were obligations to act and obligations not to act, and the verb " perform " seemed to leave the latter out of account. It would be better to say " must be observed ". Those proposals could, in any case, be referred to the Drafting Committee.

64. He was opposed to the Cuban amendment, which introduced the criterion of validity, because that criterion was more debatable than the notion of a treaty in force. Besides, a treaty whose operation had been suspended did not lose its validity. The *pacta sunt servanda* rule could and should apply only to a treaty in force.

65. Mr. BRIGGS (United States of America) said that the *pacta sunt servanda* rule had come down through the ages as a self-evident truth. Both comparative law and the history of legal systems showed that it had gained universal acceptance; it had been found to be a legal necessity. The principle had been a basic rule of international law from its earliest origins, and was the foundation-stone of further progress and development.

66. The United States delegation gave its unqualified support to the *pacta sunt servanda* rule as formulated in article 23. It was strongly opposed to the amendments in documents A/CONF.39/C.1/L.118 and L.173.

67. The draft convention dealt with the validity and termination of treaties, as was to be expected. The provisions relating to those subjects were in Part V; article 39 provided that validity might be impeached only " through the application of the present articles ", and paragraph (4) of the commentary to that article stated that that expression referred to the draft articles as a whole. It would therefore serve no purpose to insert the world " valid " in article 23, and it might encourage States mistakenly to claim a right of non-performance before any invalidity had been established.

68. An increasing number of treaties was being concluded, and that was not a luxury but a necessity for development and the peaceful co-existence of all States, weak or strong. The amendments based on the concept of validity would undermine the principle that treaties must be performed, though in practice, treaties whose validity was contested were an insignificant minority. Moreover, those amendments prematurely raised a question dealt with later in the draft articles in provisions which maintained a careful balance between the need for stability and the need for change.

69. He accepted the principle of the amendment by Pakistan, but thought it would be more appropriately placed in a convention on State responsibility than in one on the law of treaties.

70. The amendment submitted by the Congo (Brazzaville) weakened the rule in article 23 by casting doubt *ab initio* on every treaty, and although it stated in paragraph 2 that good faith was presumed, it seemed to undermine that assertion by the reference in paragraph 1 to treaties regularly concluded.

The meeting rose at 1 p.m.

TWENTY-NINTH MEETING

Thursday, 18 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 23 (Pacta sunt servanda) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 23 of the International Law Commission's draft.[1]

2. Mr. MARTINEZ CARO (Spain), speaking as one of the sponsors of the five-State amendment (A/CONF. 39/C.1/L.118), said that the proposal to replace the words " treaty in force " by the words: " valid treaty " involved something much deeper than a mere question of terminology. The *pacta sunt servanda* rule was the

[1] For a list of the amendments submitted, see 28th meeting, footnote 4.

cornerstone of the whole law of treaties; indeed it had even been urged by some that it should either be made the first article of the future convention, or else solemnly proclaimed in the preamble. It was therefore essential that such a major provision should be expressed in clear and unambiguous terms and the joint amendment would do precisely that.

3. The International Law Commission had very properly referred in article 23 to the duty to perform treaties in good faith. The principle of good faith, which was essential to international relations, was at the very root of the *pacta sunt servanda* rule. His delegation had opposed the proposal to delete sub-paragraph (*a*) of article 15, in the interests of upholding the principle of good faith in the process of negotiation prior to the conclusion of a treaty. The principle of good faith applied even more strongly to the performance of obligations resulting from a valid treaty.

4. The present text of article 23 placed the emphasis on the purely formal aspects of the treaty. It seemed to suggest that a treaty was governed by the *pacta sunt servanda* rule merely because it was in force. In fact, that rule was not, and could not be, used to cover invalid treaties, or treaties which had been already terminated, as the Expert Consultant himself had pointed out at the 849th meeting of the International Law Commission.[2] The joint amendment would make it clear that, for the *pacta sunt servanda* rule to apply, the treaty must conform not only with formal requirements but also with the requirements on essential validity. In particular, the treaty must have been freely consented to, without any taint of coercion, fraud or corruption.

5. Another argument for the joint amendment was that the words " treaty in force " could be taken to refer to the purely temporal factor of the duration of the treaty, whereas it was essential to stress in article 23 that the treaty must constitute a *titulus validus*, to use the term employed by Francisco de Vitoria.

6. Lastly, the use of the term " valid treaty " would show that the *pacta sunt servanda* rule did not apply to a treaty which became void and terminated as a result of the emergence of a new rule of *jus cogens* with which it came into conflict, as in the circumstances envisaged in article 61. For the provisions of article 23 to apply, the treaty must be valid at the time of its conclusion and continue to be valid.

7. Mr. TALALAEV (Union of Soviet Socialist Republics) said that article 23 was of fundamental importance; great stress should be laid on the principle of *pacta sunt servanda* in the preamble to the convention. The strict application of treaties was essential to stable international relations; the violation of treaty obligations undermined the foundations of peace and trust between States, and generated disputes which could lead to military action. The principle of *pacta sunt servanda* was an important source of international law and an instrument of peaceful co-existence between States. It was embodied in the Declaration of London of 1871,[3] according to which no contracting party could alter any of the provisions of the treaty without the consent of the other contracting parties and it was also laid down in Article 2 of the United Nations Charter, in the 1948 Charter of the Organization of American States, and in the Charter of the Organization of African Unity.

8. The Soviet Union was in favour of the strictest possible application of treaties in the interests of good international relations, and was firmly opposed to treaties procured by force to obtain colonial possessions or secured by fraud and bribery. In 1917 his Government had abrogated all unequal treaties.

9. All the amendments took fully into account the present stage in the development of international law and conformed with the spirit and letter of the International Law Commission's draft articles; the Cuban amendment (A/CONF.39/C.1/L.173) was especially effective in that regard. The USSR delegation considered that there were three main points of conformity.

10. First, the amendments conformed with the definition of a treaty in article 2, paragraph 1, of the draft, in which a treaty was said to mean an agreement between the parties. And what did such an agreement represent but a concordance of wills, based on the principles of free will and equality? But if the outward expression of will was not based on the real will of the parties, and if that expression had been extorted by force or threat of force by the stronger State, the agreement would be merely fictitious, and the principle *pacta sunt servanda* could not extend to it.

11. Secondly, that was confirmed in articles 49, 50 and 65 of the draft. In particular, article 65 stated that " the provisions of a void treaty have no legal force ". That being so, the principle *pacta sunt servanda* did not apply to such treaties; the aforesaid amendments to article 23 were based on that premise.

12. Thirdly, the five-State amendment (A/CONF.39/C.1/L.118) distinguished clearly between the operation and the validity of an international treaty. Indeed, an international treaty might be formally operative, i.e. it might enter into force and not be terminated, but it might still be invalid if it was concluded in violation of international law.

13. A treaty did not become valid merely because the parties had brought it into force and had declared it to be binding between them; that view had been expressed by Hyde. The treaty would come into operation, but would not be valid if it was contrary to the fundamental principles of international law.

14. The amendment by Pakistan (A/CONF.39/C.1/L.181) was also a useful addition, since it fully conformed with contemporary international law and with the Draft Declaration on Rights and Duties of States.[4]

15. In the light of those considerations the Soviet Union delegation would vote for the amendments submitted by Cuba (A/CONF.39/C.1/L.173), the five States (A/CONF.39/C.1/L.118), Pakistan (A/CONF.39/C.1/L.181) and the Congo (Brazzaville) (A/CONF.39/C.1/L.189). In addition, it believed that the principle *pacta sunt servanda* could be formulated more comprehensively, as had been done in the following terms by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States:

[2] *Yearbook of the International Law Commission, 1966*, vol. I, part II, p. 37.

[3] *British and Foreign State Papers*, vol. 61, p. 1198.

[4] General Assembly resolution 375 (IV).

" 1. Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

" 2. Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

" 3. Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

" 4. Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail." [5]

16. Mr. FRANCIS (Jamaica) said it was not clear whether the rule set out in article 23 applied also to obligations assumed by third States in the circumstances envisaged in article 31. As now drafted, article 23 would seem to impose obligations only upon " the parties to it " that was, to the treaty, and would thus appear to give free licence to a third State to contract out of the *pacta sunt servanda* rule in respect of its obligations under a treaty to which it was not technically a party, but in respect of whose provisions it had expressly accepted obligations. In view of that possibility, it might have been better to make article 23 refer to obligations assumed by a State under a treaty in accordance with the rules set forth in the draft articles; he would be grateful to the Expert Consultant for a clarification on that point. Subject to that remark, he supported the International Law Commission's text.

17. Mr. MALITI (United Republic of Tanzania), speaking as one of the sponsors of the five-State amendment (A/CONF.39/C.1/L.118), said that the present text of article 23 was not well-balanced, since it stated the requirement of good faith only with respect to the performance of the treaty, whereas the element of good faith must also be present in all the transactions leading up to the conclusion and entry into force of the treaty. By introducing the concept of a " valid treaty " the joint amendment covered that point. He felt certain that the more balanced text which would result from the incorporation of that amendment would attract more support from States than the present wording.

18. Some delegations appeared to have difficulties over the use of the term " valid ". He would urge those delegations, when it came to voting, to concentrate on the idea contained in the joint amendment rather than on the term used. The purpose of the sponsors had been to specify the requirement of good faith in connexion with the negotiations leading up to the conclusion of the treaty. Once that idea was accepted, the Drafting Committee could be relied on to find an appropriate wording to express it. He was not impressed by the objection that, because the articles on validity were placed later in the draft, it would be premature to speak of validity in article 23. The problem was purely one of drafting and the matter could be adjusted later when the final arrangement of the articles was decided.

19. He supported the views of the Jamaican representative on the question of obligations assumed by a third State.

20. Mr. COLE (Sierra Leone) said that his delegation was inclined to support the joint amendment (A/CONF. 39/C.1/L.118) because it was concerned lest the modest and sober formulation of the *pacta sunt servanda* rule in article 23 should be invoked in defence of treaties which had been concluded in violation of the United Nations Charter.

21. Mr. MIRAS (Turkey) said he welcomed the provisions of article 23, which gave expression to a rule of customary international law of very long standing that was at the same time a rule of international morality. The rule was particularly important because of the thousands of treaties at present in force which constituted the very foundation of contemporary international society. It would be no exaggeration to say that the maintenance of peace largely depended on the observance of treaty obligations.

22. The *pacta sunt servanda* rule had been proclaimed in such international instruments as the Covenant of the League of Nations and the Charter of the United Nations, which expressed in the third paragraph of its Preamble the determination of the peoples of the United Nations " to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained " and in Article 2(2) the duty of all member States to " fulfill in good faith " their Charter obligations. For those reasons, he supported the suggestion by the International Law Commission in the last sentence of its commentary to the article, that the principle of *pacta sunt servanda* might suitably be given stress in the preamble to the convention.

23. The commentary to article 23 pointed out that the *pacta sunt servanda* rule and the principle of good faith were inseparably linked. The International Law Commission had established that link in article 23, but it had adopted a formulation that was perhaps unduly succinct. He would accordingly favour the inclusion in article 23 of a provision similar to paragraph 2 of the article as drafted by the Special Rapporteur in his third report in 1964 [6] specifying that " a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects ". Similarly, it would be wise to include a provision on the lines of paragraph 4 of the Special Rapporteur's 1964 draft and to state that " the failure of any State to comply with its obligations " under article 23 " engages its international responsibility ".[7] The inclusion of such additional provisions would strengthen the rule in article 23.

24. In his delegation's view, the words " in force " were unnecessary; it was obvious that a treaty must be in force before the rule in article 23 could apply. Certain speakers had given to the words " in force " an interpretation contrary to the habitual meaning of those words, and he could not possibly accept that.

[5] A/6799, para. 285.

[6] *Yearbook of the International Law Commission, 1964*, vol. II p. 7, article 55.

[7] *Ibid.*

25. He supported the amendment by Pakistan (A/CONF. 39/C.1/L.181) which would strengthen the principle of the observance in good faith of treaty obligations. On the other hand, he could not support the five-State amendment (A/CONF.39/C.1/L.118) or the amendments by Cuba (A/CONF.39/C.1/L.173) or the Congo (Brazzaville) (A/CONF.39/C.1/L.189) which would weaken the provisions of article 23.

26. Mr. KEMPFF MERCADO (Bolivia) speaking as one of the sponsors of the five-State amendment (A/CONF.39/C.1/L.118), said that article 23 as it stood could give the impression that its provisions would protect conventions which violated the principles of the United Nations Charter, or treaties which were legally invalid or treaties which had been obtained by the threat or use of force, in other words treaties which did not result from the free consent of the parties, and were contrary to international public order.

27. His delegation fully subscribed to the *pacta sunt servanda* rule as a fundamental principle of international law, but considered that it was also essential to safeguard the principle of good faith with regard to the actual conclusion of a treaty. A treaty which had been imposed by force, or a treaty which sanctioned a *de facto* situation, was contrary to the principles of the United Nations Charter and could not be binding upon the parties. Any attempt to impose a rule that all treaties must be regarded as sacrosanct and observed accordingly, even if unjust or invalid, would be repugnant to the legal conscience of mankind. A treaty which had been imposed by force was void *ab initio* and was therefore not protected by the *pacta sunt servanda* rule. It would be contrary to the very concept of justice and to the rules of *jus cogens* to claim otherwise.

28. In the International Law Commission's discussions, doubts had been raised regarding the expression " treaty in force ", which could be interpreted in a manner that would weaken the rule embodied in article 23. In fact, although an attempt had been made to express the rule in very simple terms, the use of the words " in force " in the context involved a contradiction in terms: the text could be taken as meaning that a treaty obtained by the threat or use of force, or an unjust treaty which upheld a *de facto* situation, was binding upon the parties. It could thus be used to claim as having binding force treaties that were not real treaties but situations created by force that involved threats to international peace. The expression " treaty in force " would then serve the purposes of States which were more concerned to defend rights arising from unjust treaties than to make concessions in the interests of justice. The present wording of article 23 could thus be interpreted in a manner wholly at variance with the spirit underlying the article.

29. It was for those reasons that the Bolivian delegation had joined the sponsors of the amendment to redraft article 23 so as to speak of " every valid treaty ". That expression would introduce greater clarity into the *pacta sunt servanda* rule and prevent it from being invoked in defence of international agreements which were at variance with the principles of the United Nations Charter.

30. Mr. BARROS (Chile) said that the arguments of the sponsors of the joint amendment (A/CONF.39/C.1/L.118) had not convinced his delegation that there was any need to depart from the International Law Commission's text of article 23.

31. It would be most inappropriate to employ in article 23 the expression " valid treaty " which would introduce into the provisions of the article a dangerously controversial element that was directly connected with the concepts of nullity and voidability to which other articles referred. From the legal point of view, a treaty could be " valid " and yet not be " in force ", for instance, a treaty signed but not ratified, in cases in which consent to be bound was expressed by ratification. The treaty would be a " valid treaty " but would not be binding upon the parties. The same was true of a treaty which had been terminated; despite its validity while it lasted, the treaty no longer bound the parties, since it had ceased to be in force. In short, not all " valid " treaties were binding; it was only treaties " in force " that were binding.

32. The commentary to article 23 showed that, in the International Law Commission's discussions, misgivings had been expressed that even the expression " in force " might lend itself to interpretations calculated to weaken the clear statement of the *pacta sunt servanda* rule, and it was obvious to his delegation that the expression " valid treaty " would weaken the rule even more. His delegation would not, therefore, vote in favour of the five-State amendment (A/CONF.39/C.1/L.118). Nor could it vote in favour of the Cuban amendment (A/CONF.39/C.1/L.173), which would weaken the *pacta sunt servanda* rule and the principle of performance in good faith of treaty obligations. There could be no justification for making the *pacta sunt servanda* rule subject to the provisions of the future convention on the law of treaties. The rule expressed in article 23 antedated any convention on the law of treaties, and should therefore be expressed in clear and forthright terms.

33. His delegation favoured the idea embodied in the amendment by Pakistan (A/CONF.39/C.1/L.181). There were good reasons for including in the draft a clause prohibiting a party to a treaty from invoking its own constitutional laws as an excuse for its failure to perform treaty obligations. A State could always invoke its constitutional provisions in order to refuse to sign a treaty; but once it had expressed its consent to be bound by a treaty, nothing could justify its attempting later to evade performance by invoking the provisions of its constitution, and still less of its ordinary legislation.

34. He could not support the first part of the amendment by the Congo (Brazzaville) (A/CONF.39/C.1/L.189), which would weaken the *pacta sunt servanda* rule by introducing the idea that, for that rule to apply, a treaty must have been " regularly " concluded and have entered into force. As to the second part of the amendment, his delegation would have no objection to the statement that " good faith is presumed "; it understood that presumption to apply not only to the performance of treaty obligations, but also to the actual conclusion of a treaty.

35. In short, his delegation supported article 23 as formulated by the International Law Commission, with the possible addition of the ideas contained in the amendment by Pakistan (A/CONF.39/C.1/L.181) and in the second

part of the amendment by the Congo (Brazzaville) (A/CONF.39/C.1/L.189).

36. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that his delegation agreed with the International Law Commission that the rule *pacta sunt servanda* was a fundamental principle of the law of treaties. The importance of the rule was evident from the fact that it was included in a number of fundamental instruments of international law, including the Charter of the United Nations; accordingly, it must be stated in the draft convention.

37. At first sight, it might seem that the principle was self-evident and needed no further exposition or defence. But certain modern jurists of Western countries had tried to undermine the principle by arguing that, assuming that States freely submitted to the rules of international law under treaties, then they were equally free to depart from those rules at any time. It should be made quite clear, however, that in speaking of international treaties, such instruments must only be those concluded in accordance with the principles of the sovereignty and equal right of States; this could not include treaties concluded in violation of basic principles of international law. Therein lay the very substance of the principle *pacta sunt servanda.*

38. The literature on international law abounded with attempts to find some artificial basis for the validity of international law treaties, such as natural reason, legal logic, voluntary self-limitation and the free will of States, but all those theories suffered from the shortcomings of being far removed from the realities of international life. The task before the Conference was to produce a convention which reflected those realities and met the requirements of the stage now reached in the development of international treaty relations. The text of article 23 must therefore be based on the principle of observance of international treaties in accordance with the sovereignty and equal rights of States, as an essential guarantee of the maintenance of world peace and the further development of international co-operation. Treaties faithfully observed were instruments of peace, of the settlement of international problems and of the alleviation of international tension; accordingly, all peace-loving States were vitally concerned with the inclusion of the principle of *pacta sunt servanda* in the convention and in its strict observance. That was a fundamental tenet of the science of international law in the Soviet Union and of Soviet foreign policy.

39. In the light of those considerations, the Byelorussian delegation supported the five-State amendment (A/CONF.39/C.1/L.118) and the amendments submitted by Cuba (A/CONF.39/C.1/L.173), Pakistan (A/CONF. 39/C.1/L.181) and the Congo (Brazzaville) (A/CONF.39/ C.1/L.189).

40. Mr. KHASHBAT (Mongolia) said that the importance of the rule *pacta sunt servanda* in stabilizing the international legal order was rightly stressed in the Commission's text of article 23. Nevertheless, that text referred to only one aspect of the rule, that of the performance of treaties in good faith, whereas it was vitally important that treaties should also be concluded in good faith; treaties were binding only to the extent that they derived from the free will of the parties. The term " in force " not only laid insufficient stress on the necessity for the treaty to be valid, but might lead to certain undesirable interpretations. The Mongolian delegation therefore supported the five-State amendment (A/CONF. 39/C.1/L.118) and the Cuban amendment (A/CONF.39/ C.1/L.173), which along with similar proposals could be referred to the Drafting Committee.

41. Mr. NACHABE (Syria) said he could support the amendments submitted by the five States (A/CONF.39/ C.1/L.118), Cuba (A/CONF.39/C.1/L.173) and the Congo (Brazzaville) (A/CONF.39/C.1/L.189). Although his delegation was not opposed to the idea expressed in the Pakistan amendment (A/CONF.39/C.1/L.181), it wished to point out that the rule of the incontestable primacy of a treaty in force over the domestic law of any State was already fully recognized in international law.

42. Mr. OSIECKI (Poland) said that the Commission's text of article 23 rightly combined the two principles of observance of treaties and good faith in their performance. Nevertheless, the Commission's draft related only to treaties in force, and did not mention all the conditions of validity expressed in other articles of the convention. Article 23 could therefore be regarded as a general rule serving as an introduction to the exceptions set out in part V of the convention, although its rightful place was in part III. The Polish delegation considered that the rule *pacta sunt servanda* should apply only to treaties which fulfilled all the conditions of validity set out in the relevant articles of the convention, and it could therefore support the five-State amendment (A/CONF.39/C.1/ L.118). It also believed that the Cuban amendment (A/CONF.39/C.1/L.173) was useful and should be referred to the Drafting Committee.

43. Mr. MARESCA (Italy) said that, if Latin were still the language of diplomacy, as it had been for over a thousand years, the mere statement *pacta sunt servanda* would have sufficed as the text of article 23. The International Law Commission had produced an admirable translation of the principle contained in those three words: it had conveyed the underlying idea that treaties were not merely rules, but also realities, and it had incorporated the idea that the attitude of good faith must prevail throughout the performance of a treaty in force. The Commission's text was complete, effective and simple, and the attempts of the sponsors of amendments to improve it would, in the opinion of the Italian delegation, only weaken the draft and impair its balance. Of course, every treaty must be valid and must be concluded in good faith, but his delegation doubted the necessity of inserting that concept into such a basic rule as *pacta sunt servanda.*

44. The amendment by Pakistan (A/CONF.39/C.1/L.181) proposed the addition of a concept which in fact always prevailed in international law. Although it might be advisable to state the principle somewhere in the convention, it seemed hardly appropriate to attach it to the basic principle as set out by the International Law Commission. The Drafting Committee might be asked to consider whether the idea proposed in the Pakistan amendment should be the subject of a new article or of an additional paragraph to article 23.

45. Mr. MYSLIL (Czechoslovakia) said that the rule *pacta sunt servanda* not only set out the basic obligations

of States, but was also the cornerstone of peaceful co-existence, for without faithful observance of treaties, international co-operation and even the very existence of international law were unthinkable. Nevertheless, the duty of faithful performance of treaties was not absolute, since it related only to treaties which had been concluded in conformity with the general principles of international law and whose entry into force and existence were compatible with that law. It would therefore be erroneous and misleading to regard article 23 as applicable to treaties concluded under conditions of duress, obvious inequality or violation of the principles of the United Nations Charter. For those reasons the Czechoslovak delegation had co-sponsored the five-State amendment (A/CONF.39/C.1/L.118) in the belief that the expression " valid treaty " was more appropriate than " treaty in force ": certain treaties had entered into force, but were nevertheless invalid because they had been imposed in circumstances which excluded the free expression of the will of the people, or under the threat or even by the use of force.

46. The sponsors of the amendment had noted the United States representative's opinion that the amendment was premature, in view of its close link with part V of the draft convention. They would therefore not object to the postponement of a decision on their proposal: if, however, it were decided to vote on their amendment, rather than to refer it to the Drafting Committee, the sponsors hoped that the decision would be taken on the principle involved, rather than on any specific wording.

47. Mr. HARRY (Australia) said his delegation agreed with the Italian representative that the rule *pacta sunt servanda* was a fundamental principle of the law of treaties. The basis for the rule was set out clearly in Article 2(2) of the United Nations Charter. The Australian delegation hoped that the Committee would follow the suggestion of the International Law Commission in paragraph (5) of its commentary, that the principle might suitably be given stress in the preamble to the convention, and considered that Article 2 of the Charter provided a good basis for such a passage in the preamble.

48. His delegation could support the International Law Commission's text, and believed that attempts to burden the convention with unnecessary qualifications should be avoided. Accordingly, it did not consider that the five-State amendment (A/CONF.39/C.1/L.118) was an improvement. Article 23 was obviously not concerned with invalid treaties; the article would in any case be read in context with the other articles of the convention, including those on validity.

49. Mr. SINCLAIR (United Kingdom) said his delegation considered it essential to reaffirm the rule *pacta sunt servanda*, the importance of which could not be over-emphasized in the light of current international tensions. It was gratifying to see that none of the amendments attacked the basic principle, though some of them gave rise to problems.

50. Thus, his delegation could see no reason for using the word " valid " in article 23 as proposed by five States (A/CONF.39/C.1/L.118). The question of invalidity arose in connexion with part V of the draft, and any discussion of the matter in connexion with part III was premature. It was self-evident that any treaty which was invalid, was found to be invalid or was invalidated for any reason based on the convention, would not be in force within the meaning of article 23. As the Expert Consultant had said, the Commission's text presupposed concurrent application with other articles of the convention. Moreover, a treaty which was valid might not yet have come into force, and would not be binding on the parties because no legal obligations would yet have accrued.

51. The Cuban amendment (A/CONF.39/C.1/L.173) was also likely to give rise to problems. To the extent that the phrase " in conformity with the provisions of the present Convention " qualified the words " in force ", it seemed to be inconsistent with article 21, paragraph 1, which provided that a treaty entered into force in such manner and upon such date as it might provide or as the negotiating States might agree; to the extent that it qualified the word " treaty ", it seemed to be unnecessary as well as inconsistent with articles already adopted which, in referring to the word " treaty ", did not seek to qualify the term in that way.

52. Furthermore, the United Kingdom delegation attached great importance to the procedural safeguards which would surround the application of the articles on invalidity. If the word " valid ", or the phrase " in conformity with the provisions of the present Convention ", were used in article 23, there might be a risk of divorcing allegations of invalidity from those procedural safeguards for the application of the articles on invalidity. That was presumably not the intention of the sponsors, but the use of the word " valid " could give rise to such misunderstandings. For similar reasons, his delegation could not support the amendments proposed by the Congo (Brazzaville) (A/CONF.39/C.1/L.189).

53. Although his delegation approved the substance of the Pakistan amendment (A/CONF.39/C.1/L.181), it doubted whether the phrase in question should be included in article 23. If a vote were taken on the proposal, his delegation would vote for the principle, on the understanding that the placing of the phrase would be left to the Drafting Committee.

54. Mr. FATTAL (Lebanon) said that his delegation fully supported the remarks of the United States and Italian representatives. The International Law Commission's statement of the rule *pacta sunt servanda* should remain in its original form. Any amendment could only weaken the concise and simple text submitted by the Commission.

55. Mr. DE BRESSON (France) said that article 23 was the keystone of the draft convention, the essential objective of which was to ensure that treaty relations, which were the very basis of all international relations, should be established on sound and clear foundations. The principle of good faith in the performance of a treaty must be stated without reticence and without restriction. The International Law Commission's text met those requirements, and the French delegation did not consider that any of the amendments were desirable or necessary. That view applied in particular to the five-State amendment (A/CONF.39/C.1/L.118) and the Cuban proposal (A/CONF.39/C.1/L.173); once a treaty was in force, it was regarded as conforming with all the rules of public international law, including the prospective

convention, and the term " treaty in force " covered the form and substance to which the validity of a treaty was subject. Furthermore, the amendments would weaken the fundamental principle which all States should be interested in maintaining. His delegation had nothing against the idea proposed by Pakistan (A/CONF.39/C.1/L.181), but doubted whether the addition was necessary.

56. Mr. SAULESCU (Romania) said that, in the conditions of modern international life, the vital principle *pacta sunt servanda*, which dominated the law of treaties, took on new dimensions. An increasing number of treaties were being concluded with a view to organizing multilateral international co-operation in various matters of concern to the maintenance of peace and the progress of nations, and an ever-growing number of bilateral agreements were stimulating exchanges of material and spiritual values among countries. Under those new conditions, the principle *pacta sunt servanda* was acquiring great significance for the stability and development of treaty relations. Strict observance of the principle would contribute to the creation of a new system of international relations, based on mutual respect for the personality of each State, which would promote the spirit of reason and morality in international life.

57. The Romanian delegation was on the whole in favour of the International Law Commission's text, which rightly stressed the compulsory nature of treaties in force and the duty to perform them in good faith. Nevertheless, the principle could not be applied either to treaties whose legal existence was in any way tainted or to those which could be terminated by invoking some cause of invalidity. In fact, the subjects of the principle of *pacta sunt servanda* were valid treaties which conformed with the fundamental principles of international law and other legal rules governing treaties at the time of their conclusion, as well as during their performance; the principle was organically linked with other fundamental principles of international law, and presupposed the full validity of the treaty relations to which it applied. The principle of respect for treaties rested on real stability of international relations, which could only be based on treaties ensuring free consent and equal rights of the parties and containing provisions in compliance with the rules of international law. As Vattel had pointed out, non-observance of the principle that treaties should be performed in good faith was a violation of international law, liable to jeopardize the peace and security of nations. The Romanian delegation therefore supported the five-State amendment (A/CONF.39/C.1/L.118) and the Cuban amendment (A/CONF.39/C.1/L.173).

58. Mr. DONS (Norway) said that the principle of *pacta sunt servanda* was intended to apply both to treaties provisionally in force under article 22 and to treaties definitively in force under article 21. That was expressly stated by the International Law Commission in paragraph (3) of its commentary to article 23. But the Committee had decided at the 27th meeting to delete the words " enter into force " in article 22 and substitute the words " be applied ", which were intended to convey a somewhat different idea, and could have consequences for the interpretation of the scope of article 23 which must be considered by the Drafting Committee.

59. Mr. LATUMETEN (Indonesia) said he was in favour of adopting the Commission's text; he fully agreed with the content of paragraphs (2) and (3) of its commentary. The principle of good faith governed the behaviour of States and must apply to circumstances not foreseen by the parties. He was not inclined to favour the amendment submitted by the delegation of Congo (Brazzaville) (A/CONF.39/C.1/L.189) because the words " which have been regularly concluded " were quite superfluous.

60. Although he agreed with the substance of the Pakistan amendment, the addition it proposed would not make the principle of good faith any more forceful and in any case the acts mentioned in the amendment were already covered in article 23.

61. He was averse to the inclusion of the word " valid " in article 23 which might give rise to doubts; moreover, the conception of validity belonged to a different part of the draft.

62. Mr. RUEGGER (Switzerland) said that the rule *pacta sunt servanda* was generally recognized as a cornerstone of international law and was accepted by all States. He was in favour of adopting the Commission's text as it stood, without any change; the reasons for it had been carefully set out in the commentary. He also supported the suggestion that special emphasis should be laid in the preamble on the principle of *pacta sunt servanda* as a norm of the first importance.

63. He could not accept the proposal in the five-State amendment to qualify the word " treaty " by the word " valid "; that could lead to disputes and it was evident that those disputes would have to be settled by the International Court of Justice or by an arbitral tribunal. The Pakistan amendment should be mentioned in the Committee's final report, but should not form part of article 23.

64. Mr. ROSENNE (Israel) said that none of the amendments improved the International Law Commission's text, which was definite and unadorned.

65. The principle of the Pakistan amendment was sound and called for fuller consideration, but it would probably need to be incorporated in a separate article.

66. Mr. RUDA (Argentina) said that the rule *pacta sunt servanda* was of prime importance and a secure foundation for peaceful international relations. It applied to any treaty in force and must certainly be included in the draft. The form and categorical wording chosen by the Commission were perfectly satisfactory and mention must be made of good faith.

67. He could not agree to the insertion of the word " valid " as proposed in the five-State amendment.

68. Mr. ALCIVAR-CASTILLO (Ecuador) said that the sponsors of the five-State amendment (A/CONF.39/C.1/L.118) wished to distinguish between a valid treaty and a treaty in force. The former had to meet certain conditions of form and substance, whereas entry into force was only a matter of form and had precise legal effects. A treaty could be valid without being in force.

69. It had been argued that article 23 could be dispensed with in view of the existence of Article 2 of the United Nations Charter, but he would not have thought that would be a satisfactory method. He had welcomed the United States representative's statement that treaties

must be concluded in good faith. Perhaps the same speaker had been right in arguing that it was premature to mention validity in article 23 since that element was not dealt with until part V of the draft. It might be advisable for the Committee not to vote on amendments to article 23 but simply to approve the principle and refer them to the Drafting Committee.

70. Sir Humphrey WALDOCK (Expert Consultant) said that it would be wrong to interpret the International Law Commission's earlier doubts regarding the inclusion of the words " in force " as implying that it might have favoured their substitution by the expression " valid treaty ". On the contrary, those doubts had arisen because the Commission was at first disinclined to admit any qualifying words of any kind in the article. He himself, however, had been insistent on the need to retain the words " in force " because they had not been made part of the definition of " treaty " in article 2; because the draft convention distinguished between " conclusion " and " entry into force "; and because it provided expressly for cases of termination and suspension of operation of treaties.

71. The United Kingdom representative had asked whether the words " in force " should be interpreted as meaning in force for the purposes of the convention. The answer was in the affirmative; that had been the Commission's intention. That was much the same as saying " in force in accordance with the provisions of the convention " but it was not the same as saying " applied " in accordance with those provisions.

72. The Jamaican representative had asked why the Commission had omitted any provisions to cover the case of a third State which might be subject to the obligations of a treaty under a later article. In his third report,[8] submitted to the Commission in 1964, he had included a provision on that point but the Commission had preferred to keep article 23 as simple and forceful as possible. Moreover, the final form of the provisions of the convention regarding third States had seemed to make it unnecessary to cover the point expressly, since they referred in terms to the obligation of the third State.

73. The principle in the amendment by Pakistan (A/CONF.39/C.1/L.181) was one that was generally recognized in international law, but the Commission had decided that it belonged to the topic of State responsibility though it had some relevance to the law of treaties. He himself had at first been hesitant as to whether it should be left out of the present draft altogether.

74. Mr. ALCIVAR-CASTILLO (Ecuador) said that perhaps the five-State amendment could be approved in principle and then referred with the other amendments to the Drafting Committee.

75. Mr. ALVAREZ TABIO (Cuba) and Mr. MOUDILENO (Congo, Brazzaville) said they both agreed with that procedure.

76. The CHAIRMAN said he would put the Pakistan amendment to the vote.

The Pakistan amendment (A/CONF.39/C.1/L.181) was adopted by 55 votes to none, with 30 abstentions.

[8] *Yearbook of the International Law Commission, 1964*, vol. II, p. 7, article 55.

77. The CHAIRMAN suggested that the other amendments to article 23 be referred to the Drafting Committee, it being understood that the sponsors of those amendments accepted, in principle, the existing text of the article.

It was so agreed.[9]

78. Mr. BADEN-SEMPER (Trinidad and Tobago) said that the amendments involved points of substance and ought to be voted on.

79. Mr. CHAO (Singapore) said that, in view of the emphasis that had been placed on the need for good faith, he would like to propose a new article to be inserted between articles 14 and 15 reading: " States, in the course of negotiations for the conclusion of a treaty shall at all times be governed by the principle of good faith."

80. Such a provision would have close links with article 23 and its precise position could be determined by the Drafting Committee.

81. The CHAIRMAN said he doubted whether the Committee could go back on a part of the draft which had already been disposed of.

82. Mr. FRANCIS (Jamaica) suggested that the representative of Singapore might bring up his amendment when the Drafting Committee submitted its report.

83. Mr. TABIBI (Afghanistan) said that the Committee should not reopen discussion on articles already approved; the representative of Singapore could submit his amendment in plenary.

84. Mr. MALITI (United Republic of Tanzania) said he saw no objection to the Committee considering the amendment by Singapore.

85. Mr. CHAO (Singapore) said he would be content to raise the matter at the second session of the Conference in 1969.

The meeting rose at 6.15 p.m.

[9] For resumption of discussion, see 72nd meeting.

THIRTIETH MEETING

Friday, 19 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 24 (Non-retroactivity of treaties)[1]

1. Mr. VEROSTA (Austria) said he agreed with the principle set out in article 24. The purpose of the amendment by Austria and Greece (A/CONF.39/C.1/L.5 and

[1] The following amendments had been submitted: Austria and Greece, A/CONF.39/C.1/L.5 and Add.1; Finland, A/CONF.39/C.1/L.91; Cuba, A/CONF.39/C.1/L.146; United States of America, A/CONF.39/C.1/L.155; Republic of Viet-Nam, A/CONF.39/C.1/L.179; Japan, A/CONF.39/C.1/L. 191.

Add.1) was to alter only the opening words of the article, because they implied that the nature or character of the treaty could justify its retroactivity. Flexibility which would enable a treaty to be regarded as retroactive in the absence of express provision conflicted with the requirements of legal security. If the parties thought that the nature or character of the treaty justified its being applied retroactively, they should include a stipulation to that effect, otherwise difficulties were bound to arise regarding the interpretation of its nature or character. Moreover, the Conference, when framing the final clauses of the convention, would have to provide for the retroactivity or non-retroactivity of its provisions. He hoped it would do so expressly.

2. Mr. CASTRÉN (Finland), introducing his delegation's amendment (A/CONF.39/C.1/L.91), said there seemed to be a contradiction between articles 24 and 15 of the draft, since article 15 stipulated that States were bound by certain obligations of good faith before the entry into force of the treaty. That was why the Finnish delegation had proposed the inclusion in article 24 of a proviso referring to article 15. It regarded its amendment as a purely drafting matter which could be referred to the Drafting Committee.

3. Mr. ALVAREZ TABIO (Cuba) said that the object of his delegation's amendment (A/CONF.39/C.1/L.146) was to bring the wording of the article into line with the intention expressed by the International Law Commission in its commentary.

4. The commentary showed that the Commission had adopted the following principles: a treaty could not apply to acts and facts begun and completed nor to situations which had arisen and ceased to exist before the entry into force of the treaty; on the other hand, acts, facts or situations that had their origin before the entry into force of the treaty, but continued to exist after it, were subject to its provisions.

5. However, article 24, as worded in Spanish, submitted acts and facts to a different system from that governing situations. The expression "*que haya tenido lugar*", as applied to acts and facts, covered them all indiscriminately, whereas the expression "*que haya dejado de existir*", if used of situations, created a distinction between those which had ceased to exist and those still in existence. Acts and facts would be governed by the principle of absolute non-retroactivity, whereas for situations, such non-retroactivity would be only relative. The amendment proposed by the Cuban delegation, which repeated the expression used in paragraph (4) of the International Law Commission's commentary would restore unity to the system of acts, facts and situations, which, as indicated in paragraph (3) of the commentary, must come within the provisions of the treaty if they continued to occur or exist after its entry into force.

6. With regard to the introductory portion of article 24, the Cuban delegation approved of the reason behind the Commission's choice, which was explained in paragraph (4) of the commentary.

7. Mr. BEVANS (United States of America) said that the essential aim of article 24 was to establish a presumption that treaties were non-retroactive. When they concluded a treaty, States did not usually wish to make it retroactive. The exception stated at the beginning of the article sufficed to settle the rare cases in which retroactive application was intended.

8. The United States delegation, in submitting its amendment (A/CONF.39/C.1/L.155), aimed at removing the dangers to which the strength of the principle was exposed from a reference to situations which had ceased to exist at the date of entry into force of the treaty.

9. The expression "any situation which ceased to exist" was ambiguous; the ambiguity could encourage States seeking to apply the convention retroactively to claim that a previous fact, excluded by article 24 from the application of the convention, had given rise to a situation which had not ceased to exist. Although it was relatively easy to establish the date of an act or fact, it was more difficult to state with precision when a situation resulting from an act or fact had ceased to exist.

10. His delegation therefore hoped that the Drafting Committee would find it possible to delete that ambiguous expression.

11. Mr. FUJISAKI (Japan) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.191) was to eliminate the ambiguity at the beginning of article 24 by avoiding the use of the words "appears from". There might of course be cases in which the treaty had to apply retroactively despite the absence of an express provision. Such cases were adequately covered by the second part of the proposed amendment. The Japanese delegation considered that its amendment was purely a drafting matter and could be referred to the Drafting Committee.

12. Mr. SARIN CHHAK (Cambodia) said he was satisfied with the International Law Commission's wording and found it comprehensive. His only doubt was whether the Committee of the Whole and the Drafting Committee should not consider expressing the principle first and the exception afterwards, in order to give due weight to the rule of the non-retroactivity of treaties.

13. Mr. SAMRUATRUAMPHOL (Thailand) said that the principle of the non-retroactivity of treaties, unless otherwise provided or intended, was generally accepted in international law, and he therefore approved of article 24.

14. The Cuban amendment (A/CONF.39/C.1/L.146) was acceptable, as it was consistent with the explanations in the commentary to the article and with the principle that acts, facts or situations which recurred or continued to exist after the entry into force of a treaty must be subject to its provisions.

15. The Thai delegation preferred the International Law Commission's text to that proposed in the amendment by Austria and Greece (A/CONF.39/C.1/L.5 and Add.1), since due account must be taken of cases where the nature of the treaty implied that it was to be retroactive. Difficulties might arise in determining the nature of the treaty, but they should be solved in good faith.

16. Mr. CRUCHO DE ALMEIDA (Portugal) said he too thought that article 24 was built on a distinction between acts and facts, on the one hand, and situations, on the other. With certain exceptions, acts or facts—instantaneous events or events limited *ratione temporis*—

would be subject to the rules in force at the time they occurred. Situations, namely events which continued in time, would, on the other hand, be subject to any changes in the legal situation made by a new treaty if they had not ceased to exist before it entered into force.

17. That distinction had its disadvantages and might give rise to unnecessary disputes. Situations were merely the result of acts or facts and to subject situations to the rules of the new treaty was equivalent to subjecting the acts or facts from which they derived to the innovating rules in that treaty, which was precisely what was excluded in the beginning of article 24. The article should at least provide a criterion to distinguish between situations independent of the acts or facts which had given rise to them and other situations.

18. Instead of stating only half the case, as it did, the article should remain silent on continuing situations. The Portuguese delegation therefore supported the United States amendment. For the sake of brevity, he was making no comment on the other amendments and would merely state that he was in favour of the retention of the remainder of article 24.

19. Mr. GONZALEZ CAMPOS (Spain) said he supported the text of article 24, which stated in negative terms the principle that a treaty applied only to acts, facts or situations which continued to exist after its entry into force. A presumption of non-retroactivity was thus established, unless the parties intended otherwise. It was essential not to infringe the freedom of contract. The establishment of the intention was therefore an essential element.

20. The rule respecting the application of treaties in time raised very complex questions, whether it was a matter of the preceding or subsequent character of the acts, facts or situations, or of the entry into force taken as a time limit for the application of the treaty.

21. The Spanish delegation realized those difficulties and considered that the solution found by the International Law Commission was satisfactory and that the delicate balance of the terms it had used should not be disturbed.

22. In his view, two ideas might lead to a due understanding of article 24. Firstly, although the nature of the treaty was implied in the opening words of article 24, the emphasis placed on the intention of the parties imparted a subjective character to the rule. The nature of the treaty, viewed as an objective element, usefully supplemented the subjective criterion for fixing the limits *ratione temporis* of the treaty's application. Secondly, the principle of good faith had an important place in the non-retroactivity of treaties. It was not only a matter of the part it had to play in the questions of interpretation raised by non-retroactivity but also of its place together with the intention of the parties and the nature of the treaty in the exception stated at the beginning of article 24.

23. With regard to the notion of entry into force, his delegation believed that reference was undoubtedly being made to the dual system in articles 21 and 22, namely both provisional and final entry into force.

24. Commenting on the amendments submitted, he observed that the problem raised by the application in time of treaties to situations, although difficult, could be solved by sound interpretation of the article's text. He did not, therefore, support the deletion of the reference to situations, as requested in the United States amendment, since that would lead to an unduly rigid régime where retroactivity was concerned. He was also opposed to the amendment by Austria and Greece, since, in view of the importance of the notion of the nature of a treaty, the wording used should be sufficiently broad to embrace it. He found the substance of the Cuban delegation's amendment acceptable and he would support it, although to some extent the terms used might perhaps give the text a depreciatory tone. That point, however, might be referred to the Drafting Committee for consideration.

25. Mr. WERSHOF (Canada) said that article 24 should be worded as simply and precisely as possible. There was nothing to prevent a State, if it thought proper, from providing that a treaty should have retroactive effect. If a treaty contained no provision to that effect, it should be possible to apply a simple and precise rule. The Austrian amendment (A/CONF.39/C.1/L.5 and Add.1) was very useful, because it deleted the ambiguous phrase " Unless a different intention appears from the treaty or is otherwise established ".

26. Since States could stipulate in the treaty that the non-retroactive rule did not apply, there was no reason to be concerned with their intention. The Austrian representative had suggested that his amendment should be referred to the Drafting Committee, but, in the Canadian delegation's view, it was not merely a question of drafting and the amendment should be voted on.

27. The Canadian delegation also supported the amendment in document A/CONF.39/C.1/L.155 for the reasons given by the United States representative. Although the phrase " any act or fact which took place " was very precise, the same could not be said of " or any situation which ceased to exist ". Such ambiguous terms should not be kept in the article.

28. The Cuban amendment (A/CONF.39/C.1/L.146) did not seem to make the article any more precise, and the new wording was likely to give rise to quite as many difficulties as that proposed by the International Law Commission. The Canadian delegation would not be able to support that amendment.

29. Mr. JIMÉNEZ DE ARÉCHAGA (Uruguay) said he did not support the amendment by Austria and Greece (A/CONF.39/C.1/L.5 and Add.1) as the rule laid down was too rigid. A treaty could be retroactive not only if there had been a " special clause " but also if there had been " a special object necessitating retroactive interpretation ", as the International Court of Justice had said in the *Ambatielos* case.[2] One example was the Washington Rules in the *Alabama* case. The Japanese amendment (A/CONF.39/C.1/L.191) was preferable from that point of view.

30. The reason why the Cuban amendment (A/CONF. 39/C.1/L.146) had been submitted might well be the vagueness of the Spanish text, which was not as clear as the English and French texts; it would be best to bring the Spanish text into line with the English text and to say " *un hecho que tuvo lugar* " instead of " *que haya tenido lugar* ".

[2] *I.C.J. Reports, 1952*, p. 40.

[3] *P.C.I.J.*, Series A/B, No. 74, p. 10.

31. If the phrase " or any situation which ceased to exist " were deleted, as proposed in the United States amendment (A/CONF.39/C.1/L.155), article 24 would be incomplete, since there were situations which could not be described as acts or facts, for example a sentence for a criminal offence that was still being served. It was curious that in almost all the cases in which the problem of the retroactive application of a treaty was involved, the Courts had described them as " situations ". For example, in the *Phosphates in Morocco* case, the Permanent Court of International Justice had used the term " situation ". It would be preferable not to amend the original text of the article, which laid down in negative form a non-controversial rule, namely that the new treaty did not apply to acts or facts which had taken place, or to situations which had ceased to exist, before its entry into force. *A contrario*, that meant that the treaty did apply to acts or facts which took place, or to situations which began to exist, after its entry into force. The cautious wording did not say explicitly, but implied, that the treaty could apply to pending situations. That was not stated positively, because, generally speaking, the authors of a treaty took into account facts and situations which existed on the date of the entry into force of the treaty. It was therefore not necessary to state a residual rule, and what mattered was the intention of the parties. The Uruguayan delegation would vote for the original text.

32. Mr. DE BRESSON (France) said he approved of article 24 in principle, but considered that the non-retroactivity rule, which was a basic principle of the law of treaties, should be stated as clearly and concisely as possible. The existing text contained two phrases which were likely to give rise to difficulties in applying the rule, namely " intention ... is otherwise established " and " any situation which ceased to exist ". The French delegation was therefore in favour of the amendments which made the text clearer, in particular those submitted by Austria and Greece (A/CONF.39/C.1/L.5 and Add.1) and by the United States (A/CONF.39/C.1/L.155). It was for the Drafting Committee to take those amendments into consideration and to seek a more satisfactory wording of the text submitted by the International Law Commission.

33. Mr. SINCLAIR (United Kingdom) said that a residual rule relating to the application of a treaty in time was necessary and that rule should indicate clearly that the treaty applied only to acts and facts subsequent to the treaty's entry into force. As the Canadian representative had observed, the negotiating parties, if they judged proper, were always free to make provision for the retroactivity of a treaty. The United Kingdom delegation shared the United States representative's doubts about the meaning and purpose of the phrase " any situation which ceased to exist ", since there was a danger that it might be interpreted as authorizing very broad exceptions to the non-retroactivity rule. Despite the Uruguayan representative's arguments, he was not convinced that the phrase should be retained. In any event, it seemed necessary to retain the introductory words to the article as proposed by the International Law Commission, as the formulation was very flexible. The United Kingdom delegation could not therefore support the amendment by Austria and Greece (A/CONF.39/C.1/L.5 and Add.1). It also preferred the International Law Commission's wording to that proposed by Japan (A/CONF.39/C.1/L.191).

34. Mr. MARESCA (Italy) said his delegation was convinced of the need to include a rule on non-retroactivity in the convention. The rule should be clear and brief; the original text was on the whole satisfactory. However, the words " is otherwise established " introduced an element of uncertainty and detracted from the clarity of the text. The Italian delegation therefore supported the amendment by Austria and Greece (A/CONF.39/C.1/L.5 and Add.1). The International Law Commission had introduced a subtle distinction between acts and facts which had taken place, and situations which had ceased to exist, before the date of the entry into force of the treaty. If the facts and acts alone were mentioned, the non-retroactivity rule would undoubtedly have the necessary flexibility and an element of uncertainty would be removed.

35. His delegation supported the Finnish amendment (A/CONF.39/C.1/L.91), as it laid stress on the essential link between articles 15 and 24 with respect to the attitude which States should adopt even before the treaty entered into force.

36. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said he was in favour of the text submitted by the International Law Commission. Under the article nothing could prevent a State from giving retroactive effects to a particular provision of a treaty. That was a manifestation of the sovereign will of States. The article stated, furthermore, that as a general rule a treaty was not retroactive. But, under the internal legislation of States, neither did the laws have retroactive effects. Accordingly, no one could object to the basic provisions of the article. His delegation could not accept the United States amendment (A/CONF.39/C.1/L.155). The underlying idea of that amendment had already been studied by the International Law Commission, which had decided to reject it. The Cuban amendment (A/CONF.39/C.1/L.146) might be referred to the Drafting Committee.

37. Mr. KEITA (Guinea) said that on the whole his delegation approved of the draft article, although it appreciated the efforts made by those delegations that had submitted amendments. With regard to the United States amendment (A/CONF.39/C.1/L.155), there was no doubt that although acts and facts could be determined precisely, the expression " situation which ceased to exist " might lend itself to ambiguity. Accordingly that amendment deserved to be taken into consideration. The idea of non-retroactivity had been adopted both in private law and internal law. At the time of the entry into force of a law, situations existed which could hardly be regulated by the new law. The same applied in international law upon the conclusion of a treaty. It might be possible therefore to adopt a solution less radical than mere deletion and say, for instance " any situation definitively established at the date of the entry into force of the treaty ".

38. Mr. GÖR (Turkey) said he recognized that the provisions of a treaty could apply only to acts and facts which occurred when the treaty was in force. Exceptions to that rule should be limited to very specific cases. The retroactivity of a treaty should be clear from the actual text of the treaty. His delegation therefore supported the

amendment by Austria and Greece (A/CONF.39/C.1/L.5 and Add.1), for the expression " Unless a different intention appears from the treaty or is otherwise established " lent itself to confusion and was liable to give rise to disputes. His delegation could not accept the Finnish amendment (A/CONF.39/C.1/L.91), for articles 15 and 24 were not concerned with the same subject.

39. Mr. ROSENNE (Israel) said he considered that the beginning of the article should not lay down too strict a rule by stipulating that the text of the treaty should alone determine whether a particular case should constitute an exception to the general rule of non-retroactivity. The convention should be confined to giving general directives, leaving it to those responsible for drafting future treaties or for interpreting them in specific cases to include or apply whatever degree of retroactivity might be appropriate in the circumstances. For that reason, his delegation could not support the suggested amendments to the opening words of article 24. On the other hand, it would agree to the deletion of the words " or any situation which ceased to exist ". The idea expressed in that phrase was probably already contained in the words " any act or fact which took place... before ", so that the deletion of the phrase in question would not substantially change the meaning of the article.

40. His delegation would have no objection to a change in the presentation of the article, setting out the principle before the exception, if the Drafting Committee thought fit.

41. Mr. VEROSTA (Austria) said he did not think that the amendment proposed by his delegation and the Greek delegation (A/CONF.39/C.1/L.5 and Add.1) would make article 24 too rigid. The new wording would merely serve to draw attention to the situation which would arise from the absence in the treaty of a clause concerning retroactivity. In the absence of a precise statement on the matter a State might claim one day that the convention, by its very nature, was retroactive. His delegation therefore maintained its amendment.

42. Mr. MULIMBA (Zambia) said he regretted the absence of the Expert Consultant, as he would have liked to obtain additional explanations before giving his views on the deletion of the words " or any situation which ceased to exist ".

43. Mr. YASSEEN (Iraq) said that article 24 touched upon a basic problem which the convention on the law of treaties could not ignore. The expression " or any situation which ceased to exist " was absolutely essential, as it was intended to take account of cases not covered by the words " any act or fact which took place ... before."

44. The acts could have been performed before the date of entry into force, but the situation could continue after that date, and if so, the provisions of the treaty must apply even if the situation commenced before entry into force. He was opposed to the United States amendment (A/CONF.39/C.1/L.155) and was in favour of the retention of the existing wording of article 24.

45. The CHAIRMAN put the amendment submitted by Austria and Greece to the vote.

The amendment (A/CONF.39/C.1/L.5 and Add.1) was rejected by 46 votes to 24, with 18 abstentions.[4]

46. The CHAIRMAN put the United States amendment to the vote.

The United States amendment (A/CONF.39/C.1/L.155) was rejected by 47 votes to 23, with 17 abstentions.

47. The CHAIRMAN said that the amendments submitted by Finland (A/CONF.39/C.1/L.91), Cuba (A/CONF.39/C.1/L.146) and Japan (A/CONF.39/C.1/L.191), which related to matters of drafting, would be referred to the Drafting Committee.[5]

Article 25 (Application of treaties to territory)[6]

48. The CHAIRMAN announced that the delegation of the Republic of Viet-Nam had withdrawn its amendment to article 25 (A/CONF.39/C.1/L.180).

49. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that, indirectly, article 25 in its present form raised one of the most important problems of international law and internal law, namely the application of the norms of international law or the application of international agreements within the territories forming a State. International law could not apply directly within the territories forming a State unless a rule to that effect existed in the internal law.

50. The delegation of the Ukrainian SSR considered that the formula adopted by the International Law Commission—that " the application of a treaty extends to the entire territory of each party "—was contrary to international law and to some existing internal law systems.

51. The legal procedure for giving effect to the provisions of a treaty within a country varied from country to country. In the Ukrainian SSR, the provisions of a treaty had legal effect and were applied in the country after a law had been passed. In the United States and Austria, on the other hand, a different system was in force: the internal law gave a global authorization whereby every international treaty applied throughout the territory as soon as it was concluded.

52. Article 25 raised a complex problem. The Ukrainian amendment aimed at altering the wording without affecting the substance of the article and he requested that the amendment should be referred to the Drafting Committee.

53. Mr. HARRY (Australia) said that a rule establishing the territorial scope of a treaty might prove necessary in a number of situations. It was true that the intention of the negotiating States would normally appear from the treaty or be otherwise established before or during the negotiations or at the time consent to be bound by the treaty was expressed. But if the intention could not be established, a residuary rule was desirable.

[4] In view of this decision, the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.179), which was to a similar effect, was not put to the vote.

[5] For resumption of the discussion on article 24, see 72nd meeting.

[6] The following amendments had been submitted: Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.164; Republic of Viet-Nam, A/CONF.39/C.1/L.180.

54. In some cases, for instance in the Antarctic Treaty,[7] the treaty provisions related to a limited geographical area covering only a part of the territories of some of the parties to the treaty. Such cases were exceptional and would always be covered by express provisions. The problem arose rather where parts of the territories of negotiating States were regarded as distinct for the purpose of various phases of the treaty-making process, either because the parts were members of a federal union with treaty-making capacity, as in the case of the Ukrainian SSR, or, as in the case of dependent territories, specially those about to become independent, because the contracting State, according to its constitution or practice, consulted the legislative or executive authorities of those parts. The problem was of particular relevance where one of the component parts of the State, though not itself an independent sovereign State, was substantially autonomous either generally or in relation to the subject-matter of the treaty in question. In such cases a State, if it had been able to consult the competent authorities of the part of its territory concerned on the issues as they arose in the course of negotiations, might, with the agreement of the other contracting parties, confine the obligations arising from the treaty to those parts which had expressed the wish to become bound. If, on the other hand, it had been unable to carry out the necessary consultations during the negotiations, the State might wish to defer its declaration until it had ascertained the opinions of the parts of its territory concerned.

55. He wished to make it clear that the Australian delegation was not concerned in that context with the problem of ratification of treaties where the subject-matter might necessitate legislation by a member state of the Australian Federation. The need to consult a state government might sometimes influence a decision to sign certain treaties or delay their ratification but there was no problem of territorial application. It was different with the Territory of Papua, which, together with the Territory of New Guinea, enjoyed a high degree of local self-government. Its destiny was to become a self-governing country developed for independence if and when it was clearly demonstrated by the majority of the indigenous population that that was what they wished. There might be occasions when it would be necessary to consult the authorities of the Territory of Papua before ratifying or even signing a treaty.

56. He accepted the view of the International Law Commission, as expressed in paragraph (4) of its commentary, that " the words ' unless a different intention appears from the treaty or is otherwise established ' ... give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory."

57. Article 25 was only a residual rule of interpretation, and could not in any way be construed as a norm requiring a State to express its consent to be bound by treaties without first establishing whether the treaty was acceptable and applicable to all the component parts of the State. That would continue to be a matter for internal law and practice. In conclusion, he said that he would prefer the International Law Commission's wording, but he would not oppose the Ukrainian amendment (A/CONF.39/C.1/L.164) if it was widely supported.

[7] United Nations, *Treaty Series*, vol. 402, p. 71.

58. Mr. RIPHAGEN (Netherlands) said that the Netherlands Government, in its comments[8] on article 57 of the 1964 draft, which corresponded to article 25 of the present draft, had pointed out that the wording of the article might deprive States made up of separate autonomous countries of the possibility now existing in current international practice of differentiating between those autonomous parts in so far as that might be required in consequence of their special constitutional structure. His Government had on that occasion cited various autonomous entities having exclusive competence to decide whether or not they would be bound by the provisions of a treaty concluded by the State of which they were constituent parts, either on behalf of one or more of the other constituent parts or without express specification. His Government had considered that the rule stated in that article was useful, but that it did not respect the right of autonomous countries forming a State to accept or refuse the rights or obligations arising out of a treaty which had not been adopted or authenticated at their request or on their behalf. The Netherlands Government had therefore asked for the article to be supplemented by a provision to the effect that any State consisting of separate elements and signing a treaty not containing a provision on territorial application should have the right to declare to which of its constituent parts the treaty would apply in accordance with the wishes of the autonomous parts concerned.

59. In paragraph (4) of its commentary to article 25, the International Law Commission had said that such a provision " might raise as many problems as it would solve ". The Commission suggested moreover that the wording of the article as it now stood gave the necessary flexibility to the rule to cover, *inter alia*, the situation which his Government had had in mind.

60. The Netherlands delegation thought that the Commission's view was justified: the Kingdom of the Netherlands, in which three countries in two different hemispheres formed one State on the basis of complete autonomy and absolute legal equality was a case in point. Assuming that the words in the present draft " or is otherwise established " implied the liberty to continue the practice referred to, the Netherlands delegation favoured the existing wording of article 25.

61. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said he wished to make it clear that his delegation's amendment did not aim at excluding part of a territory from the scope of a treaty; the amendment clearly stipulated that " a treaty is binding upon each party in respect of its entire territory ". The basic issue was whether the norms of international law could be applied directly to a State's territories. With regard to the statement by the Australian representative, he pointed out that the Antarctic was not the territory of a State.

62. Mr. BARROS (Chile), replying to the observation of the Ukrainian representative regarding the Antarctic, said that Chile reserved its position with regard to the situation of the Chilean Antarctic.

The meeting rose at 1 p.m.

[8] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 320.

THIRTY-FIRST MEETING

Friday, 19 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 25 (Application of treaties to territory) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 25 of the International Law Commission's draft.[1]

2. Mr. REGALA (Philippines) said that on the whole he was satisfied with the wording of article 25 as submitted by the Commission. However, as pointed out by a German jurist in an article published in October 1957, it raised a number of questions such as what was the meaning of the phrase " or is otherwise established "? That phrase might seem to open the door to a party to the treaty evading its obligations. The same writer had also pointed out that the phrase " entire territory " was not defined; did it include, for example, air space? Perhaps a clause ought to be added in the article to the effect that, unless a different intention of the parties was established, the application of the treaty extended to the entire territory under the jurisdiction of the State.

3. The CHAIRMAN suggested that article 25 together with the Ukrainian amendment (A/CONF.39/C.1/L.164) be referred to the Drafting Committee, and that the Committee pass on to consider article 26.

It was so agreed.[2]

Article 26 (Application of successive treaties relating to the same subject-matter)[3]

4. Mr. DE BRESSON (France) said that the French amendment (A/CONF.39/C.1/L.44) was consequential to some French amendments to earlier articles concerning restricted multilateral treaties. It was important to ensure that all parties to such treaties would apply their provisions *in toto*. The amendment need not be put to the vote but could be referred direct to the Drafting Committee.

5. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the purpose of the Soviet Union's amendment (A/CONF.39/C.1/L.202) was to link article 26 and article 23 and to ensure that the principle of *pacta sunt servanda* was applied. If the parties to successive treaties were the same, no great problem arose, but the situation might be more difficult when the parties were not the same and when the provisions of the two treaties were liable to conflict. It was a generally recognized principle of law that Governments must honour their treaty obligations and it was therefore important that later treaties should be consistent with the terms of earlier ones. If they were not consistent, the provisions of the earlier treaty prevailed. Of course, if a State assumed conflicting treaty obligations, that might give rise to State responsibility. The joint Romanian and Swedish amendment (A/CONF.39/C.1/L.204) was acceptable and resulted in a simpler version of pagagraph 4.

6. Mr. BLIX (Sweden) said that the joint amendment submitted by Romania and Sweden sought to shorten the draft by amalgamating sub-paragraphs (*b*) and (*c*). It would not change the substance.

7. Mr. FUJISAKI (Japan) said that the case of a treaty that was not to be considered as inconsistent with an earlier treaty was different from the case of a treaty being subject to another. In the former case, the question of one treaty prevailing over the other should not arise. With that consideration in mind his delegation had submitted an amendment (A/CONF.39/C.1/L.207) and he suggested that the Drafting Committee should take up the point.

8. Mr. SARIN CHHAK (Cambodia) said that his delegation's amendment (A/CONF.39/C.1/L.208) dealt with the cases covered in article 26, paragraph 4 (*b*) and (*c*). If there were two successive treaties that were not incompatible with each other, the first governed the rights and obligations between the parties. In cases when two treaties were in conflict, then the earlier treaty prevailed over the later one, because it had priority in time and because the parties to the second treaty must be presumed to have acted in bad faith.

9. Mr. RUEGGER (Switzerland) said that in view of the nature of his country's international status, he had prepared a statement concerning Article 103 of the Charter, which he would ask should be included in the Committee's final report. Naturally, the International Law Commission had wished to take account of that important article in the Charter, which was binding on the great majority of the States attending the present Conference, though not for all of them. Switzerland was not a member of the United Nations, though it took an active part in much of the work being done by United Nations bodies in economic, social, cultural and humanitarian matters. And as it was not bound by the Charter, its signature of the convention being prepared would have to be made subject to a reservation concerning Article 103.

10. Mr. LADOR (Israel) said that article 26 did not cover the case when States were parties to different treaties in a successive chain of treaties, but none were party to the same ones. The United International Bureaux for the Protection of Intellectual Property (BIRPI) had submitted some relevant information in its written statement (A/CONF.39/7, part B, section 5), paragraph 3 of which stated that, between two States which were not parties to the same treaties, there could, of course, be no legal relations under the general principles of international law arising out of those treaties. A special situation existed in international unions like those administered by BIRPI, which provided for the possibility of a State acceding to both treaties, or only to the later treaty, thus becoming a member of the union and tacitly assuming obligations towards all member

[1] The only amendment before the Committee was that submitted by the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.164).

[2] For resumption of discussion, see 72nd meeting.

[3] The following amendments had been submitted: France, A/CONF.39/C.1/L.44; Union of Soviet Socialist Republics, A/CONF.39/C.1/L.202; Romania and Sweden, A/CONF.39/C.1/L.204; Japan, A/CONF.39/C.1/L.207; Cambodia, A/CONF.39/C.1/L.208.

countries. But while that practice was covered by article 4 of the draft, matters falling within the range of article 26 required an appropriate solution within that framework.

11. The Drafting Committee would need to examine the relationship between articles 26 and 36. His own delegation preferred the simpler variant of paragraph 5, when it had formed part of article 63 of the Commission's penultimate draft.

12. Mr. SEPULVEDA AMOR (Mexico) said that article 26 governed the relationship between successive treaties, but it should leave the door open for other systems.

13. Mr. SINCLAIR (United Kingdom) said that he was not satisfied that the Commission's text would prove adequate in practice. There were doubts about the meaning of the phrase " the same subject-matter ". Did the United Nations Covenants on Human Rights relate to the same subject-matter as the European Convention on Human Rights or the ILO and UNESCO Conventions on certain specific aspects of human rights? Also it might sometimes be difficult to determine which was the earlier and which the later treaty. Supposing that convention A was signed in 1964 and came into force in 1966, whereas convention B was signed and entered into force in 1965, which of them would be the earlier? If convention B were regarded as the earlier on the grounds that the date of entry into force was decisive, would the answer be different if convention A had entered into force provisionally in 1964? To take a different example, supposing a multilateral convention was opened for signature in 1960, State A ratified it in 1961, and the convention entered into force in 1962. Then State A and State B concluded a bilateral treaty on the same subject in 1963 which entered into force in 1964, after which State B acceded to the multilateral convention in 1965. Which of the treaties was the earlier and which was the later? In State A's view, the multilateral convention was the earlier but in State B's view it was the later.

14. There was no need to subdivide multilateral conventions into various categories; the provisions of paragraph 4 would, he believed, fully protect the parties to restricted multilateral treaties, which in any case could always modify the terms of a treaty by unanimous consent.

15. He had not had the time fully to study the Japanese amendment (A/CONF.39/C.1/L.207) but considered that there was force in the Japanese representative's argument. The other amendments were of a drafting character and could be referred to the Drafting Committee.

16. Mr. VOICU (Romania) said that the aim of the joint amendment submitted by Romania and Sweden (A/CONF.39/C.1/L.204) was to make the text as concise as possible. Given the existence of numerous treaties on the same subject, article 26 was particularly important, and the International Law Commission's text, which took existing practice only into account, was well balanced. He would support all amendments that did not radically alter the substance of that text.

17. Mr. WOODLEY (Observer for the United International Bureaux for the Protection of Intellectual Property—BIRPI), speaking at the invitation of the Chairman, said that the principle underlying article 26, especially paragraph 4, was that, in the case of successive treaties on the same subject matter, there were no treaty relations between two States which were not parties to the same treaty. However, a special situation existed in international Unions such as those administered by BIRPI, which included the Unions instituted by the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works. Those Conventions had been revised on several occasions but each revision was merely a different version of the original Convention which continued to exist. There was only one Union constituted by each original Convention.

18. Technically, each original Convention and its revising Acts were separate and successive treaties each calling for ratification. A State, however, sometimes acceded to the most recent Act of a Union, without declaring that its accession was valid for the previous Acts. In its relations with States parties to the most recent Act, no problem arose. In its relations with States members of the Union but not parties to the most recent Act, on the other hand, the acceding State was understood to have tacitly accepted all the previous texts, so that its relations with the States parties only to the earlier texts was governed by those earlier texts.[4] The legal position was arguable, but the system was the only practicable one. The Union was more important than the Convention which had set it up. Without that tacit acceptance system, the State acceding to the latest text would have no relations with half the membership of the Union.

19. Bearing in mind that Unions were a special case in that respect, article 26, with or without the proposed amendments, was acceptable to BIRPI. Article 4, as it had emerged from the Drafting Committee,[5] took into account, to some extent, the practices of Unions. Perhaps the Drafting Committee would wish to consider the insertion in Part VI (Miscellaneous Provisions) of a clause to make it clear that the established practices of Unions of States, in the relations between the States parties to them, were not prejudiced by the draft convention. A safeguarding clause of that type was necessary in relation not only to article 26, but also to such other provisions as those of article 8 on voting, as already pointed out by BIRPI at the 9th meeting.[6]

20. Mr. DENIS (Belgium) asked whether the French amendment (A/CONF.39/C.1/L.44) purported to reverse the rule in paragraph 3 of article 26, where a " restricted " multilateral treaty was concerned.

21. Mr. BEVANS (United States of America) said he opposed the French amendment (A/CONF.39/C.1/L.44), which would greatly restrict the ability of less than all the parties to a multilateral treaty dealing with regional matters, or matters of concern to a few States, to alter their treaty relations, unless all the parties to the original treaty agreed. Any one party could thus thwart the efforts of all the others and thereby retard the continued

[4] See document A/CONF.39/7, part B, section 5, para. 7.

[5] See 28th meeting, para. 14.

[6] Paras. 25-27.

evolution of regional affairs, or the progressive development of international law. Moreover, the French amendment was unnecessary. The rights of a State party to the earlier treaty that chose not to become a party to the later one were fully protected under paragraph 4(*b*) of article 26 as it stood.

22. He was not in favour of referring the French amendment to the Drafting Committee to await a decision on the French proposal to include in article 2 (Use of terms) a reference to " restricted multilateral treaty " (A/CONF.39/C.1/L.24). The concept embodied in the present amendment (A/CONF.39/C.1/L.44) was quite independent of the use of the words " restricted multilateral treaty ", and it was to that concept that the United States delegation was opposed.

23. With regard to the USSR amendment (A/CONF.39/C.1/L.202), he questioned the advisability of introducing in paragraph 4 a reference to article 23 *(Pacta sunt servanda)*. He failed to see why such a reference should be introduced only in that paragraph and not elsewhere in the draft articles. An isolated reference of that kind to article 23 might be misconstrued as indicating that the *pacta sunt servanda* rule did not govern other provisions of the draft where it was not specifically mentioned.

24. Mr. DE BRESSON (France) said that his amendment (A/CONF.39/C.1/L.44) was intended to deal with a case that was not covered by the provisions of paragraph 4(*b*) of article 26. Where the earlier treaty was a restricted multilateral treaty, and a second treaty was concluded between some of its parties only, it was the provisions of the earlier treaty which should prevail, in the interests of the integrity of the treaty; that integrity was essential to the very existence of that type of treaty.

25. The objections raised by the United States representative would not apply if a definition of the term " restricted multilateral treaty " were included in article 2, paragraph 1, as proposed by France (A/CONF.39/C.1/L.24).

26. Mr. WERSHOF (Canada) said that he had serious doubts with regard to the suggestion by the French delegation that its amendment (A/CONF.39/C.1/L.44) should be referred to the Drafting Committee. The amendment involved a point of substance, and a controversial one at that; some expression of opinion on it by the Committee of the Whole was therefore necessary. Moreover, the Committee of the Whole would sooner or later have to take a decision on whether or not to include in the draft convention the concepts of " general multilateral treaty " and " restricted multilateral treaty ".

27. The CHAIRMAN said that the question of the possible inclusion of provisions on both " restricted " and " general " multilateral treaties had been reserved and the Drafting Committee had been asked to report on it.[7] The Committee of the Whole would take a decision on the issues involved later. Meanwhile, since the French delegation had not requested a vote on its amendment to article 26 (A/CONF.39/C.1/L.44), which was connected with one of those issues, it would seem appropriate to refer that amendment to the Drafting Committee, together with the other amendments (A/CONF.39/C.1/L.202, L.204, L.207 and L.208), which were agreed to be of a drafting character.

28. Mr. BARROS (Chile) said he warmly supported the Canadian representative's remarks. The Committee of the Whole should take a decision on the French amendment (A/CONF.39/C.1/L.44).

29. Mr. ZEMANEK (Austria) said he also supported that view; where an amendment raised a point of substance and its sponsor did not press for a vote, the amendment should be deemed to have been withdrawn.

30. Mr. DE BRESSON (France) said that the issue of restricted multilateral treaties could best be decided after the Drafting Committee had reviewed its implications on all the articles. For that reason, it was undesirable to vote on that issue with respect to article 26 in isolation.

31. Mr. YASSEEN, Chairman of the Drafting Committee, said that the issue which had been referred to the Drafting Committee was a general one and did in fact affect a number of articles. But the Drafting Committee could not itself decide the issue; it needed instructions in the form of a decision on the substance by the Committee of the Whole. The same was true with regard to the problem of " general " multilateral treaties.

32. Mr. AMADO (Brazil) said that no harm would be done by referring the French amendment to the Drafting Committee, since that Committee could always report that an issue of substance was involved which called for a decision by the Committee of the Whole.

33. Mr. KOVALEV (Union of Soviet Socialist Republics) said that the Committee had already referred to the Drafting Committee a number of amendments on " restricted " multilateral treaties. It would be acting inconsistently if it were now to vote on the French amendment.

34. Mr. AUGE (Gabon) said that it would be premature to vote on the French amendment until a decision had been reached on the general issue of " restricted " multilateral treaties.

35. Mr. KEBRETH (Ethiopia) said he agreed with that view. The issue raised by the French amendment was not new; the substance had been discussed in connexion with the French proposal on article 2 (A/CONF.39/C.1/L.24).

36. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 26 and the amendments thereto to the Drafting Committee.

It was so agreed.[8]

Article 27 (General rule of interpretation), and

Article 28 (Supplementary means of interpretation)

37. The CHAIRMAN invited the Committee to consider together articles 27 and 28 and the amendments thereto.[9]

[7] See 6th meeting, paras. 33-44.

[8] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to " restricted multilateral treaties " until the second session of the Conference. Final Consideration of article 26 was therefore postponed until the second session.

[9] The following amendments had been submitted:

To article 27: Philippines, A/CONF.39/C.1/L.174; Pakistan, A/CONF.39/C.1/L.182; Ukrainian Soviet Socialist Republic,

38. Mr. McDOUGAL (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.156) to replace by a single article the provisions of articles 27 and 28, said that the text of those articles, as adopted by the International Law Commission, embodied over-rigid and unnecessarily restrictive requirements. The purpose of the United States amendment was to restore the authority of a process of interpretation which was well-established in international law and which had served the world well for several centuries.

39. The system adopted by the Commission, of two separate articles 27 and 28, established a hierarchical distinction between certain primary means of interpretation described as a " general rule of interpretation " and certain allegedly " supplementary " means of interpretation. Among the primary means, the predominant emphasis was laid on the text of the treaty, which was to be interpreted in accordance with the so-called " ordinary meaning " to be given to the terms " in their context and in the light of its object and purpose ". The commentary to article 27 explained, however, that the reference to " the context " was not to factual circumstances attending the conclusion of the treaty but to the verbal texts, and that the reference to " object and purpose " was not to the actual common intent of the parties, but rather to mere words about " object and purpose " intrinsic to the text. In fact, the commentary apparently flatly rejected that common intent as the goal of interpretation.

40. Under article 28, the so-called " supplementary " means of interpretation, which included " the preparatory work of the treaty and the circumstances of its conclusion " were barred to the interpreter, except merely to confirm the meaning resulting from the application of the " general rule " in article 27, in all cases other than the exceptional ones set forth in sub-paragraphs (*a*) and (*b*) of article 28.

41. In short, the whole system was built on the well-known maxim by Vattel that " It is not permissible to interpret what has no need of interpretation "—a proposition which had come to be recognized as an obscurantist tautology, since the determination of the question whether a text required, or did not require, interpretation was itself an interpretation. McNair had pointed out that the maxim " is constantly employed, both by advocates and tribunals, as an argument against seeking to find out what was the intention of the parties in using the words, having regard to the surrounding circumstances ", and had aptly described it as " a *petitio principii* because it begs the question whether the words used are, or are not, clear—a subjective matter because they may be clear to one man and not clear to another, and frequently to one or more judges and not to their colleagues ".[10]

42. Canons of interpretation as a whole had seldom been considered as mandatory rules of law that would preclude examination of relevant circumstances. Only rarely had principles regarding the plain and natural meaning, or the admissibility of preparatory work, been employed so as to foreclose inquiry. It was true that disputes on interpretation had on occasion been solved by applying simple dictionary definitions of words used in the text, but it had much more frequently been ruled that a text was meaningless apart from the context of the circumstances in which it had been framed. The overwhelming body of case-law of international courts and arbitral tribunals, and the practice of Ministries of Foreign Affairs in the interpretation of treaties, bore out the right of the interpreter to take into account any circumstance affecting the common intent that the parties had sought to express in the text. The practice of international organizations pointed in the same direction. The observer for the International Labour Organisation had stated at the 7th meeting of the Committee of the Whole [11] that " ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28 ". Interpreters, moreover, had habitually employed other principles of interpretation, such as that of effectiveness, which was not reflected in articles 27 and 28.

43. The restrictions placed by article 28 on the use of preparatory work did not represent established practice. Even in the *Lotus* case, which perhaps contained the most famous exposition of the alleged rule that " there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself ",[12] the Permanent Court of International Justice did in fact look at the preparatory work.

44. The rigid system of articles 27 and 28 was thus not an expression of existing rules of international law. Furthermore, if an attempt were made to introduce it, it would prove totally unworkable. It was based on the assumption that a text had a meaning apart from the circumstances of its framing, and that it could be interpreted without reference to any extraneous factor. In reality, words had no fixed or natural meaning which the parties to an agreement could not alter. The " plain and ordinary " meanings of words were multiple and ambiguous and could be made particular and clear only by reference to the factual circumstances of their use. Accordingly, an interpreter could not hope to apply the " general rule " in article 27, or to invoke the " supplementary means " authorized in article 28, without at the same time violating the rule of textual interpretation laid down in article 27. It was only by examining the circumstances of the conclusion of the treaty that a meaning could be ascribed to the text; and it was only by means of that examination, and by having recourse to the preparatory work, that it was possible to arrive at the conclusion that an " interpretation according to article 27 (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable ", and that the " supplementary means " could be used under article 28.

45. The fact that the textual approach to interpretation was impossible to apply was demonstrated by the very presence at the Conference of the Expert Consultant

A/CONF.39/C.1/L.201; Romania, A/CONF.39/C.1/L.203; Australia, A/CONF.39/C.1/L.210; Ceylon, A/CONF.39/C.1/L.212; Greece, A/CONF.39/C.1/L.213; Federal Republic of Germany, A/CONF.39/C.1/L.214; Spain, A/CONF.39/C.1/L.216.

To article 28: United Republic of Tanzania, A/CONF.39/C.1/L.215; Spain, A/CONF.39/C.1/L.217.

Amendments to combine articles 27 and 28 in a single article were submitted by the United States of America (A/CONF.39/C.1/L.156) and the Republic of Viet-Nam (A/CONF.39/C.1/L.199).

[10] McNair, *The Law of Treaties*, 1961, p. 372.

[11] Para. 12.

[12] *P.C.I.J.* (1927), Series A, No. 10, p. 16.

and by the frequent appeals to him for enlightenment on the " ordinary " meaning of the wording of the draft articles—necessary despite the full availability of the International Law Commisssion's preparatory work; the unquestioned authority exercised by him when clarifying that meaning was based not on his linguistic ability or his skill as a logician, but rather on his very special knowledge, as the Commission's Special Rapporteur on the law of treaties, of all the circumstances attending the framing of the draft.

46. The rigid and restrictive system of articles 27 and 28 should not be made international law because it could be employed by interpreters to impose upon the parties to a treaty agreements that they had never made. The parties to a treaty could well have a common intent quite different from that expressed by the " ordinary " meaning of the terms used in the text. The imposition upon the parties of certain alleged " ordinary " meanings, combined with the preclusionary hierarchy of means set forth in articles 27 and 28, could lead to the arbitrary distortion of their real intentions. It was essential to respect the free choice of the States parties regarding their agreements, and not to impose upon them the choices of others.

47. A modest concession had been made in paragraph 4 of article 27 in the provision that "A special meaning shall be given to a term if it is established that the parties so intended ". However, paragraph (17) of the commentary stated that " the burden of proof lies on the party invoking the special meaning of the term ", and it was not indicated how such special meaning could be established otherwise than by recourse to the means ruled out by article 28.

48. The criterion of ordinary meaning, because of its ambiguity, opened the door to arbitrary interpretations of the text and would create greater uncertainties than an insistence upon a comprehensive, contextual examination of all factors potentially relevant to common intent. An over-emphasis upon the primacy of the text led to decisions such as the much-criticized 1966 Advisory Opinion of the International Court of Justice in the most recent of the *South-West Africa* cases.[13]

49. The purpose of the United States amendment (A/CONF.39/C.1/L.156) was to eliminate the rigidities, restrictions and hierarchical distinctions in draft articles 27 and 28. The text of a treaty and the common public meanings of words would be made the point of departure of interpretation, but not the end of the inquiry. The text would be treated as one important index among many of the common intent of the parties. No fixed hierarchy would be established among the elements of interpretation; the amendment sought to make accessible to interpreters whatever elements might be significant in a particular set of circumstances, including ordinary meaning, subsequent practice and preparatory work, but not excluding others that might be also relevant.

50. The amended text thus proposed sought to preserve as much as possible of the original wording while merging the two articles. His delegation, however, was not wedded to any particular words or formulation. The choice of a formula was a matter of drafting, provided the basic objective was achieved of removing all hierarchical weightings and obstacles to an unrestricted inquiry into all elements relevant to rational interpretation.

51. Mr. PHAN-VAN-THINH (Republic of Viet-Nam), introducing his delegation's amendment to articles 27 and 28 (A/CONF.39/C.1/L.199), said that the proposal was essentially one of drafting. The introduction of a new sub-paragraph (*a*) in paragraph 3 of article 27 would obviate the need for article 28 and would greatly simplify the International Law Commission's text. The Commission's draft gave the impression that it wished to establish a kind of hierarchy for the various rules and means of interpretation, by drawing a distinction between rules of interpretation and supplementary means of interpretation. In his delegation's opinion, however, preparatory work and the circumstances in which the treaty had been concluded often represented means of interpretation as valid, if not as essential, as the context, particularly when they were concerned with ascertaining the intention of the parties. Moreover, it seemed logical to include preparatory work and the circumstances in which the treaty had been concluded in paragraph 3, so that they should precede the special meaning to be given to a term if it was established that the parties so intended, as provided in paragraph 4. If his delegations's drafting amendment was acceptable to the majority, the word " rule " in the title of article 27 should be in the plural.

52. Mr. IRA PLANA (Philippines) said that his delegation had submitted its amendment to article 27 (A/CONF. 39/C.1/L.174) because it considered that the word " context " in paragraph 2, as used by the International Law Commission, was rather too broad; it therefore proposed to limit the term to the text of the treaty, its preamble and annexes. The amendment would not affect the intention of the Commission, because sub-paragraphs 2(*a*) and 2(*b*) must in any case be considered together in interpreting the treaty. His delegation had no objection to the inclusion of additional primary means of interpretation in article 27.

53. Mr. SAMAD (Pakistan) said that his delegation had submitted its amendment to article 27 (A/CONF.39/ C.1/L.182) because, apart from the case of subsequent agreements between the parties regarding the interpretation of the treaty, there were cases where the parties entered into subsequent agreements concerning the implementation of the treaty, which might shed light on their intentions. His delegation had no objection to the amalgamation of articles 27 and 28.

54. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic), introducing his delegation's amendment to paragraph 1 of article 27 (A/CONF.39/C.1/L.201), said that the International Law Commission had discussed the form of the provision at length, and had rightly rejected proposals whereby a treaty might be interpreted exclusively in connexion with the intention of the parties. It had, however, gone to the other extreme in deciding that the interpretation should be based exclusively on the terms of the treaty in their context and in the light of its object and purpose; the text of a treaty was the result of negotiations during which the intentions of the parties became evident. Accordingly, his delegation had proposed the addition of the phrase " expressing the agreed intentions of the parties ", at the end of paragraph 1.

[13] *I.C.J. Reports 1966*, p. 6.

The amendment could be referred to the Drafting Committee.

55. Mr. VOICU (Romania) said that his delegation considered the International Law Commission's text of articles 27 and 28 to be generally acceptable, and that its amendment to article 27 (A/CONF.39/C.1/L.203) was purely a drafting amendment. Sub-paragraphs 2(*a*) and 2(*b*) of article 27 and the commentary thereto seemed to need some clarification: if, for purposes of interpretation, the context of a treaty comprised any agreement relating to the treaty which had been made between all the parties at the time of the conclusion of the treaty, obviously an interpretative agreement would be part of the context, and sub-paragraph 2(*a*) would be fully applicable to authentic interpretation, since it related to one of the essential instruments of interpretation. On the other hand, when an agreement made between all the parties at the time of the conclusion of a treaty had some relation to the treaty, although it had no interpretative character, it could no longer be regarded as an authentic instrument of interpretation. Its relation with the treaty might be an agreement *in pari materia:* for example, two States concluding a trade agreement and a financial agreement simultaneously might stipulate the relationship between the two instruments in a clause of the agreement, but it could not be assumed from the fact that they were materially related that one treaty was interpretative of the other.

56. The International Law Commission had prudently stated in paragraph (13) of its commentary that the fact that those two classes of documents were recognized as forming part of the context did not mean that they were necessarily to be considered as an integral part of the treaty, and that whether they were an actual part of the treaty depended on the intention of the parties in each case. Nevertheless, it was hard to conceive that, for instance, a cultural agreement concluded between all the parties at the time of the conclusion of a consular convention could be regarded as part of the text of that convention and as a means of interpreting that instrument. It should therefore be specified that the agreements in question were those " relevant " to interpretation. Such an addition seemed to be particularly important since paragraph 2 of article 27 introduced an obvious distinction between the annexes and the agreements relating to the treaty, which were protocols and exchanges of notes or letters between the parties at the time of the conclusion of a treaty.

57. Sub-paragraph 2(*b*) was pertinent to authentic interpretation because it attached the necessary importance to instruments made by one or more parties and accepted by the other parties as instruments related to the treaty. That paragraph related to interpretative declarations and interpretations *inter se*, but those two hypotheses were not clearly stated in the commentary, which remained somewhat obscure on two points. First, no example was given to prove that the provision related to an interpretative instrument made by some of the parties among themselves and formally accepted by the other parties. The Special Rapporteur had clarified the matter in his sixth report by stating that, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties.[14] The laconic formulation of sub-paragraph (*b*) gave no answer to the question whether the instrument in question related to the treaty by virtue of its content or of its interpretative character. Secondly, the provision contained no indication of the manner in which such an instrument should be accepted by the other parties. In the event of formal acceptance, the accepting parties would by law become co-authors of the instrument, but if the instrument was interpretative, its acceptance would have the effect of rendering a given interpretation authentic with regard to all the parties. If, on the other hand, the instrument was not interpretative, its acceptance would make the accepting States contracting parties.

58. Those were the reasons why the Romanian delegation had considered it necessary to submit its drafting amendments.

59. Mr. HARRY (Australia) said that his delegation's amendments to paragraph 3 of article 27 (A/CONF.39/C.1/L.210) related to the drafting only. Its proposed amendment to sub-paragraph (*a*) concerned the subject of agreement between the parties regarding the interpretation of the treaty. According to paragraph (14) of the commentary, for the purpose of the general rule of interpretation, any agreement between the parties on interpretation, whether made before, during, or after the conclusion of the treaty, should be taken into account. On the other hand, sub-paragraph (*a*) was limited to subsequent agreements on interpretation. Although sub-paragraph 2(*a*) should also be taken into account in that connexion, that clause, which concerned agreements on interpretation reached at the time of the conclusion of the treaty, did not necessarily include agreements on interpretation made at an earlier stage, while negotiations were still in process: the wording of the French and Spanish texts made that even more doubtful. The solution proposed by his delegation was simply to omit the word " subsequent " from sub-paragraph 3(*a*): the provision would then cover all agreements on the interpretation of the treaty, whenever made. That proposal corresponded with the solution adopted by the Commission itself in its 1964 draft in the then article 69 on interpretation.[15]

60. The Australian drafting amendment to sub-paragraph 3(*b*) had been prompted by the statement in paragraph (15) of the commentary that the Commission had had the common understanding of the parties in mind. The idea was clearly expressed in the French and Spanish texts, and the amendment therefore affected the English text only.

61. With regard to the substance of articles 27 and 28, the Australian delegation was in favour of using the International Law Commission's proposals as a basis. It considered that the " textual " approach was most likely to contribute to the certainty and security of treaty obligations; nevertheless, it respected the arguments advanced by the United States representative, and reserved the right to return at a later stage to the points he had mentioned.

62. Mr. JIMÉNEZ DE ARÉCHAGA (Uruguay) said

[14] *Yearbook of the International Law Commission, 1966*, vol. II, p. 98, para. 16.

[15] *Yearbook of the International Law Commission, 1964*, vol. II, p. 199.

that, in introducing his amendment, the United States representative had referred to two schools of thought on interpretation, one which sought to determine the genuine intention of the parties, and the other, followed by the International Law Commission, which based interpretation on the text of the treaty. In adopting that approach, the Commission had taken into account some opinions expressed on the Lauterpacht draft in the Institute of International Law.

63. Judge Huber, for instance, had stated that international law should avoid the idea of a " will of the parties " floating like a cloud over the *terra firma* of a contractual text. If respect for the wording of a treaty that had been signed and ratified was not something sacred, if the parties were to be allowed freely to invoke their supposed real will, an essential advantage of written and conventional law would be lost. The text signed was the only, and the most recent, expression of the common will of the parties.[16]

64. Similarly, Sir Eric Beckett had claimed that there was a complete unreality in the references to the supposed intention. As a matter of experience, it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had absolutely no common intention with regard to it. In other cases, the parties might all along have had divergent intentions with regard to the actual question in dispute. Each party had deliberately refrained from raising the matter, possibly hoping that the point would not arise in practice, or possibly expecting that, if it did, the text which had been agreed would produce the result which it desired. If there was too ready admission of the preparatory work, the State which had found a clear provision of the treaty inconvenient for one reason or another was likely to be furnished with a *tabula in naufragio*, because there was generally something in the preparatory work that could be found to support almost any contention.[17]

65. In the opinion of the Uruguayan delegation, the structure of the International Law Commission's texts should be maintained. The articles had deliberately been drafted in a progressive order, beginning with a reference to the text of the treaty, and gradually introducing first materials intrinsic to the text, and then such extrinsic materials as preparatory work, which was a means of shedding light on the intentions of the parties, but on which by definition no agreement had been reached between them. One reason why no reference had been made to preparatory work in article 27 was that the Commission had not wished to encourage parties to use such material as a means of infiltrating extrinsic elements into the text with a view to evading clear obligations. As Sir Eric Beckett had pointed out in the passage quoted above, it was only too easy for a State wishing to evade its obligations to inject an element of uncertainty by referring to preparatory work. A further reason for having two articles was to deal with the case of third States which had not participated in the conference convened to draw up the treaty.

66. The separation of the two articles did not mean that the Commission had ruled out the preparatory work in matters of interpretation; it had not presupposed two distinct phases of interpretation; on the contrary, the procedures listed in the two articles would be applied concurrently. The rule in article 28 was extremely flexible, and did not create any hierarchy between methods of interpretation. Article 27 contained a very broad definition of " context " which included much of the material traditionally regarded as preparatory work, provided it was so agreed between the parties.

67. One of the United States amendments separated the object and purpose of the treaty from the context, two elements that were in juxtaposition in the Commission's draft. The Commission had deliberately referred to the object and purpose of the treaty as the most important part of the context, not as an independent element, since the latter course might lead to distorted interpretations, and open the door to the teleological method that might result in a subjective and self-interested approach. The Uruguayan delegation supported the text of the two articles as drafted by the International Law Commission.

68. Mr. DADZIE (Ghana) said that his delegation had some doubts concerning the advisability of including provisions on interpretation in a convention which sought to codify the rules applicable to the conclusion, validity and termination of treaties. It was most unusual to codify rules of interpretation, although it was customary to restate principles of interpretation, because the latter were only guidelines intended to assist international tribunals and decision-makers in ascertaining the intention of the parties for the purpose of applying the terms of a treaty to a particular situation. Nevertheless, his delegation would accept a restatement of the factors to be taken into account in the interpretation of treaties, in the light of modern precedents and examinations of the whole problem of legal interpretation.

69. The first question that arose, however, was whether the provision should be obligatory, in the sense of laying down rules which international tribunals, arbitral bodies and decision-makers must apply. The Ghanaian delegation considered that there were no obligatory rules of interpretation in international law; there was ample authority in support of that view, which was, indeed, cited in the commentary. But there was a wealth of material on the principles of interpretation, developed on the basis of general notions and Latin maxims, analogies with municipal law, decisions of international tribunals and awards of arbitral bodies. When faced with the problem of interpretation, international tribunals and decision-makers selected from that material the principles they considered appropriate in the case at issue; any constraint to apply a particular rule derived from the logic of the situation in the light of precedents of interpretation.

70. Since those principles of interpretation were permissive, there could be no question of creating a hierarchy for their application. The crucial point in the function of interpretation was to ascertain the intention of the parties with regard to a particular problem, and it was therefore of no consequence how the intention was discovered. Accordingly, the Ghanaian delegation could not endorse the International Law Commission's adoption

[16] *Annuaire de l'Institut de droit international*, vol. 44 (1952), tome I, p. 199.

[17] *Annuaire de l'Institut de droit international*, vol. 43 (1950), tome I, pp. 438 and 440.

of the textual approach. In the first place, the precise definition of the term " ordinary meaning " was by no means clear, for day-to-day experience showed that words had no ordinary meaning in isolation from their context; indeed, during negotiations, words were sometimes used not to reflect agreement, but to conceal disagreement. Secondly, it was not clear how the object and purpose of the treaty would be determined in a given case. Article 27 and the commentary thereto seemed to limit that determination to the text, and if the text did not yield the necessary meaning, article 28 was hardly applicable. Paragraph 3 of article 27 allowed for reference to subsequent practice to establish the understanding of parties, but it was not clear what was meant by subsequent practice. Finally, his delegation failed to see how the special meaning intended by the parties was to be discovered if the use of the preparatory work of the treaty was to be resorted to for two purposes only.

71. It should be borne in mind that even the current Conference had recognized the need for something other than the text of the International Law Commission's draft; that was the reason for the presence of the Expert Consultant, who, despite the lucid commentary to the draft, had often been called upon to explain not only the text, but also the implications of the provisions and the intentions of the Commission. The Ghanaian delegation could therefore only accept a provision which combined the most important principles of interpretation in one permissive article and which indicated that the object of interpretation was to ascertain the intention of the parties in relation to particular problems arising out of the application of a treaty. Amendments such as those of the United States (A/CONF.39/C.1/L.156) and the Philippines (A/CONF.39/C.1/L.174) were consistent with that approach and should serve as a basis for the Committee's decision.

The meeting rose at 6 p.m.

THIRTY-SECOND MEETING

Saturday, 20 April 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 27 (General rule of interpretation) and *Article 28* (Supplementary means of interpretation) *(continued)* [1]

1. Mr. PINTO (Ceylon) said that he had listened with close attention to the statements of the representatives of the United States and Uruguay regarding the two main approaches to the problem of treaty interpretation. In the first a comprehensive examination of the context was recommended with a view to ascertaining the common will of the parties, whereas in the second a hierarchical series of rules for determining the meaning of a treaty would be followed.

2. His delegation was in favour of placing emphasis on the search for the will of the parties, but it seemed that common sense should rule out the acceptance of a host of factors which the parties, to uphold their own interests, might consider to be relevant. It should be possible to combine the two and produce a text which, while emphasizing the paramount importance of the parties' intentions, would lay down definite rules of interpretation and guidelines concerning the respective importance of those two factors.

3. His delegation had submitted an amendment (A/CONF.39/C.1/L.212) which was consequential upon the somewhat restrictive approach adopted by the International Law Commission in articles 27 and 28. That approach seemed to raise a problem in respect of treaties adopted within international organizations. Paragraph 2 of article 27 mentioned two types of instruments that should be taken into consideration for the purpose of interpretation of the treaty, namely an agreement concluded between the parties and an instrument drawn up by one or more parties and accepted by the others.

4. In the case of treaties adopted within international organizations, provision should be made for a third type of instrument, comprising any explanatory memorandum or report that accompanied a treaty and was communicated to States, for signature or ratification, by the competent organ of the organization, and which the organization deemed important for the interpretation of the new treaty. Such a memorandum did in fact form part of the context of certain treaties but did not come under article 27 or even article 28. Examples of such memoranda or reports were those of the Executive Directors of the International Bank for Reconstruction and Development, which accompanied the Articles of Agreement of the International Finance Corporation [2] and of the International Development Association [3] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [4] —all treaties that had been adopted within the Bank. His delegation believed that article 27 should recognize the importance of instruments of that kind for the interpretation of the class of treaty in question. That was the purpose of its amendment.

5. It might be possible to argue that that question was already covered by article 4, but the Committee should consider well before reading too much into the unduly concise and perhaps already over-burdened terms of that article. To rely too much on article 4 would be to risk building up difficult problems of interpretation for the future in certain areas such as that dealt with in article 27. It would be as well to be explicit.

6. Mr. KRISPIS (Greece) said that paragraph 2 of article 27 provided that for the purpose of the interpretation of a treaty, the context should comprise principally the text of the treaty, including its preamble and annexes. There was no doubt that in the absence of an indication to the contrary, the preamble and the annexes formed part of the treaty. A question which arose more in practice, however, than in theory was whether the title of the treaty and the titles of its parts, chapters, sections and articles

[1] For a list of the amendments submitted to articles 27 and 28, see 31st meeting, footnote 9.

[2] United Nations, *Treaty Series*, vol. 264, p.117.

[3] *Op. cit.*, vol. 439, p. 249.

[4] *Op. cit.*, vol. 575, p. 159.

also formed part of the treaty. A convention on the law of treaties had to answer that question. It was well known that jurists attached importance to the titles of the articles of a treaty in determining the real meaning of the text of the articles. The existence of a comma or a semi-colon and their precise position were sometimes taken into account. The convention should therefore state that those titles formed part of the text of a treaty. It was quite possible that the Committee of the Whole would agree unanimously on the substance of the amendment proposed by the Greek delegation (A/CONF.39/C.1/L.213). If so it could simply be referred to the Drafting Committee.

7. In the opinion of the Greek delegation, the interpretation of a treaty was essentially a mental process of attempting to establish the intention of the parties to the treaty as expressed in words. There was no absolute interpretation with a given text; there were usually several possible interpretations, and there might even be conflicting interpretations. Consequently, interpretation could not obey set rules. If a treaty contained one or more rules as to its interpretation, those rules themselves would need to be interpreted, but at that point no rules of interpretation would be available. Even if a treaty provided rules for the interpretation of clauses regarding interpretation, those provisions would require to be interpreted by means not contained in the treaty. There was a vicious circle and thus it would be vain to set down rules about interpretation. All that could be done was to facilitate interpretation and lay down guidelines to assist jurists in their efforts to determine the meaning of a text. Under those conditions, it seemed impossible to draw up guidelines on interpretation in the form of rules of law. One had to be content with a description of the various factors which would facilitate the task of interpretation. Jurists should be given the means of discovering the ideas conveyed by the words used by the authors of a treaty to express their intention.

8. The object of article 27 was to base interpretation mainly on the ordinary meaning to be given to the terms of the treaty. What did the words " the ordinary meaning to be given to the terms of the treaty " signify? The Greek delegation doubted whether it was really possible to speak of " the ordinary meaning " of words. The mere consultation of a dictionary would immediately reveal that a single word could have many meanings. Moreover, the same word was sometimes used to describe more than one thing, and the same thing could be described by two or more words. Language also developed; the word " territory " for example, used to mean *terra firma* only, but had come to be applied to the territorial sea and perhaps to the continental shelf. The time factor thus influenced the meaning of words.

9. In the opinion of his delegation, articles 27 and 28 were among the less happy provisions of the International Law Commission's draft. It would be wise to have only a single article entitled " Interpretation of a treaty " and to take into consideration for that purpose all the factors connected with the intention of the parties. The United States amendment (A/CONF.39/C.1/L.156) was acceptable in that respect and the Greek delegation would therefore support it. If it was approved by the Committee of the Whole, his delegation would withdraw its own amendment, since the United States proposal did not refer to the preamble and annexes, which it seemed could be taken for granted.

10. Mr. BLOMEYER-BARTENSTEIN (Federal Republic of Germany) said that the rule stated in article 27, paragraph 3(*c*) differed from the other provisions in article 27 in so far as it referred to a body of rules which had no direct relation to the treaty in question. In his delegation's opinion the sub-paragraph would have to be completed. Why should only the rules of general international law applicable between the parties be taken into account? Would it not be sensible, and even necessary, to try to interpret treaties in such a manner that they did not conflict with prior treaties which the parties had concluded with other States? When there was a possibility of interpreting a treaty so that it was consistent with the other obligations of a party, that interpretation should take precedence in order to avoid conflicting obligations, and it could not be assumed that a State concluding a treaty with another State intended to violate its obligations vis-à-vis a third State.

11. The delegation of the Federal Republic of Germany considered that an additional provision to that effect should be inserted in article 27, paragraph 3, because at present States were regulating more and more questions by means of bilateral and multilateral treaties. It could of course be argued that a State which had concluded a treaty in good faith was entitled to expect to learn from its partner of all the possible limitations to which the obligations forming part of the treaty in the course of negotiation might be subject. Only those facts of which the parties were aware when they gave their consent to be bound could be considered to be part of the consent. That reasoning might, however, lead to an infringement of the contractual rights of third States which had also been acquired in good faith. Third States were equally entitled to have their legal interests protected.

12. The amendment submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.214) was not intended to cover cases in which a party to a treaty had concluded another treaty with a third party dealing with the same subject-matter, with the result that it could only fulfil its obligations towards one of the two parties. Such a case clearly constituted a breach of the treaty which came under article 57 of the draft convention. The amendment dealt with cases where it was possible to reconcile the different obligations of one party vis-à-vis two different parties. It might be assumed, for example, that State A had concluded with States B and C two treaties, the provisions of which overlapped in part. If A and B had accepted the compulsory jurisdiction of the International Court of Justice, party B might bring the case before the Court asking for a decision based on the text of the treaty concluded with A. State C which wished to protect its rights under the terms of its treaty with State A would request the Court to be permitted to intervene under article 62 of the Statute. In its final judgement the Court would have to decide whose rights were to be protected, a question not easy to settle, in particular if party A could prove that it had acted in good faith itself. If the text and the context of the two treaties permitted an interpretation which would leave both treaties valid and would enable party A to fulfil both of them, it was hard to imagine that the Court would prefer a solution which would cause unwarranted harm to at least one of the parties. The

grounds underlying the decision of the Court or of an arbitral tribunal in a case of that sort should also guide the parties. That was the reason for the amendment submitted by the Federal Republic of Germany. It did not introduce any new ideas into matters of interpretation, but merely formulated a principle which was self-evident and was probably already used in practice by the parties to a treaty and by courts. If that rule was not incorporated in the convention, there might be misunderstanding; the rules on interpretation seemed so elaborate that they might be regarded as exhaustive. That might entail the exclusion of all means other than those mentioned in Section 3 on interpretation.

13. His delegation considered that its proposal contained nothing new of substance, but it did, nevertheless, contain a new element. The proposal might be referred to the Drafting Committee.

14. Mr. MALITI (United Republic of Tanzania) said he could not accept either of the two proposals regarding interpretation, as set out in draft articles 27 and 28 and in the United States amendment (A/CONF.39/C.1/L.156) respectively. After carefully studying the matter, the Tanzanian delegation had decided to submit an amendment (A/CONF.39/C.1/L.215) which might reconcile the two opposing views. The object of the amendment, which would delete the entire wording of article 28 after the word " conclusion ", was to impart greater flexibility to the International Law Commission's draft, so that recourse could also be had to " the preparatory work of the treaty and the circumstances of its conclusion ". The Tanzanian delegation had thought it preferable for the wording in question to be submitted as a separate article so as to make it clear that whereas article 27 stated the primary sources of evidence, the rule contained in article 28 dealt with supplementary means of interpretation. Recourse without restriction could thus be had to the preparatory work of the treaty and the circumstances of its conclusion, although primary importance should be given to the meaning derived from the application of article 27.

15. Consequently, the Tanzanian delegation could not accept the United States proposal, which would attribute equal importance to all the means of interpretation it listed.

16. He did not share the view of those delegations which had questioned the purpose and necessity of codifying international rules regarding the interpretation of a treaty. The fact that no amendment had been submitted proposing the deletion of articles 27, 28 and 29 suggested that even those delegations were not absolutely convinced that the interpretation rules should not be codified.

17. The divergence of opinion between the respective supporters of the International Law Commission's draft and the United States amendment turned on the question whether or not the preparatory work of the treaty and the circumstances of its conclusion were as important as the means of interpretation specified in article 27. In that respect his delegation agreed with the statement in paragraph (10) of the commentary on article 27 and 28: " Moreover, it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation ".

18. It might also be asked what was meant by " preparatory work ". The proceedings of the Conference were preserved in the form of summary records and were widely circulated, but there were also confidential communications exchanged between Governments before the Conference and negotiations between the various regional groups, as well as conversations at receptions on issues discussed in the Conference. Were those discussions part of the preparatory work just as much as the official documents of committees? At what stage of negotiations could the preparatory work be said to reflect the intention of the parties? The Committee should therefore be extremely cautious in dealing with preparatory work. The preparatory work of the treaty and the circumstances of its conclusion could only play a secondary part in interpretation.

19. The International Law Commission had pointed out in paragraph (10) of its commentary that the provisions of article 28 did not have the effect of drawing a rigid line between the different means of interpretation. The latter part of the article could therefore be deleted without loss, leaving the text clearer and capable of a more realistic application.

20. Mr. NAHLIK (Poland) said that, had it not been for the objections raised against articles 27 and 28, in particular in connexion with the United States amendment, those articles could have been adopted without much discussion, as their wording was extremely clear and convincing. He would like to submit four observations in that respect.

21. Firstly, the International Law Commission had been accused of having been too " conservative " in its treatment of the subject, by paying too much attention to the text of the treaty. It was true that, in its commentary, the International Law Commission, while noting the existence of three main approaches to interpretation— " textual ", " intentional " and " functional "— affirmed its preference for the first of those approaches and stressed the paramount importance of the text for the interpretation of treaties. Nevertheless, in many of the draft articles, the Commission had shown great concern for the intentions—both explicit and implicit—of the parties. Moreover it had expressly mentioned the object and purpose of the treaty in article 27. Accordingly, the Commission excluded neither the approach based on the intentions of the parties, nor the functional approach; it merely attributed prime importance to the study of the text.

22. Secondly, the alleged opposition between those three approaches was largely artificial. As had been pointed out by Professors Fenwick and Verdross, among many other authorities, the intention of the parties was to be gathered, above all, from the text of the treaty. That seemed indeed to be a question of common sense. There was no proof more direct and more authentic of the intentions of the parties than the text they drew up together to embody those very intentions.

23. Thirdly, although the so-called Vattel principle, according to which what was clear required no interpretation, had been referred to as " obscurantist tautology ", it had nevertheless been approved by eminent

authors such as Guggenheim and Rousseau, and confirmed on many occasions by national and international courts; to quote but one such pronouncement, it had been confirmed by the International Court of Justice in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations.*[5] Of course, the same word might have several meanings, but that was true of certain words only. Moreover, among different meanings of a word, there was usually one which could be considered as its " ordinary " or " natural " meaning. It was common sense again to assume that that was probably the one that the parties had adopted. And that was what the International Law Commission proposed. However, a special meaning might be given to a term, in accordance with the intention of the parties. As that would be an exception to the rule, it would need to be proved.

24. Fourthly, referring to the criticism that the International Law Commission had not attached sufficient importance, as means of interpretation, to the circumstances in which the treaty had been concluded, especially to the preparatory work, he recalled that both the Permanent Court of International Justice and the International Court of Justice had on many occasions, such as the *Lotus* case,[6] or the *Jurisdiction of the European Commission of the Danube* case,[7] displayed great caution in that respect. Most authors also limited the possibility of having recourse to historical interpretation to certain cases only, for example for interpreting " controversial provisions ", (Oppenheim, ed. Lauterpacht) or to " *traités-contrats* " only but not to " *traités-lois* " (Rousseau). Guggenheim had pointed out how divergent and subjective historical arguments could be, while Lord McNair had asked the plain question " Once you start on this line of inquiry, where are you going to stop ? " Finally, the following two objections against excessive emphasis on " historical " interpretation could be made: firstly, although the historical elements surrounding the conclusion of important treaties such as the Treaty of Versailles or the United Nations Charter were well known, in the case of agreements of minor importance the historical elements were neither well known nor easily accessible; secondly, in view of the modern practice of acceding to multilateral treaties, it was not fair to States which had acceded to a given text if they could run the risk of being confronted at any time with the history of the drawing up of the treaty in which they had had no part. Accordingly, without entirely neglecting the historical elements of interpretation the International Law Commission had rightly considered them as auxiliary means of interpretation.

25. Lastly, he found it hard to understand how a classification of means of interpretation which placed the main emphasis on the text of treaties could be considered to endanger the treaty relations between States. The text was the most stable and permanent element of a treaty. Consequently, emphasis on the value of the text could strengthen the stability and permanency of treaty relations. What would endanger them would be precisely to depart from the text in which the parties had expressed their intentions.

26. His delegation firmly supported the substance of the text of the two articles drafted by the International Law Commission. Perhaps some minor drafting changes could be made, but that should be left to the Drafting Committee, to which some of the amendments submitted could be referred.

27. Mr. COLE (Sierra Leone) said his view was that, despite the difficulty of the question of the interpretation of treaties, the convention should contain provisions likely to facilitate the task of the authorities that had to interpret treaties. He was glad, therefore, that the deletion of articles 27 and 28 had not been requested.

28. His delegation fully supported the text prepared by the International Law Commission, for its provisions were simple, realistic and non-controversial. Anything that might have been left out in article 27 was covered by article 28, which did not appear to be restrictive.

29. He merely wished to make two suggestions for submission to the Drafting Committee. The first concerned the word " agreement " used in sub-paragraphs 2(*a*) and 3(*a*) of article 27 which, according to paragraphs (13) and (14) of the International Law Commission's commentary, meant an agreement in writing. Perhaps it would be better to say so explicitly in the text of the article. The second suggestion was in connexion with paragraph (17) of the commentary, which stated that the purpose of paragraph 4 of article 27 was to emphasize that the burden of proof lay on the party invoking the special meaning of the term. His delegation would very much like to see that point embodied in the text of the article, by way of clarification.

30. It was in the light of those considerations that his delegation would vote on the amendments affecting the substance of articles 27 and 28.

31. Mr. MARTINEZ CARO (Spain) said that the Spanish representative in the Sixth Committee of the General Assembly had already emphasized the pre-eminence of the text of the treaty as an objective expression of the will of the parties in preference to any subjective reconstruction of their intentions from the preparatory work.[8]

32. Authoritative opinion had nevertheless criticized the excessive rigidity of the International Law Commission's draft on the ground that it sought to interpret words in accordance with dictionary definitions, which might conflict with the will of the parties. It also happened that the parties adopted a meaning other than the ordinary meaning; that frequently occurred, and provision should be made for that eventuality. Moreover, when the parties were members of the same system of law, a term, although it might have a special meaning for third parties would have an ordinary meaning for the parties concerned and not a special meaning in the sense of paragraph 4 of article 27.

33. The substance of the problem lay in a proper appreciation of the rule stated in article 27, paragraph 1, to which the first Spanish amendment (A/CONF.39/C.1/L.216) related. The general aim of the amendment was, if possible, to reconcile the opposing views of the respective supporters of the pre-eminence of the text and the

[5] *I.C.J. Reports, 1950.*

[6] *P.C.I.J.* (1927), Series A, No. 10.

[7] *P.C.I.J.* (1927), Series B, No. 14.

[8] *Official Records of the General Assembly, Twenty-first Session, Sixth Committee,* 912th meeting, para. 38.

intention of the parties by clarifying the significance of the expression " ordinary meaning ", since it was the text which should initially be taken as the basis for determining the ordinary meaning given to a term in relations between the parties. It was a question not of looking to the special intentions of the parties, but to their common intentions. The purpose of the Spanish amendment was thus threefold: to introduce an element of relativity essential in the law of treaties, to include a moderate subjective element, namely the common intention of the parties, and to mitigate the severity of article 27 otherwise than in the exceptional circumstances covered by paragraph 4. The interpreter should work from the elements constituting the legal world which the treaty represented.

34. It could be objected that the expressions " ordinary meaning " and " between the parties " contradicted each other. The Spanish delegation had decided to retain the word " ordinary " for practical reasons. Parties usually employed terms in the meaning which was " ordinary " at the time when the treaty was drawn up. If that was not so, and a given term had another meaning, either ordinary or special, between the parties, then that meaning should prevail. In any case, the matter could be referred to the Drafting Committee for consideration.

35. With regard to his delegation's amendment to article 28 (A/CONF.39/C.1/L.217), he pointed out that although the reference to subsequent acts of the parties lengthened the list of supplementary means, it was nevertheless necessary. Those acts were covered neither by article 27, paragraph 3, nor indeed by article 38, since they did not necessarily constitute an " agreement " of the parties. The replacement of the word " confirm " by " supplement " reflected more accurately the role of the means of interpretation contemplated in article 28.

36. He inquired whether the word " instrument " in the amendment by Ceylon (A/CONF.39/C.1/L.212) could include the resolutions of competent organs of an organization.

37. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation attached great importance to the problem of interpretation of treaties. Proper interpretation was essential for the proper performance of a treaty, and would strengthen the *pacta sunt servanda* rule, which was essential in international law.

38. The object of interpretation was to establish the common intentions of the parties, as expressed in the common purpose of the treaty. That consideration justified the amendment by the Ukrainian SSR (A/CONF.39/C.1/L.201).

39. The text of the treaty was the main source of those intentions because it fixed in words the common intentions on which the parties had agreed. The International Law Commission had therefore been right to stress the importance of the context, including the preamble, the annexes and the other instruments relating to the treaty, and to separate them, as the main factor in interpretation, from the supplementary means described in article 28.

40. The United States amendment completely upset the system adopted by the International Law Commission. The single-article solution minimized the role of the text by presenting it as merely one factor amongst others. The proposal was politically dangerous, in that it would permit an arbitary interpretation divorced from the text and capable of altering its meaning, which was only possible if the change was the subject of agreement between the parties.

41. Amendments such as that submitted by the United States departed from the pattern proposed by the International Law Commission by reflecting the special interests of States participating in the Conference. The purpose of the International Law Commission's strict formulation was to avoid unilateral interpretation by States and to bring out their common intention.

42. The expression " interpreted in good faith in accordance with the ordinary meaning " had been criticized on the ground that words might have more than one meaning, but as the Polish representative had said, that was the case with only a minority of words. That minority was covered by article 27, paragraph 4. Of course, an agreement might not always be clear; in that case, the International Law Commission's draft authorized recourse to supplementary means of interpretation.

43. The Soviet Union delegation could not support the United States amendment, which aimed at sanctioning a system which would permit the arbitrary and unilateral interpretation, and consequently also application, of a treaty. The Commission's draft, on the other hand, met the requirements of contemporary international relations. The amendments submitted by the Ukrainian SSR, Pakistan, Greece, Romania and Australia (A/CONF.39/C.1/L.201, L.182, L.213, L.203 and L. 210) might improve the wording. That was unfortunately not so with the amendment submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.214), because it would enable States which were not parties to a treaty to intervene in its interpretation.

44. Mr. DE BRESSON (France) said that articles 27 and 28 had rightly been included in the draft convention. Compared with the provisions dealing with the entry into force and the termination of treaties, those dealing with application were already far from numerous. It would therefore be regrettable if the provisions on the method of interpreting international agreements were deleted.

45. Articles 27 and 28 were a thorny matter, inasmuch as they could be regarded as reflecting the doctrinal conflict between those who advocated giving preference to the letter of a treaty and those who held that the intention of the parties should predominate. The proposed new articles did not seem, however, wholly to justify that way of viewing the matter.

46. Throughout the provisions of articles 27 and 28 there was an underlying recognition of the intention of the parties as the foundation for the interpretation of treaties. The authors of the draft had nevertheless believed that the intention should be sought in the first place in the instruments made jointly by the parties, which alone could lead to an objective interpretation, and only thereafter in the more subjective elements comprising, in particular, the preparatory work and the circumstances in which the agreement had been concluded.

47. The French delegation remained firmly of the opinion that the best way to ascertain the intention of the parties to a treaty was primarily to examine the text in which they had determined to express and record their agreement. What would be the use of negotiators devoting

months, even years, to preparing a text and weighing every expression in it, if, finally, the meaning of the terms adopted could be challenged at the first opportunity? In that particular case logic and legal stability were on common ground. It was much less hazardous and much more equitable when ascertaining the intention of the parties to rely on what they had agreed in writing, rather than to seek outside the text elements of intent which were far more unreliable, scattered as they were through incomplete or unilateral documents. Care should be taken not to give preference to the ulterior motives of the negotiators over the ideas they had decided to express and formally to record.

48. The reference in article 27, paragraph 1 to the " ordinary meaning " of the terms used was an entirely satisfactory solution. It covered both the usual dictionary meaning of words and the special meaning that words might acquire in the context of a given convention, the object of which might require recourse to a specific use of terms.

49. The French delegation maintained therefore that in interpreting a treaty the ordinary meaning of the text should be preferred. It believed that it would be equally legitimate to have recourse in the first place for enlightenment on the text to the agreements made when a treaty was concluded or to any formal or implied agreements between the parties during the interpretation or application of a treaty. If, despite such precautions, any doubt lingered about the meaning of a provision in a treaty, it would then be quite natural to have recourse to the preparatory work and the circumstances of the conclusion of a treaty, as provided in article 28.

50. His delegation was therefore in favour of the text proposed by the International Law Commission, as it found it the most reasonable, the soundest and the most suited to an objective attempt to ascertain the joint intention of the parties. It could not support the amendments submitted by the United States of America (A/CONF.39/C.1/L.156), the Philippines (A/CONF.39/C.1/L.174) and the Republic of Viet-Nam (A/CONF.39/C.1/L.199) in so far as they were intended to remove a certain hierarchy in the means of interpretation which the French delegation considered necessary. On the other hand, it was in favour of the amendments submitted by Pakistan (A/CONF.39/C.1/L.182), the Ukrainian SSR (A/CONF.39/C.1/L.201), Romania (A/CONF.39/C.1/L.203) and Australia (A/CONF.39/C.1/L.210), which had the merit of clarifying the Commission's text. His delegation had not yet had time to consider the amendments which had just been circulated.

51. Some objections to articles 27 and 28 would perhaps be lessened if they had not been given titles which accentuated the difficulties raised by the articles. He reserved the right to revert to the general problem of titles of the various draft articles.

52. Mr. AMADO (Brazil) reminded the Committee that Vattel himself had laid it down that the terms should be interpreted in accordance with the meaning attributed to them when the treaty was concluded. The meaning of the text or, in other words, the ordinary meaning to be attributed to the terms of a treaty in their context was, therefore, the starting point for interpretation. The Brazilian delegation fully shared that view, which was also that held by the International Law Commission. The Commission, having very carefully considered all the aspects of interpretation and having reviewed older and more modern formulations, had endeavoured to make the notion of context more specific, as article 27, paragraph 2 testified.

53. The other means of interpretation referred to in article 28 should be called " *supplémentaires* " rather than " *complémentaires* ". Although the preparatory work must undoubtedly be borne in mind, the utmost caution was necessary. States sometimes concealed their real views on the questions under discussion at conferences or resorted to friendly States to express them. A certain degree of confusion was thereby created, and gave rise to mistrust.

54. The Brazilian delegation was in favour of the International Law Commission's draft. It could not accept the amendments submitted by the United States of America (A/CONF.39/C.1/L.156) and the Federal Republic of Germany (A/CONF.39/C.1/L.214). On the other hand, it supported the amendments submitted by Australia (A/CONF.39/C.1/L.210), Pakistan (A/CONF.39/C.1/L.182), the Ukrainian SSR (A/CONF.39/C.1/L.201) and Romania (A/CONF.39/C.1/L.203), which made the Commission's text clearer.

55. Mr. STREZOV (Bulgaria) said he approved of the substance of articles 27 and 28 of the International Law Commission's draft. In his opinion, article 27 set out satisfactorily the general legal rules observed by Ministries of Foreign Affairs in interpreting international treaties. In a convention on the law of treaties, the practice of Ministries of Foreign Affairs was more important than the views of the various schools of thought. Moreover, the solution adopted by the International Law Commission took international precedents into account.

56. He also approved of the logical reasoning by which the International Law Commission had been guided in setting out the means of interpreting a treaty. It was undeniable that the real intention of the parties should be sought in the first place in the text of the treaty itself. It was only when the general rules set out in article 27 did not make it possible to give a clear and reasonable meaning to a clause in a treaty or to a treaty as a whole that recourse should be had to the supplementary means of interpretation mentioned in article 28.

57. With regard to the drafting, he supported the amendments by Romania (A/CONF.39/C.1/L.203) and the Ukrainian SSR (A/CONF.39/C.1/L.201), which made the International Law Commission's text clearer. On the other hand, he could not support the amendments submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.199) and the United States of America (A/CONF.39/C.1/L.156), to combine articles 27 and 28 in a single article.

58. Mr. MARESCA (Italy) observed that an agreement was the meeting of the wills of the parties. To grasp the meaning of a treaty and to measure its scope was to grasp the intentions of the parties and measure their scope. It was the text of the treaty which disclosed the intention of the parties. Of course, it was the meaning and not the letter that should be taken into consideration. It sometimes happened, however, that the text did not

disclose the deeper intention of the parties in any precise manner. Recourse should then be had to all the means of interpretation listed in the Commission's draft articles 27 and 28. No hierarchy should be established as between those means. The preparatory work and the circumstances in which a treaty had been concluded should not be regarded as subsidiary means of interpretation. The Italian delegation was therefore in favour of combining articles 27 and 28 in a single article. It would support the amendments to article 28, if that article was not combined with article 27.

The meeting rose at 12.55 p.m.

THIRTY-THIRD MEETING

Monday, 22 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 27 (General rule of interpretation) and

Article 28 (Supplementary means of interpretation) *(continued)*

1. THE CHAIRMAN invited the Committee to continue its consideration of articles 27 and 28 of the International Law Commission's draft. [1]

2. Mr. SINCLAIR (United Kingdom) said he wished to analyse some of the arguments advanced by the United States representative during the Committee's 31st meeting [2] when introducing his delegation's amendment (A/CONF.39/C.1/L.156) to articles 27 and 28. A particular reason for subjecting those articles to careful examination was that the statements made in the debate would constitute part of the preparatory work of the forthcoming convention on the law of treaties.

3. The most important issue raised in connexion with the subject of treaty interpretation was that of the primary aim of treaty interpretation. It was often asserted that it was to ascertain the common intention of the parties, independently of the text. That view had been subjected to fierce criticism in the debate on treaty interpretation in the Institute of International Law in the early 1950s and had ultimately been decisively rejected by the Institute. Parts of the United States representative's statement had seemed to be directed towards reviving the doctrine thus rejected.

4. The United Kingdom delegation did not consider that there was any undue rigidity in ascribing paramount importance to the principle of textuality in treaty interpretation. As had already been pointed out by the representative of Uruguay, the dangers of the alternative doctrine had been persuasively presented by Sir Eric Beckett at the Institute of International Law when he had stated that there was a complete unreality in the references to the supposed intention of the legislature in the interpretation of the statute when in fact it was almost certain that the point which had arisen was one which the legislature had never thought of at all; that was even more so in the case of the interpretation of treaties. As a matter of experience it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had had absolutely no common intention with regard to it. In other cases the parties might all along have had divergent intentions with regard to the actual question which was in dispute; each party had deliberately refrained from raising the matter, possibly hoping that that point would not arise in practice, or possibly expecting that if it did, the text which was agreed would produce the result which it desired. [3]

5. The United Kingdom delegation upheld the view expressed in the resolution adopted on the subject by the Institute of International Law in 1956, according to which, when agreement had been reached between the parties on the text of the treaty, the natural and ordinary meaning of the terms of the treaty should be taken as the basis for interpretation; the terms of the provisions of the treaty should be interpreted in the context as a whole, in good faith, and in the light of the principles of international law. [4]

6. As the International Law Commission stated in paragraph (11) of its commentary to the articles, the starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. Moreover, in the case of many important multilateral conventions, some of the parties might have joined by subsequent accession, particularly in the case of new States which had not been in a position to participate in preparing the original instruments. It was hardly possible to interpret the rights and obligations of those acceding States in the light of the supposed common intention of the original drafters; it was wiser and more equitable to assume that the text represented the common intentions of the original authors and that the primary goal of interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors.

7. With regard to the criticisms levelled against the phrase " ordinary meaning ", the words obviously could not be viewed in isolation; it was inconceivable that the International Law Commission had intended that interpreters of treaties should arbitrarily select dictionary meanings when construing treaty texts. Paragraph 1 of article 27 referred to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and paragraph (12) of the commentary clearly indicated the sense in which the term " ordinary meaning " was used. The Commission presumably also had in mind the need to differentiate between the ordinary meaning of a treaty provision and any special meaning which might be established in accordance with paragraph 4 of the article. In any case, the concept

[1] For a list of the amendments submitted to articles 27 and 28, see 31st meeting, footnote 9.

[2] Paras. 38-50.

[3] See *Annuaire de l'Institut de droit international*, vol. 43 (1950), tome I, p. 438.

[4] *Op. cit.*, vol. 46, (1956), p. 349.

of " ordinary meaning " seemed to have afforded no undue disquiet to international or national judges, a point which the Polish representative had illustrated with reference to decisions of the International Court of Justice and the Permanent Court of International Justice. Even in the United States, the Supreme Court had, as recently as 1963, considered an issue relating to the interpretation of the 1945 Income Tax Convention between the United States and the United Kingdom in the case of *Maximov v. United States*. In giving judgement, the then Justice Goldberg had stated that the plain language of the convention did not afford any support to the petitioner's argument, and that there was no indication that application of the words of the treaty according to their obvious meaning effected a result inconsistent with the intent or expectations of its signatories. [5]

8. Part of the purpose of the United States amendment seemed to be to place preparatory work on a parity with other means of interpretation, and the United States representative had argued that article 28 imposed on the use of preparatory work restrictions which were inconsistent with established practice. The United Kingdom delegation considered that recourse to the preparatory work of a treaty as a guide to interpretation should always be undertaken with caution. In the first place, preparatory work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiation, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation. If preparatory work were to be placed on equal footing with the text of the treaty itself, there would be no end to debate at international conferences.

9. The International Law Commission had established a delicate balance in the value to be attached to preparatory work. Interpreters of treaties usually had recourse to that work to see what guidance it could afford, but the Conference was seeking not to describe the process of interpretation, but to distil the common rules which resulted from the process. In making that vital distinction, the Commission had undoubtedly not sought to deny the usefulness of preparatory work as a guide, but had simply wished to recognize that the evidentiary value of preparatory work was less than that of the text of the treaty itself.

10. Finally, if greater significance were attributed to preparatory work than in the Commission's text of article 28, a greater degree of risk would be created for new States wishing to accede to treaties in the drafting of which they had taken no part. The text of the treaty was what those new States had before them when deciding whether or not to accede; if more weight were attached to preparatory work in the rules of treaty interpretation, new States would be obliged to undertake a thorough analysis of the preparatory work before acceding to treaties, and even a thorough analysis was likely to give them limited enlightenment on the intentions of the parties. The United Kingdom delegation, therefore, could not support the United States proposal because, although the new text placed primary emphasis on the text of the treaty, it gave equal weight to a series of factors of greater or lesser significance in treaty interpretation and was likely to open the door to a never-ending stream of inquiry for would-be interpreters, and to encourage unnecessary disputes. The Commission's text corresponded much more precisely to the rules accepted and applied by international tribunals and in State practice. In principle his delegation would have no overriding objection to an amalgamation of the two articles, provided the proper balance between the general rule and the supplementary means of interpretation was preserved.

11. For similar reasons, his delegation could not support the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199) or the Philippine amendment (A/CONF.39/C.1/L.174) because the context of a treaty covered more than the text, preamble and annexes. The amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.214) would have to be considered carefully in relation to article 26. The United Kingdom delegation agreed with the comments of the Tanzanian representative in connexion with his delegation's amendment (A/CONF.39/C.1/L.215), on the value to be attributed to preparatory work, but thought it might be unwise to remove the qualifications in article 28 entirely. The remaining amendments would no doubt be referred to the Drafting Committee.

12. Mr. ZEMANEK (Austria) said the debate had shown that there were two distinct approaches to the problem of treaty interpretation. According to one, the will of the parties was exhaustively expressed by the text of a treaty and could therefore be ascertained exclusively from it, and according to the other, the text of a treaty was only one element in ascertaining the intention of the parties. Those two approaches could not be reconciled at the theoretical level, but in any case such reconciliation was not the task of the Conference: its aim should be to adopt a workable rule of positive law commanding the widest possible support. Neither the International Law Commission nor a majority of delegations to the Conference could purport to teach governments to alter their traditional positions. The Committee should therefore adopt a flexible text which, while it might not completely satisfy the advocates of either theory, would be at least acceptable to both. In the contrary event, if a substantial minority opposed the text finally adopted, reservations might be expected to the provisions, or at worst, the Conference would end by having no clause on interpretation at all.

13. The Austrian delegation believed that the necessary flexibility might be achieved by enhancing the role of preparatory work. Preparatory work was the key to the problem, for a number of reasons. In the Committee's own work, for example, no fewer than nine articles provisionally approved by the Committee contained such phrases as " it appears from the circumstances... " or " a different intention is otherwise established... ". In paragraph (3) of its commentary to article 10, the International Law Commission, referring to paragraph 1(*b*) of that article, stated that " in this case it is simply a question of demonstrating the intention from the evidence "; such demonstration seemed to be impossible

[5] *United States Reports*, vol. 373, pp. 52 and 54.

without recourse to the preparatory work of the treaty.

14. The problem also arose in paragraph 4 of article 27, which provided that a special meaning should be given to a term if it was established that the parties so intended. With the exception of the cases where, according to the commentary, the technical or special use of a term appeared from the context, the intention of the parties could only be ascertained by recourse to the preparatory work; and yet, according to the Commission's wording of article 28, the preparatory work would not be considered in such a case, because it met none of the requirements stipulated in the article. First, the search was evidently not intended to confirm the meaning resulting from the application of article 27, because the intention of the parties to use the term in its technical sense might not be apparent before the preparatory work was examined. Secondly, the interpretation according to article 27 would neither leave the meaning ambiguous or obscure nor lead to a result which was manifestly absurd or unreasonable. On the other hand, if the ordinary meaning of the term, instead of its technical meaning, were used for interpretation, the results might not correspond to the true intention of the parties.

15. The Austrian delegation considered that such eventualities should be avoided, either by amending the Commission's text along the lines set out in the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199), which took preparatory work into account together with the context, or by formulating article 28 more flexibly, as proposed in the Tanzanian amendment (A/CONF.39/C.1/L.215).

16. Mr. NYAMDO (Mongolia) said that, in considering articles 27 and 28, the Committee must first decide whether each State should interpret treaties according to its own lights, or whether it should decide on a firm general rule on treaty interpretation. The Mongolian delegation was in favour of the latter solution. The International Law Commission had prepared a sound and well-balanced text of a uniform general rule based on the text of the treaty, as against extrinsic proof of intention as the fundamental means of interpretation.

17. In his delegation's opinion, any diminution of the importance of the text as a basis for interpretation would tend to undermine the stability of treaty relations. The meaning of a treaty must not be the meaning ascribed to it by just one of the parties; interpretation must be based on the intention common to all the parties as expressed in the text of the treaty itself. Accordingly, his delegation did not believe that the United States amendment (A/CONF.39/C.1/L.156) improved the Commission's text in structure or in substance. On the other hand, the amendment by the Ukrainian SSR (A/CONF.39/C.1/L.201) deserved careful attention, as did the Romanian drafting amendment (A/CONF.39/C.1/L.203.). Those and some of the other drafting amendments could be referred to the Drafting Committee.

18. Mr. EEK (Sweden) said that, in view of the wide variety of opinions expressed on treaty interpretation in legal literature and of the fact that no uniform State practice had yet developed in the matter, an authoritative formulation of rules on treaty interpretation had become vital in order to safeguard stability in treaty relations. Codification would obviously not have sufficed, and the International Law Commission had recognized that fact in choosing the method of formulating rules leading to a higher degree of certainty. The Swedish delegation fully endorsed that approach, which involved the progressive development of a part of the law of treaties which was as yet obscure.

19. The Commission had had to make a second choice between the textual approach, which it had ultimately adopted, and the subjective approach whereby the ordinary meaning to be given to the terms of a treaty could be set aside if it was clearly established that there was a conflict between the terms and the proven common intentions of the contracting parties. A number of representatives had referred to the shortcomings of the latter approach. Whereas the textual approach did not entail the same dangers, it had the drawback, or hardship, that it required representatives of States drafting the text of a treaty to consider all the implications of a subsequent textual approach to interpretation in the event of dispute; it called for energetic efforts to achieve the utmost clarity and completeness in formulating the text of a treaty. But that hard work seemed to be a reasonable price to pay for achieving the maximum certainty and a solid foundation for the expectations of each party with respect to the conduct of the others in the future and to the outcome of litigation in the event of a dispute.

20. The Swedish delegation considered that the Commission's texts of articles 27 and 28 should not lightly be set aside. Although article 27 favoured the textual approach while also giving considerable weight to the object and purpose of the treaty, article 28 gave wider scope than the opponents of the draft were prepared to admit for the use of all supplementary means of interpretation, including preparatory work. The Swedish delegation saw considerable danger in such proposals as that of the United States, and would be unable to support them.

21. Mr. RUDA (Argentina) said that the question which arose in connexion with Part III of the draft convention was whether it was desirable to include rules on treaty interpretation. There were many indications that the International Law Commission had been right to try to establish such rules, despite the divergent practice in the matter. First, there was a considerable volume of case-law on treaty interpretation, particularly in the International Court of Justice, which had come to some clear and decisive conclusions. Secondly, the existence of a general rule in the convention would have the effect of reaffirming the principle *pacta sunt servanda*, which was the fundamental basis of the law of treaties. Thirdly, in the absence of standards on interpretation, States could choose their own particular means of interpretation in order to evade their obligations in the performance of a treaty. The existence of Part III of the convention would help to stabilize treaty relations, as the members of the Committee seemed to realize, for no one had suggested the deletion of articles 27 and 28.

22. On those general assumptions, the second problem that arose was that of the basic criterion of treaty interpretation. In paragraph (2) of the commentary, the Commission listed three possible approaches, which might be described as the textual, subjective and functional approaches. The Argentine delegation was in favour of the textual approach, based on the thesis that the starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions

of the parties. That view was based not only on the Commission's deliberations, or even on logic, but on the support it found in a large body of doctrine and in decisions of the International Court of Justice. Thus, at the Granada session of the Institute of International Law in 1956, that method of interpretation had been adopted by 35 votes to none, with 6 abstentions. The trend of contemporary doctrine, according to which the text should be the point of departure, was also supported by decisions of the International Court of Justice: in its Advisory Opinion of May 1948 on Conditions of Admission of a State to Membership in the United Nations,[6] the Court had stated that it regarded the text as sufficiently clear, and consequently did not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there was no occasion to resort to preparatory work if the text of a convention was sufficiently clear in itself. The Court had repeated that opinion in the *Ambatielos* case [7] in 1952.

23. The International Law Commission had followed that doctrine in drafting paragraph 1 of article 27, which comprised the principles of interpretation in good faith, in accordance with the ordinary meaning of the terms of the treaty; it made it clear that the intention of the parties should be embodied in the terms of the treaty, and should be interpreted not *in abstracto*, but in the context, with due consideration for the object and purpose of the treaty. In view of the variety of possible circumstances, the Commission had not adopted a rigid approach; the provisions of article 27 constituted a single rule, as was indicated by the title of the article, and although the paragraphs were placed in logical sequence, they did not indicate any hierarchy, as was clear from the introductory sentences to paragraphs 2 and 3. Paragraph 2 listed the intrinsic means of interpretation, and paragraph 3 the extrinsic means, but there was no question of any adverse reflection on the use of the latter. Furthermore, sub-paragraph 3(*b*) related to subsequent practice, qualified by the phrase " which establishes the understanding of the parties regarding its interpretation "; it was important that the practice should be established, and should not be just any action arbitrarily taken by the parties. Accordingly, his delegation considered that the Commission's text of article 27 solved some difficult legal problems and was flexible enough to become a most useful instrument of treaty interpretation.

24. The Argentine delegation was in favour of separating the general rule of interpretation and the supplementary means of interpretation, since to place preparatory work and analysis of the circumstances of the conclusion of a treaty on a higher level would destroy the very basis of the draft, which was the presumption that the text of the treaty was the authentic expression of the intentions of the parties. Recourse to means of interpretation not listed in article 27 should be permitted only in the case mentioned in article 28, particularly where preparatory work was concerned.

25. The value of preparatory work was undeniable, and it should play its proper part among the supplementary means of interpretation, but in view of the difficulties of ascertaining intentions before a treaty had been signed, preparatory work should be used with great caution, as Sir Eric Beckett had pointed out in the Institute of International Law: if recourse to preparatory work in interpretation were made too easy, States might invoke preparatory work to prove their arguments in support of any thesis. That applied *a fortiori* to the circumstances surrounding the conclusion of a treaty. In view of all those considerations, the Argentine delegation supported the Commission's text, and could not vote for the United States amendment (A/CONF.39/C.1/L.156), which would certainly not make for certainty and clarity in the complex process of treaty interpretation.

26. Mr. RUEGGER (Switzerland) said that generally speaking he was in favour of the International Law Commission's text, but had doubts as to whether the distinction it had drawn between a general rule and supplementary means of interpretation was justified. Although the text itself was, of course, of prime importance, it would not always be easy for an arbitrator or judge to establish from the text alone the common intention of the parties, a difficulty to which Judge Huber had drawn attention. Moreover, the constitutional bodies which had to establish that intention would also have to examine the text.

27. He had some sympathy for the United States amendment (A/CONF.39/C.1/L.156), which would make for flexibility, and was in favour of any proposal that did not seek to establish a hierarchy in the methods of interpretation. Articles 27 and 28 should contain an enumeration of means of interpretation but not an exhaustive one.

28. The fact should also be borne in mind that articles 27 and 28, if adopted, would have some effect on the application of Article 38 of the Statute of the International Court of Justice which had functioned well and had allowed the necessary margin of flexibility.

29. Mr. MWENDWA (Kenya) said that the International Law Commission had been right in giving pride of place to the textual approach, since it would lead to certainty in treaty relations. The difficulty of establishing the intention of parties was due to the fact that it would require extensive recourse to preparatory work, whereas the records of negotiations leading up to the conclusion of a treaty were often incomplete or inconclusive and some decisions were arrived at informally without being recorded in writing at all. Unless clear rules were laid down in articles 27 and 28, the principle of *pacta sunt servanda* would be jeopardized. The Commission's draft satisfactorily covered both major treaties and most international agreements within the definition established in the draft convention.

30. The words " any agreement relating to the treaty which was made between all the parties " in paragraph 2(*a*) and the words " any instrument " in paragraph 2(*b*) suggested that only written documents drawn up in connexion with the treaty should be taken into account for purposes of interpretation.

31. The United States amendment was not acceptable because it opened the way for the party with the greatest powers of persuasion to impose its interpretation on the other parties. The Pakistan amendment (A/CONF.39/C.1/L.182) was unnecessary. The amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199) was not acceptable because it rejected the priorities established

[6] *I.C.J. Reports 1948*, p. 63.

[7] *I.C.J. Reports 1952*, p. 28.

by the Commission. The Romanian amendment (A/CONF.39/C.1/L.203) would lead to difficulties in determining what was relevant. The Greek amendment (A/CONF.39/C.1/L.213) was unnecessary and the Spanish amendment (A./CONF.39/C.1/L.216) would make the process of interpretation altogether too subjective. The amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.214) was not necessary. He did not agree with the proposal to merge articles 27 and 28 into one article.

32. The Commission's draft had rightly laid great emphasis on good faith, the absence of which had contributed to the absurd decision in the *South-West Africa* case.

33. Mr. BRODERICK (Liberia) said that, although views differed on the rules of interpretation, certain general principles, without being dogmatic, were recognized by jurists and courts on both the internal and the international planes. They served as guidelines in ascertaining the meaning of expressions used in a treaty, but only where a general principle was appropriate in a particular case could it be applied. The first thing to be established was the will of the parties, assuming that the treaty had been entered into in good faith, and the text was the most authentic expression of that intention and should be given priority. Only when the text failed to indicate the intention should resort be had to extrinsic matters.

34. In principle, his delegation endorsed the texts submitted by the International Law Commission. If the two articles were combined, that would not materially affect their substance.

35. Mr. OGUNDERE (Nigeria) said that the interpretation of a treaty involved a logical process that had to be taken step by step, with good faith as the starting point, as the Commission had wisely emphasized at the beginning of article 27. There were no generally accepted rules of interpretation in international law and articles 27 and 28 represented an effort to lay down certain rules which, if accepted, would simplify the work of interpretation by judicial and arbitral tribunals. The Commission had adopted a cautious approach to the use of preparatory work and had achieved a careful balance between the common law and continental systems. It did not exclude preparatory work and placed the correct emphasis on the text of the preparatory work as a supplementary means of ascertaining the intention of the parties in the two exceptional circumstances specified in article 28.

36. The Commission had been right to emphasize in paragraph (8) of its commentary that " the process of interpretation is a unity " founded on the primacy of intrinsic over extrinsic evidence. The former was the text of the treaty and related agreements or instruments wherein the parties, after the negotiations, gave expression to their intentions. Preparatory work was extrinsic evidence and only a supplementary source of interpretation.

37. Thus his delegation approved in principle the provisions of articles 27 and 28, subject to any drafting changes, and preferred having two separate articles. It was opposed to the amendments by the United States and by the Republic of Viet-Nam. The others, which were of a drafting character, could be referred to the Drafting Committee.

38. Mr. SUAREZ (Mexico) said that interpretation of the text of a law was often an extremely difficult task, so much so that the most learned judges of the highest municipal and international courts often failed to agree on the interpretation to be given to a text and were obliged to take decisions by a majority vote. Interpretation was inevitably subject to the human factor, and differences in the interpretation of the same text were bound to lead to disputes, many of them in good faith, and to majority decisions which could only detract from the prestige of the judiciary.

39. Faced with that difficult problem, the International Law Commission had wisely drafted provisions which concurred with the views expressed in the best legal writings and in the bulk of court decisions. It had opted for the rule that the will of the parties as declared in the text represented their authentic intention, and had thereby rejected the doctrine which would allow the interpreter to resort to any available means in a search for the actual intentions of the parties. It had abided by the old maxim of Roman law: *uti lingua nuncupassit, ita jus est.* It was only in those cases where the expression in the text of the intention of the parties was ambiguous or obscure, or where the reading of that text led to absurd or unreasonable results, that it was permissible to resort to supplementary means of interpretation of which the preparatory work and the circumstances of the conclusion of the treaty were two. Although article 28 did not say so explicitly, it was to be understood that in that case the interpreter could also make use of the rules of logic and dialectics, legal maxims and all his legal, historical and sociological knowledge.

40. Since his delegation regarded the subsidiary character of the supplementary means set forth in article 28 as a key element in the system of articles 27 and 28, it could not support the United States amendment (A/CONF.39/C.1/L.156). It would serve no useful purpose merely to enumerate, without indicating any priority, a series of means of interpretation which was necessarily incomplete, and from which the interpreter could choose whichever he preferred. Rather than adopt such a system, it would be better to delete the articles altogether, and leave interpretation completely free.

41. The provisions of paragraph 3(*b*) of article 27, on the reference for purposes of interpretation to subsequent practice in the application of the treaty were closely connected with those of article 38, on modification of treaties by subsequent practice. The Committee had before it two proposals, by Finland (A/CONF.39/C.1/L. 143) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220), to delete article 38. If those proposals were rejected, article 27 would not require any amendment. If, however, article 38 were deleted, paragraph 3(*a*) of article 27 should be amended so as to state that any subsequent practice by the parties in the application of the treaty could be taken into account for purposes of interpretation only if that practice did not openly conflict with the text of the treaty. Unless that final proviso were introduced, it would be possible to modify the treaty by the devious route of interpretation. He accordingly suggested that paragraph 3(*a*) of article 28 be reserved until the results of the discussion on article 38 were known.

42. The Mexican delegation supported the International Law Commission's text of articles 27 and 28.

43. Mr. ALVAREZ TABIO (Cuba) said he supported the Commission's text, which was well-balanced and based on the proposition that the text of the treaty was the authentic expression of the will of the parties and that the first thing to be done in interpreting it was to establish the literal meaning of the terms in the light of the general context of the treaty. The Commission suggested that the universally accepted means of interpretation should be applied in a flexible manner taking into account the circumstances of each case. The process of interpretation was a single one and the elements of a treaty had to be regarded as inseparable.

44. Article 28 rightly dealt separately with supplementary means of interpretation, which could only be resorted to if the text was not clear. He was opposed to combining the two articles in one.

45. The United States amendment (A/CONF.39/C.1/L.156) was unacceptable because it did not admit the primacy of the text and gave preparatory work equal importance with the text.

46. Mr. TÖTTERMAN (Finland) said that his delegation considered that it was in the interests both of individual States and of the international community as a whole to achieve a maximum measure of certainty in the interpretation of treaties, and it was therefore desirable to include rules on the subject in the draft convention. The weight to be given to the text, to the intention of the parties as distinct from the text, and to the object and purpose of the treaty could give rise to divergent views. The International Law Commission had succeeded in striking a balance, relying on the jurisprudence of international tribunals and taking account of the need for stability in treaty relations. Its texts reinforced the rule *pacta sunt servanda*, and would provide a valuable instrument for the interpretation and application of treaties and for their drafting.

47. The fear expressed in the discussion that the Commission's articles paid insufficient regard to the intention of the parties by establishing a distinction between general and supplementary means of interpretation and reducing the importance of preparatory work was excessive. The draft articles were based on the idea that the establishment of the common intention of the parties was the point of departure for interpretation, and it was reasonable to assume that the draftsmen of a treaty would have exercised care in giving written expression to the intention of the parties.

48. He could not support amendments which failed to maintain the distinction between general and supplementary means of interpretation and which wished to merge articles 27 and 28. He opposed the amendment of the United Republic of Tanzania (A/CONF.39/C.1/L.215), because it gave too much importance to preparatory work.

49. The Pakistan amendment (A/CONF.39/C.1/L.182) introduced a new element which might be too far-reaching in its consequences. The Australian amendment (A/CONF.39/C.1/L.210) to delete the word "subsequent" in paragraph 3(*a*) of article 27 would obscure the necessary connexion between that sub-paragraph and paragraph 2(*a*), and so would not be conducive to clarity. The insertion of the word "common" in paragraph 3(*b*) might be useful.

50. The Greek amendment (A/CONF.39/C.1/L.213) departed from current practice and opinion and his delegation could not support it. The remaining amendments were of a drafting character.

51. Mr. MIRAS (Turkey) said that the Commission's articles contained progressive rules. The Commission had not sought to deal with all hypotheses in the controversial problem of interpretation and had confined itself to formulating certain fundamental principles which might be regarded as rules of international law. In its comments on what had previously been articles 69, 70 and 71, his Government had expressed approval of the Commission's text. [8]

52. The rules of interpretation must be based on the principle of good faith. The text of the treaty had to be regarded as the final expression of the intention of the parties, the text being read in the ordinary meaning of words. If the text of the treaty was ambiguous or obscure, then resort must be had to the preparatory work.

53. Mr. MYSLIL (Czechoslovakia) said that, in the draft adopted by the International Law Commission in 1964, [9] the provision now appearing in paragraph 3(*c*) had formed part of the basic rule expressed in paragraph 1 of the article. In the opinion of his delegation, that important provision belonged in the basic rule and its transfer to paragraph 3 had not been convincingly justified. The application of the rules of international law in the process of interpretation should not be made dependent on the will of the parties. It must be assumed that the parties could not have intended to violate such fundamental rules of international law as the sovereignty of States. He would therefore urge that the provision in paragraph 3(*c*) be transferred back to paragraph 1.

54. With regard to the same provisions, the question had arisen whether the "relevant rules" of international law were those in force at the time of the conclusion of the treaty or those in force at the time of its application. He submitted that it was in the interests of the international community to take into account the rules of international law in force at the time of application of the treaty. Principles and institutions of law underwent changes in the course of time; for example, the rules relating to neutrality. It would be undesirable to apply rules existing in the seventeenth and eighteenth centuries or rules which had become obsolete since war had been outlawed after the Pact of Paris of 1928. A static interpretation of the law could lead to a misinterpretation. The International Law Commission was to be congratulated on the manner in which it had dealt with a problem that was difficult both in theory and in practice.

55. That being the position taken by his delegation, he could support the amendments by Pakistan (A/CONF.39/C.1/L.182), the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.201), Romania (A/CONF.39/C.1/L.203), Australia (A/CONF.39/C.1/L.210) and Greece (A/CONF.39/C1./L.213), which were largely of a drafting character, but not any of the other amendments.

56. Mr. CRUCHO DE ALMEIDA (Portugal) said that in its Advisory Opinion on the interpretation of the Convention of 1919 concerning employment of women during the night, the Permanent Court of International

[8] *Yearbook of the International Law Commission, 1966*, vol. II, p. 342.

[9] *Yearbook of the International Law Commission, 1964*, vol. II, p. 199.

Justice had found that the preparatory work confirmed the conclusion reached on a study of the text of the Convention. [10] In that particular instance, the judges had been fortunate because the two elements of interpretation had yielded the same results. There had been other decisions in international case law when the natural meaning of the text had coincided with the historical meaning. But a rule could not be based on coincidences, and that was precisely the case with article 28. What would happen if, though the text of a treaty was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning came to light? It was impossible to be sure in advance that those circumstances would confirm the textual meaning of the treaty. If the emphasis were placed on good faith, it would appear that in such a case those circumstances should be taken into consideration, although they did not lead to the confirmation of the meaning resulting from the application of article 27. But that would destroy the hierarchy established between articles 27 and 28.

57. There were two further points he wished to make. First, the " ordinary meaning " doctrine with its emphasis on the clarity of the text led to the unpleasant but inevitable conclusion that one of the parties to a dispute over the interpretation of a text must be acting in bad faith. The truth was certainly different: many pronouncements by international tribunals affirming the clarity of the texts under interpretation were nothing but an artificial way of reassuring the parties to the dispute about the reasonableness of the interpretations adopted by those tribunals. Secondly, it had been said that when there was no agreement between the parties except on the words of a text, only the textual approach to interpretation could be helpful. Even in those cases interpretation did not consist of a search for a hypothetical " ordinary meaning ". It had to be recognized that in those circumstances interpretation would necessarily be an activity of a discretionary and creative nature. He would therefore support the United States amendment (A/CONF.39/C.1/L.156) because it was flexible and he would also support others in the same sense, such as the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199).

58. Mr. BADEN-SEMPER (Trinidad and Tobago) said he supported the remarks by the Austrian representative; the Drafting Committee should make a careful examination of articles 27 and 28 in the light of all the amendments proposed and of the discussion, and endeavour to produce a text which would command a broader measure of acceptance. The differences between delegations were not as wide as appeared at first sight. His delegation was in favour of combining the two articles; the Drafting Committee should bear in mind that the concept of ordinary meaning would essentially be a fiction unless that ordinary meaning could be gleaned from the circumstances surrounding the conclusion of the treaty.

59. Investigation of the circumstances surrounding the conclusion of a treaty should be undertaken in order to determine not the subjective intention of the parties but rather the objective intention expressed by them in the text of the treaty.

60. Lastly, he could not support the United States amendment to insert in paragraph 3(*b*) the word " common " before the word " understanding " (A/CONF.39/C.1/L.156). The introduction of that qualification would inject into the provisions of paragraph 3(*b*) a rigidity which was inconsistent with the other provisions of the articles.

61. Mr. RAZAFINDRALAMBO (Madagascar) said that the dispute between those who upheld the primacy of the text and those who advocated the need to search for the intention of the parties was essentially a doctrinal dispute. The question should be viewed from the practical point of view and, in practice, the United States amendment (A/CONF.39/C.1/L.156) involved grave dangers, bearing in mind the Committee of the Whole's decision to delete sub-paragraph (*a*) of article 15. [11] The effect of that decision was that the principle of good faith would not be made applicable at the stage of the negotiation of a treaty. If the United States amendment to articles 27 and 28 were adopted, a State could then, at the time of the negotiation of a treaty, purposely lay great stress on a position which was manifestly unacceptable to the other party; at the time of the application of the treaty, it would be open to that party to invoke its initial position as part of the preparatory work and thus, under cover of interpretation, frustrate the application of a clear and unambiguous text.

62. It was essential to guard against that danger, since a State would not be required, now that article 15(*a*) had been deleted, to refrain during the negotiations from " acts tending to frustrate the object and purpose of the proposed treaty. " It was for those reasons that his delegation opposed all attempts to place on an equal footing with the text of the treaty other means of interpreting the intention of the parties, which were of a purely unilateral or subjective character.

63. His delegation would vote in favour of the International Law Commission's draft, which made a distinction between the general rule of interpretation in article 27 and the provision for recourse to supplementary means of interpretation in article 28. His delegation would oppose all amendments which were not of a purely drafting character.

64. Mr. PINTO (Ceylon) said that he would reply to the question put by the Spanish representative at the previous meeting, whether the term " instrument " in the amendment by Ceylon (A/CONF.39/C.1/L.212) was intended to cover decisions and other acts of the organization relevant to the treaty adopted within the organization. His delegation did not wish its present statement to prejudge the question whether, and if so to what extent and in what circumstances, the decisions and other acts of the organization might become relevant to the interpretation of the treaty adopted within it under another provision of the draft articles, or under some other rule of international law. That being said, he wished to state that his delegation's amendment was designed to cover only a limited special class of instrument adopted by the competent organ of an organization in connexion with a particular treaty, and intended by the organization to be of significance for the interpre-

[10] *P.C.I.J.* (1932), Series A/B, No. 50, pp. 378-380.

[11] See 20th meeting, para. 47.

tation of the treaty. The explanatory memoranda or reports adopted by the Executive Directors of the International Bank for Reconstruction and Development and circulated to member States together with certain treaties adopted within the Bank when opening them for signature and ratification, constituted examples of such instruments.

65. The CHAIRMAN invited the Expert Consultant to answer the various points raised during the discussion.

66. Sir Humphrey WALDOCK (Expert Consultant) said that he wished to dispel any impression that the International Law Commission had approached the problem of interpretation from the point of view of settling a doctrinal controversy. The Commission had of course taken into account the various theories in the matter but the rules which it had framed had been conceived as reflecting what happened in State practice; at the same time, the Commission had striven to give legal character as rules to some of the practice.

67. For example, with regard to the use made in practice of preparatory work for purposes of interpretation, the differences of opinion were not very wide. The Commission had fully appreciated the importance and the value of preparatory work and had fully realized that habitual recourse was had to such preparatory work whenever a party had some difficulty. From his experience as a practitioner of international law, he could say that preparatory work played little part so long as there was no problem, but when difficulties arose—and they did so for more than one reason—recourse was had to preparatory work. Sometimes difficulty arose because the text was ambiguous; it was also common, however, for one of the parties to find that the text had proved awkward in application because it had led to results not at first contemplated. Recourse was then had to preparatory work to try and find arguments for some other meaning for the text of the treaty.

68. In the circumstances, if the door were opened too widely to the use of preparatory work, very real dangers would arise for the integrity of the meaning of the treaty. The Commission had therefore considered that those elements of interpretation which had an authentic and binding character in themselves must be set apart in article 27; some distinction must be drawn between them and the other elements, although there had been no intention to discard recourse to preparatory work.

69. It was important to bear in mind that, under article 28, such supplementary means as preparatory work could be used " in order to confirm the meaning resulting from the application of article 27 ", apart from serving to determine that meaning in the cases envisaged in subparagraphs (*a*) and (*b*) of article 28. The International Law Commission had given careful consideration to the term " confirm "; the use of the term " verify " had also been suggested, a use which would have gone near to bringing preparatory work into the first processes of interpretation, but the Commission had ultimately settled for " confirm ". There had certainly been no intention of discouraging automatic recourse to preparatory work for the general understanding of a treaty.

70. With regard to the expression " ordinary meaning ", nothing could have been further from the Commission's intention than to suggest that words had a " dictionary " or intrinsic meaning in themselves. The provisions of article 27, paragraph 1, clearly indicated that a treaty must be interpreted " in good faith " in accordance with the ordinary meaning of the words " in their context ". The Commission had been very insistent that the ordinary meaning of terms emerged in the context in which they were used, in the context of the treaty as a whole, and in the light of the object and purpose of the treaty. So much so that, quite late in the Commission's deliberations, it had even been suggested that paragraph 4 of article 27 could safely be omitted. It was said with some justice during those discussions that the so-called " special " meaning would be the natural meaning in the particular context.

71. He could not agree with the Austrian representative's remark that in such cases the special meaning could only be arrived at by reference to the preparatory work. That type of case was comparatively rare; but those which had occurred did not support the Austrian representative's view. For example, in the *Legal Status of Eastern Greenland* case,[12] the Permanent Court of International Justice had considered whether the word " Greenland ", used in certain treaties between the parties to the case, meant the whole island, or had been used in the special meaning of Eastern Greenland; that question had been discussed in the Court by reference to the context and not to the preparatory work. The fact that the Commission had considered doing away with paragraph 4 of article 27 clearly illustrated its wish to associate in the strongest possible way the " ordinary meaning " with the context; the Commission had, moreover, stated in paragraph 3 an expanded concept of " context " to cover the relevant elements of authentic interpretation.

72. With regard to the question of hierarchy, he must emphasize that the arrangement of the elements set forth in article 27 was not intended to establish any order of priority among them; the Commission had simply adopted what seemed a logical arrangement. Unfortunately, in such cases it was almost impossible to prevent interpretations from being placed upon the arrangement chosen, as was amply demonstrated by the controversy over the order in which the sources of international law were set forth in Article 38(1) of the Statute of the International Court of Justice. As far as article 27 was concerned, the intention had been to place on the same footing all the elements of interpretation therein mentioned.

73. As to the distinction between articles 27 and 28, there had been a difference in treatment by the Commission because the two sets of elements were founded on slightly different legal bases.

74. On the question of the temporal element, he said that there were immense difficulties in any treatment of the subject with respect to interpretation. The Commission, after struggling with those difficulties, had abandoned the attempt to cover the point in the draft, realizing that it would have involved entering into the whole relationship between treaty law and customary law.

75. The CHAIRMAN said he would invite the Committee to vote first on the amendments to both articles 27 and 28.

[12] *P.C.I.J.* (1933), Series A/B, No. 53, p. 49.

The United States amendment to articles 27 and 28 (A/CONF.39/C.1/L.156) was rejected by 66 votes to 8, with 10 abstentions.

The amendment by the Republic of Viet-Nam to articles 27 and 28 (A/CONF.39/C.1/L.199) was rejected by 70 votes to 3, with 9 abstentions.

76. Mr. BADEN-SEMPER (Trinidad and Tobago) asked whether the rejection of those amendments would preclude the Drafting Committee from using any of the ideas which they contained.

77. The CHAIRMAN said that, since the two amendments had been rejected, no part of them would be referred to the Drafting Committee.

78. He invited the Committee to vote on the amendment by Ceylon to article 27.

The amendment by Ceylon (A/CONF.39/C.1/L.212) was rejected by 29 votes to 9, with 49 abstentions.

79. The CHAIRMAN said that the amendments to article 27 by the Philippines (A/CONF.39/C.1/L.174), Pakistan (A/CONF.39/C.1/L.182), the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.201), Romania (A/CONF.39/C.1/L.203), Australia (A/CONF.39/C.1/L.210), Greece (A/CONF.39/C.1/L.213), the Federal Republic of Germany (A/CONF.39/C.1/L.214) and Spain (A/CONF.39/C.1/L.216) would be referred to the Drafting Committee.

80. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.214) involved a point of substance and it should be put to the vote.

81. The CHAIRMAN said that the representative of the Federal Republic of Germany clearly stated that his amendment was one of drafting and had asked that it should not be put to the vote. Where a quasi-substantive amendment was not insisted upon by its sponsor, the implication was that it was withdrawn and that the fate of the amendment in the Drafting Committee was immaterial to the sponsor.

82. He invited the Committee to vote on the Tanzanian amendment to article 28.

The amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.215) was rejected by 54 votes to 8, with 25 abstentions.

83. The CHAIRMAN said that the Spanish amendment to article 28 (A/CONF.39/C.1/L.217) would be referred to the Drafting Committee.

84. If there were no objections, he would take it that the Committee accepted articles 27 and 28, which could be referred to the Drafting Committee with the drafting amendments already mentioned.

It was so agreed. [13]

The meeting rose at 5.55 p. m.

[13] For resumption of the discussion on articles 27 and 28, see 74th meeting.

THIRTY-FOURTH MEETING

Tuesday, 23 April 1968, at 10.55 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Texts proposed by the Drafting Committee

1. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement on article 8 and to introduce the text of articles 6 and 7 adopted by that Committee.

Article 8 (Adoption of the text)

2. Mr. YASSEEN, Chairman of the Drafting Committee, explained that in the absence of specific instructions from the Committee of the Whole, the Drafting Committee had been unable to prepare a text for article 8.[1]

Article 6 (Full powers to represent the State in the conclusion of treaties) [2]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 6 adopted by the Drafting Committee read as follows:

"*Article 6*

" 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

"(*a*) he produces appropriate full powers; or

"(*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to dispense with full powers.

" 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

"(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

"(*b*) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

"(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of the adoption of the text of a treaty in that conference, organization or organ."

4. The words " Except as provided in paragraph 2 ", at the beginning of paragraph 1, had been deleted as not being absolutely necessary. In the opening sentence the affirmative form had been substituted for the negative, in order to make the text more flexible.

5. In accordance with the amendment submitted by the United States (A/CONF.39/C.1/L.90), the Drafting Com-

[1] At the 80th meeting, further consideration of article 8 was deferred until the second session of the Conference. See also 15th meeting, footnote 4.

[2] For earlier discussion of article 6, see 13th meeting.

mittee had included the words " the practice of the States concerned " in paragraph 1(*b*). In that connexion, the Drafting Committee believed that several problems relating to the question of full powers could be solved by referring to the practice of States. In States where a Minister was responsible for a certain sector of foreign affairs, for example the Minister for Commonwealth Relations in the United Kingdom and the Minister for International Trade in some other countries, the reference to " the practice of the States concerned " might relieve the Minister of the need to produce full powers when negotiating a treaty on a matter within his competence.

6. In paragraph 2(*c*), the Drafting Committee had replaced the words " to an organ of an international organization " by the words " to an international organization or one of its organs " and the words " in that conference or organ " by the words " in that conference, organization or organ ", in order to give effect to the amendments submitted by Hungary and Poland (A/CONF.39/C.1/L.78 and Add.1) and by the United States (A/CONF.39/C.1/L.90). For contemporary practice showed that some representatives were accredited not merely to an organ of an international organization, but to the organization as a whole. The Drafting Committee wished to emphasize that the expression " representatives accredited by States " at the beginning of sub-paragraph (*c*) did not refer to all members of a delegation or diplomatic mission, but only to those entitled to represent their country.

7. The Drafting Committee had decided not to refer to negotiation in the article, as proposed by Hungary and Poland (A/CONF.39/C.1/L.78 and Add.1) for fear that that might curtail the freedom of diplomacy.

8. With regard to the proposal by Italy (A/CONF.39/C.1/L.83) to add at the end of paragraph 2(*b*) the phrase " and for the purpose of concluding an agreement between those States in conformity with diplomatic practice, in particular, in the form of an exchange of notes ", the Drafting Committee had considered that the reference to " the practice of the States concerned " in paragraph 1(*b*) made that addition unnecessary.

9. Lastly, the Drafting Committee had decided against the United States proposal (A/CONF.39/C.1/L.90) to add a new paragraph 3, since it was self-evident that States always had the right to require full powers for the performance of an international act relating to the conclusion of a treaty.

10. The CHAIRMAN invited the Committee to take a decision on article 6.

11. Mr. DE LA GUARDIA (Argentina) asked that article 6 be put to the vote, so that his delegation could abstain.

12. Mr. CARMONA (Venezuela) asked for a separate vote on paragraph 1(*b*).

13. Mr. BARROS (Chile) said that the Spanish version of article 6 was not satisfactory. He suggested that an informal working party composed of members of Spanish-speaking delegations be set up to revise the text of that article and of the whole convention.

14. Mr. JAGOTA (India), referring to paragraph 2(*c*) of the English text, suggested that instead of the words " for the purpose of the adoption " the words " for the purpose of adopting " should be used, as in paragraph 1 and paragraph 2(*b*), in order to make the wording of the article more uniform.

15. Mr. DADZIE (Ghana) said that in paragraph 2(*b*), it would be better to use the words " sending State and receiving State " instead of the words " accrediting State and the State to which they are accredited ".

16. Mr. KHLESTOV (Union of Soviet Socialist Republics) asked whether the vote on article 6 was to be on the substance or on the drafting. The Committee had adopted the substance of article 6 before referring it to the Drafting Committee, so it should now vote on the drafting of the article.

17. Mr. HARRY (Australia) observed that it was very difficult at that stage to make a distinction between a vote on the substance and a vote on the drafting of an article. It seemed that the Committee was called upon to take a decision on a precise text. Opinions might differ on whether the changes made by the Drafting Committee altered the substance of the article, but the fact remained that the convention would be interpreted according to its terms. Any changes in the text of an article must therefore be submitted to the Committee of the Whole for approval before it was put before the plenary Conference. Texts revised by a working party set up for the purpose must also be submitted to the Committee of the Whole.

18. Mr. KEARNEY (United States of America) asked how the Committee could determine whether a delegation was voting on the substance or the drafting of an article.

19. Mr. DE LA GUARDIA (Argentina) said that during the work of the Drafting Committee, his delegation had expressed reservations about article 6, paragraph 2(*c*), because it could not accept an amendment adopted by the Drafting Committee. He therefore asked for a separate vote on paragraph 2(*c*), because, in his view, the vote should be on the substance of the article.

20. Mr. TABIBI (Afghanistan) said that the Committee had voted on the substance of article 6 before referring it to the Drafting Committee. If delegations wished to propose amendments to the text adopted by the Drafting Committee, they should submit them to the plenary Conference. To vote on the substance of the texts submitted by the Drafting Committee would be contrary to the procedure followed hitherto.

21. Mr. MARESCA (Italy) said he thought the changes made by the Drafting Committee had improved the text of article 6. Nevertheless, he wished to point out that the formula " the practice of the States concerned " did not cover the case the Italian delegation had had in mind when it had proposed an addition to paragraph 2(*b*). According to diplomatic practice, the head of a diplomatic mission could be authorized to express his Government's consent when an agreement was concluded in the form of an exchange of notes. Consequently, his delegation would be unable to vote in favour of article 6.

22. Mr. SEPULVEDA AMOR (Mexico) said his delegation could not accept the new text submitted by the Drafting Committee. It therefore supported the Chilean representative's proposal that a working party be set up to review the Spanish version of the article.

23. Mr. ZEMANEK (Austria) said he thought there had been a misunderstanding. So far, the Committee, before referring articles to the Drafting Committee, had voted, not on the text of the articles, but on the proposed amendments to them. Consequently, a delegation might wish to abstain from voting on the text of an article.

24. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he thought that reference of an article to the Drafting Committee with the proposed amendments implied that the Committee of the Whole had adopted the substance of the article, and was asking the Drafting Committee to incorporate the proposed amendments. If that were so, the Committee of the Whole should now vote only on the drafting of article 6. If some delegations wished to revert to questions of substance, the Committee should modify the procedure followed hitherto. If delegations considered that the changes made in the text by the Drafting Committee altered the substance of the article, the Committee should take a decision on the substance by a two-thirds majority vote. The rules of procedure must be clearly established. A delegation could not be prevented from raising a question of substance unless the Committee had adopted a rule of procedure to that effect.

25. Mr. WERSHOF (Canada) said that the difficulty arose from the fact that the present Conference had not followed the same procedure as previous codification conferences, at which the Committee of the Whole had voted on the substance of the articles and amendments and then referred them to the Drafting Committee, which, after preparing the new text of the articles, had reported to the plenary session of the Conference and not back to the Committee of the Whole. If, at the present Conference, the Committee of the Whole had voted on the substance of the articles and amendments before referring the articles to the Drafting Committee, the Committee of the Whole would only need to decide, perhaps by vote, on the drafting of article 6 as proposed by the Drafting Committee; but that was not the case. At the 13th meeting the Committee of the Whole had rejected by vote the amendment submitted by Sweden and Venezuela (A/CONF.39/C.1/L.68/Rev.1). Some other proposed amendments to article 6 had been withdrawn. The Chairman had then said that article 6 and amendments which had not been withdrawn would be referred to the Drafting Committee. That statement did not in any way imply that the Committee of the Whole had adopted the substance of article 6.

26. Furthermore, the Drafting Committee had amended paragraphs 1 (*b*) and 2 (*c*) of article 6, in accordance with amendments which had never been put to the vote in the Committee of the Whole. Consequently, it was essential that a vote be taken now on the substance of article 6, so that delegations could record their agreement or disagreement with the changes made by the Drafting Committee. Delegations were also entitled to ask for a separate vote on any sub-paragraph; if that was objected to under the rules of procedure, the Chairman should put to the vote the request for a separate vote. If the principle invoked by the representatives of Afghanistan and the USSR was to be adopted, according to which the Committee of the Whole could not vote on the substance of an article after it had been referred to the Drafting Committee, the Committee of the Whole must vote on every substantive amendment and on the substance of the whole article in the first place before referring it to the Drafting Committee, and thereafter make sure that the changes made by the latter did not alter the substance in any way.

27. Mr. BLIX (Sweden) thought that the main difficulty arose from the fact that the articles examined by the Drafting Committee were again submitted to the Committee of the Whole, whereas at previous conferences they had been submitted to the plenary conference. When the Committee of the Whole referred an article to the Drafting Committee, it had taken a decision on the substance, whether it had formally approved the article or not. The amendments relating to substance had been adopted or rejected by the Committee. With regard to article 6, for example, Sweden and Venezuela had submitted an amendment (A/CONF.39/C.1/L.68/Rev.1) which had been rejected. The Committee need not vote a second time. Of course, there were borderline cases. The correct procedure for dealing with them would be to allow a second vote to be taken in the plenary conference, where a two-thirds majority would be required. There was nothing to prevent delegations from submitting amendments to the plenary Conference if they wished. At the present stage, the members of the Committee should confine themselves to making comments. The Drafting Committee might perhaps re-examine the controversial issues and submit its comments to the plenary Conference, where the final vote would be taken. For the time being, the Committee was not called upon to vote on the substance of article 6.

28. Mr. TABIBI (Afghanistan) said that the matter under discussion was a very important one which might hinder the Conference's work and set a regrettable precedent for future United Nations conferences. According to the rules of procedure, the draft articles adopted by the International Law Commission constituted the basic proposal for discussion by the Conference (rule 29) and all amendments should be based on that text (rule 30). It was true that the procedure adopted by the present Conference departed to some extent from the normal procedure, because the General Assembly had decided that two sessions of the Conference would be held. That complicated the position; but in so far as article 6 was concerned, the Committee had voted on the substance and referred the text to the Drafting Committee. The Drafting Committee's task was to perfect the wording of the articles. It could not take decisions on substance. Delegations which did not approve of article 6 could submit amendments to the plenary Conference, but for the time being, the Committee of the Whole should confine itself to giving its decision on the work of the Drafting Committee.

29. Mr. DE LA GUARDIA (Argentina) said he agreed that it would be illogical to vote a second time on amendments that had been rejected or adopted. As to article 6, paragraph 2(*c*), the Committee had never formally accepted the addition of the words " to an international organization ". That amendment (A/CONF.39/C.1/L.90) had been referred direct to the Drafting Committee. Was it a matter of drafting or of substance? It was obviously a borderline case. It would, however, be necessary to take a decision on the matter.

30. The CHAIRMAN said the best course would be to take separate votes on paragraph 1(*b*) and paragraph 2(*c*) before putting article 6 to the vote as a whole.

It was so decided.

Paragraph 1, sub-paragraph (b) was approved by 83 votes to 3, with 5 abstentions.

Paragraph 2, sub-paragraph (c) was approved by 84 votes to 1, with 3 abstentions.

The remainder of article 6 was approved by 88 votes to none, with 2 abstentions.

Article 6 as a whole was approved by 88 votes to none, with 4 abstentions.

31. In reply to a question by Mr. KEMPFF MERCADO (Bolivia) regarding the appointment of a working party to revise the Spanish text, the CHAIRMAN said that the Drafting Committee would consider the matter and report to the Committee of the Whole.

Article 7 (Subsequent confirmation of an act performed without authority) [3]

32. Mr. YASSEEN, Chairman of the Drafting Committee, said that that Committee had adopted the following text for article 7:

"*Article 7*

"An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of that State."

33. The Drafting Committee had made only a few changes in the original text. The words " competent authority of the State " had been replaced by the words " competent authority of that State ", which seemed more precise. In the French text the words " *d'après l'article 6* " had been replaced by the words " *en vertu de l'article 6* ". The Committee had found that the amendment by Spain (A/CONF.39/C.1/L.37) unduly widened the scope of the draft article submitted by the International Law Commission and had not thought fit to accept it. No decision had been taken on the proposals by Japan (A/CONF.39/C.1/L.98) and Singapore (A/CONF.39/C.1/L.96) to transfer article 7 to another part of the convention. The Drafting Committee had taken the view that questions relating to the arrangement of the articles in the convention should be discussed at a later stage.

34. Mr. ARIFF (Malaysia) reminded the Committee that he had submitted an amendment to article 7 (A/CONF.39/C.1/L.99) intended to fill a gap in the International Law Commission's text, which did not state how the act of concluding a treaty performed by a person not representing a State was to be confirmed by the competent authority of the State. The insertion of the words " expressly or by necessary implication " would have filled that gap. Unfortunately, when he submitted his amendment, the text had not yet been circulated, so that the members of the Committee had probably not had an opportunity of examining it thoroughly and it had consequently been rejected. If the Committee of the Whole had referred the amendment to the Drafting Committee, it might have been taken into account. In view of the importance of the matter, the Malaysian delegation could not accept the text of article 7 as it stood. It would therefore vote against the text, if it was put to the vote.

35. The CHAIRMAN said he would take note of the comments made by the representative of Malaysia. He then put to the vote the text of article 7 adopted by the Drafting Committee.

The article was approved by 87 votes to 2, with 1 abstention.

36. Mr. BLIX (Sweden) said he did not think the procedure applied to the articles adopted by the Drafting Committee was quite clear. It might be advisable for the General Committee of the Conference to look into the matter.

37. The CHAIRMAN said that the question would be referred to the General Committee of the Conference for consideration. Meanwhile, if any delegation thought that a text adopted by the Drafting Committee departed from the decision taken by the Committee of the Whole it could have the floor to comment on the matter in the same way as earlier in the meeting.

38. He invited the Committee to resume consideration of the draft articles adopted by the International Law Commission.

Article 29 (Interpretation of treaties in two or more languages) [4]

39. Mr. KEARNEY (United States of America) said that the amendment submitted by his delegation (A/CONF.39/C.1/L.197) was intended to make the wording of article 29 more precise. The proposal regarding paragraph 1 was to replace the word " text " after the word " particular " by the words " language version ". The reason for the change was that the word " text " was used in two different senses in that paragraph.

40. The amendment to paragraph 3 clarified the meaning. The presumption stated should, in his opinion, constitue a separate paragraph, in which the word " text " would be replaced by the words " language version ". As worded by the International Law Commission, paragraph 3 raised difficulty, because the second sentence laid down two rules for settling differences concerning the meaning of terms: recourse could be had to the means of interpretation specified in articles 27 and 28, and if that failed, a meaning could be adopted which reconciled the texts as far as possible. The last phrase was merely an invitation to effect some sort of compromise, but without any indication of the basis for the compromise. Moreover, in many cases reconciliation was impossible. That had been the problem in the *Mavrommatis Palestine Concessions* case decided by the Permanent Court of International Justice, with regard to the terms " public control " in English and " *contrôle public* " in French.[5] The Court had settled on a meaning which it considered to harmonize the French and English versions, because

[3] For earlier discussion of article 7, see 14th meeting.

[4] The following amendments had been submitted: United States of America, A/CONF.39/C.1/L.197; Republic of Viet-Nam, A/CONF.39/C.1/L.209. Australia submitted a sub-amendment (A/CONF.39/C.1/L.219) to the United States amendment.

[5] *P.C.I.J.* (1924), Series A, No. 2, p. 20.

it was the meaning most consonant with the object and purpose of the treaty as the Court saw it.

41. The difficulties were particularly serious when the treaty dealt with legal problems and two or more systems of law were involved. It often happened that there was no legal concept in one system which corresponded to a legal concept in the other. An equivalent term was employed, but it rarely expressed the legal concept in question. The term " trustee " as used in financial agreements was a case in point.

42. Those were the considerations which had led the United States delegation to propose the addition of a new paragraph 4. The aim was simply to offer the Committee of the Whole a more precise text, and the amendment could be referred to the Drafting Committee. In view of the discussion which had just taken place, however, he would have no objection to the amendment being put to the vote if some delegations thought it raised a question of substance.

43. The CHAIRMAN said he thought it would be preferable for the United States amendment to be put to the vote.

44. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation's amendment (A/CONF.39/C.1/L.209) followed from its amendments to articles 27 and 28 (A/CONF.39/C.1/L.199). It was designed to expand the means of interpreting treaties drawn up in two or more languages.

45. The solution proposed in the last phrase of paragraph 3 might raise many difficulties in the interpretation of a treaty of that kind. The International Law Commission had suggested a sort of compromise, but without specifying the basis for it. In the opinion of his delegation, it was the object and purpose of the treaty which could serve as a basis for a compromise, since they were, quite naturally, essential reference elements which could be of great help in overcoming difficulties of interpretation where a treaty itself provided no precise solution.

46. The International Law Commission itself had frequently stressed the importance of the object and purpose of a treaty, in particular in article 16, sub-paragraph (*c*), and in article 27, paragraph 1.

47. He thought his delegation's amendment was purely a matter of drafting.

48. Mr. HARRY (Australia), introducing his delegation's sub-amendment (A/CONF.39/C.1/L.219) to the United States proposal, said that the International Law Commission had pointed out in paragraph (6) of its commentary that few plurilingual treaties containing more than one or two articles were without some discrepancy between the texts. That was confirmed by the request of the Chilean representative that a working party be set up to examine the Spanish version of article 6.

49. The International Law Commission had also noted that a plurilingual treaty might provide that in the event of divergence between the texts a specified text was to prevail. But it was a fact of international life that those States which had secured for their own language the status of an official language were seldom willing that another national language should prevail.

50. The Commission had also mentioned that where the language of one State was not understood by the other or where neither State wished to recognize the supremacy of the other's language, a bilateral treaty sometimes included a text in a third language which was authoritative in case of divergence. The 1957 Treaty of Friendship between Japan and Ethiopia was a case in point.[6] But where multilateral treaties were concerned, was there a language sufficiently neutral to prevail over the great official languages?

51. Pending agreement on a language whose neutrality was universally recognized, as that of Latin had once been—such as the modern international language, Esperanto—a rule should be framed to deal with the situation which arose when there were several equally authoritative versions of a convention and no neutral version to refer to.

52. The Australian delegation thought that the International Law Commission had been right to provide that articles 27 and 28 should be applied first. However, he had doubts about the value of the last phrase of article 29, paragraph 3. In his opinion, it was necessary to lay down a principle to which reference must be made when seeking a meaning that would reconcile the texts. His delegation supported the amendments submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.209) and the United States (A/CONF. 39/C.1/L.197), the purpose of which was to ensure the adoption of the meaning most consonant with the object and purpose of the treaty. It was necessary to try to reconcile the texts, however, because a meaning could not be adopted which bore no relation to them.

53. The Australian amendment would not set aside the solution proposed by the Commission, since its aim was that the parties should adopt the meaning which best reconciled the two versions, provided that it was consonant with the object and purpose of the treaty.

54. Mr. STREZOV (Bulgaria) said he was in favour of the International Law Commission's text, but wished to call the Drafting Committee's attention to paragraph 3 of article 29. The phrase " a meaning which as far as possible reconciles the texts " seemed to him to be acceptable, but it would nevertheless be advisable to attach greater importance to the language in which the treaty had been originally drafted. That question had been raised in the International Law Commission and some of its members had even spoken of a legal presumption in favour of the language in which the treaty had originally been drafted.

55. Mr. KUO (China) said that the present wording of article 29 was acceptable. He was in favour of that part of the United States amendment (A/CONF.39/C.1/L.197) which divided paragraph 3 into two separate paragraphs, and of the amendments submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.209) and Australia (A/CONF.39/C.1/L.219), which improved the International Law Commission's text. As to the United States amendment to paragraph 1, he was not convinced that it was the word " version " that was most often used in treaties to designate a text in a particular language. But that was a matter of drafting which should be settled by the Drafting Committee.

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[6] United Nations, *Treaty Series*, vol. 325, p. 101.

56. Mr. DE BRESSON (France) said he was in favour of article 29 as drafted by the International Law Commission, but he had no objection to the United States proposal to divide paragraph 3 into two separate paragraphs. He doubted whether there would be any advantage in replacing the word " text " by the word " version ". In the language of diplomacy, the word " text " was used to refer to texts drawn up in different languages and he was therefore in favour of retaining it. He supported the Australian sub-amendment (A/CONF.39/C.1/L.219).

57. Mr. MARTINEZ CARO (Spain) supported the amendments submitted by the United States (A/CONF. 39/C.1/L.197), the Republic of Viet-Nam (A/CONF.39/ C.1/L.209) and Australia (A/CONF.39/C.1/L.219), which improved the wording of article 29.

58. The Spanish delegation thought it necessary to insert in paragraph 3 the phrase " a meaning shall be adopted which is most consonant with the object and purpose of the treaty ".

59. The various amendments should be referred to the Drafting Committee so that it could work out an appropriate formula.

60. Mr. MARESCA (Italy) said that the International Law Commission's text was acceptable, but he thought the United States amendment (A/CONF.39/C.1/L.197) greatly improved the wording. The history of diplomacy had shown that it was not always easy to adopt a meaning which reconciled the different texts and that it was sometimes necessary to have recourse to objective elements such as the purpose of a treaty. For those reasons, he supported the United States amendment and the Australian sub-amendment which combined the International Law Commission's text with the new formula proposed by the United States.

61. Mr. SINCLAIR (United Kingdom) said that the text of article 29 was acceptable on the whole, but the second sentence of paragraph 3 gave rise to some difficulties because the differences of meaning disclosed might be irreconcilable.

62. His delegation considered the United States proposal a useful one, but it preferred the Australian sub-amendment which, while retaining the possibility of adopting a meaning that reconciled the texts, also prescribed the adoption of a meaning consonant with the object and purpose of the treaty.

63. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the text of article 29 provided a satisfactory solution of the problem of interpretation of a treaty in several languages.

64. The first part of the United States amendment was a matter of drafting; it improved the wording of the article. However, his delegation saw no point in stating that a meaning should be adopted which was most consonant with the object and purpose of the treaty; it found the International Law Commission's text more satisfactory.

65. He saw no objection to asking the Drafting Committee to study the various amendments.

66. Mr. ROSENNE (Israel) said he supported the United States amendment to paragraph 1 and also the proposal to divide paragraph 3 into two separate paragraphs. He doubted whether it would be useful to make a specific reference to the object and purpose of the treaty, as that expression already appeared in article 27, paragraph 1, and articles 27 and 28 were expressly mentioned in article 29. He was in favour of the present text of article 29, subject to examination by the Drafting Committee.

67. Sir Humphrey WALDOCK (Expert Consultant), referring to the United States proposal to replace the word " text " by the word " version ", said that the International Law Commission had studied that question in detail. In current practice, the final clauses of treaties referred to different " texts " in different languages and codification conventions also used the word " text ". There was another technical reason for choosing that word: there were versions known as " official versions " which were not authoritative, and as the International Law Commission had established a difference between authentication and adoption and had made authentication a separate process in the conclusion of treaties, the distinction between a " text " and a " version " must be maintained, the " text " being a document which had been authenticated.

68. Mr. BADEN-SEMPER (Trinidad and Tobago) said that the United States amendment adding a new paragraph was a matter of substance and should be put to the vote. The interpretation of a treaty by recourse to its object and purpose was already covered in article 29, since the International Law Commission's text referred back to articles 27 and 28.

69. Mr. FRANCIS (Jamaica) observed that the United States amendment appeared to omit a reference to article 28. It should be remembered, however, that the United States had submitted an amendment combining articles 27 and 28 in a single article (A/CONF. 39/C.1/ L.156). Presumably the United States amendment was intended to include a reference to articles 27 and 28, and was therefore only a matter of drafting.

70. Mr. KEARNEY (United States of America) confirmed that the reason why only article 27 had been mentioned was that the United States amendment to articles 27 and 28 (A/CONF.39/C.1/L.156) combined those articles; hence article 28 should be referred to in his delegation's amendment to article 29.

71. The CHAIRMAN proposed that article 29 be referred to the Drafting Committee.

It was so decided.[7]

72. The CHAIRMAN welcomed Mr. Žourek, a former member of the International Law Commission, who had been the Expert Consultant at the 1963 Conference on Consular Relations.

73. Mr. ŽOUREK (Czechoslovakia) thanked the Chairman for his words of welcome and said he was particularly glad to be taking part in the Conference convened to codify such a very important branch of international law.

The meeting rose at 1 p.m.

[7] For resumption of discussion, see 74th meeting.

THIRTY-FIFTH MEETING

Tuesday, 23 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 30 (General rule regarding third States)

1. The CHAIRMAN invited the Committee to consider Part III, Section 4 of the International Law Commission's draft, beginning with article 30 and the amendments thereto.[1]

2. Mr. CARMONA (Venezuela), introducing his amendment to combine articles 30, 31, 32 and 33 into a single article (A/CONF.39/C.1/L.205/Rev.1), said that the amendment would simply clarify the wording and improve the application of the system embodied in the International Law Commission's four articles. The basic principle, the rule that treaties created neither rights nor obligations for third States except with their express consent, was set forth in clear terms in paragraph 1 of his amended text. That same paragraph embodied the substance of the present paragraph 2 of article 32 by means of the proviso " and under the conditions they establish." That formulation did away with the distinction which the Commission had endeavoured to draw between rights and obligations for third States in articles 31 and 32. That distinction derived from academic dissertations and it had no basis in reality. The position in State practice was simply that no State accepted either obligations or rights under a treaty to which it was not a party otherwise than through a clear and unambiguous expression of consent. The International Law Commission had stated that principle, as far as obligations were concerned, in its formulation of article 31; with respect to rights, however, provision had been made in paragraph 1 of article 32 for tacit consent, and even for a presumption of consent based on the conduct of the third State concerned. That system, which was not borne out by State practice, had been adopted by the Commission by a majority vote. There then remained only the problem of obligations imposed upon an aggressor State—a problem which was settled by the provisions of article 70.

3. With regard to the question of revocation or modification, paragraph 2 of his amended text (A/CONF.39/C.1/L.205/Rev.1) embodied in substance the provisions of the two paragraphs of the International Law Commission's article 33. However, the concluding proviso, which would now apply to both rights and obligations, had been amended to read " unless the treaty otherwise provides or it clearly otherwise appears from its nature and provisions ". That formulation would leave less margin for doubt.

4. Mr. MALITI (United Republic of Tanzania), introducing his delegation's amendment (A/CONF.39/C.1/L.221), to delete the words " without its consent " and add at the beginning of the article a reference to articles 31, 32 and 34, said that those were the articles which provided for the exceptions to the important principle *pacta tertiis nec nocent nec prosunt.*

5. His amendment would make the statement of the rule more vivid, while at the same time pointing out where the exceptions to the rule were to be found. The manner in which the International Law Commission had brought the element of third party consent into article 30 seemed to cast doubt on the effects of the rule by appearing to suggest that the third party had merely to consent for the treaty to affect it; that was not correct, since the provisions of articles 31 and 32 showed that the combined action of parties and non-parties was necessary in order to derogate from the principle involved.

6. Article 33 dealt with the principle from the point of view of the third State only, but the rule had to be looked at also from the point of view of the parties to the treaty. It could happen that a third State claimed a right but the parties objected on the ground that they had not consented to confer such a right upon a third State.

7. He could not support the Venezuelan amendment to combine articles 30, 31, 32 and 33 (A/CONF.39/C.1/L.205/Rev.1); the basic principle in the matter was sufficiently important to deserve an article on its own, separate from the exceptions. Moreover, the juridical differences between a provision imposing obligations and one conferring rights on third States, so well elaborated in the commentary, would be lost if the articles were combined.

8. Mr. KHASHBAT (Mongolia) said that the principle in article 30, that agreements imposed neither obligations nor rights upon third parties without their consent, was much more important in international law than in private law, because international law governed the relations between sovereign States. Article 30 would thus safeguard the sovereign rights of States.

9. The principle *pacta tertiis nec nocent nec prosunt* had in the past been accepted as an abstract formula but, in international relations, the rights of third States had been respected only when they were powerful enough to protect their own interests. Weak States had often been obliged to accept obligations imposed upon them under treaties to which they were not parties, and even to tolerate interference in their internal affairs by more powerful States. A glaring example of that type of violation of the vital interests of a third State had been the Munich agreement of September 1938 which had sealed the tragic fate of Czechoslovakia, a State which had not been a party to that agreement. The late Prime Minister Nehru, in a speech on 9 September 1954, had complained that the problems of Asian peace and security were being discussed by powers outside Asia, and that the treaties relating to Asia had been concluded mainly by non-Asian Powers. The same approach was to be found in legal literature, where claims had been made to a " right " to protect States without their consent, thus flouting their sovereign will. The socialist States had from the outset adopted a very different approach; respect for the sovereignty of third States had been at the very basis of their foreign policy.

[1] The following amendments had been submitted: Venezuela, A/CONF.39/C.1/L.205/Rev.1; United Republic of Tanzania, A/CONF.39/C.1/L.221.

10. The provisions which the International Law Commission had embodied in article 30 should be retained since they reflected existing international law and were in full conformity with the basic principle of the sovereign equality of States. There was no justification for changing the wording of article 30 or for merging it with other articles. He could not therefore support any amendments to that effect.

11. Mrs. THAKORE (India) said that articles 30 to 34 of the International Law Commission's draft were as a whole acceptable to her delegation. It had at first had some reservations because the scheme of those articles relating to the effect of treaties on third States would appear to run counter to that embodied in the United Nations Charter. Obligations could only arise for a third State from its express acceptance; with regard to rights, however, it was sufficient under article 32 that the third State should exercise the right or not raise an objection.

12. Under the United Nations Charter, the scheme appeared to be just the reverse. By Article 2(6), the United Nations had been empowered to ensure that non-member States of the United Nations acted in accordance with the Principles of the Charter as far as might be " necessary for the maintenance of international peace and security ". That power and competence of the United Nations imposed corresponding obligations upon non-member States, in other words, on third States. There was nothing said about the express acceptance by the third States concerned. On the other hand, in article 35(2) of the Charter, a third State was given the right to " bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party ". In that case, however, the third State must accept " in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter ". The same appeared to apply for a third State when it became a party to the Statute of the International Court of Justice under Article 93(2) of the Charter. The distinction drawn between rights and obligations in the United Nations Charter was thus the very opposite of that embodied in the system proposed by the International Law Commission in its draft. On reflection, her delegation had decided to ignore that apparent contradiction on the ground that the special position of the United Nations with regard to the maintenance of peace and security would probably justify the imposition on a third State of obligations without its express consent.

13. The International Law Commission had compromised on the doctrinal dispute with regard to the question whether the rights of the third State were created by the treaty or by the express consent of that third State. She hoped that the compromise thus adopted would not create any difficulties. At one time, her delegation had been inclined to press for express consent for the exercise of rights by a third State, because a seeming benefit might prove to create obligations and liabilities for the third State without its express consent, under the guise of conditions for the exercise of rights as specified in paragraph 2 of article 32. But there again, her delegation had taken into account the fact that certain treaties creating objective régimes, rights valid *erga omnes*, should not require express acceptance by the beneficiary States. Article 32 had been designed to provide for that situation and should therefore be kept as it stood. The Commission itself had explained that it had not included in the draft any specific reference to treaties creating objective régimes on the understanding that the matter was covered by article 32, a point to which reference was made in paragraph (4) of the commentary to article 34. In view of that position, she also agreed to the manner in which paragraphs 1 and 2 of article 33 had been formulated. She also fully supported the retention of article 34 as it stood.

14. As a result of her delegation's position in favour of the retention of the present articles 30 to 34, it could not accept the Venezuelan proposal to combine articles 30 to 33 (A/CONF.39/C.1/L.205/Rev.1), the proposal by Finland to delete the second sentence of paragraph 1 of article 32 (A/CONF.39/C.1/L.141), or the proposals by Finland and by Venezuela to delete article 34 (A/CONF. 39/C.1/L.142 and L.223). She could accept, however, the amendment by Japan to article 32 (A/CONF.39/C.1/ L.218). The amendment by Syria to article 34 (A/CONF. 39/C.1/L.106) appeared to be of a drafting nature and could be referred to the Drafting Committee.

15. Mr. MOUDILENO (Congo, Brazzaville) said he supported the system adopted by the International Law Commission regarding the effect of treaties on third States, but suggested that the provisions of articles 30 and 31 and paragraph 1 of article 32 should be combined in a single new article 30.

16. The first paragraph of the new consolidated article would state the rule that a treaty could only have effects as between the States which had concluded it or had acceded to it. The second paragraph would specify that any special provision of a treaty which stipulated an obligation for a third State would only apply to that State with its consent. The third paragraph would state that any special provision of a treaty which stipulated rights in favour of a third State, a group of third States or all States would only apply to those States with their consent.

17. The provisions now embodied in paragraph 2 of article 32 should form a separate article, to be numbered 31. Those provisions laid down the very important rule that a State which accepted rights under a treaty to which it was not a party must comply with the conditions for the exercise of that right provided for in the treaty. The new article 31 might be worded to read, more or less: " A State which, under the provisions of article 30, accepts an obligation or a right stipulated in a treaty to which it is not a party shall, in the performance of that obligation or the exercise of that right, comply with the provisions of the treaty on the subject ".

18. That formulation would cover the case not only of the rights but also that of the imposing of obligations upon a third State. In both cases, provision should be made for compliance with the conditions laid down in the treaty.

19. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that he could not support the amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.221), which gave to the provisions of articles 31 and 32 the appearance of exceptions to the general rule embodied in article 30. In fact, those provisions were simply applications of the

general rule in article 30 requiring the consent of the third State.

20. Nor could he accept the Venezuelan amendment (A/CONF.39/C.1/L.205/Rev.1), which would apply exactly the same legal régime to both rights and obligations of third States. The International Law Commission had done well to make separate provision for rights and obligations and to require express consent only in respect of obligations. Where an obligation was concerned, it was clear that the third State had no interest in taking it up and its position should therefore be presumed to be negative. In order to safeguard the position of the third State, express consent had therefore been required. If the same system were now to be adopted with regard to rights, as was proposed in the Venezuelan amendment, the interests of third States would not be served. Moreover, it would represent a step backwards in relation to contemporary international law. The existing State practice was that, where a treaty stipulated benefits for a third State, its consent could well be tacit; in fact, consent could result from the mere conduct of the third State, or from the actual exercise of the right or benefit by that third State.

21. The Commission had decided not to include any provision on treaties creating so-called objective régimes. Such rights of third States as the freedom of navigation in certain rivers and canals, proclaimed for all States in certain multilateral or bilateral treaties, would therefore now be based on the provisions of article 32. If the express consent of those third States were required, the door would be open to the frustration of the rights of free navigation; a State wishing to hamper the exercise of such rights could claim that the third States concerned had not expressly accepted the rights. The position at present was that the mere exercise of the right of navigation by the captain of a ship flying the flag of a State was deemed sufficient to confer the right on that State.

22. There was no danger of obligations being imposed upon a third State under the guise of conditions for the exercise of rights. A third State could always refuse to exercise a right and would thereby be exempt from the conditions attached to its exercise. If, on the other hand, it wished to take up the right conferred upon it, it was only proper that it should comply with the conditions attached to the exercise of that right.

23. Mr. BADEN-SEMPER (Trinidad and Tobago) said that the amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.221) should be considered by the Drafting Committee. He was in favour of dropping the words " without its consent " and also of excluding the proposed opening proviso in order to emphasize the categoric nature of the provision. If however it were decided to retain the opening proviso, it should refer to articles 31, 32 and 33 rather than to articles 31, 32 and 34.

24. Mr. ARIFF (Malaysia) said he also supported the amendment by the United Republic of Tanzania, the opening proviso of which established a useful link with the following articles. Without that link, the principle stated in article 30 would appear to stand alone without any qualification.

25. Mr. MALITI (United Republic of Tanzania) said he would ask that his amendment (A/CONF.39/C.1/L.221) should not be put to the vote but be referred to the Drafting Committee.

26. Mr. TAYLHARDAT (Venezuela) said that he did not wish his amendment (A/CONF.39/C.1/L.205/Rev.1) to be put to the vote and requested that it be referred to the Drafting Committee.

27. Mr. TABIBI (Afghanistan) said that article 30 laid down the correct rule in the matter. The agreement of States was the basis of all rules of international law, so that a State which was not a party to a treaty could have neither rights nor obligations under it without its consent.

28. He supported article 30 as it stood, as well as the following articles which set forth the exceptions to the general rule embodied in article 30. The provisions of all those articles were particularly important for small countries, on which, in the past, obligations had often been imposed without their consent. The text of the articles had been very carefully drafted by the International Law Commission and he would appeal to the Venezuelan delegation to withdraw its amendment to combine articles 30 to 33, since it would weaken the rule in article 30.

29. The CHAIRMAN said that the Venezuelan amendment (A/CONF.39/C.1/L.205/Rev.1) had in effect been withdrawn. The Tanzanian amendment (A/CONF.39/C.1/L.221) would be referred to the Drafting Committee. If there were no objection, he would take it that the Committee agreed to refer article 30 to the Drafting Committee on that basis.

It was so agreed.[2]

Article 31 (Treaties providing for obligations for third States) and *Article 32* (Treaties providing for rights for third States)[3]

30. Mr. KHASHBAT (Mongolia), introducing his delegation's amendment to articles 31 and 32 (A/CONF.39/C.1/L.168), said that it was merely of a drafting character. Its effect would be to transpose articles 31 and 32 so that the article concerning rights for third States came first. Since the purpose of the rule set forth in the two articles was to safeguard the sovereign equality of States, it seemed appropriate that the article on rights should precede the article on obligations.

31. As a consequential amendment, he proposed that the two paragraphs of articles 32 and 33 be transposed, so that the paragraph dealing with rights for third States came first in each case.

32. Mr. CASTRÉN (Finland) said that his delegation had introduced its amendment (A/CONF.39/C.1/L.141) proposing the deletion of the second sentence of paragraph 1 of article 32 because that sentence provided that a right might be created for a third State even without its consent, in the absence of a contrary indication. That derogation from the general rule in article 30 might be dangerous, since it introduced an element of uncertainty

[2] For resumption of discussion, see 74th meeting.

[3] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.141; Mongolia, A/CONF.39/C.1/L.168; Japan, A/CONF.39/C.1/L.218; Netherlands. A/CONF.39/C.1/L.224. The amendment by Venezuela (A/CONF.39/C.1/L.205/Rev.1) to combine articles 30-33 in a single article had been withdrawn (see paragraph 29 above).

into the system of Section 4 of Part III of the draft. The third State might thus against its will become a so-called party to the treaty through pardonable negligence. States which had a small staff dealing with foreign affairs were often unable to follow and examine all the treaties concluded by other States.

33. Moreover, in many treaties rights were closely linked with obligations, as was apparent from paragraph 2 of article 32. If a third State reacted too late, the provisions of sub-paragraph (*b*) of article 42 might be invoked, and it might be presumed to have acquiesced in the application of the treaty in question. It might, of course, be argued, as the International Law Commission did in paragraph (7) of the commentary, that the provision gave the necessary flexibility to the operation of the rule in paragraph 1, and had the effect of further narrowing the gap between the two theories as to the source of the right arising from the treaty; but the Finnish delegation preferred precision and certainty to flexibility in the case at issue and considered that, by stating the presumption, the Commission had in fact taken a position in the doctrinal dispute, and had lent its support to the thesis that a right or obligation might arise for third States through the main treaty, without a subsidiary agreement with the third State. Accordingly, his delegation agreed with some of the Governments which had submitted comments on the provision, that it would be better to delete that controversial and equivocal sentence, which the Commission had added only at the end of its second reading of the draft.

34. Mr. FUJISAKI (Japan) said that his delegation had submitted its amendment to article 32 (A/CONF.39/C.1/L.218) to make it clear that the presumption in the second sentence of paragraph 1 was applicable only if the treaty was silent on the point. The amendment could be referred to the Drafting Committee.

35. Mr. RIPHAGEN (Netherlands) said that his delegation had submitted its amendment to article 32 (A/CONF.39/C.1/L.224) because it was not convinced that the system proposed by the International Law Commission in respect of the rights of third States under a treaty corresponded to actual State practice. If a treaty provided for a particular régime from which States which were not parties to the treaty might also benefit, it was not the assent of such third States, whether expressed or tacit, which created a relationship between the parties and those third States, but rather the fact that the third State had actually made use of that régime. For instance, it would be strange if a treaty according a right to all States should, through the presumed assent of those States, create a relationship with States which might not even know that the treaty existed at all, or with States which would never be in a position to make use of the régime instituted by the treaty. In the latter case, even the expressed assent of the third State should not be regarded as confirming the kind of inchoate title provided for in paragraph 2 of article 33. Indeed, there seemed to be no reason even to envisage the possibility of an irrevocable right being conferred on a State which had never made use of the provisions of a treaty to which it was not a party.

36. The Netherlands amendment to article 33 (A/CONF.39/C.1/L.225) was more a question of drafting. In proposing the deletion of the words " or modified " in paragraph 1 and the consequential changes in paragraph 2, his delegation based itself on the consideration that the modification of a right could have one of three meanings: first, an enlargement of the scope of the right, which would not require the consent of the third State; secondly, a diminution of the right, which amounted to complete or partial revocation and was therefore already covered by the article; or, thirdly, a change in the conditions under which the right was to be exercised, already covered by paragraph 2 of article 32. The words " or modified " were therefore superfluous and might create confusion. The amendment could be referred to the Drafting Committee.

37. Mr. MARESCA (Italy) said that his delegation fully supported the Finnish amendment (A/CONF.39/C.1/L.141). Since a treaty was an agreement between the parties to it, it constituted *res inter alios acta* for third States, and neither the rights nor the obligations deriving from that treaty could apply to them unless it was decided that it was indispensable for third States to enjoy certain rights conferred on them by the parties. In such cases, however, it was essential to obtain the consent of the third States, not only to obligations, but also to rights arising from the treaty. The presumption in the second sentence of paragraph 1 of article 32 was contrary to practice, to the general principles of treaty law and to the position of third States in respect of treaties.

38. Mr. BOYARSHINOV (Union of Soviet Socialist Republics) said that the legal position of third States had not only a theoretical, but a practical significance, for article 32 was concerned with the protection of the sovereign rights of States in respect of treaties conferring rights on third States. In practice there were several categories of such treaties: some, such as the 1948 Convention regarding the Regime of Navigation on the Danube,[4] conferred on all States freedom of navigation on a basis of absolute equality; other treaties, such as the United Nations Charter, conferred rights and obligations on a specific group of States, while yet others granted such rights to individual States.

39. The USSR delegation considered that the International Law Commission's text of article 32 was quite satisfactory, since it covered the requirements of all cases where the parties to a treaty might decide to confer certain rights on third States, and stressed the need for third States' consent to the acceptance of those rights. As the Uruguayan representative had pointed out, consent need not necessarily be express; it could be tacit.

40. His delegation could not support the Finnish proposal (A/CONF.39/C.1/L.141) to delete the last sentence of paragraph 1. It agreed with the arguments of the Mongolian representative in favour of changing the order of articles 31 and 32, so that the rights of third States should be stated before their obligations.

41. His delegation would vote for the International Law Commission's text of article 32, on the understanding that it did not affect the rights and privileges which might be derived from most-favoured-nation clauses. The practice of including such clauses in treaties was

[4] United Nations, *Treaty Series*, vol. 33, p. 197.

increasing: most-favoured-nation treatment was a keystone of the tariff and trade policies of a large number of States, with widely differing social and economic structures. The system was used not only with regard to tariffs and trade, but in many other agreements, such as the 1951 Convention relating to the Status of Refugees,[5] under which refugees enjoyed more favourable treatment, or at least no less favourable treatment, than other aliens. The International Law Commission had considered the question of most-favoured-nation treatment in connexion with Mr. Jiménez de Aréchaga's proposal to include a separate article on the rights of States arising from most-favoured-nation clauses, but had decided that it would be inexpedient, in view of the specific nature of the question. Nevertheless, the Commission had unanimously decided that the articles on the position of third States should not be interpreted as infringing those rights in any way.[6] The USSR delegation hoped that the Rapporteur would reflect the International Law Commission's position on the most-favoured-nation principle in his report.

42. Mr. MAKAREWICZ (Poland) said that his delegation was in favour of retaining the International Law Commission's wording of article 32, including the second sentence of paragraph 1. The Polish delegation saw no danger in the presumption of the State's assent, so long as the contrary was not indicated. Under article 32, paragraph 2, a third State exercising a right in accordance with paragraph 1 of that article had to comply with the conditions for its exercise provided for in the treaty, or established in conformity with the treaty: those conditions would in most cases also indicate the way in which a State's assent was to be expressed. The parties to a treaty intending to grant a right to a particular State or to a small group of States would no doubt lay down detailed conditions for the exercise of the right, and probably also explicit requirements as to the way in which the third State should express its assent.

43. Consequently, in practice, the presumption in the second sentence of paragraph 1 of article 32 would be applicable mainly to cases where the right was granted to a large number of States or to all the States, for instance, when right of passage was granted on a waterway which had previously not been open to general navigation. It would be quite superfluous to require third States to give their express assent in such cases, particularly since it might be difficult to decide to whom, how and when express assent was to be notified. The concept of presumed assent would facilitate the granting of rights to large numbers of States. The solution adopted by the International Law Commission corresponded to the requirements of international life, and should be approved by the Conference.

44. Mr. WERSHOF (Canada) said that, although his delegation respected the arguments in the commentary concerning the distinction between the requirement of express assent in article 31 and presumed assent in article 32, it considered it advisable to require express assent in both cases. It therefore supported the Finnish amendment (A/CONF.39/C.1/L.141) as a step in that direction. If the Finnish proposal were rejected the Canadian delegation would support the Japanese amendment (A/CONF.39/C.1/L.218). On the other hand, it could not support the Netherlands amendment (A/CONF.39/C.1/L.224) to article 32, which would have the effect of removing any requirement of assent on the part of the third State, even in a presumed form. The Canadian delegation considered that the Finnish and Netherlands amendments were substantive and hoped that a vote would be taken on them.

45. Mr. VEROSTA (Austria) said that his delegation would vote in favour of the Finnish amendment (A/CONF.39/C.1/L.141), in the belief that the last sentence of paragraph 1 of article 32 was superfluous and might give rise to difficulties by not fully stressing the necessity of obtaining the assent of the third State to the rights conferred on it. If the Finnish amendment were not approved, his delegation could support the Japanese amendment (A/CONF.39/C.1/L.218), but not the Netherlands amendment (A/CONF.39/C.1/L.224).

46. Mr. USTOR (Hungary) said that his delegation could support the texts of articles 31 and 32 as drafted by the International Law Commission, because they were in harmony with the basic principles of the sovereignty and independence of States. Articles 30 to 33 should be read together with article 70, which constituted an important general reservation to the whole draft, and especially to the articles on the relationship between treaties and third States. Another reservation to the articles in question appeared in paragraph 32 of the Commission's report on its eighteenth session,[7] where it was stated that the draft on the law of treaties did not deal with most-favoured-nation clauses and that those clauses were in no way touched by articles 30 to 33.

47. The Hungarian delegation could not support the Finnish proposal (A/CONF.39/C.1/L.141) to delete the second sentence of paragraph 1 of article 32. The Commission had considered it desirable to include that provision in order to give the necessary flexibility to the operation of the main rule of article 32 in cases where the right was expressed in favour of all States or of a large group of States. That presumption seemed to be useful and should be retained.

48. The effect of the Netherlands amendment (A/CONF.39/C.1/L.224) was very similar to that of the Finnish amendment, and the Hungarian delegation could not support it either. It did not believe that article 32 in its present form created a legal relationship between the parties to the treaty and the third State without the latter's consent, and therefore considered that it created no danger for the third State, which, as the Netherlands representative had pointed out, might not even know of the faculty opened to it. On the other hand, article 31 adequately protected the third State against the danger of undertaking any obligation which might be attached to the right offered to it.

49. His delegation could support the Mongolian amendment (A/CONF.39/C.1/L.168), which could be referred to the Drafting Committee. If the Mongolian proposal were adopted, the order of the words "obligations" and "rights" should also be reversed in articles 30 and 33.

[5] United Nations, *Treaty Series*, vol. 189, p. 150.

[6] *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, para. 21.

[7] *Yearbook of the International Law Commission, 1966*, vol. II, p. 177.

The Japanese amendment (A/CONF.39/C.1/L.218) could also be referred to the Drafting Committee.

50. Mr. ŽOUREK (Czechoslovakia) said that the International Law Commission's drafts of articles 31 and 32 were generally acceptable to his delegation, but it hoped that the Drafting Committee would take into account the Mongolian proposal (A/CONF.39/C.1/L.168) to reverse the order of the two articles. He had no specific remarks to make on article 31, except that, like all the other provisions of the draft, it should be read together with article 70, on the case of an aggressor State.

51. The main difficulty with regard to article 32 seemed to lie in the fact that it covered two categories of treaties, those having an analogy with private international law and those having an analogy with public international law. In the former case, the right must be accepted by the third State, but it was difficult to stipulate that requirement in respect of such normative treaties as those on freedom of navigation on international waterways and those containing most-favoured-nation clauses. In the case of such rights derived from international regulation, it was of course the sovereign right of every State to refuse the privilege conferred upon it.

52. It was very difficult to draw a distinction between the two categories of treaties in a convention on the law of treaties, but the International Law Commission had struck a well-balanced compromise between the two points of view concerning the need for the assent of third States to rights conferred upon them by international treaties. The Czechoslovak delegation therefore could not support any of the amendments to article 32.

53. Mr. BRODERICK (Liberia) said he supported the Finnish amendment (A/CONF.39/C.1/L.141).

54. Sir Humphrey WALDOCK (Expert Consultant) said that the Finnish representative had not been entirely correct about the position in the International Law Commission regarding article 32. There had been a division of opinion on a point of principle as to whether a treaty could of itself create rights without the consent of a third State. The Commission had had to seek common ground and at the same time to reflect the practice of States and take into account the needs of the international community.

55. Assent of the third State had been stipulated as necessary, but the Commission had recognized that it could take different forms. It had decided to include the presumption in the second sentence of paragraph 1 in order to protect the position of third States in respect of that important category of treaties which created rights in favour of all States or of wide categories of States. The Commission had attached special importance to the provision when it had decided not to include an article dealing with what were sometimes known as objective régimes. Articles 31, 32 and 33 must be read as a whole and article 32 assumed the simultaneous operation of article 31. In a case where a treaty provided for an obligation for a third State parallel to a right, that had equally to be accepted in addition to acceptance of the right. That situation was covered by articles 31 and 32, while paragraph 2 of the latter article dealt with the conditions of the exercise of the right. No State was bound to exercise the right. Moreover, article 33 provided for the revocation or modification of obligations, but made no similar provision for the renunciation of a right, since that went without saying.

56. Mr. MWENDWA (Kenya) said he supported the Finnish amendment.

57. Mr. RIPHAGEN (Netherlands) said he withdrew his delegation's amendments to articles 32 and 33 (A/CONF.39/C.1/L.224 and L.225).

58. Mr. CASTRÉN (Finland) said that his delegation had not proposed that consent to a right must be express; it could be tacit.

59. Mr. ARIFF (Malaysia) said he supported the Finnish amendment.

60. Mr. BISHOTA (United Republic of Tanzania) said he was not clear as to the reason for the difference in wording between articles 31 and 32 in respect of the category to which the third State must belong in order to be affected by the provision in the treaty imposing obligations or conferring rights. In particular, did article 31 imply that the third State in question should be specifically mentioned in the treaty?

61. Sir Humphrey WALDOCK (Expert Consultant) explained that in article 32 there was a particular need to provide for treaties that contemplated conferring a right on a group of States or on all States. That possibility would be unlikely to arise under article 31 in regard to obligations, but the language of that article was general so that the case was not excluded.

62. Mr. KRISPIS (Greece) said that there could be situations when rights conferred upon third States created a burden, for example, when dues were payable for navigation on an international waterway.

63. Sir Humphrey WALDOCK (Expert Consultant) said that the conditions for the exercise of a right were laid down in article 32, paragraph 2. The situation would be more difficult when parallel obligations and rights ensued from a treaty, both of which had to be accepted before the right became established. In such cases both articles 31 and 32 would apply.

64. The CHAIRMAN suggested that article 31 be approved and referred to the Drafting Committee.

It was so agreed.[8]

65. The CHAIRMAN put to the vote the amendment by Finland to article 32.

The amendment by Finland (A/CONF.39/C.1/L.141) was rejected by 46 votes to 25, with 17 abstentions.

66. The CHAIRMAN suggested that article 32 be referred to the Drafting Committee together with the amendments by Japan (A/CONF.39/C.1/L.218) and Mongolia (A/CONF.39/C.1/L.168).

It was so agreed.[9]

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[8] For resumption of discussion, see 74th meeting.

[9] For resumption of discussion, see 74th meeting.

Article 33 (Revocation or modification of obligations or rights of third States) [10]

67. Mr. ESPEJO (Philippines), introducing his delegation's amendment (A/CONF.39/C.1/L.211), said that its aim was to make the language of article 33 more forceful. As the changes were of a drafting character it could be referred to the Drafting Committee.

68. The CHAIRMAN suggested that article 33 be referred to the Drafting Committee with the Philippine amendment.

It was so agreed.[11]

Article 34 (Rules in a treaty becoming binding through international custom) [12]

69. Mr. NACHABE (Syria) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.106) was to state clearly that, for a rule to become binding upon a third State, that State must recognize it as a customary rule of international law. The International Law Commission had underlined that fact in the first two sentences of paragraph (2) of its commentary. More and more new States were joining the international community as subjects of international law with the same sovereign rights as other States and there was no question of imposing upon them customary rules in the formulation of which they had not taken part, particularly since some of the rules originated in treaties that were aimed at safeguarding the individual interests of particular States.

70. For such rules to become binding on third States, particularly new States, their obligatory character must be recognized by the States in question. Article 38 of the Statute of the International Court of Justice referred to " international custom, as evidence of a general practice accepted as law " and " the general principles of law recognized by civilized nations ". During the discussion on article 34 in the Commission, some members had been concerned about the drafting of the article and had even questioned whether it had a place in a draft on the law of treaties.

71. He asked that his amendment be referred to the Drafting Committee.

72. Mr. CASTRÉN (Finland) said his delegation had proposed the deletion of article 34 (A/CONF.39/C.1/L.142) for formal reasons. It had been inserted by the Commission out of considerations of caution, but in his opinion it had no place in a convention exclusively concerned with the law of treaties. It would not be possible to contest the independent validity of the customary rules of international law, the other principal source of international law, and to deduce from the deletion of article 34 that the proposed convention would exempt States from obligations incumbent on them by virtue of the rules of customary law.

73. Mr. CARMONA (Venezuela) said that article 34 dealt with an extremely delicate matter which was of particular complexity, inasmuch as it touched the sovereignty of third States. In its present form the rule was not a progressive one. Great caution had been exercised in the matter by the International Court of Justice in the *Asylum* case.[13] The application and practice of article 34 might involve the imposition on third parties of obligations to which they had not consented, and he could only accept such a provision in cases of *jus cogens*. He therefore opposed article 34, the maintenance of which might deter States from ratifying the convention.

74. Mr. SEPULVEDA AMOR (Mexico) said the purpose of his delegation's amendment (A/CONF.39/C.1/L.226) was to make the text more forceful. Certain treaties could enunciate general principles of law, the Convention on the Prevention and Punishment of the Crime of Genocide,[14] for example. Article 34 was important and should be retained.

75. Mr. SECARIN (Romania) said that the draft articles should mention exceptions to the rules laid down in articles 31-33 which established the conditions when treaties could create rights and obligations for third States. The application of a treaty could be extended beyond the contracting parties by collateral links which third States accepted either expressly or tacitly, but only when the rules were rules of customary international law. The process was a characteristic of modern times. Rules accepted by some States were subsequently applied by third States, by virtue of having become rules of customary law. That was particularly true of codifying treaties. The International Law Commission had been careful to remove any misunderstandings and had embodied a reservation in article 34, the value of which was to set out the legal basis for obligations and rights that could be invoked *erga omnes*.

76. Article 34 should be maintained because it represented a realistic solution and would make for the progressive development of law. Relations between States were based on the free expression of their will, which was the material source of the law of nations. It was in the tacit agreement of States, which consented to observe certain norms as customary rules in their practice, that the compulsory force of those norms resided.

77. He therefore supported the Syrian amendment (A/CONF.39/C.1/L.106).

78. Mr. MAKAREWICZ (Poland) said that article 34 was useful and enunciated a generally recognized principle. The real source of the obligation for the third State was recognized international custom, not the treaty. The practical importance of the article lay in the fact that it could provide an effective safeguard against the temptation for a State to invoke its non-participation in a treaty in order to evade rules which were binding on it under another heading. Rules contained in the Vienna Regulation of 1815 had become in course of time generally accepted as rules of customary law and had been applied by non-parties to the Regulation. The Laws and Customs of War on Land codified in the

[10] An amendement to article 33 had been submitted by the Philippines (A/CONF.39/C.1/L.211. Amendments submitted by Venezuela (A/CONF.39/C.1/L.205/Rev.1) and the Netherlands (A/CONF.39/C.1/L.225) had been withdrawn (see paragraphs 29 and 57 above).

[11] For resumption of discussion, see 74th meeting.

[12] The following amendments had been submitted: Syria, A/CONF.39/C.1/L.106; Finland, A/CONF.39/C.1/L.142; Venezuela, A/CONF.39/C.1/L.223; Mexico, A/CONF.39/C.1/L.226.

[13] *I.C.J. Reports, 1950* p. 266.

[14] United Nations, *Treaty Series*, vol. 78, p. 277.

Hague Convention of 1907 had come to be generally accepted as norms of international customary law and as a consequence, even those States which were not parties to the Convention were under an obligation to respect the rules, and that principle had been confirmed by the Nuremberg Military Tribunal. For those reasons the Polish delegation was opposed to the deletion of article 34.

79. The Syrian and Mexican amendments deserved careful consideration by the Drafting Committee.

80. Mr. TABIBI (Afghanistan) said he supported the proposals by Venezuela and Finland to delete the article, which added nothing to the draft. If it were retained, he would vote in favour of the Mexican and Syrian amendments.

81. Mr. MARESCA (Italy) said that article 34 was so important that it might have been inserted at the beginning of the draft; it was certainly essential in an instrument of codification. New rules of customary international law were continually being created and that practice ought to be reflected in the draft. The article should be maintained in its present form. The Mexican amendment would make its meaning clearer.

82. Mr. DE BRESSON (France) said that he was far from convinced that article 34 was either necessary or desirable. The conditions in which customary rules were imposed on States derived from custom and not from the treaty itself. He therefore feared that the article, instead of making the situation clearer, might raise doubts and cause confusion, and was inclined to agree with the views expressed by the Finnish and Venezuelan representatives.

83. Mr. SUY (Belgium) said that he too supported the views put forward by Finland and Venezuela, not because he contested the principle stated in the article, which had been recognized by the Nuremberg Military Tribunal, but because it had no place in a convention on the law of treaties; it related to the process of the formation of customary law. If the article were retained, he would support the Mexican amendment.

The meeting rose at 5.55 p.m.

THIRTY-SIXTH MEETING

Wednesday, 24 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 34 (Rules in a treaty becoming binding through international custom) [1] *(continued)*

1. Mr. MIRAS (Turkey) said that his delegation fully shared the concern expressed at the previous meeting by several delegations in connexion with article 34. That article considerably weakened the scope of the rule of relativity—based on sovereignty—which was set forth in articles 30 to 33: that was one of the essential rules of the law of treaties.

2. Article 34 did not raise the question of traditional custom, but that of the formation of custom through treaties. The object of the convention was to codify the law of treaties or more precisely a part only of that law. Accordingly, there was no need to include any reference to the transformation of treaties into customary rules. That was a difficult question and should be treated separately. Article 34 would be more appropriate in a separate work of codification relating to the notion of custom. Retention of the article might make it very difficult for certain States to accept the future convention. Efforts could of course be made to improve the drafting of the article and that was the purpose of the Syrian amendment (A/CONF.39/C.1/L.106). If the article was to be retained, it would be preferable to include a reference to Article 38 of the Statute of the International Court of Justice, which defined international custom as evidence of a general practice accepted as law.

3. The Mexican amendment (A/CONF.39/C.1/L.226) proposed to extend the scope of article 34 by the addition of the words " or as a general principle of law ". But he thought that in order to obviate the difficulties to which article 34 might give rise, the best solution would be to delete it.

4. For those reasons, he supported the amendments of Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223).

5. Mr. KRISPIS (Greece) pointed out that according to prevailing opinion, both as regards practice and doctrine, the general principles of law recognized by civilized nations constituted a source of international law, in the same way as treaties and custom. In the case of a conflict between a general rule of law and a customary or treaty rule, the latter prevailed, since it was normally *jus specialis*. However, that fact did not affect the equality of the three sources of international law, namely treaties, customs and the general rules of law.

6. If article 34 was adopted in its present wording, it might provide arguments for the opponents of the theory according to which the general rules of law were equal as sources of international law to treaties and customs. Moreover, on the basis of the precedent created by Article 38 of the Statute of the International Court of Justice, which placed the three sources on the same footing, article 34 might be considered a step backwards.

7. For those reasons, his delegation would vote in favour of the Mexican amendment (A/CONF.39/C.1/L.226), but proposed to add at the end the words " recognized by civilized nations ". If the Mexican amendment was rejected, his delegation would vote for the deletion of article 34.

8. He was in favour of the Syrian amendment (A/CONF. 39/C.1/L.106), which would improve the text of article 34.

9. Mr. ŽOUREK (Czechoslovakia) pointed out that his Government's proposal to delete article 34, which had been submitted in its written observations (A/CONF. 39/5), was not motivated by a negative attitude towards the idea on which that article was based. On the contrary, the principle set forth in article 34 seemed to be irrefutable.

[1] For the list of the amendments submitted, see 35th meeting, footnote 12.

10. There were in fact many examples of provisions which had their origin in treaties but had enlarged their scope through custom and become valid *erga omnes*. The Declaration of Paris of 1856 to abolish privateering and the treaty rules to abolish slavery as well as the international regulations governing the régime of certain straits and canals of international concern had become through custom integral parts of international law.

11. It was for quite a different reason, therefore, that his Government had requested the deletion of article 34, namely, because the wording of that article had seemed to it to be too vague and liable to give rise to a considerable number of abuses.

12. The text of article 34, which proclaimed rather a general principle, referred to customary law without further details. But it might include rules in process of formation concerning which it was not yet possible to say whether they already constituted customary rules. Moreover, particular customs might exist which were binding only on the States of a certain region.

13. In proposing the deletion of article 34, his delegation had never intended to dispute the legitimacy of the process referred to in the text of the article.

14. The Syrian amendment (A/CONF.39/C.1/L.106) considerably improved the present wording of the article and allayed the fears of his delegation; it would therefore vote in favour of the amendment, and if it was adopted, would be able to accept article 34, as amended.

15. Mr. BADEN-SEMPER (Trinidad and Tobago) said he fully supported the principle embodied in article 34. Although articles 30 to 33 were intended to codify what appeared to be existing practice in the matter of the relation of treaties to third States, they also involved an element of progressive development.

16. His delegation thought that it was necessary to avoid the disastrous effect which a strict application of the rules in articles 30 to 33 would have on the process whereby rules of customary international law were established. The text of article 34 contained all the safeguards necessary for that purpose.

17. He could not support the Syrian amendment (A/CONF.39/C.1/L.106), since it had long been recognized that customary international law was based not only on the existence of a general practice but also on the *opinio juris sive necessitatis*. The amendment was superfluous and called into question the precepts underlying customary international law.

18. His delegation failed also to see the purpose of the Mexican amendment (A/CONF.39/C.1/L.226).

19. What were called general principles of law, when embodied in a treaty, became principles or rules of treaty law, and their juridical basis lay in the treaty itself. The general principles of law, namely those of internal law, if widely recognized in the various juridical systems, constituted a source of international law which was quite distinct from the other two sources specified in Article 38, paragraphs 1(*a*) and (*b*) of the Statute of the International Court of Justice.

20. Lastly, he proposed the replacement of the expression " customary rule of international law " by " rule of customary international law ", and asked the Drafting Committee to consider that wording.

21. Mr. MUTUALE (Democratic Republic of the Congo) said that article 34 was of great practical importance, because its effects might be damaging to relations between States.

22. His delegation regarded the Syrian amendment (A/CONF.39/C.1/L.106) as specially valuable, since it took account of the need for respect for the sovereign equality of States, particularly that of newly independent States. Articles 30 to 33 were based on the legal principle of the sovereign equality of States but that principle was not embodied in article 34, in which the International Law Commission could almost be said to have taken the opposite view.

23. It was difficult to see how a government of a sovereign independent State could, purely automatically, be legally bound by an obligation stipulated in a treaty concluded by other States. The International Law Commission would appear to have replied that the obligation would only exist if it was derived from a clause stating and constituting a customary rule of international law.

24. It would still be necessary to give a precise definition of international custom. In particular, how many times must a usage be repeated in order to become international custom? And even assuming it was possible to define the specific elements constituting international custom, could a State be subjected to the traditional practices of other States, dictated by specific circumstances arising out of their interests and their past struggles? That was why his delegation declared itself hostile to any idea likely to impose an obligation on third States in the name of international custom alone, without recognition and acceptance of that custom by the State concerned.

25. He had no objection to the Mexican amendment (A/CONF.39/C.1/L.226).

26. Mr. USTOR (Hungary) said that article 34 did not state a new rule, because its provisions did not come within the progressive development of international law but were part of contemporary customary international law.

27. The scope of many treaties had been extended by custom; for example, the Briand-Kellogg Pact of 1928 [2] had gradually become a rule of customary international law for States which were not parties to it.

28. He agreed that the rule expressed in article 34 was not strictly a matter of the application of treaties but gave an idea of the possible long-term effects of a treaty.

29. The recognized principles of international law should be adhered to. He favoured the retention of article 34 and thought that the amendments submitted by Syria (A/CONF.39/C.1/L.106) and Mexico (A./CONF. 39/C.1/L.226) should be referred to the Drafting Committee.

30. Mr. TEYMOUR (United Arab Republic) said that a treaty concluded between a number of States might express a rule which could subsequently be generally recognized and accepted by the international community as binding and general by way of custom. The purpose

[2] League of Nations, *Treaty Series*, vol. XCIV. p. 57.

of the 1961 Vienna Convention on Diplomatic Relations [3] had been to state existing rules of customary law. The International Law Commission had explained in its commentary to article 34 that a rule set down in a treaty concluded between States became binding on third States as a customary rule of international law only if they recognized it as such. He supported the Syrian amendment (A/CONF.39/C.1/L.106), which clarified the existing wording of article 34 along those lines and thus recognized the principle of the sovereign equality of States.

31. Mr. ALCIVAR-CASTILLO (Ecuador) said that article 34 stated a general rule which might be placed either at the beginning or at the end of the convention.

32. The wording of the article caused some difficulty to his delegation, as it mentioned only a customary rule of international law, whereas what became universally binding was a rule of general international law, the source of which might be either customary practice or a treaty.

33. It had been argued that the universally binding character of a rule in a treaty even for States which were not parties to a general multilateral treaty was due to that rule becoming custom. Other explanations were possible, however, especially Scelle's doctrine of the expansive force of law-making treaties. However that might be, he believed that the text of article 34 should rather refer to a rule of general international law, and he wished to draw the attention of the Drafting Committee to that matter. He supported the amendments by Syria (A/CONF.39/C.1/L.106) and by Mexico (A/CONF. 39/C.1/L.226).

34. Mr. RUIZ VARELA (Colombia) observed that draft article 34 could be accepted if custom was regarded as a fundamental source of international law. That source was, indeed, mentioned in Article 38 of the Statute of the International Court of Justice. In the context, it was not a rule relating to progressive development, but to codification of the existing law. Consequently, article 34 in no way affected the sovereignty of third States: they were bound by the provisions of a treaty only if those provisions became rules of customary law. As stated in the commentary to article 34, the source of the binding force of the rules was custom, not the treaty.

35. The only defect in article 34 was remedied by the amendments submitted by Syria (A/CONF.39/C.1/L.106) and by Mexico (A/CONF.39/C.1/L.226). The former made it clear that the customary rule must be recognized as such. Although the amendment did not state it in so many words, it was self-evident that the customary rule should be recognized as such by third States, since for States parties to a treaty the provisions of that treaty had binding force. The other amendment made matters still clearer by introducing the notion of a "general principle of law".

36. The Colombian delegation would therefore vote for article 34 and the amendments thereto by Mexico and Syria. It would vote against the amendments submitted by Venezuela (A/CONF.39/C.1/L.223) and Finland (A/CONF.39/C.1/L.142).

37. Mr. YASSEEN (Iraq) said he was in favour of retaining article 34. The provisions of a treaty could subsequently become customary rules and thereby be considered rules of law. Such provisions would have binding force for third countries, not because they were part of the treaty, but simply as customary rules.

38. The Syrian amendment (A/CONF.39/C.1/L.106) lent greater precision to the International Law Commission's text and the Iraqi delegation would vote for it. As it stood, article 34 was simply a reservation and in no way prejudged the question of the formulation and scope of customary rules. Even if the Committee of the Whole did not accept the Syrian amendment, the process of formulating customary rules would not be affected and the general principle that custom always had a specific scope would still apply. For instance, a regional custom could not be extended to other regions for which that custom had not been contemplated.

39. The amendment submitted by Mexico (A/CONF.39/ C.1/L.226) was wholly justified from the technical point of view, inasmuch as written law and custom were not the sole sources of international law. The general principles of law were also mentioned in the Statute of the International Court of Justice as one of those sources. A general principle could undoubtedly be conceived as being established on the basis of a rule, but that was hardly likely in practice. A general principle flowed from a legal order, from a whole set of rules. It could not be established on the basis of an article in a treaty without passing through the stage of custom. Consequently, from the practical point of view, he had some doubts about the utility of the amendment.

40. Mr. IBLER (Yugoslavia) said that the inclusion of article 34 in the draft convention was fully justified. He supported the amendments submitted by Syria (A/CONF. 39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226), as they improved the International Law Commission's text by making it more precise.

41. Mr. CHANG CHOON LEE (Republic of Korea) said he supported the amendments by Finland (A/CONF. 39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223) to delete article 34. As it stated in the commentary, the International Law Commission had desired to emphasize that the article was purely and simply a reservation designed to negative any possible implication from articles 30 to 33 that the draft articles rejected the legitimacy of the status of the customary rule of international law with respect to treaty relations. The Commission had not considered that it should cover the whole question of the relation between treaty law and customary law. It had recognized that the question would lead it far beyond the scope of the law of treaties proper and would more appropriately be the subject of an independent study. While appreciating the reasons for which the International Law Commission had devised the article, he himself considered that the subject should not be dealt with in that part of the convention; it should rather take the form of a general reservation on customary rules of international law.

42. In conclusion, he wished to explain that his delegation's support of the amendments to delete article 34 did not mean any denial of the existence of the customary rules of international law.

[3] United Nations, *Treaty Series*, vol. 500, p. 95.

43. Sir Humphrey WALDOCK (Expert Consultant) said that the reasons why the International Law Commission had not considered it necessary to mention the general principles of law in article 34 had already been explained by the representative of Iraq. Article 34 dealt solely with the question of the principles contained in the provisions of a treaty which became customary rules in the ordinary process. It was hardly probable that a new principle stated in a treaty would become binding without passing through the stage of custom. A reference to the general principles of law was not, of course, contrary to the intention of the article. It was only because the question was covered by a reference to custom that the Commission had not felt it necessary to mention those principles. Article 34 was simply a reservation designed to obviate any misunderstanding about articles 30 to 33. It in no way affected the ordinary process of the formulation of customary law. The apprehensions under which certain delegations seemed to be labouring originated in a misunderstanding of the purpose and meaning of the article.

44. The CHAIRMAN put to the vote the amendments by Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223) to delete article 34.

At the request of the representative of Venezuela, the vote was taken by roll-call.

Afghanistan, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Afghanistan, Argentina, Ceylon, Federal Republic of Germany, Finland, Norway, Peru, Republic of Korea, Spain, Sweden, Switzerland, Turkey, Uruguay, Venezuela.

Against: Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Central African Republic, Chile, China, Colombia, Congo (Democratic Republic of), Cuba, Denmark, Ecuador, Ethiopia, Ghana, Guatemala, Holy See, Hungary, India, Iran, Iraq, Israel, Italy, Jamaica, Japan, Kenya, Kuwait, Liechtenstein, Madagascar, Malaysia, Mali, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Pakistan, Philippines, Poland, Portugal, Republic of Viet-Nam, Romania, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Thailand, Trinidad and Tobago, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Yugoslavia, Zambia.

Abstaining: Algeria, Bolivia, Congo (Brazzaville), Costa Rica, Cyprus, Czechoslovakia, Dahomey, Dominican Republic, France, Gabon, Greece, Guinea, Indonesia, Ivory Coast, Liberia, Monaco, Syria, Tunisia.

The amendments were rejected by 63 votes to 14, with 18 abstentions.

45. The CHAIRMAN put the Mexican amendment (A/CONF.39/C.1/L.226) to the vote.

The amendment was adopted by 38 votes to 28, with 28 abstentions.

46. The CHAIRMAN put the Syrian amendment (A/CONF.39/C.1/L.106) to the vote.

The amendment was adopted by 59 votes to 15, with 17 abstentions.

47. The CHAIRMAN said that article 34, as amended, would be referred to the Drafting Committee.

48. Mr. FRANCIS (Jamaica) explained that he had not voted for the Syrian amendment because the words " recognized as such " could be interpreted either widely or restrictively.

49. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that in his opinion article 34 meant that norms of customary international law could become binding on a third State only if that State recognized that those provisions were binding upon it. They could obviously not become binding on a State which did not recognize those norms as having become binding on it. As to the meaning of the term " a general principle of law ", the Soviet Union delegation understood it to mean " generally recognized principles of international law ".

50. Mr. DADZIE (Ghana) explained that his delegation had abstained from voting on the Syrian amendment because it feared that the words " recognized as such " might open the door to abuse. The text would be more acceptable to his delegation if the Drafting Committee agreed to insert the word " generally " before the words " recognized as such ".

51. The CHAIRMAN said that the Drafting Committee would take the Ghanaian representative's comments into consideration.

52. Mr. MAIGA (Mali) explained that his delegation had voted against the Mexican amendment, not because it was opposed to the general principles of law, but because under Article 38 of the Statute of the International Court of Justice those principles were recognized solely by civilized nations. As his delegation found some difficulty in drawing a distinction between civilized and uncivilized nations, it could not accept that amendment.[4]

Article 35 (General rule regarding the amendment of treaties) and

Article 36 (Amendment of multilateral treaties) [5]

53. The CHAIRMAN invited the Committee to take up Part IV of the draft (Amendment and modification of treaties), beginning with articles 35 and 36.

54. Mr. PINTO (Ceylon) said that his delegation's amendment to article 35 (A/CONF.39/C.1/L.153) was a drafting amendment. The International Law Commission, no doubt unintentionally, had placed more emphasis on the agreement of the parties than on the amendment procedure specified in the treaty. The purpose of the Ceylonese amendment was to restore the procedure specified in the treaty to its normal status.

55. Mr. BARROS (Chile), introducing his delegation's amendment (A/CONF.39/C.1/L.235), said that its first

[4] For resumption of the discussion on article 34, see 74th meeting.

[5] The following amendments had been submitted:
To article 35: Ceylon, A/CONF.39/C.1/L.153; Chile, A/CONF.39/C.1/L.235.
To article 36: France, A/CONF.39/C.1/L.45; Netherlands, A/CONF.39/C.1/L.232.

aim was to dispose of a slight difference between the Spanish version of article 35, which began with the words " *Todo tratado* ", and the English and French versions, which read "A treaty " and " *Un traité* " respectively.

56. Secondly, the commentary to article 35 showed that the International Law Commission had contemplated two distinct cases: that of bilateral treaties the amendment of which necessitated the agreement of the parties, and that of multilateral treaties the amendment of which did not require the unanimous agreement of the parties. The Chilean amendment was therefore designed to state expressly in the text what was apparent from the commentary. The amendment could be referred to the Drafting Committee if the principle it embodied was accepted by the Committee of the Whole. The Chilean delegation attached no particular importance to the wording it had proposed, provided the idea it had put forward was adopted. For example, the article could first state that any treaty might be amended by agreement between the parties and then deal in turn with the cases of bilateral and multilateral treaties.

57. Mr. DE BRESSON (France) said that his delegation's amendment to article 36 (A/CONF.39/C.1/L.45) followed from the amendments already proposed to other articles on the subject of restricted multilateral treaties. It was contrary to the very essence of the restricted multilateral treaty to offer some parties, as article 36 did, the opportunity of amending the text of such a treaty with respect to their relations with each other. The French delegation therefore proposed the exclusion of that class of treaty from the application of the provisions of article 36. As with the other amendments of that kind, he requested that the amendment to article 36 be referred to the Drafting Committee.

58. Mr. KRAMER (Netherlands) said he had concluded from reading article 36 that the International Law Commission had simply made a mistake in paragraph 2. His delegation's amendment (A/CONF.39/C.1/L.232) would correct that mistake.

59. Mr. CHAO (Singapore) said that he gathered from reading the English version of article 36, paragraph 3, that if a treaty was open to accession by certain States or by all States, such invitation to accede could not be later withdrawn. In other words, States which were at a given moment parties to a treaty could not amend it so as to bar any further accession. On the other hand, although States were not permitted to close the door, they could open it wider. He would appreciate it if the Expert Consultant would throw some light on that point and state whether that was really the meaning and effect which the International Law Commission had intended to give to the paragraph.

60. Paragraph 3 had been added to article 36 only at the eighteenth session of the International Law Commission. He would like the Expert Consultant to explain, first, whether the Commission, in adding the paragraph, had considered that the clause which opened the treaty to signature or accession by third States could be amended and secondly, why the Commission had considered that third States entitled to become parties to the treaty should be treated on an equal footing with a negotiating State not yet a party to the treaty.

61. If the International Law Commission had wished to give paragraph 3 the meaning and effect which its wording seemed to imply, it was an unnecessary curtailment of the sovereign rights of States, since it was hard to see why the provision relating to accession to the treaty, unlike the other provisions, could not be amended.

62. He was not making a formal proposal, but he did suggest that the qualification " unless the treaty as amended otherwise provides " should be added at the beginning of paragraph 3. That suggestion might be submitted to the Drafting Committee, subject to any explanations given by the Expert Consultant.

63. He supported the amendments by Ceylon and the Netherlands, as they improved the text. They might be referred to the Drafting Committee.

64. Mr. KEMPFF MERCADO (Bolivia) said he found the International Law Commission's text clear and precise and it fairly and fully described the régime of treaty amendment. The Ceylonese amendment was superfluous, in his view, and the Chilean amendment would make the rules unduly rigid.

65. Mr. SMALL (New Zealand) suggested that it would be unwise to include a presumption such as that in article 36, paragraph 5, particularly in view of its effect on new or smaller States with only a restricted legal staff and limited record facilities. Though it was unusual for a State which became a party to a treaty to overlook the existence of any protocols to it, it might easily happen in certain circumstances, particularly when a State took rapid measures to accede to a multilateral treaty of great practical importance to it.

66. With that preliminary remark, he asked if the Expert Consultant could explain more precisely the meaning of the phrase " failing an expression of a different intention ". The commentary to article 36 did not altogether make clear the effect of that provision in practice. By far the most usual practice was for a State which acceded to a multilateral treaty to accede by a document referring in specific terms to a particular convention signed on a specific date and at a specific place. Would the act of acceding to such a convention thus made specific be deemed in fact to express the intention to accede solely to that convention and to no later protocols? Or on the other hand, would such an accession be taken as including unspecified later protocols? If the Expert Consultant could comment on that point, his explanation would throw more light on the general meaning of paragraph 5.

67. Mr. HARRY (Australia) said that under article 2 of the draft, the treaties to which the convention applied were defined as agreements " in written form ". Since article 35 stipulated that the rules laid down in Part II applied to an agreement to amend a treaty, it would perhaps be advisable to add at the end of the paragraph " if it is in written form ". The Drafting Committee might consider that point.

68. Mr. SINCLAIR (United Kingdom) said he wished to offer a few observations on articles 35 and 36 and the amendments to those articles.

69. The Chilean amendment, for which he had some sympathy, could not be adopted as it stood, for the first sentence of article 35 was in the nature of an intro-

duction to the question as a whole: it did not relate to bilateral agreements alone. It might be that the Drafting Committee could find a solution. He was doubtful, however, whether the Ceylonese amendment added anything useful to the text.

70. Article 36 was complicated and should be read in conjunction with the provisions of article 37. Although he had no objection to the rule set forth in paragraph 2 of article 36, if a rule on that point had to be included in the convention, he queried whether it was really desirable, for it might be difficult to identify the parties to a long-established treaty in view of the uncertainties surrounding the law of State succession.

71. With regard to the question raised by the representative of Singapore concerning paragraph 3 of article 36, he was looking forward with interest to the Expert Consultant's reply.

72. The residual rule in paragraph 5 of article 36, which his delegation accepted in principle, might give rise to difficulties, for in practice mistakes did occur. Moreover, if a State which had to enact internal legislation to give effect to a treaty within its territory found itself in the situation referred to in paragraph 5, it would have to provide for two classes of States in its implementing legislation.

73. Nevertheless, he was not opposed to that rule, in so far as it was cast as a double residual rule. It would, in fact, apply only in the absence of a contrary intention expressed either in the treaty, or by the party itself.

74. He saw no need for the French amendment, because the parties to a restricted multilateral treaty would inevitably stipulate expressly that the treaty could be amended only by the unanimous consent of the parties. In any event, he was opposed to the subdivision of multilateral treaties into categories.

75. He would be interested to hear the comments of the Expert Consultant on the amendment proposed by the Netherlands.

76. His delegation was not opposed to article 36, but the article undoubtedly represented the progressive development of international law and might give rise to some practical difficulties.

77. Mr. KEARNEY (United States of America) agreed that the amendment of a treaty should, if tantamount to a new treaty, result from a written agreement. In that respect, the expression " any procedure " in the amendment by Ceylon was too vague, since it could imply that a treaty could be modified by an oral amendment. He would like to know the Expert Consultant's views on that point.

78. The question of the written form also arose with article 36, particularly in connexion with the notification as provided in paragraph 2. The Drafting Committee should clarify the position, because the written form clearly seemed to be the rule, at least for multilateral treaties.

79. Moreover, paragraph 5 of article 36 did not seem to cover the case where the parties had decided that their amendment to the treaty must be accepted by any State becoming a party to it. The United States delegation did not think that a provision of that kind was prohibited by article 36, as worded, but it wished to know the Expert Consultant's opinion on the matter.

The meeting rose at 1 p.m.

THIRTY-SEVENTH MEETING

Wednesday, 24 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 35 (General rule regarding the amendment of treaties) and

Article 36 (Amendment of multilateral treaties) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 35 and 36 of the International Law Commission's draft.[1]

2. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that the Commission had rejected the kind of language used in the amendment by Ceylon (A/CONF.39/C.1/L.153) in order that respect for amending procedures provided for in the treaty might not be endangered. Treaties often contained procedures for amendment and, in accordance with the principle *pacta sunt servanda*, those procedures should be observed unless there was unanimous agreement between the parties to disregard them.

3. Both parts of the second sentence in article 35 were important, and laid down that the rules in Part II applied. The same conditions for the adoption of amendments to a treaty as those provided in article 8 obtained, in other words a two-thirds majority was required. In that way, a small group of States could not frustrate the amendment of multilateral treaties.

4. He would not vote for the amendment by Ceylon. The purpose of the Chilean amendment (A/CONF.39/C.1/L.235) was to cover bilateral treaties, but that was already done in the Commission's draft, so that the amendment was unnecessary. The guarantees sought in the Chilean proposal were provided by the reference to Part II. In Part II, article 8, paragraph 1 laid down the general rule that the adoption of an amending treaty took place by unanimous consent, subject to the provisions of paragraph 2 of that article. If the Chilean proposal were adopted, there would be no general rule for multilateral treaty amendments not adopted at international conferences.

5. Some mention had been made of practical difficulties to which article 36 might give rise, but they could be overcome by resort to *inter se* agreements, as provided in article 37.

6. Mr. ARIFF (Malaysia) said that the amendment by Ceylon covered the situation when a treaty provided

[1] For the list of the amendments to articles 35 and 36, see 36th meeting, footnote 5.

for its own amendment and the parties agreed on a procedure of their own choice. For example, it could be by means of an exchange of notes. The words " by agreement between the parties " should certainly be kept, as well as the second sentence in the International Law Commission's draft.

7. Mr. DE LA GUARDIA (Argentina) said he supported the text submitted by the Commission. The amendments by Ceylon and Chile were unduly restrictive, and distorted the sense of the article.

8. Mr. SAMRUATRUAMPHOL (Thailand) said he was in favour of the Commission's draft for articles 35 and 36. The Chilean amendment appeared to be unnecessary, but that submitted by Ceylon deserved examination.

9. Mr. RIPHAGEN (Netherlands) said that the purpose of the Netherlands amendment to article 36 (A/CONF. 39/C.1/L.232) was to enlarge the circle of States entitled to participate in the negotiations relating to the modification of a multilateral treaty. Often such treaties did not enter into force until many years after the adoption of the text owing to the large number of ratifications required for its entry into force. In the meantime, all the States which had expressed their consent to be bound should have the right to take part in the amending process. The text as submitted by the Commission limited the faculty to take part in the amending process to the parties, but until the treaty entered into force, there were no parties. The phrase proposed by his delegation " contracting States " would cover all States which had expressed their consent to be bound.

10. Mr. MARESCA (Italy) said that although the proposition contained in the Chilean amendment (A/CONF.39/C.1/L.235) might seem self-evident, it was nevertheless desirable to include it. The renewal of treaty law was an essential aspect of international law.

11. The presumption contained in paragraph 5(*a*) of article 36 seemed to him to go too far.

12. The French amendment (A/CONF.39/C.1/L.45) could go to the Drafting Committee. He was not convinced that there was any practical need to introduce the notion of restricted multilateral treaties, and feared that such an addition would make for rigidity and complicate the process of amendment.

13. Mr. BARROS (Chile) said that the title of article 35 made it clear that bilateral treaties were covered as well as multilateral treaties. He agreed with the Uruguayan representative that the Chilean amendment was already implicit in the Commission's draft but he still thought it preferable to insert an express rule on the point.

14. Sir Humphrey WALDOCK (Expert Consultant) said that the Uruguayan representative had exactly described what had been the International Law Commission's intention. There could be no shadow of doubt that the rule for which the Chilean representative was contending was already contained in the Commission's draft of article 35.

15. The Australian representative had asked why the Commission had left out the reference, which had previously appeared in the article, to agreements " in written form ". It had recognized that in some cases treaties, especially those in simplified form, were varied by informal procedures and even by oral agreement of ministers, so that an express reference to agreement in written form might give the impression that amendment by oral agreement was excluded as a matter of course. The Commission had not accepted the principle of an " *acte contraire* " and considered that amendment by oral agreements would be covered by the general reservation in article 3.

16. The Netherlands amendment to paragraph 2 of article 36 was designed to cover cases when there was a considerable interval between signature and entry into force. In that event a text might be found to be unsatisfactory, so that it would be desirable to amend it, in order to attract the ratifications necessary to bring it into force, but he did not think that the Netherlands amendment offered quite the right solution for such cases. The States which needed to be consulted in such cases were surely the negotiating States rather than the contracting States. What the Commission had tried to do had been to find the right balance between attributing a reasonable freedom to the parties to amend a treaty and protecting the rights that States must be considered to have in the text of a treaty which they had drawn up and adopted. If the treaty was not yet in force and amendment became necessary, that would clearly have to be done by the States which had taken part in drawing up the text, and the Commission had thought it sufficient to leave the matter to diplomatic action. The Commission's draft had dealt rather with cases when the treaty was already in force. The Netherlands amendment might fill a gap, but for reasons a little different from those advanced in its support. It would help to cover the not uncommon case of a State which had established its consent to be bound but for which the treaty would not come into force until after the expiry of a short interval of time.

17. With regard to a point made by the representative of Singapore at the previous meeting concerning paragraph 3, it would be going too far to exclude from the right to become parties to an amending agreement States which, under the final clauses, had a right to participate in the treaty. It was the interests of the negotiating States which the Commission had sought to protect. The rule formulated in paragraph 3 also covered any State entitled to become a party under the final clauses and in that respect was perhaps too wide, but it could only be restricted by confining it to the negotiating States.

18. The presumption contained in paragraph 5 had been fairly fully explained in the commentary. The Commission had been informed that, in United Nations practice, States often gave no indication of their intentions when depositing an instrument of ratification, the reason often being that they had not given the matter any thought. Where no clear statement of intention existed, a presumption would be made *de lege ferenda* of their intention to become a party to the amended version of the treaty. The kind of treaties most often in need of amendment were technical ones to which States were hardly likely to wish to become parties when the text had already been overtaken by events and undergone amendment.

19. Mr. BARROS (Chile) said that the discussion had shown that in substance his amendment (A/CONF.39/

C.1/L.235) was perhaps unnecessary. He was thinking in particular of the statement by the Expert Consultant that there could be no shadow of doubt that the rule for which Chile was contending in its amendment was already contained in article 35. The record of that statement could prove very valuable if some day it were desired to ascertain the history of article 35 and the scope of its application with regard to the revision of bilateral treaties. On that understanding, he would withdraw the Chilean amendment.

20. Mr. PINTO (Ceylon) said that his amendment (A/CONF.39/C.1/L.153) was purely of a drafting character and he would withdraw it.

21. The CHAIRMAN said that, since both the Chilean and the Ceylonese amendments had been withdrawn, article 35 could now be referred to the Drafting Committee.

It was so agreed.[2]

22. The CHAIRMAN suggested that since the amendments to article 36 by France (A/CONF.39/C.1/L.45) and the Netherlands (A/CONF.39/C.1/L.232) were both of a drafting character, they could be referred to the Drafting Committee.

23. Mr. WERSHOF (Canada) said that the French amendment raised a controversial issue of substance, and was certainly not a mere drafting matter. He understood that at a later stage all the French amendments on the question of restricted multilateral treaties would come up for decision. In the meantime, the final decision on article 36 might perhaps be deferred.

24. The CHAIRMAN said it had been agreed that in due course the Commission should consider the French amendment on restricted multilateral treaties.

25. Mr. VEROSTA (Austria) said that, for reasons of internal constitutional law, his delegation must reserve its position with respect to the interpretation of subsequent treaties. He agreed with the Expert Consultant that suitable latitude should be allowed as to the form which amendments to treaties might take; it could even be oral.

26. He hoped, in due course, to learn what the difference was between amendment and modification of treaties; both terms were used in the title of Part IV.

27. The CHAIRMAN suggested that, on the understanding he had mentioned, article 36 should be referred to the Drafting Committee.

It was so agreed.[3]

Article 37 (Agreements to modify multilateral treaties between certain of the parties only)

28. The CHAIRMAN invited the Committee to consider article 37 and the amendments thereto.[4]

29. Mr. DE BRESSON (France), introducing his amendment to article 37 (A/CONF.39/C.1/L.46), said that its purpose was similar to that of earlier amendments submitted by France to other articles of the draft: to take into account the special case of restricted multilateral treaties.

30. Article 37 specified the conditions under which a multilateral treaty could be modified between certain of the parties only. A provision of that type could have no application to a restricted multilateral treaty as the French delegation conceived such a treaty. For that reason, his delegation proposed the insertion, at the beginning of paragraph 1, of the proviso " Except in the case of a restricted multilateral treaty ".

31. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.237), said that, when the Committee had considered article 17, it had approved, subject to drafting, the provisions of paragraph 2 of that article to the effect that, in certain circumstances, a reservation required the acceptance of all the parties to the treaty. The purpose of his amendment (A/CONF.39/C.1/L.237) was to specify the requirement of the agreement of all the parties to the treaty if, in the same circumstances, some of the parties wished to modify the treaty between themselves only. There was a clear analogy between the two cases envisaged in paragraph 2 of article 17 and in article 37 respectively.

32. Mr. ŽOUREK (Czechoslovakia) said that article 37, which dealt with an extremely complex problem, was generally acceptable. His delegation had, however, submitted a drafting amendment (A/CONF.39/C.1/L.238) to add, at the end of paragraph 1(*b*) (iii), the words " or by another rule of international law." The purpose of that amendment was to clarify the meaning of the sub-paragraph. The word " treaty " as used in article 37 clearly meant the multilateral treaty in question and *inter se* agreements might well be prohibited, not by that treaty but by some other treaty, or by a rule of general international law. A case in point was Article 20 of the Covenant of the League of Nations which had prohibited for the future the conclusion of any treaty inconsistent with the terms of the Covenant. The position would be similar in the case of an *inter se* agreement which violated a general norm of international law, such as a rule of international criminal law.

33. Mr. BOLINTINEANU (Romania), introducing the joint amendment (A/CONF.39/C.1/L.240), said that there was an error in the French original: the concluding words of the opening phrase of sub-paragraph (*b*) should read " *à condition que celle-ci* ".

34. The purpose of the joint amendment, which was purely one of drafting and presentation, was to give first place to the requirement that the *inter se* modification must not be prohibited by the treaty; if the treaty prohibited such an *inter se* agreement, there was no occasion to examine the application of the other two requirements set forth in sub-paragraphs 1(*b*) (i) and 1(*b*) (ii). It was only where no such prohibition existed in the treaty that the parties concerned would have to consider whether the *inter se* agreement could be concluded without affecting the other parties to the treaty, and without frustrating the object and purpose of the treaty. The proposed presentation set forth those three

[2] For resumption of the discussion on article 35, see 78th meeting.

[3] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to " restricted multilateral treaties " until the second session of the Conference. Further consideration of article 36 was therefore postponed.

[4] The following amendments had been submitted: France, A/CONF.39/C.1/L.46; Australia, A/CONF.39/C.1/L.237; Czechoslovakia, A/CONF.39/C.1/L.238; Bulgaria, Romania and Syria, A/CONF.39/C.1/L.240.

requirements in a more logical order than the present text of paragraph 1(*b*), and had the further merit of underlining the primacy of the text of the treaty. Paragraph (2) of the commentary drew attention to the fact that all three requirements of paragraph 1(*b*) of article 37 must be fulfilled: " These conditions are not alternative, but cumulative ". That being so, the order in which they were set down in paragraph 1(*b*) did not affect the substance of the whole provision. The effect of the text with or without the joint amendment (A/CONF.39/C.1/L.240) would be the same; the amendment should therefore be referred to the Drafting Committee.

35. Mr. DE BRESSON (France) said he was afraid that the complex provisions of article 37 might in practice conflict with those of article 36, paragraph 2. There was a danger that parties wishing to amend a multilateral treaty might use an *inter se* agreement under article 37 in order to bypass the procedural requirements of article 36. He had also considerable doubts regarding the usefulness of article 37, since the case it envisaged would appear to be already covered by article 26. Furthermore, the concept of an *inter se* modification could prove in practice to be detrimental to the security of international treaty relations.

36. He would like to hear the views of the Expert Consultant on those points before deciding on the position of his delegation.

37. Mr. STREZOV (Bulgaria) said that the arrangement adopted in the joint amendment (A/CONF.39/C.1/L.240) of which his delegation was one of the sponsors was more logical than that of the present text. Paragraph 1(*a*) and the opening phrase of paragraph 1(*b*) would state the two outside limits, by providing respectively for the case in which *inter se* agreements were expressly allowed and that in which they were prohibited by the treaty. Subparagraphs 1(*b*) (i) and 1(*b*) (ii) would then define the conditions which the agreement must fulfil.

38. He hoped the Drafting Committee would give the joint amendment careful consideration.

39. Mr. SINCLAIR (United Kingdom) said that real problems could arise from the joint application of articles 36 and 37. An operation which began as an attempt to amend the treaty for all the parties could easily end as a modification between some of them *inter se*. On the other hand, an *inter se* modification agreed upon as between some of the parties only might appeal to the others and lead ultimately to the amendment of the treaty for all the parties to it. He would be grateful if the Expert Consultant would explain how to draw the distinction between " amendment " and " modification " in cases of that kind.

40. Again, in cases which began under article 36 but ended under article 37, he feared that the provisions of paragraph 1(*b*) of article 37 might well prove much too rigid. In treaty revision, flexibility was essential, particularly where long-established treaties were concerned. There had been cases where an attempt had been made to assemble all the parties to a multilateral treaty, but without success; if a revision operation of that type came under article 37, the conditions laid down in paragraph 1(*b*) might prove to be unduly strict.

41. With regard to the amendments, his delegation had already stated its position on the French proposal relating to " restricted " multilateral treaties. He would reserve his position on the Australian amendment (A/CONF.39/C.1/L.237) until the final text of article 17, paragraph 2, emerged from the Drafting Committee.

42. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that article 37 served a very useful purpose by dealing with a situation which was not uncommon in practice. Regional arrangements, for which the United Nations Charter itself made specific provision in articles 52 to 54, were an important example of *inter se* agreements to vary, as between some of the parties, the provisions of the main treaty. Frequently a number of States bound by close historic and other ties would be able, in their *inter se* relations, to go further than the other parties in the direction of progress marked by the main treaty.

43. *Inter se* agreements were often the result of a process for amending a treaty set in motion under article 36. They also provided a necessary safety-valve for cases in which, for one reason or another, a useful step forward could not be immediately approved by a few of the original parties. In technical conventions, such as those on air navigation or postal relations, the *inter se* procedure had become a necessity of everyday international life and to prohibit such agreements, or render them unnecessarily difficult, would give to a single party a right of veto in matters where there was a genuine need to keep abreast of developments.

44. Another reason for retaining article 37 was that its deletion would do away with the safeguards embodied in sub-paragraphs 1(*b*) (i) and 1(*b*) (ii). The provisions of article 26 as they stood would not fill that gap. Paragraph 5 of article 26 began with the words " Paragraph 4 is without prejudice to article 37 ", thereby establishing a close link between the provisions of the two articles. If therefore article 37 were to be deleted, the substance of its provisions would have to be reintroduced in article 26.

45. Mr. VEROSTA (Austria) said that, in article 35, his delegation had been able to accept the term " agreement " in a broad sense. But in article 37 the position was different, particularly in view of the words used in paragraph 1 " may conclude an agreement to modify ": an agreement which was said to be " concluded " could not be anything but a formal treaty. He would be grateful to the Expert Consultant for an explanation on that point, and also on the distinction between " amendment " as used in articles 35 and 36, and " modification " as used in article 37.

46. With regard to the joint amendment (A/CONF.39/C.1/L.240), he would suggest that the concluding words of the opening phrase " provided that the modification " be replaced by the single word " and "; that change would make the meaning clearer.

47. Mr. SØRENSEN (Denmark) said he strongly supported the International Law Commission's formulation of article 37 for the reasons already given by the representative of Uruguay. For the same reasons, he opposed the amendment by Australia (A/CONF.39/C.1/L.237), which would place an additional restriction on the conclusion of *inter se* agreements by introducing a reference to treaties of the type envisaged in article 17. His country was particularly concerned to avoid any

such limitations being imposed on the *inter se* modification of agreements between a limited number of States of the type referred to in paragraph 2 of article 17. The analogy drawn by the representative of Australia between a reservation and an *inter se* modification was more apparent than real. At the time of the conclusion of a multilateral treaty, it might be justifiable to exclude reservations but, as time passed, the need for *inter se* modifications could well become apparent.

48. His country had considerable experience of agreements between a limited number of States, and it had not been at all uncommon for a treaty of that type to require *inter se* modification. A treaty on the status of citizens of one of the States parties in the territory of another was often found, with the passage of time, to require changes in order to bring its provisions up to date. The procedure for revision would then be embarked upon in the manner indicated in article 36, but it would be found that one or two of the parties were not yet ready to make the desired modification because they had not kept quite abreast of the new developments. In cases of that type, there was no reason to exclude an *inter se* agreement which brought the system up to date between the States concerned, provided the rights of the other original parties were not violated. The provisions of paragraph 1(*b*) of article 37 afforded ample safeguards in that respect, and the further restrictions suggested in the Australian proposal were unnecessary.

49. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had used the term " agreement " advisedly in article 37 so as to avoid any confusion with the term " the treaty " which, in the context, referred to the particular multilateral treaty that it was proposed to modify in the relations between some of its parties only.

50. Similarly, the Commission had found it convenient to reserve the use of the term " amendment " for cases where there was an intention to amend the treaty for all its parties as in article 36. The term " modification " had been used in article 37 for the case where a small circle of States wished to vary the provisions of the initial instrument in the relations between themselves; the case was not one of a full amendment of the treaty from the point of view of the intention of the parties, or even in law. It would be ultimately for the Drafting Committee and the Committee of the Whole to decide on those questions of terminology.

51. The International Law Commission had considered at length the problem of the relationship between article 26 and articles 36 and 37. The Commission's approach had been aptly described by the representatives of Uruguay and Denmark. With regard to the point raised by the representative of France, he said that article 26 dealt with the application of two successive treaties which came into conflict; the second treaty did not purport to be an amendment of the first, but rather a separate treaty. It was undesirable to encourage the notion that an agreement which violated the initial agreement could be resorted to for purposes of modification. The case envisaged in article 36 was one in which the initial intention of the parties was to amend the treaty as between all the parties. That process might of course ultimately result in the emergence of certain *inter se* relationships if not all the parties to the treaty ratified the amendment. However, the amending agreement would, from the beginning, be open to participation by all the original parties.

52. The case envisaged in article 37 was quite different from those contemplated in articles 35 and 36. Article 37 dealt with the case where from the outset some of the parties had the intention of varying certain provisions of the treaty in their particular relations. One obvious example was that of agreements at the regional level. Articles 26 and 37 would thus meet two distinct sets of needs. As far as article 37 was concerned, it was necessary to make its provisions strict, in order to prevent abuses which would constitute violations of treaty obligations.

53. Mr. VEROSTA (Austria) said he was grateful to the Expert Consultant for his clarification and would suggest that, in view of the somewhat special meaning attached to the terms " amendment " and " modification ", an appropriate provision describing their use be inserted in article 2, paragraph 1.

54. Mr. BOLINTINEANU (Romania), speaking on behalf of the sponsors of the joint amendment (A/CONF. 39/C.1/L.240), said the representative of Austria had made a most useful suggestion which should be referred to the Drafting Committee along with the joint amendment itself, for use in drafting the English text. As far as the French text was concerned, the concluding words of the opening phrase of sub-paragraph (*b*) would still read " *à condition que celle-ci* ".

55. The CHAIRMAN said that the amendments by France and Australia (A/CONF.39/C.1/L.46 and L.237) would remain in abeyance until the question of " restricted " multilateral treaties came to be decided.

56. If there were no objections, he would consider that the Committee agreed to refer article 37 to the Drafting Committee, together with the Czechoslovak amendment (A/CONF.39/C.1/L.238) and the joint amendment (A/CONF.39/C.1/L.240).

It was so agreed.[5]

Article 38 (Modification of treaties by subsequent practice)[6]

57. Mr. CASTRÉN (Finland) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.143) to delete article 38 for the same reasons as had prompted it to propose the deletion of article 34, namely, that it did not regard it as expedient to deal in a convention on the law of treaties with the complex questions of relationships between customary and treaty law. Another reason for the Finnish amendment was that article 38 seemed to duplicate sub-paragraph 3(*b*) of article 27, under which subsequent practice in the application of the treaty which established the understanding of the parties regarding its interpretation was to be taken into account. That rule of interpretation in itself meant that a treaty could be

[5] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to "restricted multilateral treaties " until the second session of the Conference. Further consideration of article 37 was therefore postponed.

[6] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.143; Japan, A/CONF.39/C.1/L.200; Venezuela, A/CONF.39/C.1/L.206; Republic of Viet-Nam, A/CONF.39/C.1/L.220; France, A/CONF.39/C.1/L.241.

modified by the practice of the parties and, in any case, the distinction between those two provisions of the draft was practically non-existent. The Finnish delegation had therefore proposed the deletion of article 38.

58. Mr. FUJISAKI (Japan), introducing his delegation's amendment (A/CONF.39/C.1/L.200) to delete article 38, said that the Japanese Constitution stipulated that treaties must be concluded with the approval of the Legislature, and the same rule applied to the amendment of a treaty. Modification might not mean exactly the same thing as amendment, but it was obviously difficult to draw a clear distinction. An arbitration between France and the United States regarding the interpretation of a bilateral air transport services agreement was cited in the commentary as an example, but the Japanese delegation did not consider that such practice was soundly enough established to warrant the inclusion of the rule in the convention.

59. Mr. CARMONA (Venezuela), introducing his delegation's amendment (A/CONF.39/C.1/L.206) to delete article 38, said that the original article on modification in the International Law Commission's 1964 draft had covered three cases—namely, modification by a subsequent treaty relating to the same subject matter to the extent that their provisions were incompatible, the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all parties, and subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions.[7] One Government had observed in its comments that sub-paragraph (*b*) of the then article 68 was redundant because it dealt with a matter of pure interpretation. The Special Rapporteur on the law of treaties had clearly shown in his sixth report in 1966 the weakness of the argument for maintaining the former sub-paragraph (*d*) of article 68, which had become article 34 of the present draft and which the majority of the Commission had regarded as an independent provision. Furthermore, the Special Rapporteur had stated that practice contrary to a treaty constituted a violation, not an interpretation of the treaty.[8] Cases of amplification of a treaty, on the other hand, were recognized as simple questions of interpretation, and it was obvious that the article as now drafted had no legal basis.

60. Practice incompatible with a treaty constituted no basis for a new rule of law, but an abuse of law and a violation of the treaty. When the parties found that circumstances had changed, they could not authorize a violation of law, but should proceed to modify the treaty by concluding another or by preparing an additional protocol which would legalize the new situation; that had always been the procedure followed by the international community. Practice in itself could not be a basis for derogation from written domestic or international law; the common law practice could not be regarded as generally applicable, and the arbitration case between the United States and France cited in the commentary did not alter that situation. The Venezuelan delegation therefore objected strongly to the wording of article 38 and hoped that the Committee would decide to delete it.

61. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation had submitted its proposal (A/CONF.39/C.1/L.220) to delete article 38 because, in the first place, the word "*celle-ci*" in the French text grammatically referred to the application of the treaty, which could not establish the agreement of the parties to modify its provisions.

62. But irrespective of that drafting difficulty, his delegation could see no advantage in including a provision on modification of treaties by subsequent practice. If, in applying the treaty, the parties noted that new circumstances had arisen since the signature of the treaty, which made modification or redrafting desirable or necessary, they could at any time agree in writing on an appendix, protocol or annex to the original treaty. To allow for the possibility of modifying the treaty by subsequent practice would open the door to all kinds of interpretations, in the course of which the treaty might lose much of its substance. Deletion of the article would in no way diminish the possibility of subsequent adaptation to circumstances and would not detract from the flexibility of application; on the contrary, it would lead to greater certainty and security.

63. Mr. DE BRESSON (France) said that, although the idea of recourse to State practice in the application of a treaty as a means of interpretation was unexceptionable, it was quite a different matter to lay down a rule whereby that practice could in itself alter the substance of treaty obligations. The formulation of article 38 was open to three main objections. First, many international agreements contained specific provisions on the conditions of their revision: to admit that the parties could derogate from those clauses merely by their conduct in the application of the treaty would deprive those provisions of all meaning. Secondly, adoption of the article might raise serious constitutional problems for many States: the principle of formal parallelism required that modifications of a treaty at the domestic level should follow the same procedure as the original text. If the manner in which the responsible officials applied the treaty was in itself capable of leading to modification, that requirement of parallelism could hardly be met. Moreover, it was doubtful whether the precise and strict conditions laid down in article 6 and the following articles of the draft, on consent to be bound by a treaty, would retain any meaning if the treaty could be subsequently modified in the manner provided for in article 38. Thirdly, the rule proposed in article 38 would hardly conform with the harmony of international relations. Indeed, if States were given the impression that any flexible attitude towards the application of a treaty was tantamount to agreement to modify the treaty, they would tend in future to become much more circumspect and rigid in their attitudes.

64. Those considerations alone might have led the French delegation to join other delegations in proposing the deletion of article 38. But although the rule, if formulated in too general terms, might actually be dangerous, it was nevertheless valid in the case of certain technical agreements, which might indeed be modified by practice under certain circumstances. If the Committee

[7] *Yearbook of the International Law Commission, 1964*, vol. II, p. 198, article 68.

[8] *Yearbook of the International Law Commission, 1966*, vol. II, p. 90.

decided to retain the article, the French delegation considered that the rule it stated should be kept within the limits of its actual application in a well-known arbitration award by an eminent personage closely connected with the work of the Conference. To that end, it had submitted its amendment (A/CONF.39/C.1/L.21), providing that the principle in that article might not apply either when the treaty itself specified the manner in which it could be revised, or when the form in which it had been concluded constituted a bar to its modification under different conditions.

65. Mr. MARTINEZ CARO (Spain) said that from the outset his delegation had had serious doubts about the advisability of including article 38 in the convention, and as the Conference proceeded, its doubts had only increased. Those delegations which had proposed the deletion of the article were merely confirming the apprehensions expressed by some members of the International Law Commission in 1964 and 1966. The commentary itself showed that the article was far from convincing; in fact it was so unclear that it could mean almost anything.

66. The principle on which article 38 was based was that a tacit agreement might lead to the modification of a treaty when evidence of such agreement was provided by the subsequent practice of the parties in applying the treaty. That principle raised a number of problems. The first problem was to clarify the new legal concept of the practice of the parties which modified the text of a treaty. Article 38 already combined four legal concepts: interpretation based on practice establishing agreement; scope of application of the treaty by the parties; modification of treaties, otherwise than by formal amendment; and amendment of treaties in accordance with articles 35 to 37, which also included amendment in the traditional sense of revision. It was questionable whether an additional concept, of the practice of the parties capable of modifying a text, was justified, or whether it could not be incorporated in one of those four. The International Law Commission itself stated in paragraph (1) of its commentary to the article that " the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice ", and a member of the Commission had said that the difference between interpretation and modification was only one of degree. [9] Even if the Commission's contention that " legally the processes are distinct " were accepted, the difficulty of separating them cast serious doubt on the advisability of retaining the provision. The Drafting Committee already had before it a Spanish amendment (A/CONF.39/C.1/L.217) to include a reference to subsequent practice in article 28, on supplementary means of interpretation.

67. The next problem was whether article 38 was or was not compatible with the other provisions of the draft. The wording " the agreement of the parties to modify " the provisions of a treaty could only mean tacit agreement, whereas under article 2 the scope of the convention extended only to treaties in written form; consequently, article 38 was a derogatory clause, affecting the conclusion, entry into force, amendment and termination of a treaty, and might be used as an escape clause in respect of all those stages of treaty-making.

68. With regard to consent to be bound by a treaty, the adoption of the article would make it possible for any Government official, even a minor official, to alter what had been agreed upon in a formally ratified treaty. Moreover, such changes might conflict with fundamental provisions of the convention, despite the terms of articles 43 and 44 and the rules the Committee had already approved in article 6 and 7. One member of the International Law Commission had suggested specifying in the commentary that the subsequent practice must be attributable to the State through the acts or omissions of those officials competent to bind the State on the international plane; [10] but in day-to-day practice treaties were not applied by officials at that high level. Article 38 thus opened the way to unconstitutional modifications of a treaty, to which parliament would never consent in a written treaty. If parliamentary approval was required to bind the State, the same rule should apply to practice in the application of the treaty.

69. Moreover, if it were agreed that a treaty could be modified by subsequent practice in its application, it might be asked whether that applied to all the provisions of a treaty. Mr. Tunkin had argued in the Commission that only secondary provisions, not the essential provisions of a treaty, could be thus modified; [11] but neither article 38 nor the commentary shed any light on that vital point.

70. Another difficulty would arise if the treaty contained a clause on modification. In that event, could an official who did not possess treaty-making authority nevertheless modify the special revision or modification clause? If so, article 38 could mean that it was possible and legal to do by tacit agreement what it was impossible and illegal to do by formal agreement; it could only be regarded as conflicting with the principle *pacta sunt servanda.*

71. Further, the statement that subsequent practice in the application of the treaty might establish the agreement of the parties raised difficulties concerning the sense in which the terms " practice " and " parties " were used. " Practice " was a very broad term, which might include acts of various organs dealing with foreign relations and active and passive attitudes; its use raised questions of assent and acquiescence, unilateral acts and, more specifically, validity of protests. One member of the Commission had stated that a practice entailing desuetude could be used to bring a treaty to an end, and *a fortiori* as a means of modifying it: [12] that surely meant that article 38 offered new grounds for the termination of a treaty.

72. Even if it were claimed that the notion of practice was clear, the notion of consistency of practice was not, nor how long the practice must continue before agreement on modification could be established. That led to the delicate area of the relationship between customary and treaty law. Sir Humphrey Waldock had stated in the International Law Commission that there was a similarity between the formation of custom and the implied agreement contemplated in the article. [13] The problem became particularly serious if article 38 were read together with article 34, for then difficult questions of " legal custom " arose in connexion with bilateral treaties, and the no less

[9] *Yearbook of the International Law Commission, 1966*, vol. I, part II, 866th meeting, para. 26.

[10] *Ibid.*, para. 9.

[11] *Ibid.*, para. 18.

[12] *Ibid.*, para. 60.

[13] *Ibid.*, 876th meeting, para. 44.

difficult question of the effect of custom on third States, in connexion with multilateral treaties.

73. Finally, the practice referred to was the practice of the parties. But it was not clear which parties. Was it the practice of some of the parties without objection from the others, or was it the practice of some of the parties despite the objection of the others, or was it that, as stated in paragraph (2) of the commentary, " the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question "? That raised the two further problems, of the possibility of a practice *inter se* being established among a small group of the parties to a treaty, and of the position of new States acceding to the treaty vis-à-vis the existence, prior to their accession, of a practice which had modified the provisions of the instrument.

74. All those difficulties arose from the fact that article 38 was a hybrid between the logical solutions of modification of a treaty by another treaty, and modification by the establishment of a new customary rule binding on all the parties. The first case was covered by articles 35 to 37, and the second fell outside the scope of the convention, except for a negative and unnecessary reference to it in article 34. The Commission's attempt to cover both solutions has resulted in an article which could only undermine the stability of treaty relations and should therefore be deleted.

75. Mr. VARGAS (Chile) said that his delegation would vote for the deletion of article 38, in the belief that the adoption of the provision would weaken the principle of *pacta sunt servanda* which the Committee had adopted in article 23. Once a treaty was in force, the parties were bound by it until it was modified in accordance with article 35, by agreement between the parties. That agreement implied express consent by the States in question. If article 38 were adopted, any State wishing to evade its obligations under a treaty could invoke subsequent practice with a view to modifying the treaty for its own ends. The Chilean delegation considered that subsequent practice might be a useful element in the interpretation of a treaty, and had therefore supported sub-paragraph 3(*b*) of article 27, but it could not agree that such practice in the application of the treaty in itself sufficed to modify the treaty without an express consent of the parties. Any changes of circumstances necessitating modification could be dealt with through the procedures set out in article 36. Since article 38 was not only superfluous but potentially dangerous, his delegation hoped that it would be deleted; in the contrary event, it would support the French amendment (A/CONF.39/C.1/L.241), which, although not entirely satisfactory, improved the International Law Commission's text of the article.

76. Mr. WERSHOF (Canada) said that his delegation, too, was in favour of the deletion of article 38. If the Committee decided to retain the article, his delegation would support the French amendment (A/CONF.39/C.1/L.241).

77. In the event of the article being retained, he would ask the Expert Consultant for clarification on two points. First, was it appropriate to use the word " modification " in article 38, when it was used in a special sense in article 37? Secondly, did " the agreement of the parties " mean all the parties in the case of multilateral treaties or, as in article 37, two or more parties who might bring about modification of the treaty *inter se*?

The meeting rose at 6 p.m.

THIRTY-EIGHTH MEETING

Thursday, 25 April 1968, at 11.5 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 38 (Modification of treaties by subsequent practice) *(continued)* [1]

1. Mr. GRISHIN (Union of Soviet Socialist Republics) said that the reason why there had been so many proposals to delete the article was that its provisions were not in conformity either with the rules of international law or with those of internal law.

2. On the international plane, the article did not set any limits for the modification of a treaty by subsequent practice, so it could happen that, in practice, relations between the parties to a treaty would be different from those established by the treaty. It was true that that situation could arise, but it could not be reflected and legalized in a convention as important as that on the law of treaties. Such legalization would be incompatible with the purposes of the convention and the stability of international treaties, and in addition, it would create difficulties for third States.

3. It had been asked whether the subsequent practice on which the modification of a treaty was to be based would be that followed by all the parties to the treaty or only by some of them. Article 38 gave no answer to that question. If it was to be the practice of all the parties, it would be better to apply articles 35 and 37 than to take as a basis the practice followed in applying the treaty, which would make it hard to determine what part of the treaty had been modified and when. If the practice of only some of the parties was sufficient, it would be necessary to know the requisite number of parties and whether a practice which did not reflect general agreement could modify the treaty for other parties which had not followed that practice and might not agree with it. The Soviet Union delegation considered that the reply to the latter question must be in the negative, if only because of the principle *pacta sunt servanda*.

4. Moreover, the requirements of internal law, that was to say the rules of constitutional law governing the conclusion of international treaties, should not be overlooked.

5. For all those reasons, article 38 could not be retained in the convention on the law of treaties. The fewer controversial articles the convention contained, the easier it would be to apply.

6. Mr. KEARNEY (United States of America) said he supported the amendments submitted by Finland (A/

[1] For the list of the amendments submitted, see 37th meeting, footnote 6.

CONF.39/C.1/L.143), Japan (A/CONF.39/C.1/L.200), Venezuela (A/CONF.39/C.1/L.206) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220) deleting article 38. What particularly worried the United States delegation was that relatively low-ranking officials such as vice-consuls and third secretaries might interpret a treaty erroneously and follow a course of conduct which, unknown to governments, could lead to modification of the treaty.

7. He was glad the Soviet Union representative had said that the convention should contain as few controversial articles as possible, and he hoped that principle would be followed.

8. Mr. YASSEEN (Iraq) said he was in favour of retaining article 38, which reflected positive law.

9. Formalism was certainly not an established principle of international law and sovereign States were not subject to the requirements of the " *acte contraire* " theory, which was not accepted in international law. Sovereign States could act as they wished, within certain limits of course: it was sufficient for their agreement to be clear. The agreement of the parties sufficed to terminate or modify a treaty. That agreement need not be in the form of a solemn instrument. Article 38 did not depart from those principles. It provided that agreement to modify a treaty was established by practice, that was to say by a series of acts: not just any practice, but one which could be attributed to States. That excluded an act by a consul or other official who exceeded his powers.

10. Hence article 38, which was based on the agreement of the parties to modify the treaty, was in no way incompatible with the general principles of international law, with the fundamental rules governing the law of treaties, or, least of all, with the principle *pacta sunt servanda.*

11. Some speakers had maintained that subsequent practice was adequately covered by article 27, paragraph 3(*b*), but that provision dealt with interpretation, which was quite distinct from modification; the difference between interpretation and modification was the difference in kind between a declaratory act and a constituent instrument.

12. To sum up, article 38 should be retained in the convention on the law of treaties because it reflected positive law and was not incompatible with the fundamental rules of the law of treaties, which made the agreement of the parties an essential principle for the conclusion, termination or modification of treaties.

13. Mr. MAKAREWICZ (Poland) said that his delegation favoured the deletion of article 38, which lacked clarity and would raise more problems than it solved.

14. It was true that the unanimous practice of the parties could lead to the modification of a treaty, but that process was really outside the scope of the convention, which was limited to treaties concluded between States in written form.

15. The normal way to modify a treaty was that described in articles 35-37. Modification by a subsequent practice was rather exceptional. Besides, the problem was far too complicated to be solved satisfactorily in a single article which simply stated that a treaty might be modified by subsequent practice.

16. With regard to the French amendment (A/CONF.39/C.1/L.241), he said it would be difficult, in practice, to decide whether the provisions of a treaty or the conditions of its conclusion were such as to constitute a bar to its modification by subsequent practice.

17. Finally, article 38 might interfere with the constitutional practice of States in regard to the conclusion of treaties.

18. Mr. HU (China) said his delegation was in favour of deleting article 38 because it was liable to cause misunderstanding or even disagreement between the States concerned.

19. Mr. RUIZ VARELA (Colombia) said he supported the amendments submitted by Finland, Japan, Venezuela and the Republic of Viet-Nam deleting article 38.

20. Though well aware of the great difference between the modification of treaties by subsequent practice, provided for in article 38, and their interpretation taking subsequent practice into account, provided for in article 27, paragraph 3(*b*), the Colombian delegation took the view that article 38 did not reflect a fact or an evident requirement of the international community to the same extent as article 27.

21. Article 27, paragraph 3(*b*), reflected traditional practice in the interpretation of all international treaties. Article 38, on the other hand, was contrary to law and to democracy, because treaties were unmade in the same way as they were made, and if a particular procedure had been followed in the negotiation, signing, internal approval and ratification of a treaty—a procedure which involved compliance with the internal constitutional system—the same procedure must be followed for any modification of the treaty, so as to ensure the desired balance between the internal powers of governments and parliaments in the process of contracting or modifying international obligations.

22. Mr. MARESCA (Italy) said that article 38 reflected a legal fact which had always existed. International law was not a slave to formalism and by reason of its nature must adapt itself to practical realities.

23. It was true that the written form was the normal form for an agreement and the one which afforded the most complete legal certainty, but there were other means of expressing an agreement, among which practice was the most reliable and the most obvious. A glance at history could only make one thankful that, in certain cases, practice had modified treaties, which might otherwise have had tragic consequences. Consequently, States should not be bound more than was necessary.

24. Moreover, the draft articles themselves did not overlook agreements in unwritten form or practice as a source of law and a criterion for application. Article 38 reaffirmed the fact that law could evolve as the need arose.

25. Naturally, if a treaty laid down special procedure for its modification, practice would not be the most normal procedure; he therefore supported the French amendment (A/CONF.39/C.1/L.241).

26. The retention of article 38 was essential for the structure of the draft convention.

27. Mr. MIRAS (Turkey) said that under the Turkish Constitution, international treaties which had duly entered into force became law; hence the Turkish delegation could not support the retention of article 38,

which provided for the modification of treaties by subsequent practice. Moreover, it did not think that the article stated an existing rule of international law. The arbitration case cited in the commentary in no way justified the adoption of such provisions.

28. In addition, the article was unnecessary. Article 27, paragraph 3(*b*), provided sufficient flexibility by introducing the element of subsequent practice in the interpretation of treaties; that flexibility should not be carried so far that subsequent practice was recognized to be capable of modifying the treaty itself. Besides, article 38 militated against the flexibility aimed at, for contracting parties might be led to adopt an unyielding attitude in applying treaties, in order to prevent a flexible practice from being regarded as a modification of the treaty.

29. The Turkish delegation therefore supported the four proposals to delete article 38.

30. Mr. THIAM (Guinea) expressed his delegation's anxiety at the unfortunate repercussions which article 38 might have if retained in its present form, particularly on the principle *pacta sunt servanda.*

31. In the case of multilateral treaties, a majority of the States parties to a treaty might follow a practice which modified it, while the remainder, a minority, continued to abide by the provisions clearly stated in the text of the treaty. That situation had been envisaged by the Commission in paragraph (2) of its commentary to article 38. In such a case, the States which strictly applied the principle *pacta sunt servanda* would, as it were, be penalized. Naturally, States which did not approve of the modifying practice remained free to withdraw from the treaty, but it must not be forgotten that the aim of the convention was to develop contractual relations between States and promote international co-operation.

32. The delegation of Guinea was therefore in favour of deleting the article, which might frustrate the principle *pacta sunt servanda.*

33. Mr. VEROSTA (Austria) said he recognized the existence of the rule stated in article 38; moreover, it was a principle of international law. The article dealt with the problem facing all legislators and authors of treaties as soon as negotiations had been completed. A French jurist had said: " He who only knows the Code does not know French civil law. " The same was true of international law. Several examples could be given of multilateral treaties between Austria and other States which had been modified by practice. Article 38 was not contrary to the principle *pacta sunt servanda* and the International Law Commission had been right to include it in the draft convention. The Austrian delegation would vote in favour of retaining the article in its present form or as modified by the French amendment (A/CONF.39/C.1/L.241).

34. Mr. ALVAREZ (Uruguay) said that article 38 raised many insoluble problems and was incompatible with the principles forming the very basis of the convention being prepared. There was no rule of international law laying down that a treaty could be modified by subsequent practice, even if that practice resulted from the tacit agreement of the parties. Furthermore, it was not practice that modified a treaty; an agreement could be modified only by another agreement.

35. Among the many questions that arose, the following might be mentioned. What was the scope of the expression " a treaty "? Did it include peace treaties, the United Nations Charter, the agreements on human rights, the Genocide Convention? Which provisions of those treaties could be modified by subsequent practice? At the 866th meeting of the International Law Commission, Mr. Tunkin had expressed the view that the Commission should be cautious and indicate that the key provisions of a treaty could not be amended by subsequent practice. [2] If that were not so, treaties would provide no guarantee, since the result of practice could be to prejudice the recognition of fundamental freedoms and rights and of the principles enunciated by the United Nations Charter. And what was to be understood by practice? An international treaty in force bound all the organs of a State. It might therefore be asked whether all the organs of a State were empowered to take a decision concerning the application of a subsequent practice or whether the express or implied confirmation of the competent authority of the State was required. Must the practice referred to in article 38 satisfy certain prior conditions as to its nature and scope? It was in that respect that the article conflicted with the principle *pacta sunt servanda,* since any practice which entailed the modification of a treaty necessarily entailed the non-application, in other words, the breach, of the provisions of the treaty, until such time as it could be considered to be the expression of a tacit agreement between all the parties.

36. Article 38 also raised insoluble problems for internal law. A modification might not have been approved of by all the competent organs of a State; how then could that State apply it in its territory? Again, at what moment could a treaty be said to be modified by a subsequent practice of the parties, and who would determine that moment? In addition, it was clear that during the proceedings of the International Law Commission its members had not agreed on the conditions to be satisfied by subsequent practice if it was to modify multilateral treaties. Any modification of those treaties should be made in accordance with certain conditions laid down in the treaty itself. An arbitral award, however well-founded, was not sufficient to make the solution applicable to a specific case into a general norm of international law.

37. With all those questions remaining unanswered, article 38 introduced an element of uncertainty. The Uruguayan delegation would therefore vote against its retention.

38. Mr. MALITI (United Republic of Tanzania) said that after studying the question carefully and listening attentively to the different speakers, he had come to the conclusion that it would be better to delete article 38. For the rule stated in that article did not exist, and even if it did, it would be a bad rule. A very clear distinction should be made between subsequent practice which could be used for the purposes of interpreting a treaty (article 27) and subsequent practice which modified the provisions of a treaty (article 38). The retention of article 38, which expressly authorized the modification of a treaty by subsequent practice, would introduce a rule permitting

[2] *Yearbook of the International Law Commission, 1966,* vol. I, part II, 866th meeting, para. 18.

breach of a treaty; that was inadmissible, especially as the convention contained rules on the revision of treaties which were legally acceptable and would not lead to the abuses that might result from the provisions of article 38.

39. Consequently, his delegation could not support article 38, which was too controversial, or the French amendment, which retained the idea of modification by subsequent practice and scarcely altered the original text.

40. Mr. ALVAREZ TABIO (Cuba) thought it would be dangerous to admit the possibility of recognizing subsequent practice as a source of law, for it might nullify written law. The retention of article 38 would weaken the *pacta sunt servanda* rule. In fact, modifying the provisions of a treaty was tantamount to concluding a new treaty, which would enter into force through the effect of custom as opposed to law, whereas the progressive development of the law of treaties should be effected by codification, as recommended in Article 13 of the United Nations Charter. Although the adoption of subsequent practice as a means of interpretation was acceptable, it was not acceptable that subsequent practice should be able to modify a treaty containing provisions that had been drawn up with great precision.

41. It was impossible to recognize a rule that was incompatible with the very idea of a treaty and ran counter to the legal principles set out in the convention. Moreover, it should not be forgotten that some constitutions gave treaties the status of internal law and that any modification entailing innovation could only bind a State if it was made under the same conditions as those which had given binding force to the treaty. The Cuban delegation would therefore vote against the retention of article 38.

42. Mr. CRUCHO DE ALMEIDA (Portugal) said his delegation was in favour of deleting article 38, because its application, particularly in the case of multilateral treaties, might be made the excuse for serious abuses and even for the violation of the principle *pacta sunt servanda*.

43. Mr. REGALA (Philippines) pointed out that many constitutions provided that any modification of a treaty must be ratified by the legislative organs of the country. That applied to the Philippines, where the approval of the Senate was required. Thus article 38 would create serious problems, since it would lay down a rule that was incompatible with the provisions of internal law in force in many States. The article would introduce an element of uncertainty and it would be better to delete it.

44. Mr. KRAMER (Netherlands) said that his delegation did not approve of article 38. It had been included in the draft at the last minute by the International Law Commission, which probably would have decided to omit it or would have seriously reconsidered it if there had been time. The Commission would then probably have provided, not that the treaty itself could be modified by subsequent practice, but that the application of the treaty might be influenced by such practice. In fact, the text of the treaty remained unchanged, whatever the practice might be, and a new document was necessary to delete or modify the provisions of a treaty or to add new provisions. Of course, subsequent practice might lead to new forms of application, or to the non-application, of certain provisions of a treaty, but not to the removal of the provisions themselves.

45. It might be asked why the Commission had decided to depart, in that article, from the rule that treaties must be in written form in order to come within the scope of the convention. The effect of article 38 was that there were treaties not in written form which could modify treaties in written form and thus come within the scope of the convention.

46. Further, in the case of a multilateral treaty it was extremely difficult to verify whether the parties were in agreement if the only source of knowledge of such agreement was the practice followed in the application of the treaty. It seemed that, if certain treaty provisions no longer met the needs of some of the parties, there would often be other parties which they still satisfied. Article 38 would entitle the parties which no longer applied the provisions to consider the treaty modified as between themselves. There would be only a very limited possibility of applying article 37, paragraph 2; the other parties might be notified of the modification only *post factum*. That notification would come as rather a surprise to the other parties, who had a right to expect that the modification would be embodied in an agreement in written form.

47. In the view of his delegation, article 38 meant that if the parties, or a number of the parties, no longer fulfilled the requirements of a treaty for a certain time, the treaty was modified *ipso facto* to the extent of the non-performance. That would derogate in a high degree from the rule *pacta sunt servanda*. However, it did not appear that there was much State practice in support of the article, so that it was unnecessary to state a rule on the subject at all. His delegation would therefore support the amendments deleting article 38.

48. Mr. ROSENNE (Israel) said that his delegation was in favour of deleting article 38. He would not go so far as to say that the rule in question did not exist in international law, but he thought it was covered by other articles of the draft. A theoretical distinction certainly existed between subsequent practice as a means of interpreting a treaty and the modification of a treaty through subsequent practice in its application; but in practice, the consequences were substantially the same, so that it did not seem necessary to insert a separate article.

49. Mr. CHEA DEN (Cambodia) said that, initially, his delegation had had some doubts about the value of article 38, for at first glance it was difficult to accept that subsequent practice could modify treaty provisions. Moreover, it was certainly difficult to define the meaning and scope of practices. However, after carefully studying the International Law Commission's commentary, his delegation had come round to the view of those delegations which had spoken in favour of retaining the article. For in fact, the modification contemplated implied the unanimous agreement of the parties, and followed from the practice States were subsequently led to adopt. That practice was the manifestation of a new common intention of the States concerned. The article merely stated a practice followed by States. His delegation would therefore vote in favour of retaining article 38. It could also accept the French amendment (A/CONF. 39/C.1/L.241).

50. Mr. RUEGGER (Switzerland) said there was no need to repeat the arguments advanced by the repre-

sentatives of Italy and Austria in favour of retaining article 38, for which his delegation would vote. In his view, the Commission's text was in conformity with international law. He also agreed with the representative of Iraq that the article reflected positive law. The case cited in the commentary on article 38, namely, the recent arbitration between France and the United States regarding the interpretation of a bilateral agreement, was not an isolated one. Some speakers had said that the question dealt with in article 38 was controversial. Unfortunately, that comment was true, but it could also be applied to other articles of the draft. The question of the modification of treaties by subsequent practice should certainly not be left to the arbitrary decision of the parties, and the draft convention should therefore contain a provision laying down procedure for judicial settlement or arbitration of disputes on the matter.

51. Mr. DE LA GUARDIA (Argentina) said he thought the arguments advanced against article 38 unconvincing. Some delegations had spoken of violation of the principle *pacta sunt servanda*. But if all the parties agreed to apply the treaty in a manner different from that laid down in certain of its provisions, where was the violation? He supported the views expressed by the representatives of Iraq, Austria, Cambodia, Italy and Switzerland, to the effect that article 38 was based on an existing principle which helped to bring international law closer to reality. The subsequent conduct of the parties was a principle that applied not only to the interpretation of treaties, but also to their modification, and that view found support in a respectable body of court opinions and legal writings, such as those of McNair and de Visscher. He would accordingly vote in favour of that article and would accept the amendment submitted by France (A/CONF.39/C.1/L.241), which removed any ambiguity there might be in the text.

52. Mr. ŽOUREK (Czechoslovakia) said that in his opinion article 38 was not in accordance with contemporary law. The International Law Commission had stressed several times in its commentaries that the essential purpose of its work was to increase the stability of treaty relations. As a whole, the draft convention bore witness to the constant pursuit of that aim, but unfortunately article 38 conflicted with it. The article gave too much importance to the practice of States and went much too far. In article 27, paragraph 3(*b*), the practice of States was recognized as one of the elements showing the will of States. And in article 34, a customary rule was regarded as a means of extending the scope of a treaty. To go further would be to introduce an element of insecurity in treaty relations between States.

53. The practice of States was not easy to establish, for it varied with time and according to political circumstances. The adoption of State practice as a means of modifying a treaty would raise innumerable difficulties. Moreover, in most cases, a formal agreement between the contracting parties was needed to modify a treaty. That being so, it might be asked why, if the parties agreed to modify a treaty on the basis of their practice, and if in most cases they had to resort to a formal agreement to do so, they should not simply revise the treaty. That would enhance the stability of treaty relations and meet the wishes of third States which might have an interest in knowing what agreements were in force, failing which the operation of the most-favoured-nation clause would be hindered.

54. Consequently, article 38 did not seem desirable, even for the progressive development of international law. The Czechoslovak delegation would therefore vote for its deletion.

55. Sir Humphrey WALDOCK (Expert Consultant) said that his task of explaining why the International Law Commission had included article 38 in the draft had been greatly facilitated by the representatives of Iraq and Italy. Some delegations had said that the article had been inserted at the last minute. It was true that it had been drafted towards the end, but the problem had had the Commission's attention in successive stages of its work. The Commission had taken account of the difference between the interpretation of a treaty on the basis of subsequent practice and the question whether a subsequent practice departed so far from any reasonable interpretation of the terms as to constitute a modification. Not infrequently the application of a treaty diverged somewhat from its terms, either because certain provisions were difficult to apply or because circumstances had changed so that the practice which had grown up did not correspond exactly to the interpretation of the treaty on the basis of its original text. The Commission could have omitted the article and considered the question as settled, although rather vaguely, by the provision in article 3(*b*), which referred to international agreements not in written form; but it had thought it wiser to deal with the question in a separate article. If it had been able to devote another session to the law of treaties, it might have examined the problem again and drafted a more elaborate text. As it was, the Commission had given particular attention to the wording of the article; it had very nearly adopted a proposal to replace the words " subsequent practice of the parties " by " the subsequent practice of all the parties ", so as to show that modification of the treaty required the tacit agreement of all the parties. That addition would perhaps have allayed the fears expressed by some delegations. Several of the criticisms made seemed, however, to show that certain delegations were not taking account of the final words " establishing the agreement of the parties to modify its provisions ".

56. He was surprised that some delegations should think article 38 constituted a quasi-violation of the principle *pacta sunt servanda*, especially as the legal basis of the article was good faith. The provision was based on the principle that a State which had taken up a position on a point of law, particularly in the interpretation of treaties, and allowed another State to act in accordance with that understanding of the legal position, could not go back on its representation of the legal position and declare the act performed illegal. Consequently, the criticism that the article was contrary to the principle *pacta sunt servanda* could not be accepted.

57. Some representatives had held that article 38 might authorize variations of treaties in violation of internal law. So far, however, such modified applications of treaties had never raised any constitutional problem. The variations normally did not touch the main basis of the treaty and did not give rise to any objections from parliaments. If the application of a treaty provision conflicted

with national law, the representative of the Ministry of Foreign Affairs of the country concerned would object and request that the treaty be amended.

58. The Commission had submitted article 38 to the Conference for approval because without that article certain existing practices remained unprovided for.

59. Mr. BADEN-SEMPER (Trinidad and Tobago) said he supported the deletion of article 38.

60. The CHAIRMAN put to the vote the amendments submitted by Finland (A/CONF.39/C.1/L.143), Japan (A/CONF.39/C.1/L.200), Venezuela (A/CONF.39/C.1/L.206) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220), all of which would delete article 38.

At the request of the Chilean representative the vote was taken by roll-call.

Italy, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Japan, Kuwait, Lebanon, Liechtenstein, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Saudi Arabia, South Africa, Spain, Sweden, Syria, Trinidad and Tobago, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Algeria, Australia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dominican Republic, Federal Republic of Gernamy, Finland, Greece, Guinea, Hungary, Israel.

Against: Italy, Kenya, Mali, San Marino, Sierra Leone, Switzerland, Argentina, Austria, Bolivia, Cambodia, Denmark, Ecuador, India, Indonesia, Iraq.

Abstaining: Ivory Coast, Liberia, Madagascar, Malaysia, Monaco, Morocco, Nigeria, Pakistan, Romania, Senegal, Singapore, Thailand, Tunisia, Zambia, Afghanistan, Belgium, Central African Republic, Congo (Democratic Republic of), Dahomey, Ethiopia, France, Gabon, Ghana, Guatemala, Holy See, Iran.

The amendments deleting article 38 were adopted by 53 votes to 15, with 26 abstentions.

The meeting rose at 12.50 p.m.

THIRTY-NINTH MEETING

Friday, 26 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 39 (Validity and continuance in force of treaties)

1. The CHAIRMAN invited the Committee to consider Part V of the International Law Commission's draft, beginning with article 39.[1] He announced that the Chinese delegation had withdrawn its amendment to that article (A/CONF.39/C.1/L.242).

2. Mr. RUEGGER (Switzerland) said that the Swiss amendment (A/CONF.39/C.1/L.121) to modify the first sentence of paragraph 1 of article 39 and delete the second sentence must be regarded as substantive, not formal. The substitution of the term "invalidation" for "invalidity" raised a point of principle: the use of the word "invalidation" established the necessary guarantees for the security of treaties. A treaty must be presumed valid until the procedure for its invalidation had been completed. In the modern world, treaties *contra bonos mores* were practically unknown, because public opinion would nearly always prevent their conclusion; but in order to render impossible unilateral claims based on alleged invalidity, it was essential to provide reliable machinery for impartial ascertainment of the real reasons of invalidity. Unless that were done, the principle *pacta sunt servanda* would be jeopardized. The overwhelming majority of treaties were concluded in good faith, so it was wrong to take the presumption of invalidity as a starting point.

3. Invalidation was a procedure which must be carried out through one or more impartial organs. In discussing article 39, it was impossible not to trespass on the important area covered by article 62 which, however, at present provided a quite inadequate framework. No official position could be taken on article 39 until the Committee had agreed on the content of article 62, which certainly needed improvement. The Swiss delegation was particularly anxious that the procedure set out in article 62 should be surrounded with all possible guarantees, with arbitration as a last resort. The value of conciliation must not be underestimated, for it had the great advantage of leaving no scars, whereas arbitration was more of a surgical process. Switzerland had promoted the conclusion of many bilateral agreements concerned with the settlement of disputes through conciliation preceding arbitral awards or court judgments, but conciliation in itself could not provide all the necessary guarantees. In view of the close link between articles 39 and 62, his delegation regretted that it could not vote on article 39 until the ultimate content of article 62 was decided.

4. In its draft of article 39, the International Law Commission had resolutely crossed the frontier dividing codification from the development of international law. That frontier had already been crossed successfully when the 1958 Conference on the Law of the Sea had provided an entirely novel agreement, the Convention on the Continental Shelf.[2] The procedure whereby that result had been achieved should help the current Conference to adopt new methods of work. It would be remembered that the Convention on the Continental Shelf had been considered by a separate committee of the Conference on the Law of the Sea. Unfortunately, in establishing the machinery for the current Conference, the Sixth Committee of the General Assembly had failed to take

[1] The following amendments had been submitted: Switzerland, A/CONF.39/C.1/L.121; Peru, A/CONF.39/C.1/L.227; Republic of Viet-Nam, A/CONF.39/C.1/L.233; China, A/CONF.39/C.1/L.242; Australia, A/CONF.39/C.1/L.245. An amendment was subsequently submitted by Singapore (A/CONF.39/C.1/L.270).

[2] United Nations, *Treaty Series*, vol. 499, p. 311.

into account the cogent arguments in favour of setting up two committees of the whole. It might nevertheless still be possible to entrust the preliminary work on Part V of the draft to a special working group. The Drafting Committee was overburdened with a number of complex problems, and could be said to be already performing the functions of a working group. He hoped that suggestion would be given serious consideration.

5. Mr. ALVARADO GARRIDO (Peru) said that his delegation's amendment to the second sentence of paragraph 1 (A/CONF.39/C.1/L.227) was not, strictly speaking, a substantive amendment; it was merely intended to clarify the International Law Commission's purpose by stressing the link between articles 39 and 62. Article 39 had to be read together with all the articles on validity and termination, particularly with the procedural provisions governing the application of the article, which contained, according to paragraph (1) of the commentary to article 62, "procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted ".

6. The second sentence of paragraph 1 of article 39 did not, however, fully reflect the commentary, according to which the term " the present articles " referred not merely to the particular article dealing with the particular ground of invalidity in any given case, but to all the provisions relating to that important legal consequence, especially article 62, which laid down the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty. The comprehensive nature of article 62 was borne out by the statement in paragraph (1) of the commentary to that article that some of the grounds upon which treaties might be considered invalid or terminated or suspended, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real dangers for the security of treaties. Since article 39 was a general provision, it should be worded precisely and unequivocally; that was the reason for the Peruvian amendment.

7. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that the main purpose of his delegation's amendment (A/CONF.39/C.1/L.233) was to stress that the rule, when determining the validity or invalidity of a treaty, should be to refer to the provisions of the convention. The remainder of the amendment related only to drafting.

8. Mr. HARRY (Australia) said that the thirty-eight articles already sent to the Drafting Committee set out a useful code of rules for the healthy functioning of contractual relations in international society in the treaty-making process. Of course, the convention must provide for normal processes of termination and suspension; many treaties had a purpose limited to a prescribed time-span, although others were designed to be perpetual. Provisions for termination, withdrawal, or suspension were as much part of the normal functioning of a treaty system as, for example, entry into force, but his delegation still needed to be convinced that some of the draft articles in Part V were necessary, at least in their existing form.

9. The Australian delegation hoped, in particular, that delegations which advocated the inclusion of various grounds of invalidity were not doing so merely on theoretical grounds. Although the International Law Commission must have borne in mind the precedents and lessons of the past, there seemed to be relatively little material to draw upon as a basis for the provisions of Part V. Indeed, Sir Hersch Lauterpacht had stated, in connexion with *jus cogens*, that there were no instances of a treaty being declared void on the grounds of the illegality of its object. It would be helpful if the Committee could be told of any actual instances, even if no cases had been decided, which illustrated those novel grounds of invalidity, for only then would it be in a position to judge whether the convention should provide for what could only be regarded as revolutionary rather than progressive—that was to say, steady, step by step—development of international law.

10. Of course, the Committee should not be concerned exclusively, or even primarily, with the past: it was attended by representatives of sovereign States, equal before the law, and its deliberations had shown that those States did not lack negotiating skill. Although the mistakes of the past must, of course, be taken into account, the primary task was to produce a balanced convention to govern future treaty relations. Australia's approach to article 39 and to the whole of Part V was based on the need to ensure that the States with which it made agreements carried out their obligations and that agreements could not be terminated except as provided for in the treaty, by the consent of all the parties, or on serious, clearly established and generally accepted grounds.

11. For example, Australia had been able to conclude a number of important trade agreements, entailing advantageous bargains with the industrial States which constituted its principal market. It certainly expected that the law of treaties would not include an unduly long and vague series of grounds on which such agreements might be invalidated if the other parties found it inconvenient or difficult to carry out their side of the bargain. Thus, if countries like Australia, which depended for their livelihood on a narrow range of primary products succeeded in persuading the industrial nations to limit the subsidies to their less efficient producers and to pay equitable and remunerative prices to efficient producers, they naturally wanted their agreements with those countries to endure.

12. The treaties in question should, of course, provide for the necessary flexibility and for emergency exceptions, but the machinery must be precise and reliable. Multilateral treaties might in future provide guarantees for the primary-producing countries, as well as a system of preferences for the manufactures and semi-manufactures of the developing countries, as a valuable aid to their industrial development. The various grounds for invalidity, termination or suspension of treaties must therefore be examined very carefully, and adequate and to some extent automatic machinery for the settlement of disputes should be provided for in Part V. The smaller countries should be able to rely on the support of courts and arbitral procedures to enforce their rights against the powerful States with which they had to trade.

13. In view of the indissoluble link between the question of settlement machinery and the substantive grounds for invalidity, the Australian delegation had submitted its amendment (A/CONF.39/C.1/L.245), solely with a

view to making explicit the International Law Commission's evident intention that the validity of a treaty might be impeached only by resort to the procedures set out in article 62. That intention seemed to be clear from paragraph (4) of the commentary to article 39, and from paragraph (1) of the commentary to article 62.

14. Since, however, article 62 would not be considered for some time and since its final text was still in the balance, the Australian delegation considered that it would be premature at that stage to take a decision on the final form of article 39. It therefore suggested that its amendment be left in abeyance until a decision was reached on article 62.

15. Mr. JAGOTA (India) said that article 39 appeared to distinguish between the articles relating to the invalidity of treaties on the one hand and those relating to the termination, denunciation, suspension of or withdrawal from treaties on the other. Paragraph 1 stated that the validity of a treaty might be impeached only through the application of the present articles, and that when invalidity was established the treaty was void. Paragraph 2 stated that a treaty " may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles ". Thus in the case of termination, denunciation or withdrawal, parties might follow either the terms of a treaty or those of the present articles and so had a choice in the matter. The choice seemed to imply that the terms of the treaty might derogate from the principles embodied in Part V of the draft. It would be interesting to hear from the Expert Consultant whether that had been the Commission's intention and if so, what was the basis of the distinction. The commentary to article 39 did not explain the point.

16. He had raised the point so as to eliminate any controversy on the subject matter of article 61, which referred to the emergence of a new peremptory norm of international law and was an extension of article 50, relating to *jus cogens*. As indicated in the commentary, it was in order to emphasize that a new peremptory norm would make an existing treaty void and would be a mode of termination that article 61 had not been included in article 50. Another reason why article 61 had been made a separate article was to emphasize that whereas a treaty would become void as a whole under article 50, a treaty which would become void under article 61 might not necessarily be terminated as a whole, and that was indicated in article 67. It would appear to follow that, since article 50 related to the validity of a treaty, the parties to a treaty could not derogate from the principle, in view of article 39, paragraph 1, but the parties to a treaty might be free to derogate from the principle in article 61 because the article related to termination and paragraph 2 of article 39 therefore applied.

17. It could be argued that article 39, paragraph 1, was not applicable only in the context of Section 2 of Part V and that the validity of a treaty might be challenged on any grounds under the relevant provisions of those articles, including article 61; the latter, however, did not relate to invalidity but to termination and therefore fell within the scope of article 39, paragraph 2. In order to avoid controversy, his delegation had moved an amendment (A/CONF.39/C.1/L.254) to incorporate article 61 in article 50 and to make consequential changes in other articles.

18. On a drafting point, it should be noted that article 40 combined the questions of invalidity, termination, and so on, of a treaty arising " as a result of the application of the present articles or of the terms of the treaty ". The two points of that phrase were transposed in paragraph 2 of article 39, probably advisedly because, according to article 39, invalidity was to be established by reference to the present articles only, whereas termination might result from applying the present articles or the terms of the treaty. It did not appear to be the Commission's intention that even the invalidity of a treaty might be established in accordance with its terms. The language would probably be made clearer by adding the words " as the case may be " after the words " or of the terms of the treaty " in article 39, paragraph 2.

19. The International Law Commission's present draft text of article 39, paragraph 1, emphasized the presumption in favour of the validity of a treaty, mentioned the law with reference to which its validity could be impeached, and indicated the consequences of the establishment of invalidity, namely, that such a treaty was void. Those elements were not specified in the proposed amendments to article 39. Accordingly, he could not support the Swiss or Australian amendments. Nor did he agree to the wording of the Peruvian amendment. In general, he favoured the Commission's draft.

20. Mr. ALVAREZ TABIO (Cuba) said he was opposed to the Swiss amendment (A/CONF.39/C.1/L.121), which would involve a radical departure from the whole system of invalidation and termination in Part V of the draft.

21. The International Law Commission's commentary to the draft articles in Section 2 of Part V clearly demonstrated the Commission's intention to regard all the grounds of invalidity set forth therein, with the possible exception of the case envisaged in article 61, as grounds of absolute nullity or voidness *ab initio* rather than of mere voidability; that approach was, of course, without prejudice to the specific effects of each particular ground of invalidity. In its provisions on the consequences of invalidity, the Commission had therefore not drawn any distinction between cases of nullity or voidness *ab initio* and cases in which consent could be invalidated at the behest of one of the parties. That approach was also illustrated by the provision in article 65, paragraph 1, which stated that " The provisions of a void treaty have no legal force ". That provision reflected, with reference to the consequences of invalidity, the idea contained in the second sentence of paragraph 1 of article 39.

22. If that approach were now to be replaced by that adopted in the Swiss amendment (A/CONF.39/C.1/L.121), all cases of invalidity would be treated as cases of " invalidation ". A treaty, consent to which had been procured by coercion or fraud, would not be void *ab initio*, but would only be annulled when invalidity was formally established. The consequences of invalidity would operate only as from that date and not retroactively. Situations created as a result of conduct in bad faith by one of the parties would thus be recognized as having legal effects.

23. The concept of voidability or " relative " nullity was applicable only in cases where the invalidity of the

treaty resulted from acts performed in good faith. Cases of voidness *ab initio*, or " absolute " nullity, resulted from conduct which deserved no legal protection whatsoever. A treaty that was merely voidable was one which originated as a valid treaty but became void subsequently. It was appropriate in that case that the decision which invalidated the treaty should operate only for the future. Where a treaty was void *ab initio*, on the other hand, the decision which recognized that defect was purely declaratory of the fact that the treaty had been void from the start; it therefore operated retroactively.

24. For the same reasons, he could not support the Peruvian amendment (A/CONF.39/C.1/L.227), which would weaken the provisions of article 39 and lead to the amendment of article 65. The present text of the second sentence of paragraph 2 of article 39 stressed the fact that invalidity was determined by the substantive provisions of the draft articles on the subject, while the amendment by Peru would subordinate invalidity to the operation of the procedural provisions of the draft. The Peruvian amendment, like the Swiss amendment (A/CONF.39/C.1/L.121), would mean that, until invalidity had been established by means of the procedure specified in article 62, a treaty which was void would continue to have legal effects. The Peruvian amendment in itself would not cause much harm if article 65 were maintained as it now stood, but like the Swiss amendment it would, if adopted, open the door to a radical transformation of the whole approach of Part V to the question of grounds of invalidity.

25. For the same reasons, his delegation considered that the Australian amendment (A/CONF.39/C.1/L.245) would not improve the text of article 39. It supported the retention of article 39 as it stood.

26. Mr. SINCLAIR (United Kingdom) said that, among the series of articles in Part V were several which were of crucial and overriding importance. Upon the decisions the Committee would take with respect to some of those articles would depend the success or failure of the Conference. Success would not be represented by the adoption of articles or amendments by a specified majority; it would rather be represented by a major effort of conciliation with the aim of producing texts which would command the broadest possible acceptance. He was conscious that all delegations were aware of their responsibilities in considering and eventually deciding on those issues. For it would be tragic if the efforts of delegations to produce a worthy convention were to be rendered nugatory by divisions on the content of some of the draft articles in Part V.

27. His delegation supported the Swiss amendment in so far as it sought to delete the second sentence in paragraph 1 of article 39. The Commission had been careful to draw a distinction between those articles which were alleged to constitute a ground of nullity *ab initio* and those which constituted a ground of voidability or invalidation. Articles 43 to 47 referred expressly to invalidating consent to be bound. In paragraph (4) of the commentary to article 46, the Commission had declared that " the effect of fraud is not to render the treaty *ipso facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent ".

28. The second sentence of paragraph 1 of article 39 might misrepresent the Commission's intention as expressed in the text of later articles in Part V and in the commentaries to them by asserting that a treaty, the invalidity of which was established under the present articles, was void. He understood the Commission to have intended to stipulate that only certain grounds of invalidity rendered a treaty void *ab initio*, but the majority of the grounds set out in Part V simply rendered it voidable at the instance of the party affected. There was an essential distinction which must be preserved between the idea of nullity *ab initio* and that of voidability. Perhaps the problem raised by the Swiss amendment could only be solved after all the articles in Part V had been considered. In any event, it would be possible to specify clearly in article 65 the distinction between treaties void *ab initio* and treaties voidable at the instance of the party affected.

29. He supported the Australian amendment (A/CONF.39/C.1/L.245) to insert the words " including article 62 " in paragraph 1 of article 39. That article in its present form was quite unsatisfactory and must contain the essential procedural safeguards, for the application of Part V must be strengthened. He interpreted the Australian proposal as referring not to the existing inadequate safeguards in article 62 but rather to the more demanding safeguards which should eventually be incorporated in the convention. It was in that sense that he supported the Australian amendment.

30. The first sentence in paragraph (5) of the commentary to article 39 stated that the phrases " only through the application of the present articles " and " only as a result of the application of the present articles " were intended to indicate that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles were exhaustive, apart from any special cases provided for in the treaty itself. There might be some cause to doubt the correctness of that statement because, for example, the articles did not seek to regulate the effect of the outbreak of hostilities on treaties, yet it was well known that that could constitute a sufficient ground for terminating or suspending the operation of a treaty obligation. It might be desirable to make suitable reference to that point in article 69. But it was clear that, as stated in paragraph 29 of the Commission's final report,[3] the topic had not been covered in the draft articles. There was therefore a question whether the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles were exhaustive. Perhaps what the Commission had intended to convey was that the grounds were exhaustive to the extent that the draft articles and the commentary read as a whole did not specifically exclude them.

31. He supported the suggestion by the representatives of Switzerland and Australia that a decision on article 39 be postponed until the rest of the articles in Part V had been examined. He was also in favour of the suggestion that a working group should be set up to consider those articles.

32. Mr. PINTO (Ceylon) said that article 39 purported to render the draft articles exhaustive as to the rights and procedure whereby a treaty could be held invalid, termi-

[3] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 9.

nated, denounced, withdrawn from or suspended. The creation of a new and exclusive régime governing so vital a matter could be undertaken only after the most careful thought.

33. The articles comprised in Part V were the most ambitious yet attempted to develop and codify international law; articles 50 and 61, which together provided for the voidance of treaties in conflict with a peremptory norm of international law, were particularly significant. His delegation supported without qualification the principle of *jus cogens* and a provision on that principle would be a milestone in the development of the codification of law. He hoped that, by a common effort, provisions on the subject defining more expressly the real content of the concept would be inserted in the draft.

34. While in the realm of private law it might be relatively simple to hold void an agreement for an illicit purpose which conflicted with a peremptory norm of domestic law or public policy, in the international sphere the concept of a peremptory norm might need further elucidation. Among peremptory norms could be cited such fundamental rules as those prohibiting genocide or slavery. Such norms were not only to be found in international law; they might also exist in custom. They were contained in the United Nations Charter and were to be found among the principles relating to friendly relations and co-operation among States, such as sovereign equality and non-intervention, now being formulated by the Sixth Committee of the General Assembly. The work of the United Nations on aggression might also yield a number of peremptory norms. If it proved impossible to define the peremptory norm, it would be advisable to establish in the convention some machinery for determining speedily, objectively and definitively whether peremptory norms existed in a particular case, particularly for the purposes of article 61.

35. Article 62 did not seem to come to grips with the problem of the prompt and effective determination of issues in a given case, and the Committee ought to consider including an appropriate declaratory mechanism for referring disputes to the International Court of Justice, perhaps to be dealt with by summary procedures. Another possibility would be reference to an arbitral tribunal empowered to make final and binding decisions. Should such a provision fail to gain support, an optional protocol might be acceptable.

36. He supported the suggestion that the decision on article 39 should be deferred until the other articles in Part V had been considered.

37. He commended the Australian amendment for the emphasis it placed on the reference to article 62 and the mechanism for the settlement of disputes.

38. Mr. SMALL (New Zealand) said that in the International Law Commission's discussions on article 39, grave concern had been expressed at the impact which the articles in Part V might have on the stability of treaties. It was that concern which had led the Commission to place at the very beginning of Part V a provision laying down the presumption that a treaty was valid until some grounds of invalidity had been established. The provision had been embodied in the opening article of Part V in order to offset the fact that the subsequent articles contained some destructive provisions. Later, the Commission had decided that a statement in the form of a presumption was too weak and had changed it to a more peremptory statement that any party wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with the provisions of the draft articles and, in particular " in accordance with the orderly procedure " which ultimately became article 62.

39. He had referred to the drafting history of article 39 because article 39 had been clearly intended as a bulwark for the stability of treaties. As such, it had a twofold purpose: first, to ensure that only those grounds set forth in Part V might be alleged as grounds of invalidity; second, to state that a party wishing to rely on such grounds could not do so entirely of its own volition, but must follow what the Commission itself described as the " orderly procedure " of article 62. On that second point, the commentary made it clear that, on all occasions when recourse was had to the substantive articles on invalidity, voidance, termination or suspension, a State could proceed only by recourse to article 62.

40. The text of article 39, in the view of his delegation, was in accordance with that comment. In view of the importance on the matter, however, his delegation felt that the procedural requirement must be stated more explicitly and therefore strongly supported the amendments submitted by Switzerland (A/CONF.39/C.1/L.121), Australia (A/CONF.39/C.1/L.245) and to some extent Peru (A/CONF.39/C.1/L.227). Those amendments should be considered together by a working group.

41. His delegation utterly rejected the notion that, if a State asserted that a treaty was void *ab initio*, it could act upon its view without recourse to article 62.

42. In view of the direct relationship between article 39 and the provisions of article 62, it was not possible to say whether article 39 would be acceptable to his delegation until the final form of article 62 was known, and in particular what judicial or arbitral settlement provisions would be included in it. As it now stood, article 62 did not provide sufficient safeguards. For those reasons he reserved his delegation's position regarding not so much the detailed wording of article 39 as its general accuracy in the context of article 62 and Part V as a whole, and supported the suggestion that a decision on article 39 should be suspended until the central issue to which article 62 gave rise had been dealt with.

43. With regard to Part V as a whole, some of its provisions were potentially unsettling to treaty relations. Any rules that might be adopted at the present Conference would inevitably be governed by the laws of space and time, and it was not easy to foresee the effect which some of those rules might have in the future, however attractive they might at present appear. The Committee should make every effort to build as safely and as moderately as possible for the future.

44. Mr. MYSLIL (Czechoslovakia) said that the provisions of Part V marked the limits of the *pacta sunt servanda* rule, a rule which could not apply to invalid treaties. The International Law Commission had succeeded in maintaining a balance between the legitimate concern of the international community to reflect social change in treaty relations and the interest of that community in the stability of treaty relations. Neither of

those two elements should be neglected; treaty relations should neither be undermined contrary to international law nor preserved in defiance of justice.

45. It had been a remarkable achievement for the Commission to have been able to offer an exhaustive enumeration of the grounds of invalidity and termination. It had also succeeded in providing an adequate formulation of the various grounds in the individual articles. That codification would be of the utmost importance for future treaty relations; without it States would have great difficulty when trying to ascertain what customary rules remained outside the scope of the convention.

46. Paragraph 1 of article 39 stated that, in the future, the validity of a treaty could be impeached only through the application of the articles which followed and for no other reasons. Paragraph 2 stated the same rule with respect to termination, denunciation and withdrawal, where the terms of the treaty might also apply. The intention had been to replace the rules of customary law by rules of treaty law and thereby prevent a recourse to customary law in the future, except perhaps with regard to the effect of hostilities on treaties; on that last point, he agreed with the United Kingdom representative on the need to cover that question. The article was also intended to give recognition to the need for legal stability and to stress the exceptional character of that part of the draft vis-à-vis the *pacta sunt servanda* principle.

47. For article 39 to have any meaning, it was essential that all the grounds of invalidity, termination, denunciation, withdrawal and suspension should be set forth in the convention on the law of treaties. Should any of the grounds, such as error or fraud, listed in Part V be removed, the article would become useless because it would be possible to impeach a treaty by invoking rules that would remain part of customary law. For those reasons, his delegation supported the retention of article 39 as it stood, but agreed that it might be difficult to adopt it until it was known that all the articles specifying grounds of invalidity, termination, denunciation and withdrawal would be included in Part V.

48. He could not accept the Peruvian amendment (A/CONF.39/C.1/L.227), which appeared to ignore the substantive law and concentrated on procedure, or the Australian amendment (A/CONF.39/C.1/L.245) which similarly placed all the emphasis on procedural elements. He also opposed the amendment by Switzerland (A/CONF.39/C.1/L.121), which would reduce the provisions of paragraph 1 to an obligation to request the invalidation of the treaty, even for an innocent party to a treaty that was void *ab initio*.

49. He saw no reason to delete the second sentence of paragraph 1, which made for a balanced statement of the subject-matter of the article. Indeed, the whole draft of Part V maintained the proper balance between considerations of substance and of procedure, a balance which should not be upset. His delegation did not underestimate the procedural aspects of the matter and attached great importance to article 62, but felt that it would also be a mistake to over-emphasize questions of procedure and to make them the central issue of the Committee's discussions.

50. Mr. TALALAEV (Union of Soviet Socialist Republics) said he supported article 39 as drafted by the International Law Commission. Its provisions adequately reflected existing rules of international law, and introduced some innovations which represented progressive development.

51. The concern which had been expressed by some representatives with regard to the effect of the provisions of article 39 was not justified. Those provisions would strengthen the stability of treaty relations and the application of the *pacta sunt servanda rule*.

52. As stated by the International Law Commission in its commentary, the validity of treaties must be regarded as the normal situation. Article 39 therefore set forth the presumption that treaties were valid and stated that invalidity must be established. It further stated that invalidity must be established under the provisions of the draft articles. A treaty was therefore valid unless it was established, under some provision of the draft articles, that it was invalid. The article thus provided a safeguard for the stability of treaty relations.

53. Article 39 limited the possibility of invalidating or terminating a treaty within the framework of the draft articles. The enumeration of grounds of invalidity and termination contained in Part V was exhaustive, a particularly important point, because it ruled out any arbitrary attempt to terminate a treaty or to declare it invalid.

54. The present text of article 39 constituted a remarkable advance by comparison with the earlier texts which had been discussed by the Commission ever since 1959. The fourth Special Rapporteur, Sir Humphrey Waldock, had approached the problem of the validity of treaties basically from the standpoint of essential validity, in other words, from the standpoints of the rules relating to substance rather than of those concerning formal validity and temporal validity, on which previous Special Rapporteurs had laid more stress. Article 39 established a clear link between the validity of a treaty and its binding force. It thus represented the other facet of the *pacta sunt servanda* rule, which proclaimed the binding force of valid treaties. The *pacta sunt servanda* rule applied to all treaties which fulfilled the conditions set forth in Part V, namely, all valid treaties.

55. For those reasons, his delegation considered that the two concepts of validity and binding force should not be separated and it therefore opposed any changes to the present text of article 39. In particular, the amendment by Switzerland (A/CONF.39/C.1/L.121) was totally unacceptable, since it would undermine the whole system of the International Law Commission's draft. It would have the effect of excluding from the draft the concept of voidness or absolute nullity and of treating all instances of invalidity as cases or relative nullity or voidability. The International Law Commission had drawn a clear distinction between the grounds of voidness or absolute nullity set forth in articles 48, 49 and 50, which made a treaty void *ab initio*, and the grounds of invalidation set forth in other articles. If, as suggested in the amendment by Switzerland, all those cases were to be placed on the same footing, a treaty obtained by means of coercion, or the violation of such *jus cogens* rules as those relating to respect for the sovereignty of States, would be treated as being merely voidable. A treaty concluded in such circumstances was null and void *ab initio* and it was unthinkable that it should be dealt with in the same manner

as a treaty consent to which was vitiated because of an error or some *ultra vires* action by the representative of a State.

56. It was true that treaties which were void because they had been obtained by coercion or because they were in conflict with a rule of *jus cogens* were rare, but they did exist and it was necessary to prevent such treaties from being concluded in the future. For those reasons, he strongly opposed the Swiss amendment and urged the Committee to abide by the clear-cut distinction which the International Law Commission had appropriately established between treaties which were null and void *ab initio* and treaties which were merely voidable.

57. He could not agree with the United Kingdom representative's statement that the second sentence of paragraph 1 was in contradiction with other provisions of Part V. Article 39 dealt with all cases of invalidity, and that meant both voidness *ab initio* and voidability. The withdrawal of the amendment in document A/CONF.39/C.1/L.242 to add at the end of paragraph 1 the words "*ab initio*" clearly showed that article 39 dealt with all cases of invalidity and not only with those of voidness or absolute nullity.

58. The Australian amendment (A/CONF.39/C.1/L.245) would not be an improvement. The words "the present articles" covered article 62 and it would serve no useful purpose to make a specific reference to that article.

59. It was still too early to express a definite view on the suggestion to set up a working party to deal with Part V, but if the Committee got into difficulties in its discussions, it might consider it.

The meeting rose at 1 p.m.

FORTIETH MEETING

Friday, 26 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 39 (Validity and continuance in force of treaties) *(continued)* [1]

1. Mr. MIRAS (Turkey) observed that the draft introduced into international law by means of a convention several instances of the invalidity of treaties taken from the private law of contract. Some of those rules would appear to lend themselves to such a transfer, provided that due caution was exercised. They should, however, be defined more precisely and the determination of such cases of invalidity should be left above all to an impartial authority, as they were in internal law. On the other hand, other rules in Part V were not suited to such a change of context, owing to the structural differences between municipal and international law.

2. In the case under consideration, namely article 39, the first essential was to provide machinery for impartial judgement in cases of invalidity. That was not a procedural matter, but an element lying at the very heart of the problem of invalidity. The Swiss amendment (A/CONF.39/C.1/L.121) brought out the need for the intervention of an impartial authority and the Turkish delegation gave it its full support. Progressive codification which introduced rules of civil law into international law should not make provision for automatic invalidity, but rather for judicial invalidation, for no one could be judge in his own cause.

3. The Turkish delegation's attitude towards the other amendments was based on the observations he had made. His delegation also supported the proposal to postpone the vote on article 39.

4. Mr. IPSARIDES (Cyprus) said that, subject to the reservations expressed by the Indian delegation at the previous meeting, his delegation was on the whole in favour of both the substance and the wording of article 39, in view of the explanations given in the commentary.

5. The amendments to article 39 were partly due to the controversial nature of the substantive articles in Part V, to which article 39 was the introduction. At that point he wished to explain his objections to the amendments. With regard to the Swiss amendment (A/CONF.39/C.1/L.121), his delegation's main consideration was that the use of the word "invalidation" might well impair the balance and uniformity of the terms used throughout the convention, in particular in Part V, and that might give rise to juridical misconceptions. Further, the amendment restricted the scope of paragraph 1 to a simple request for invalidation, or, in other words, to the purely procedural aspect of Part V; that deprived the article of its introductory nature, whereas the International Law Commission's text stated both the possibility of impeaching the validity of a treaty only through the application of the articles in the convention and the legal effect of such impeachment, namely that the treaty was void. The Peruvian amendment (A/CONF.39/C.1/L.127) too, although of a drafting nature, restricted the question of invalidity to the procedural aspects by removing any allusion to the substantive grounds of invalidity. The Cypriot delegation could not support the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.233) either, as that amendment virtually removed from the second sentence in paragraph 1 all reference to the legal effect of a successful impeachment of validity. The other drafting changes proposed in that amendment were justified, and the Drafting Committee might consider them, provided that it took care to preserve the uniformity of the terms used.

6. The Australian amendment (A/CONF.39/C.1/L.245) might be a source of confusion, since the addition of a reference to article 62 alone placed undue emphasis on the procedure for invalidation at the expense of the grounds for invalidity. The other changes proposed in that amendment were of a drafting nature and might be referred to the Drafting Committee.

7. His delegation approved of draft article 39 in principle, but thought it might perhaps be necessary to defer the vote on the article until after the debate on the substantive matters raised in Part V.

[1] For the list of the amendments submitted, see 39th meeting, footnote 1.

8. Although it did not underestimate the difficulties facing the Committee, his delegation was convinced that the points of difference could be removed with the help of the spirit of goodwill and co-operation that had characterized the Conference's work. It should be possible to find a juridical solution for even such controversial matters as the problem of *jus cogens* and the determination of nullity by an authority independent of the parties. That would prevent the work of the Conference from being jeopardized by those questions and thus ensure the success of what was perhaps the most important attempt at codification ever undertaken by the United Nations.

9. Mr. SØRENSEN (Denmark) said that an additional reason for the particular difficulties of that part of the codification of the law of treaties was that the use of notions drawn from national legal systems led to differences of opinion due to the differences in the content of those notions. Care should therefore be taken to define those notions as precisely as possible. That had not always been done in the draft. Thus, the procedure laid down in article 62 applied to all the grounds of invalidity and so placed them all on the same footing. But the grounds of invalidity dealt with in articles 48, 49 and 50 seemed to be more absolute than the others. The commentary to those articles used such expressions as " treaty *ipso facto* " void, " absolute nullity ", a treaty " void " rather than " voidable ", or again " void *ab initio* ". But if States must in any event adhere to the procedure laid down in article 62, it might well be asked what those terms corresponded to. It implied perhaps that the invalidity established in accordance with article 62 operated retroactively. But if that was so, what of article 65, which declared void *ab initio* any treaty the invalidity of which had been established, without any distinction as to the cause of invalidity? That certainly needed clarification, and any explanations the Expert Consultant might be able to give about the scope of the various notions would be most useful. Such an effort to clarify matters was indispensable if it was desired to reach an agreement.

10. Mr. BRIGGS (United States of America) said that he regarded article 39 as an important contribution to the codification and progressive development of the law of treaties. By adopting that article, the International Law Commission had unanimously recognized that the mere unilateral assertion by a State that a treaty was invalid or no longer binding on it did not establish the invalidity of the treaty and that a State could not claim to release itself unilaterally from its treaty obligations. As stated in paragraph (1) of the commentary, the validity and continuance in force of a treaty was the normal state of things which might be set aside only on the grounds and under the conditions provided for in the convention. Those conditions included not only substantive grounds for claiming or alleging invalidity or release but also those under article 42 and " notably " the procedures required under articles 62 and 63. The convention sought to safeguard the interests of the two parties and to obviate the acrid controversies which arose from arbitrary unilateral decisions.

11. There was therefore a close relationship between article 39 and the other articles of Part V. The Peruvian amendment (A/CONF.39/C.1/L.227) had the virtue of making that direct relationship clear, by making it impossible for a State which had asserted that a treaty was void to make an unfounded claim that it did not have to follow the procedures laid down in the convention. His delegation therefore supported that amendment and thought that the Australian amendment (A/CONF.39/C.1/L.245) would also help to give greater clarity to that principle, which was implicitly contained in article 39.

12. Further, his delegation thought that perhaps the second sentence of paragraph 1 of article 39 concerning the legal consequences of invalidity might be more appropriately transferred to article 65, which dealt with the same subject. As drafted, the sentence in question did not take into account the distinction that was made between the conditions laid down in articles 49, 50 and 61, which alone provided when a treaty was or became void, and those in other articles which provided grounds for invoking invalidity. The Swiss amendment, by eliminating any premature reference to void treaties, would enable the Committee to consider that important issue when it came to examine article 65. Accordingly, his delegation supported the principle of the Swiss amendment, but thought it would be desirable to include a reference to the close relationship between articles 39 and 62 along the lines proposed in the Australian and Peruvian amendments.

13. With reference to the procedures themselves, his delegation would merely place on record at that stage that it was essential to supplement them by workable and reliable provisions in order to settle any disputes respecting validity which might arise in connexion with the articles contained in Part V.

14. The issues involved in the invalidation of treaties were so grave as to necessitate some device for ensuring the impartial settlement of disputes. Devices which tended to gloss over those differences, such as optional protocols, were unacceptable to his delegation.

15. Finally, his delegation thought it would perhaps be better to defer any decision on article 39 until the Commission had considered the other articles. In particular, it was necessary to determine first of all whether a treaty was necessarily void when a ground for invalidity had been established and whether the consequences showed themselves invariably *ex tunc* rather than *ex nunc*.

16. Mr. BLIX (Sweden), commenting on some important features of article 39, said that the International Law Commission had been wise to make it clear in that article that Part V provided an exhaustive list of the grounds for invalidity, termination and suspension of treaties, thus strengthening the security of treaty relations between States. It might be difficult to subsume certain situations such as desuetude under the provisions of the articles, but it would be better for the list to be shortened if it was going to be altered. Fraud and corruption, for example, could come under the article on *jus cogens*.

17. The enumeration of the grounds of invalidity might act as a deterrent, since the parties would know beforehand that a treaty the conclusion of which was vitiated in one of the ways defined in the convention could be denounced in virtue of the provisions of the convention. Further, the exhaustive character of the list might offer some protection against denunciations on grounds not easily subsumed under the cases provided for in the

convention, even if some of the grounds listed might lend themselves to widely differing interpretations owing to their vagueness and to the absence of previous State and court practice.

18. The institution of a workable mechanism for authoritatively establishing the invalidity of a treaty would certainly play a decisive role in that respect. There would be few cases where the parties would agree that a treaty was invalid, and once the difference had arisen, they would find it difficult to agree on a method of establishing invalidity. His delegation therefore thought it necessary to improve article 62 by providing for a flexible but automatic method of establishing invalidity as required under article 39.

19. He would not at that stage discuss in detail the possibilities of improving article 62. However, since early times, when the principle *pacta sunt servanda* was virtually the only rule of treaty law, that law had developed and been refined to such an extent that the international community had to provide means for ensuring the application of the rules of treaty law when the subjects of law could not agree.

20. The Swedish delegation understood article 39 to mean that the only grounds recognized as invalidating a treaty were those specified in Part V, and that only treaties the invalidity of which had been established were void. Before invalidity was established, there was merely a claim of invalidity. Articles 43-47 corroborated that by providing that a particular ground could be "invoked". The same seemed true of articles 48-50. Coercion or the violation of *jus cogens* could be claimed as grounds for invalidity. The claim might or might not be justified. Once its justification was established, the treaty was void *ex tunc*.

21. Invalidity could be established by two principal methods, as laid down in article 62: by agreement between the parties and by seeking a solution through the means indicated in Article 33 of the United Nations Charter. It might be advisable to make it clear in article 39, as proposed in the amendments submitted by Australia (A/CONF.39/C.1/L.245) and Peru (A/CONF. 39/C.1/L.227), that invalidity was established by the methods provided for in article 62. That would not mean that a treaty claimed to be void was void only if so declared. Just as an entity might juridically constitute a State before being recognized as such by others or before being declared to be a State by an international organization through admission as a member State, so a treaty of which the invalidity was established at any given time would already be void in an abstract sense before the invalidity was established. But a party suspending the operation of a treaty which it claimed was void, but which had not yet been established as void, would incur responsibility for non-execution if the treaty was not subsequently established as void.

22. He pointed out that whereas article 39 used the words "a treaty the invalidity of which is established under the present articles", articles 43-47 referred to invalidity of consent, article 48 to the absence of legal effect and articles 49-50 to a treaty being void. The differing terminology might be due to the fact that in the case of multilateral treaties, the operation of articles 43-48 might entail, not the invalidity of the treaty itself, but only its invalidity with regard to a particular party. Perhaps article 39 should therefore be corrected to read: "The validity of a treaty or a treaty relation may be impeached ..." and "A treaty or treaty relation the invalidity of which is established ...". The question was certainly complicated and it was difficult to reach a decision on the point, as on article 39 as a whole, before discussing the other articles in Part V, with which it was closely connected. The Swedish delegation therefore thought it preferable to defer a vote on article 39.

23. Mr. GARCIA-ORTIZ (Ecuador) said that in the International Law Commission's draft convention the provisions in Part V and, in particular, those in article 39, related to the progressive development of international law. In his delegation's view, there was no reason to restrict the scope of article 39 by a reference to the procedure laid down in article 62, as in the Peruvian amendment (A/CONF.39/C.1/L.227). The question of the validity or the invalidity of a treaty related both to the form and to the substance and required that all the relevant rules should be taken into consideration. The wording of article 39, however, might be improved, as in the amendment of the Republic of Viet-Nam (A/CONF. 39/C.1/L.233) replacing the words "of the present articles" by the words "of the present Convention"; but that was the only part of that amendment which the Ecuadorian delegation could support. The Australian amendment (A/CONF.39/C.1/L.245) seemed unnecessary, since the term "draft articles" obviously included article 62. The Swiss amendment (A/CONF.39/C.1/ L.245) raised a question of substance and might well damage the most constructive part of the draft. The argument advanced by the Swiss representative seemed to assert that every treaty was valid, sacrosanct and permanent of itself, but a treaty was valid not by virtue of the mere fact that it fulfilled all the conditions of formal validity, but because it respected good faith and the other peremptory norms in force which governed the international community.

24. He would therefore vote in favour of draft article 39, which followed the line of the progressive development of international law and would not support any of the amendments, which should be put to the vote, since they all affected substance.

25. Mr. FUJISAKI (Japan) observed that in dealing with the law of treaties the emphasis should be on codification rather than on progressive development, since the codification would constitute the foundation upon which the treaty relations of the community of nations would be based. Caution should therefore be exercised in formulating the rules in Part V. If the provisions governing invalidity, termination and suspension of the operation of treaties lacked precision or might be open to arbitrary interpretation, it would defeat the whole purpose of the convention.

26. The Japanese delegation urged the need to devise some procedure to prevent abuses, a necessity repeatedly stressed in the International Law Commission's commentary. In order to obviate any confusion, the articles dealing with the causes of invalidity, termination and suspension of the operation of treaties should be closely tied to the articles laying down the procedures for

establishing invalidity, termination or suspension. He therefore supported the Australian amendment (A/CONF. 39/C.1/L.245).

27. Further, it was of the utmost importance to stipulate clearly that until all disputes were solved and invalidity, termination or suspension of the operation of a treaty was established in accordance with the procedures laid down in the convention, the treaty was valid and remained in force. The Japanese delegation thererefore supported the Peruvian amendment (A/CONF.39/C.1/L.227) in so far as it clarified that point.

28. A convention on the law of treaties, as a fundamental rule of the international community, must be based on the consensus of that community and he therefore hoped that the Committee of the Whole would spare no effort to study the provisions of Part V in detail before coming to any final conclusions.

29. Mr. DE BRESSON (France) said that his delegation fully appreciated the value and interest of a text which, alongside clauses more properly of a codifying character, embodied—more particularly in connexion with the invalidity of treaties—ideas that were often new.

30. That represented progress in the development of public international law, the desirability of which should be recognized, in so far as it put an end to the present uncertainty regarding certain methods of dissolving international agreements, and clarified situations which, it must be recognized, were sometimes solved in an unsatisfactory manner by present positive law.

31. Such an undertaking was as sublime in principle as it was difficult to carry out. He therefore welcomed the participation in that task of all States, on a footing of absolute equality, regardless of their juridical, political or social systems.

32. What mattered when evolving a system which would be binding on inter-State relations for many decades was to reason, not in terms of passing confrontations, but in terms of the long-range view that it behoved sovereign and equal States to take.

33. The objective was to obtain greater security in relations between States. Inter-State relations could only be based on law, the function of which was to enable those relations to depend on something other than a relationship of the forces confronting each other and to guarantee respect for the autonomy of the will of States, in other words their existence.

34. His delegation was ready to co-operate fully in order to ensure that the convention should be the outcome of unanimous agreement, but doubted whether, at the present stage of the Conference's work, consideration of the text of article 39 was timely. Clearly the purpose of that article was to introduce and cover the provisions of Part V as a whole. Consequently, it was extremely difficult to decide on the terms of the article before deciding on those of the articles related to it.

35. Paragraph 1 gave the impression of establishing a distinction between the impeachment of the validity of a treaty and the establishment of the invalidity of a treaty. If that was not what was intended, then the first sentence of the paragraph might appear, *a priori*, to be sufficient in itself. Obviously, if the validity of a treaty was impeached, it could only be with a view to proclaiming or declaring its invalidity.

36. The provision should confine itself to proclaiming the principle of such a possibility of impeachment and stipulating that it would be open only in the cases mentioned in the articles connected with it. Any further addition could clearly only lead to confusion.

37. But perhaps the purpose of including the two sentences was to indicate that there was a difference between the situations dealt with in articles 43 to 48 and those in articles 49, 50 and 61. If that was the case, the text should be made much more explicit and the effects of the formulation adopted should be clearly brought out. It did not seem to be the intention in any of the other provisions of Part V, including articles 42 and 62, to establish different régimes for the various cases of invalidity according to the grounds for them and in particular where the conditions for their application were concerned.

38. Accordingly, if article 39 was intended to introduce such differences, that should be made clear, either in paragraph 1 itself or preferably in the body of Part V or in each of the articles concerned. Further, it would be advisable to study carefully whether those distinctions were really useful, and if so, to specify the effects, in particular, on the relationship between articles 39 and 62.

39. Consideration of article 39 was bound up with that of the provisions concerning cases of invalidity and of article 62, which would enable the precise significance of such cases to be determined as and when they arose. It would be advisable to postpone the study of article 39 in accordance with a procedure that would enable that article to be considered in conjunction with the articles related to it. One such procedure could be the establishment of an *ad hoc* working group; the Committee of the Whole had already adopted a similar solution in connexion with article 2.

40. Mr. MARESCA (Italy) said he was convinced of the need to establish a procedure to be followed in the event of invalidity, as such a procedure might constitute a guarantee against any arbitrary decision and enable differences to be settled. Admittedly, article 62 provided for a procedure, but it did so only in very vague terms.

41. There were two very distinct elements in article 39: a statement of lack of validity and an assumption of invalidity *ab initio*. It would seem quite inappropriate to proclaim those two notions without mentioning the procedure to be followed. His delegation was therefore in favour of all amendments to establish such a procedure. The Swiss amendment (A/CONF.39/C.1/L.121) opened up the way, since it mentioned the word " invalidation ", which led to the following two assumptions: that of the declaration of an invalidity existing *ab initio* and that of the termination of the treaty owing to the emergence of a new fact the result of which would be to terminate the treaty. That amendment might well be adopted and developed. The Peruvian amendment (A/CONF.39/C.1/L.227) was of value since it established a link between articles 39 and 62. For the same reason, he supported the Australian amendment (A/CONF.39/C.1/L.245).

42. It would be advisable to postpone consideration of article 39 and to take a final decision only after all the articles in Part V had been examined.

43. Mr. MATINE-DAFTARY (Iran) said that he also attached great importance to Part V. His delegation regarded the wording of article 39 as somewhat restrictive. That article had, of course, to establish the presumption of the validity of a treaty and ensure the stability of treaty relations, but some situations could not be disregarded. Paragraph (5) of the commentary to article 39 stated that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles were exhaustive of all such grounds, but in his opinion the scope of article 39 should be extremely wide and should not exclude other grounds such as *jus cogens*, and, above all, the provisions of the Charter of the United Nations, which always prevailed in the event of incompatibility with the provisions of a treaty. As worded, however, article 39 would not allow a State which had concluded a treaty of military alliance before becoming a State Member of the United Nations to withdraw from the treaty once it became a Member.

44. Consequently, he could not support the Swiss amendment (A/CONF.39/C.1/L.121), which would restrict the scope of article 39, and seemed to overlook the traditional distinction between absolute and relative nullity.

45. With regard to the amendments submitted by Peru (A/CONF.39/C.1/L.227) and Australia (A/CONF.39/C.1/L.245), he wished to point out that article 62 concerned a matter of form, whereas article 39 related to substance; those amendments tended to confuse the two. Moreover, article 62 was applicable in any case, even if not referred to in article 39. He also thought it more logical not to come to any decision on article 39 until the whole of Part V had been examined. It would be useful if the Expert Consultant would explain why the Commission had dealt with suspension of the operation of a treaty in a separate sentence in article 39, whereas in the following articles it was associated with the other grounds of invalidity.

46. As to the notions of " obsolescence " and " desuetude " mentioned in the commentary on article 39, he pointed out that it was a legal principle that a law never fell into desuetude unless it was repealed constitutionally. It was indisputable that a treaty came to an end through obsolescence without there being any need to terminate it; that would be true of a treaty dealing with a mode of transport which no longer existed.

47. Mr. CHAO (Singapore) said that his delegation would give careful consideration to any proposal to set up machinery for the settlement of disputes arising from the operation of Part V.

48. The presumption that a treaty was valid if concluded in accordance with Part II of the draft articles was implicit in article 39. That view was confirmed by paragraph (1) of the International Law Commission's commentary to the article, which stated that the Commission " considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things ". In order to dispel any possible doubt on the matter, however, his delegation suggested that a new paragraph be added at the beginning of the article: " Subject to paragraphs 2 and 3, a treaty concluded in accordance with Part II of the present Convention is presumed valid ". That was only a suggestion, but his delegation would like to be able to submit it as a formal amendment at that late stage. [2]

49. He also supported the suggestion that a decision be deferred on the final wording of article 39 until the whole of Part V had been examined.

50. He noted that the title of Part V mentioned only the " Invalidity, Termination and Suspension of the Operation of Treaties ", whereas part V dealt with denunciation as well. He would be grateful if the Expert Consultant would explain why the term had been omitted. Subject to the latter's reply, he suggested the addition of the word " denunciation " to the title.

51. His delegation supported the amendments by Australia (A/CONF.39/C.1/L.245) and Peru (A/CONF.39/C.1/L.227), which would improve the wording of the article and give greater prominence to article 62. It also agreed with the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.233) and suggested that the Committee of the Whole should take an immediate decision as to whether the words " the present Convention " should replace the words " the present articles " wherever they occurred in the draft. In other respects, he approved of the existing wording of article 39.

52. Mr. STREZOV (Bulgaria) said he was in favour of article 39. It contained two fundamental ideas which were to be found in the various provisions of Part V. The first was that the validity of a treaty could not be impeached without due reflection, but only on the basis of serious arguments drawn from the law expressed in the convention. The second idea was that if the invalidity of a treaty was established under the convention, that treaty was indeed void. His delegation would not find it necessary to wait until the other articles of Part V had been adopted before accepting the International Law Commission's text of article 39.

53. Mr. THIERFELDER (Federal Republic of Germany) said that in dealing with Part V of the draft articles, the Committee was leaving the sphere of the old and tested rules of treaty law derived from the principle *pacta sunt servanda* and entering a world of new problems. It was no longer a question of codifying the existing rules but of formulating new rules and opening the way for the further development of international law.

54. The system proposed by the International Law Commission came close to the rules governing the law of contract as codified in internal civil law. Though it seemed logical to move in that direction, since the structure of international life was taking a new shape under the auspices of the United Nations, the ideas put forward by the International Law Commission might perhaps be in advance of developments in the international world. In any case, it would be unwise to adopt the proposed provisions without setting up a system for settling disputes. In the case of disagreement between the parties, only an impartial body with capacity to take a final decision could ultimately establish the invalidity of a treaty. Moreover, the impeachment of the validity of a treaty might have

[2] This amendment was subsequently circulated as document A/CONF.39/C.1/L.270.

serious political repercussions and thereby create a dangerous situation. The reference in article 62 of the draft to Article 33 of the Charter of the United Nations was no solution, because that Article of the Charter was far from satisfactory. A system of settling disputes was indispensable in view of the new type of conflict which might result from Part V of the draft articles, and article 39 should be supplemented by a reference to article 62.

55. The establishment of a system for settling disputes did not exclude the possibility of seeking a solution through negotiation and conciliation, but the parties might be unable to reach agreement or might not have the right to settle their dispute by agreement. An agreement could not be used to decide whether a treaty conflicted with a peremptory norm of general international law, as provided in article 50.

56. Some sort of compulsory international jurisdiction should be set up which would intervene at least at a later stage in the settlement of the dispute. Further, he thought that terms such as "void" and "invalidity" should be clarified and brought together in a logical and comprehensible system. In the cases covered by articles 48, 49 and 50, it seemed that a treaty was void *ex lege* and *ab initio*, whereas in other cases a party had to cite an act which invalidated the treaty. The procedure prescribed in article 62, however, was the same in all cases: the party claiming that a treaty was invalid must send a formal notification of its claim to the other parties. What could happen if a party failed to notify the other parties in the cases mentioned in articles 48 and 49, and if, in the case mentioned in article 50, none of the parties regarded the treaty as conflicting with a peremptory norm of international law? The terminology of article 39, paragraph 1, should therefore be examined very closely.

57. Consequently, he proposed the postponement of a vote on article 39 until the other articles in Part V, including Section 4, had been adopted.

58. His delegation would vote in favour of the amendments submitted by Peru (A/CONF.39/C.1/L.227) and Australia (A/CONF.39/C.1/L.245). As regards the amendment proposed by Switzerland (A/CONF.39/C.1/L.121), he agreed with those who regarded the second sentence of paragraph 1 as unsatisfactory. Simply to delete it, however, might not be the best way of dealing with the matter. It was necessary for article 39 to state that the invalidity of a treaty had to be established. The text of the article should be revised in the light of the Swedish representative's remarks. It would doubtless be easier to draft it once the other articles in Part V had been discussed and approved.

59. Mr. BARROS (Chile) said that admittedly jurists were likely to be greatly tempted to introduce new notions into a convention on the law of treaties by carrying institutions of internal law over into international law. In general, internal law was a step ahead of international law on the path leading to justice. The jurist should not be chary of innovations binding States to respect the norms of justice, and indeed of equity, a result already achieved in internal law. The International Law Commission's efforts in that respect deserved the gratitude of the international community. Nevertheless, one must be realistic and not lose sight of the fact that the ambitions of the jurist could not be fulfilled without the approval of statesmen. In international life a leap forward could be just as dangerous as immobility. It had been said that nature did not proceed by leaps and bounds —an example to be followed by the law.

60. The provisions in Part V dealt with two classes of invalidity; in certain cases, invalidity seemed to take effect automatically, as the terms used in articles 48, 49 and 50 implied. In other cases defects in consent could be invoked, as in articles 45, 46 and 47. The notions of invalidity, susceptibility to invalidation and validity should therefore be strictly defined.

61. The provisions of article 62 dispelled some of the apprehensions aroused in the Chilean delegation by Part V of the draft and it hoped that the debate would later remove other doubts. His delegation therefore hoped that the Committee would accept the proposal to postpone the adoption of article 39. It would support amendments that would give to progressive development a solid and lasting foundation. It should not be possible in the future to invoke whatever text was adopted in order to justify unilateral acts likely to endanger the legal stability sought by the international community.

62. Sir Humphrey WALDOCK (Expert Consultant) observed that the questions raised by various delegations had not escaped the attention of the International Law Commission. The Commission was not inspired by any excessive enthusiasm for the progressive development of law but by the necessity to take into consideration the elements of State practice, the decisions of the courts and the general principles of law that had relevance in the law of treaties. How much of those elements should be incorporated in the draft was a matter for discussion. The Commission had felt itself in duty bound to identify them, to make its selection and to submit the results of its work to the present Conference.

63. With reference to the relation between article 39, paragraph 2, and the rule laid down in article 61, that any treaty became void and terminated if it conflicted with a new peremptory norm of general international law, he said that he did not think that the issue raised by the Indian representative was very likely to arise. The words " only as a result of the application of the terms of the treaty or of the present articles " should be read in their context, namely " a treaty may be terminated or denounced or withdrawn from ", and then it was clear that the application of " the terms of the treaty " and the application of " the present articles " were separate cases and that the two provisions were cumulative.

64. Several representatives had emphasized the link between article 39 and article 62 and rightly so. Article 39 covered all the grounds of invalidity mentioned in the ensuing articles, including article 62. That was the sense of the text of article 39, paragraphs 1 and 2. Moreover, in its commentary the International Law Commission stressed that the phrase " application of the present articles " used in those two paragraphs referred to the draft articles as a whole. That was, of course, why some delegations had stated that a reference to article 62 added nothing to the text of article 39.

65. In his opinion, the critical point was to determine the scope of article 62. Its terms were general and the intention was that the article should cover all the cases dealt

with in the present articles. It was correct therefore to read it together with article 39.

66. It was clear from the general debate that the difficulties regarding interpretation to which reference had been made arose from the slight difference in the terms used in the various articles. In some cases, the Commission had used the expression " a State may invoke ", whereas in articles 49 and 50 it had preferred to say " a treaty is void ". The difference took into account the fact that a large number of articles dealt with the matter of the consent of States, whereas articles 49 and 50 dealt not only with consent of States but also with a question of public order. In articles 49 and 50 the words " a treaty is void " meant that if the nullity was established, the effect of that nullity related to the treaty itself, not merely to the consent of the States concerned. At the beginning of the International Law Commission's work, the Special Rapporteur had suggested another type of wording for article 49, because he had thought that a State which was a victim of coercion might possibly not wish to void the treaty completely; but the Commission had come to the conclusion that in such cases the danger of continuous pressure was such that the only acceptable rule was that of public order. That was why the words " a treaty is void " had been retained.

67. The Danish representative's comment that the legal terms " void ", " null ", " invalid ", " voidable " did not necessarily have the same meaning in the different systems of internal law was correct. The Commission had considered that a treaty became void either for reasons of public order or as a result of a defect in consent. Although it had recognized that in many cases either one or both of the parties should be considered as having the choice of invoking the ground of invalidity for the purpose of avoiding it, the Commission had not contemplated the possibility that a treaty should become void only from the date on which its invalidity had been established. It had tried to resolve the difficulties raised by the use of the words " ground of invalidity " and " void " and had drafted specific provisions on the consequences of the invalidity of a treaty. In general, it might be said that the term " void " applied when the avoidance of a treaty was established for some reason of public order and the expression " ground of invalidity " when what was involved was a State's consent only.

68. Some representatives had complained that article 39 was not satisfactory because the articles that followed were not exhaustive of the grounds of termination by reason of their failure to mention cases of succession of States and outbreak of hostilities. A succession of States might well be a ground for the disappearance of a party rather than for terminating a treaty. However that might be, a general reservation had been included covering State succession. With regard to an outbreak of hostilities, the Commission had given in its commentary the reasons why that subject had been left aside. As to the reference to the suspension of the operation of a treaty in article 39, that was necessary since several of the substantive articles which followed contained provisions concerning it.

69. The CHAIRMAN suggested that the Committee postpone its decision on article 39.

It was so agreed. [3]

[3] For resumption of the discussion of article 39, see 76th meeting.

Article 40 (Obligations under other rules of international law) [4]

70. Mr. SAMAD (Pakistan) said that his delegation proposed (A/CONF.39/C.1/L.183) that the words " or under the Charter of the United Nations " should be added at the end of article 40, for the phrase " to which it is subject under any other rule of international law " was not sufficiently precise. He reminded the Committee that the legal principle of good faith, which was an integral part of the *pacta sunt servanda* rule, was mentioned in Article 2 (2) of the Charter of the United Nations. In his view, it would be advisable to insist in article 40 that Member States must fulfil all the obligations arising out of the Charter of the United Nations, even in the event of withdrawal from or denunciation of a treaty. A reference to the United Nations Charter would not be out of place in the draft convention; it was mentioned in article 26, which had already been adopted by the Committee, article 49 and article 70.

71. He would leave it to the Chairman to decide whether the addition he proposed (A/CONF.39/C.1/L.183) was an amendment of substance or a drafting matter.

72. Mr. HU (China) explained that his delegation's amendment (A/CONF.39/C.1/L.243) merely proposed to reverse the order of the words in article 40. It emphasized the primacy of the treaty provisions over those of the convention and brought the text of article 40 more into line with that of paragraph 2 of article 39.

73. He wondered whether the word " invalidity " should not be deleted in article 40. Article 39, paragraph 1, stated that " The validity of a treaty may be impeached only through the application of the present articles "; in other words, the invalidity of a treaty could be established only in virtue of the succeeding articles. Consequently, there was a link between articles 39 and 40, and care must be taken to avoid any contradiction between them owing to the use of the word " invalidity ". The Drafting Committee should consider that question.

74. Mr. BRIGGS (United States of America) supported article 40, for it contained a very important rule of international law that complemented, the provision of article 34 under which a rule set forth in a treaty might become binding upon a third State as a customary rule of international law. Article 40 also complemented the clause in the preamble to the Vienna Convention on Diplomatic Relations [5] and to the Vienna Convention on Consular Relations [6] which stated that the rules of customary international law " continue to govern matters not expressly regulated by the provisions of the present Convention ".

75. The amendment submitted by the United States delegation (A/CONF.39/C.1/L.262) was of a purely drafting character. It consisted in replacing the words " it is subject under any other rule of international law " by the words " it is otherwise subject under international law ". Article 40, as worded, might be interpreted as

[4] The following amendments had been submitted: Pakistan, A/CONF.39/C.1/L.183; China, A/CONF.39/C.1/L.243; United States of America, A/CONF.39/C.1/L.262.

[5] United Nations, *Treaty Series*, vol. 500, p. 95.

[6] United Nations Conference on Consular Relations, *Official Records*, p. 175.

referring solely to the rules of customary international law to the exclusion of obligations arising out of another treaty.

76. He requested that the amendment be referred to the Drafting Committee.

77. The CHAIRMAN suggested that the Committee should adopt article 40 and refer it to the Drafting Committee with the amendments submitted.

It was so agreed. [7]

The meeting rose at 5.45 p.m.

[7] For resumption of the discussion of article 40, see 78th meeting.

FORTY-FIRST MEETING

Saturday, 27 April 1968, at 11.5 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 41 (Separability of treaty provisions) [1]

1. Mr. CASTRÉN (Finland) explained that the purpose of the two amendments submitted by his delegation in document A/CONF.39/C.1/L.144 was to extend the application of the principle of the separability of treaty provisions. Although that principle was fairly new, it had nevertheless been accepted by several writers and in judicial practice, and its utility was undeniable. The first Finnish amendment would extend the application of the principle to cases in which a treaty was terminated because of a fundamental change of circumstances—a subject dealt with in article 59. The Finnish delegation wished to limit the undesirable consequences which could follow from the recognition of a change of circumstances as a ground for terminating treaties. It was true that the introduction of the principle of separability might encourage States to invoke that provision more often, but in fact the danger was not very great, and it seemed more important to facilitate a friendly settlement between States by the application of the principle, thus avoiding denunciation of the treaty as a whole. As paragraph 2 of article 41 allowed the principle of separability to be applied in the cases covered by article 57, which dealt with the consequences of breach of a treaty, there seemed no reason why the same rule could not be adopted for change of circumstances. It was possible that the article on the principle *rebus sic stantibus* might come within the scope of article 41, paragraph 3, but the relation between paragraphs 2 and 3 was not very clear. It would therefore be desirable for the Drafting Committee to study that question; it should examine the justification for the Finnish amendment and the possibility of finding a clearer and more precise formulation for article 41, paragraph 2 and 3.

2. The purpose of the second Finnish amendment was to delete the reference to article 50 in article 41, paragraph 5, so that the principle of separability could also apply when a treaty was incompatible with a norm of *jus cogens*. A treaty might contain only one or two secondary provisions which conflicted with *jus cogens*. Why make the whole treaty void when it would suffice to invalidate only the doubtful clauses, which were separable from the rest of the treaty? The International Law Commission recommended in its commentary that in such a case the treaty should be revised; that was a complicated procedure, because it required the consent of all the parties. *Jus cogens* was itself a new principle and some writers and governments seemed to be opposed to its introduction in the international sphere. It was therefore advisable to proceed cautiously, so that the principle could be accepted by all within appropriate limits. If the Finnish amendment to article 41, paragraph 5 was accepted, articles 50 and 67 should be supplemented, for instance as suggested by Professor Ulrich Scheuner in his study on *jus cogens*. [2]

3. The Finnish delegation reserved the right to submit amendments on those lines at a later stage.

4. Mr. DE LA GUARDIA (Argentina) said that the amendment submitted by his delegation (A/CONF.39/C.1/L.244) raised questions of drafting and of substance. The amendments to paragraphs 1 and 2, which related to drafting only, could be referred to the Drafting Committee. The proposal to delete paragraphs 3, 4 and 5 was a matter of substance.

5. Article 41 provided for the separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties. The International Law Commission had discussed the matter at length and had accepted the principle of separability when the ground for invalidity, termination or suspension of the operation of a treaty related to quite secondary provisions of the treaty. In other words, the Commission had tried to reconcile the traditional principle of the integrity of treaties with the possibility of eliminating certain secondary provisions. It should, however, be noted that the judicial decisions cited by the Commission related solely to the separability of the provisions of a treaty for purposes of interpretation and not the application of the principle of separability with respect to the invalidity or termination of treaties. Those were two quite different questions. In the second case, the principle of the integrity of treaties was attacked.

6. Paragraph 3 was not satisfactory, because it was very difficult to determine which clauses were separable from the remainder of the treaty and which were an essential basis of consent to the treaty. Moreover, some clauses which now appeared secondary might later be regarded as essential. The purpose of the amendment submitted by the Argentine delegation was to revert to the principle of the integrity of treaties. It was, in fact, a residuary rule, since it was for the parties to determine what rule they wished to apply in the treaty. The Argentine delegation

[1] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.144; Argentina, A/CONF.39/C.1/L.244; Hungary, A/CONF.39/C.1/L.246; India, A/CONF.39/C.1/L.253; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.257 and Corr.1; United States of America, A/CONF.39/C.1/L.260.

[2] See *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967).

was not proposing the deletion of the exception in paragraph 2, namely, the reference to article 57, since it was a presumption accepted by many writers. If paragraph 3, containing the exception, was deleted, paragraphs 4 and 5 would become unnecessary as their subject-matter would be covered by the general rule and it was therefore proposed that those paragraphs should also be deleted.

7. At its 25th meeting, the Committee had approved the principle of the integrity of treaties with respect to reservations, by rejecting the contrary principle asserted in certain amendments to article 17, paragraph 4 (*b*). That was the principle upheld in the Argentine amendment.

8. The Argentine delegation had not taken part in the discussion on article 39, which had also dealt generally with Part V of the draft articles. It wished, however, to express its concern about the tendency—which was fairly marked in some articles—to stress the progressive development of international law rather than the codification of existing international law.

9. Mr. HARASZTI (Hungary) introduced his delegation's amendment (A/CONF.39/C.1/L.246), the purpose of which was to specify that if a treaty was breached, the State which suffered from that breach could only terminate part of the treaty subject to the conditions laid down in article 41, paragraph 3, that was to say if the clauses were separable from the remainder of the treaty and if their acceptance was not an essential basis of the consent of the parties to the treaty as a whole. It was clearly impossible to denounce part of a treaty unless the conditions set out in article 41, paragraph 3 were fulfilled, but since article 57 contained no reference to article 41, it seemed advisable to insert in paragraph 2 of article 41 the words " subject to paragraph 3 of the present article ". That amendment could be considered by the Drafting Committee.

10. Mr. JAGOTA (India) said he thought his delegation's amendment (A/CONF.39/C.1/L.253) could be considered only after the Committee had taken a decision on the Indian amendment to article 50, paragraph 2 (A/CONF. 39/C.1/L.254). If that amendment was adopted, article 41 would have to be changed. He therefore suggested that consideration of his amendment to article 41 be deferred.

11. Mr. GORDON-SMITH (United Kingdom) said that his delegation supported the principle of the separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties, and that it approved the general approach adopted by the International Law Commission on the matter indicated in paragraph (2) of the commentary. The United Kingdom delegation considered that the article could be improved, however, and had accordingly submitted a redraft (A/CONF.39/C.1/L.257 and Corr.1) for consideration.

12. The United Kingdom delegation was in agreement with paragraph 1 of the draft, but it understood that articles 51, 53, 54 and 55 were subsumed under the rule proposed in that paragraph. Those articles dealt with cases of termination, withdrawal from or suspension of the operation of a treaty in conformity with a provision of the treaty or by agreement of the parties. His delegation therefore assumed that the rule in paragraph 1 applied to the cases dealt with in those articles and that paragraph 2 did not apply to them.

13. With regard to paragraph 2, it seemed reasonable to establish a general rule of non-separability of treaty provisions and then to provide for exceptions to that rule. Paragraph 2 established paragraphs 3 to 5, and also article 57, as exceptions. The effect of the unqualified reference to article 57 was that in cases where that article allowed a party to terminate the treaty or suspend its operation " in whole or in part " on the ground of a material breach, that party had an unrestricted option as to whether or not to separate. In the view of his delegation, however, the right to suspend or terminate part only of a treaty in such a case should be subject to the conditions set out in paragraph 3. For that reason, the United Kingdom amendment omitted the reference to article 57 at the end of paragraph 2 and included in paragraph 4 a reference to article 57 as well as to articles 41 and 47.

14. The main criticism of paragraph 3 was that the criterion in sub-paragraph (*b*) might be difficult to apply in practice, for example where the particular clauses were an essential basis of the consent of some of the other parties but not all of them. It contained a very large subjective element, for it was impossible for a party to judge accurately what another party considered to be an essential basis of its consent. It appeared that the criterion could be made more objective and that was what his delegation had tried to do in sub-paragraph 3 (*c*) of its redraft. In any case, it thought the criterion should be applied by an impartial body rather than by the governments concerned.

15. With regard to paragraph 4, the redraft sought to clarify the relationship between that paragraph and paragraph 3. In the case of the Commission's paragraph 5, it did not seem right to exclude separation in cases falling under articles 48, 49 and 50, particularly the last mentioned. It was possible to conceive of a case in which a comparatively unimportant part of a treaty was in conflict with a rule of *jus cogens*. In any case, paragraph 5 did not mention article 61 and consequently did not prevent separation where a new rule of *jus cogens* developed in the future. It seemed illogical to prevent separation in the case of an existing rule, but not in that of a future rule of *jus cogens*. Paragraph 5 had therefore been omitted from the United Kingdom amendment, and replaced by a definition of the expression " group of articles " which was used in it. It was arguable whether the definition was really necessary; the Drafting Committee could consider that point.

16. Article 41 was an important article directly connected with the large group of articles on invalidity and termination of treaties which followed; it might therefore be necessary to modify it in the light of the decisions taken by the Committee on those articles. The major part of the United Kingdom amendment related to drafting and could be referred to the Drafting Committee. The proposals to vary the application of the paragraphs of article 41 to the following articles raised questions of substance, but they could nevertheless be considered by the Drafting Committee, if the Committee of the Whole decided not to take an immediate decision on article 41. The Committee of the Whole would no doubt have considered the later articles by the time the Drafting Committee considered article 41. However, his delegation would have no objection to the Committee's taking an im-

mediate decision on the principle of its proposals on questions of substance, the remainder of its proposals being referred in any case to the Drafting Committee.

17. Mr. KEARNEY (United States of America) said that the purpose of the amendment submitted by his delegation (A/CONF.39/C.1/L.260) was to add a new sub-paragraph expressing an idea that was undoubtedly implicit in article 41 as drafted. The need for the amendment arose from the possibility of an unduly narrow interpretation of the word "separable" in paragraph 3 (*a*) and of the words "an essential basis" in paragraph 3 (*b*). It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties.

18. The United States delegation was not opposed to the International Law Commission's decision to extend the application of the principle of separability, since it was a means of maintaining treaty relations while at the same time permitting the termination of parts of a treaty which ought not to remain in force. His delegation merely doubted whether article 41, as drafted, achieved the objective stated in paragraph (2) of the Commission's commentary, in particular in the fourth, fifth and sixth sentences.

19. It could be seen from paragraph (5) of the commentary that the question whether the invalidated section of the treaty was an "essential basis" of the other parties' consent to be bound was left without any very precise guidelines. What was not brought out clearly in paragraphs 3 (*a*) and (*b*) was a rule covering "the balance of the interests of the parties under the treaty", referred to in paragraph (2) of the commentary; in other words a provision concerned with the parties' interests after part of the treaty had been invalidated. For it should go without saying that that balance would not be reflected by the terms of the treaty or even the preparatory work. After some years of application, certain treaty provisions might gain or lose importance in a way not foreseen during negotiation.

20. The United States proposal to add a sub-paragraph (*c*) to paragraph 3 was designed to achieve more clearly the International Law Commission's stated objective and to ensure that the rule of separability laid down in article 41 would not create the very kind of international friction which the Commission sought to avoid.

21. His delegation did not think an amendment designed to avoid injustice could be controversial, but if there was any objection it could be put to the vote. Otherwise it could be referred to the Drafting Committee.

22. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) contained useful suggestions which should be examined. The amendments submitted by Hungary (A/CONF.39/C.1/L.246) and Finland (A/CONF.39/C.1/L.144) deserved support.

23. Mr. ROSENNE (Israel) said that the question of separability of the provisions of a treaty should be approached with the greatest caution. Certain aspects of the principle of separability had already been referred to elsewhere, for example, in connexion with the assumption of treaty obligations and the interpretation of treaties. But the problem raised by article 41 was different, and might have more serious political implications. The principle *pacta sunt servanda* must be taken into consideration. It seemed difficult to accept the proposition that a treaty could contain secondary provisions. The major principle must be the integrity and indivisibility of treaties. The separability of the provisions of a treaty could be considered only in exceptional cases.

24. The present text of article 41 was an improvement on the 1963 draft, but paragraph 3 (*b*) introduced a subjective element which could not be established through the application of the rules on interpretation already discussed. His delegation could accept that part of the Argentine amendment (A/CONF.39/C.1/L.244) which related to paragraphs 1 and 2, and the idea contained in the United States amendment (A/CONF.39/C.1/L.260). Those amendments could be examined by the Drafting Committee.

25. With regard to the amendments relating to the application of the notion of separability to the different grounds of invalidity, termination, withdrawal and suspension, namely, the Finnish amendment (A/CONF.39/C.1/L.144), the third part of the Argentine amendment (A/CONF.39/C.1/L.244) and the Indian amendment (A/CONF.39/C.1/L.253), it seemed preferable to consider them in connexion with the substantive articles dealing with those grounds.

26. The implications of the Hungarian amendment (A/CONF.39/C.1/L.246) would only be clear when the text of article 57 had been finally settled. With regard to that article, his delegation thought that the convention should be confined to stating the law of treaties and not deal with the question of remedies. The provisions on separability and breach should deal solely with the mutual relations of the parties as a matter of treaty law, and not as a matter of State responsibility.

27. His delegation could not yet take a final position on the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1), but in general his remarks applied to that amendment as well.

28. Mr. TALALAEV (Union of Soviet Socialist Republics) observed that article 41 was of the same general nature as articles 39 and 40. The text proposed by the International Law Commission corresponded in a general way to the principles stated in Part V of the draft. Article 41 made the application of the principle of the separability of treaty provisions conditional on a number of elements, first of all the nature and object of a treaty. A treaty was separable if certain of its clauses were separable from the remainder of the treaty with regard to their application. The other elements were the consent of States and the validity of the treaty; for a provision might be so important that if it became void, the remainder of the treaty could not be regarded as valid. That was the idea which the Commission had applied in paragraph 3, 4 and 5. The notion of the separability of treaties should not apply in the cases referred to in articles 48, 49 and 50, in other words, in cases in which a treaty was void *ab initio*. That idea was expressed in article 41. It was an essential idea and must certainly be stated.

29. In view of that principle, the amendments submitted by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1), Finland (A/CONF.39/C.1/L.144) and Argentina (A/CONF.39/C.1/L.244) were unacceptable, for they

frustrated the principle established by article 41. There could be no question of separability of agreements concluded as a result of coercion or the use of force. That also applied to the agreements contemplated in article 50; they were void *ab initio* because they conflicted with a peremptory norm of general international law. The amendments he had mentioned should not be referred to the Drafting Committee. The United Kingdom amendment also gave rise to some doubts, inasmuch as the notion of separability was replaced, in paragraph 5, by the notion of inter-connexion between various provisions.

30. The Hungarian amendment (A/CONF.39/C.1/L.246) improved the text and could be considered by the Drafting Committee.

31. The United States amendment (A/CONF.39/C.1/L. 260), which was substantive, was unnecessary because it did not relate to the principle of separability. It introduced a new element, the concept of justice, which only complicated matters.

32. Mr. ARMANDO ROJAS (Venezuela) said that his delegation was in favour of the Argentine amendment (A/CONF.39/C.1/L.244) deleting paragraphs 3, 4 and 5 although his delegation's real difficulty was with paragraph 4, because it did not think that separability could be permitted in cases of fraud or corruption. If the Argentine amendment was not adopted, his delegation would suggest that the Committee should defer consideration of those three paragraphs, in particular paragraph 4, and should not take a decision on them until it had examined the whole of Part V. That would also enable the Committee to avoid prejudging the fate of the Venezuelan amendments to articles 46 and 47 (A/CONF.39/C.1/ L.259 and L. 261).

33. Mr. HARRY (Australia) said that article 41 raised the question whether preference should be given to the integrity of treaties or to the continuity of treaty relations. The Australian delegation had already stressed the importance of the integrity of treaties in connexion with articles 17 and 37 and it accordingly sympathized with the Argentine amendment (A/CONF.39/C.1/L.244).

34. The wording of article 41 was not entirely clear, and the United Kingdom amendment (A/CONF.39/C.1/ L.257 and Corr.1) to change the position of the word " only " would improve it. With regard to the deletion of the words " or in article 57 " in paragraph 2, his delegation believed that the conditions laid down in paragraph 3 should also apply to the case of material breach dealt with in article 57. It was in favour of the new wording of paragraph 3 proposed by the United Kingdom in its amendment, and of the addition suggested by the United States (A/CONF.39/C.1/L.260).

35. With regard to paragraph 5, the Australian delegation's final position would, of course, depend on the wording ultimately adopted for articles 48, 49, and 50, but it could say at once that at first sight it saw no great difference in principle between article 48 and article 47, for example, that was to say between coercion and corruption, so far as separability was concerned. On the other hand, it recognized that the case covered by article 49 had special features, as the Expert Consultant had explained.

36. The Australian delegation proposed that the Committee should defer final consideration of article 41 until it had decided what was to be done with articles 48, 49 and 50.

37. Mr. SECARIN (Romania) said that the question of separability of the provisions of multilateral treaties had been recognized since the nineteenth century, and certain treaties concluded at the beginning of the twentieth century contained clauses relating to the separability of their provisions.

38. In drafting article 41, the International Law Commission had shown great concern for moderation and balance, taking into account both the present requirements of international law and the basic principles governing the law of treaties, such as the freedom of the will of the parties and the stability and integrity of treaties.

39. Paragraph 2 called for two comments. First, the reason why the Commission had included article 57 was that a material breach of a treaty by one of the parties constituted a separate case in law. A material breach entitled the other party to invoke it to terminate the treaty or to suspend its operation in whole or in part, without being obliged to ascertain whether other conditions were fulfilled, as in the situations contemplated in paragraph 3; the injured party itself decided the scope to be given to the effect of the other party's improper conduct. Secondly, the provisions of paragraph 2 could not apply to situations such as that contemplated in article 59 (fundamental change of circumstances). Under the system adopted by the International Law Commission, a fundamental change of circumstances could not, in principle, be invoked with respect to particular provisions of a treaty and, accordingly, could only give legal sanction to the separability of its provisions under the conditions set out in paragraph 3.

40. Paragraph 3 reflected the International Law Commission's concern to preserve the stability and integrity of treaties by recognizing separability in so far as the ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty related only to secondary provisions not involving the basis of the obligations on which the agreement of the parties had been reached.

41. Paragraph 5 formulated a reservation to the principle of separability, namely, compliance with the norms of *jus cogens* set out in articles 48, 49 and 50; that reservation was very well justified in the commentary.

42. The condition set out in paragraph 3 (*a*) met the concern expressed in some quarters that separability should not be accepted when continued performance of the remainder of the treaty would lead to injustice.

43. The Romanian delegation regarded article 41 as one of the key articles in the draft. It was in favour of retaining the article as it stood.

44. Mr. RUEGGER (Switzerland) said he shared the doubts that had been expressed about certain parts of article 41. He approved of the Argentine proposal to delete paragraph 3 (A/CONF.39/C.1/L.244), as it would be extremely hard in practice to decide whether certain clauses were separable. The task would be too difficult even for an impartial judicial or arbitral body. Moreover, if paragraph 3 was retained, it was to be feared that States might multiply separate agreements in order to safeguard, at least partly, the stability of law. The wording of

paragraph 3 proposed by the United Kingdom delegation (A/CONF.39/C.1/L.257 and Corr.1) was a definite improvement on the International Law Commission's text. Sub-paragraph (*c*), in particular, contained a substantial safeguard clause. In his opinion, however, the word " essential " should be deleted from that sub-paragraph, as it would be difficult to determine whether the basis was essential or not. His delegation would therefore vote in favour of the United Kingdom amendment and also of the United States amendment (A/CONF. 39/C.1/L.260).

45. The discussion had shown that article 41 could usefully be studied in greater detail.

46. Mr. DE BRESSON (France) said that his delegation was not opposed to the principle of the separability of treaty provisions or, generally speaking, to the conditions adopted by the International Law Commission for its application.

47. The amendments by the United Kingdom (A/CONF. 39/C.1/L.257 and Corr.1), the United States (A/CONF. 39/C.1/L.160) and Hungary (A/CONF.39/C.1/L.246) seemed worth considering in so far as they helped to clarify the wording of the text, to remove a certain rigidity and to take more account of the intention and interests of the parties. However, a feature of those amendments, like those of Argentina (A/CONF.39/C.1/ L.244), India (A/CONF.39/C.1/L.253) and Finland (A/CONF.39/C.1/L.144) and the Commission's text itself, was that they referred to substantive articles not yet considered by the Committee. Hence it would be better for the Committee not to take a decision on article 41 and the amendments thereto until it had considered those substantive articles.

48. Mr. EEK (Sweden) said he would like the Expert Consultant to clarify the relationship between sub-paragraph 3 (*b*) of article 41 and sub-paragraph 3 (*b*) of article 57 concerning the material breach of a treaty. According to sub-paragraph 3 (*b*) of article 41 a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty might be invoked with respect to certain particular clauses where the acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole. Consequently, the material breach, as defined in sub-paragraph 3 (*b*) of article 57, did not permit of separability. In other words, if a State A suffered from a material breach of a particular clause of a treaty by a State B, it appeared that according to article 41 State A was not entitled to suspend with respect to State B only the application of the clause violated by State B.

49. If that interpretation was correct, the rule did not seem satisfactory. The text of paragraphs 3 (*c*) and 4 of the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) might remedy the situation.

50. Mr. MARESCA (Italy) though that, in the interests of the structure of the convention and the harmony of international relations, the principle of the integrity of treaties should not be taken too far by applying it to treaty " crises " such as invalidity, termination, suspension. International agreements could not be regarded as forming an integral whole: they very often included parts which were quite different from each other. Hence the principle of separability could not be systematized on dogmatic, general and rigid lines. Some flexibility was required and consequently the Italian delegation could not support the Argentine proposal to delete paragraphs 3, 4 and 5 (A/CONF.39/C.1/L.244). On the other hand, the Argentine proposals relating to paragraphs 1 and 2 should be considered by the Drafting Committee.

51. As to the Finnish amendment (A/CONF.39/C.1/ L.144), his delegation would be unable to take a position until articles 50, 57 and 59 had been put into final form.

52. The United Kingdom amendment (A/CONF.39/C.1/ L.257 and Corr.1) certainly made the Commission's text clearer. He agreed with the United Kingdom delegation that paragraph 5 of the Commission's text should be deleted, for it was contrary to the principle that specific cases must be taken into account.

53. Article 41 referred to numerous other articles, and it would be premature to take a decision on it before considering the articles to which it referred.

54. Mr. KEBRETH (Ethiopia) said that, subject to minor drafting changes, article 41 of the International Law Commission's draft was well conceived; it was based on common sense and practical needs. It did sometimes happen that a treaty made no provision for separability, which meant that it was outside the scope of article 41, paragraph 1, and that a party nevertheless decided to invoke a ground for invalidity or termination in regard to particular clauses of a treaty. It might further be pointed out, for example, that commercial treaties more often than not contained quite separate provisions which had been grouped in a single agreement only for the sake of convenience. His delegation was glad, therefore, that the Commission had provided for separability, and it approved of the criteria set out in article 41, paragraph 3. Paragraph 4 of the Commission's text fitted in with the general philosophical scheme of the draft convention and paragraph 5 reflected the essential policy considerations of modern international society.

55. His delegation was unable to accept the Argentine amendment (A/CONF.39/C.1/L.244) for the reasons he had just given.

56. The Hungarian amendment (A/CONF.39/C.1/L.246) made the application of article 57 subject to the criteria stated in article 41, paragraph 3 (*a*) and (*b*). Consequently, it was not purely a drafting amendment.

57. The United Kingdom amendment (A/CONF.39/C.1/ L.257 and Corr.1) improved the Commission's text in many respects, but his delegation was not in favour of it, because it omitted paragraph 5 of the Commission's text, which dealt with an important matter. The reference in paragraphs 4 and 5 to articles not yet considered by the Committee should not be deleted.

58. The United States amendment (A/CONF.39/C.1/ L.260) was liable to cause some misunderstanding in the application of the criteria stated in paragraph 3 (*a*) and (*b*); for the other party might claim that continued performance of the remainder of the treaty would be unjust, even if the particular clauses were merely secondary.

59. The Ethiopian delegation was in favour of the Finnish proposal (A/CONF.39/C.1/L.144) to add a reference to article 59 at the end of paragraph 2, but it did not approve of the proposal to delete the reference

to article 50, for the reasons given at the beginning of his statement.

60. Mr. SUY (Belgium) said he wished to make a few comments on Part V—the most important part of the draft—and in particular on article 50, concerning *jus cogens*.

61. First, the rule stated in that article was certainly correct and a part of positive international law. With rare exceptions, all the writers accepted it without reservation.

62. The question arose what constituted *jus cogens*. The definition given in article 50 was purely formal and provided no information about the real content of the notion. He agreed with the Commission's formulation because in his opinion the Conference was not called upon to try to enumerate everything that was *jus cogens*; it ought not to codify *jus cogens*.

63. Another problem was whether *jus cogens* referred to a body of legal rules or whether it was rather something similar to the notion of public order in internal law: in other words, the underlying sociological, economic and other foundations of any legal order, which varied with time and place. In his opinion, what distinguished *jus cogens* in international law from the notion of public order was that it clearly referred to norms—legal rules common to the whole international legal order. Clearly, that did not preclude the existence of peremptory rules in a more limited geographical framework, for instance, in an organized regional community.

64. With regard to the expression " peremptory norm ", he said that a norm could be peremptory without being *jus cogens*, and that the expression should therefore be used with caution. German legal terminology was more precise, since it distinguished between norms which were *gebietend* (binding) and norms which were *zwingend* (compulsory), only the latter being rules of *jus cogens*.

65. Article 50 constituted an exception to the principle *pacta sunt servanda*. Hence, it should not be lightly invoked, and should be interpreted very strictly. In other articles constituting exceptions to that principle, such as article 59, concerning a fundamental change of circumstances, the International Law Commission had used very cautious wording and been careful to set out in detail the conditions under which those articles could be invoked; unfortunately, those precautions had not been taken in article 50.

66. Whatever the content of the concept of *jus cogens*, States should not be able to invoke it unilaterally and without any control in order to repudiate obligations which had become irksome, or even to impeach the validity of treaties to which they were not parties. He personally considered that provision should be made for some form of control by the community of States, which in the last instance should be exercised by a court or an arbitral tribunal; it should relate to facts rather than grounds and could constitute one of the elements of the procedure outlined in article 62.

The meeting rose at 1.5 p.m.

FORTY-SECOND MEETING

Monday, 29 April 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 41 (Separability of treaty provisions) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 41 of the International Law Commission's draft.[1]

2. Mr. MULIMBA (Zambia) said that he could not support the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) to delete paragraph 5; his delegation attached great importance to the exclusion of separability in the case of treaties concluded in the circumstances specified in articles 48, 49 and 50. Any such treaty was void *ab initio* in its entirety, and separability was therefore out of the question. Paragraph 5 of article 41 was the application of the rule contained in the second sentence of paragraph 1 of article 39.

3. His delegation favoured the idea contained in the United States amendment (A/CONF.39/C.1/L.260).

4. Mr. MOUDILENO (Congo, Brazzaville) said he had grave misgivings about the introduction of the principle of separability, because it ran counter to the *pacta sunt servanda* principle, which applied to a treaty in its entirety. There were also serious practical difficulties in the way of the application of the principle of separability. Article 41 seemed to be based on the assumption that it was possible in any treaty to separate some of the clauses from the remainder. In fact, it was difficult to see how some of the clauses of a treaty could be amputated without undermining its whole structure; in many treaties, the various clauses were interconnected, and it would not be logical to separate some of them from the others. But despite those misgivings, his delegation would not go so far as to oppose article 41.

5. Mr. MARTINEZ CARO (Spain) said the International Law Commission was to be commended for having achieved a balance between the principle of the integrity of the application of a treaty, embodied in paragraphs 1 and 2 of article 41, and the recognition of the possibility of severing some of the clauses when the grounds of invalidity or termination affected only part of the treaty. The requirements laid down in paragraph 3 for the application of the principle of separability were adequate, but his delegation supported the principle contained in the United States amendment (A/CONF.39/C.1/L.260), subject to drafting changes. The principles of justice, equity and good faith ran through the whole of the law of treaties and it would not be out of place to stress them in the present context.

6. His delegation could not support the United Kingdom amendment to delete paragraph 5. The requirement of free consent of the States parties to a treaty, sanctioned by articles 48 and 49, and the rule that the treaty was subject to the principle of *jus cogens*, laid down in

[1] For the list of the amendments submitted, see 41st meeting, footnote 1.

article 50, were fundamental and overrode all considerations of convenience or stability of treaty relations.

7. The Committee could not, however, take a decision on the substance of article 41 until it had considered the articles on the grounds of invalidity, termination, withdrawal and suspension, as the representatives of Israel and France had already urged at the previous meeting.

8. Mr. WERSHOF (Canada) said that the debate had shown that the most important point of substance involved in article 41 was that of the desirability of increasing or decreasing the possibilities of separation of the provisions of a treaty declared to be invalid. The amendments submitted by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1) and Finland (A/CONF.39/C.1/L.144) would make it possible for a State to opt for separation in cases other than those admitted in the present text, while the amendment by Argentina (A/CONF.39/C.1/L.244) would make article 41 more restrictive.

9. In his delegation's view, the approach adopted by the International Law Commission, that treaties falling under the provisions of articles 48 and 49 should be completely void and consequently not open to separability, would not serve the interests of the aggrieved State which it was intended to protect. If a treaty entered into by a State in the circumstances envisaged in those articles was generally satisfactory to that State but contained a single provision obtained by coercion, there was no reason why the aggrieved State should be denied the option of claiming the benefit of the rest of the treaty.

10. With regard to cases falling under article 50, the argument for permitting separability was of a somewhat different kind. Two countries might conceivably conclude a lengthy, complex treaty dealing with several different problems; if only one of the many provisions in the treaty conflicted with a rule of *jus cogens*, it would be in the interest of the world order to permit the survival of the other provisions of the treaty if those provisions were in fact separable and did not offend the rule of *jus cogens*. Indeed, Article 103 of the United Nations Charter, on the conflict between obligations assumed under the Charter and obligations in other treaties, rendered inoperative only the conflicting provisions of those treaties and did not purport to nullify the entire treaty. Of course, if separability were to be permitted in the cases envisaged in articles 48, 49 and 50, it would be necessary to amend the present text of those articles, which made a treaty void if it conflicted with their provisions.

11. He therefore supported the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1), especially the deletion of paragraph 5 of article 41. He also supported the Finnish amendment (A/CONF.39/C.1/L.144) but hoped that voting on both those amendments would be postponed until the Committee had dealt with articles 48, 49 and 50.

12. Mr. MENDOZA (Philippines) said that article 41 specified two exceptions to the general rule of non-separability laid down in paragraph 2: the first was the case covered in article 57; the second was covered by the provisions of paragraph 3, which made it subject to the requirements set forth in paragraphs 3 (*a*) and 3 (*b*). Although the Commission did not explicitly say so in the commentary, it would appear from the text of the article that those requirements did not apply in the case covered by article 57. The purpose of the Hungarian amendment (A/CONF.39/C.1/L.246) was to make that case also subject to those requirements; the same result would be achieved by deleting the reference to article 57 in paragraph 2, as proposed by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1).

13. The Committee was called upon to decide two questions. The first was whether or not articles 46, 47, 48, 49, 50, 57, 58, 59 and 61 should contemplate the possibility of termination, withdrawal or suspension of only a part of the tainted treaty. Should that first question be settled in the affirmative, the second question would then arise, namely, whether the requirements set forth in paragraphs 3 (*a*) and 3 (*b*) should apply in all cases where only part of the treaty was terminated or suspended.

14. Both were questions of substance; once they were settled, the problems arising out of article 41 would become essentially matters of drafting. If both questions were answered in the affirmative, the problem of drafting could be settled simply by not mentioning any specific article as an exception to the general rule in article 41, and by deleting paragraphs 4 and 5.

15. If, however, the first question were decided in the negative with respect to some of the articles mentioned, he would suggest the same form for article 41 but that instead there should be an explicit statement in the appropriate articles that partial termination, withdrawal or suspension was not allowed. Alternatively, a provision on the lines of paragraph 5 could be retained.

16. If the second question were decided in the negative, the rule to that effect should be explicitly stated in article 41, more or less on the lines of the present paragraph 4.

17. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) stated the rule more clearly than the present text of article 41, although it departed from the style of the other articles. However, he had some reservations regarding the proposed amendment to paragraph 3, especially sub-paragraph (*a*). The factors specifically mentioned in paragraphs 3 (*a*) and 3 (*b*) of the United Kingdom amendment were not the only ones that were relevant. For example, the consideration suggested in the United States amendment (A/CONF.39/C.1/L.260) might also be a factor, but it would be implicitly excluded by the text proposed by the United Kingdom, although it was implicitly included by the International Law Commission's draft.

18. His delegation thought that the factors of separability were not capable of exhaustive enumeration. If an enumeration were attempted, it would result in the exclusion of a number of relevant considerations. He accordingly suggested that, if the United Kingdom amendment to paragraph 3 (*a*) were adopted, it should be combined with the United States amendment (A/CONF.39/C.1/L.262) so that the paragraph would then read:

" (*a*) The said clauses are separable from the remainder of the treaty with regard to their application, and particularly where:

(i) the ground relates solely to a particular article or group of articles; and

(ii) the remainder of the treaty is capable of being applied without that article or group of articles; and

(iii) continued performance of the remainder of the treaty would not be unjust."

19. He hoped that those suggestions would be considered by the Drafting Committee.

20. Mr. RATTRAY (Jamaica) said that his delegation fully subscribed to the basic principle of the integrity of treaties, embodied in article 41, and recognized that the principle of separability had its proper place in the draft. However, the merits of article 41 could not be assessed until the Committee had examined the articles on the various grounds of invalidity and termination.

21. He could not support the amendment by Finland (A/CONF.39/C.1/L.144) which would permit separability in the case covered by article 59. The provisions of that article made it clear that the International Law Commission had intended that the whole of the treaty should be terminated by a fundamental change of circumstances which radically transformed the scope of the treaty obligations. Since in accordance with paragraph 1 (*a*) of article 59, the provisions of that article only operated where the existence of the circumstances in question had constituted an essential basis of the consent given to the treaty, it was clear that the whole treaty would be affected by a change in those fundamental circumstances. Unless, therefore, the provisions of article 59 were amended, it would not be possible to introduce a reference to that article in article 41. Nor could he, for similar reasons, support the proposal by Finland to delete the reference to article 50.

22. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) made the draft clearer, especially in paragraphs 1, 2 and 3, but the proposal to delete paragraph 5 was a proposal of substance which he could not support at the present stage of the discussion. It would be more logical and expeditious to postpone the decision on article 41 until the substance of the various articles which followed it had been decided. Meanwhile, he would like to hear from the Expert Consultant why the International Law Commission had placed corruption under article 47 on the same footing as fraud rather than treating it as coercion.

23. Mr. STREZOV (Bulgaria) said that, since the unity and integrity of the provisions of a treaty was a fundamental rule, his delegation agreed with the International Law Commission that it would be useful, in certain cases, to allow for the principle of separability in the application of rules relating to cases of invalidity and grounds for terminating or suspending a treaty. In such cases, it should obviously be possible to eliminate part of the provisions of a treaty without appreciably disturbing the balance between the interests of the parties, or seriously altering the basis of the obligation to which consent had been given. The Bulgarian delegation considered that the Commission's article 41 fully conveyed that idea, and could therefore vote for it.

24. Although it could not support most of the other amendments, which tended to upset the balance of the article, it believed that the Hungarian amendment (A/CONF.39/C.1/L.246) introduced a useful clarification.

25. Representatives who had spoken against the text of the Commission's paragraph 5 had particularly mentioned the reference in that paragraph to article 50, on treaties conflicting with a peremptory norm of general international law. His delegation, however, considered that the principle on which paragraph 5 was based, and which derived logically from the very nature of rules of *jus cogens*, had its place in article 41: as the Commission rightly stated in paragraph (8) of the commentary " rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid ".

26. For those reasons, the Bulgarian delegation saw no reason for postponing the vote on article 41, since that article expressed a principle which could be stated independently of its application in specific cases.

27. Mr. EVRIGENIS (Greece) said that article 41 unquestionably fell, not within the category of codification but within that of progressive—and perhaps in the case in point one might say progressist—development of international law. Since the Committee was not confronted with a *lex lata*, the problem could be considered in terms of legislative policy. In the circumstances, the fundamental question was whether the principle of the integrity of a treaty was so sacrosanct that it must serve as a point of departure. In the choice between integrity and separability, integrity might at first sight be considered preferable, as a concept more congenial to the treaty-maker's mind and even having a certain moral flavour, but it led to the logical conclusion that it was better to destroy something totally than to preserve it partially, if that was possible.

28. His delegation could not share that view: the conflict was not so much between integrity and separability but rather between rigidity and elasticity. The question was whether international treaties should become inflexible instruments, liable to be destroyed totally by some localized malady, or flexible legal instruments, capable of surviving an amputation desired by the party entitled to invoke the flaw in the treaty.

29. The Greek delegation had no hesitation in opting for a solution which would lay down separability as a principle of the law of treaties. It was time to set aside the notion of international agreements as treaties of alliance, armistice or peace, in favour of a much broader concept of the role of treaties in a world compelled by the population explosion and modern technical progress to co-operate in every sphere. Separability must therefore be accepted, but only under certain conditions. The offending part of the treaty should be considered as separable only if the remainder could survive and there was reason for its survival. The principle of separability would promote the integrity of international treaties and would be in conformity with the rule *pacta sunt servanda* which contained implicitly the principle of *favor negotii* and required the maintenance, even in part, of treaties where such maintenance was possible and did not affect the essence of contractual consent.

30. In the light of those considerations, the Greek delegation could support the Finnish amendment (A/CONF.39/C.1/L.144), but considered that its first paragraph should also include a reference to article 58,

since supervening impossibility of performance might well have a partial effect on the treaty. On the other hand, it could not support the Argentine amendment (A/CONF.39/C.1/L.244), which would have the effect of nullifying the principle of separability. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) should be seriously considered, since it laid down the general principle of separability and made it subject to reasonable and well-balanced conditions; perhaps, however, the word " clauses " might be left in paragraphs 3, 4 and 5 and not be replaced by the phrase " article or group of articles ", since it was more flexible. The United States amendment (A/CONF.39/C.1/L.260) was similar in content to the United Kingdom amendment to paragraph 3 (*b*), and the two might be amalgamated. His delegation could support the Hungarian amendment (A/CONF.39/C.1/L.246). It also took the view that the oral proposals put forward during the debate, even if they had not been formally submitted as amendments, should be transmitted in writing by the delegations concerned to the Drafting Committee for its consideration.

31. Mr. MAKAREWICZ (Poland) said that his delegation supported the International Law Commission's draft of article 41, which provided adequate safeguards for the principle of separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties, and at the same time stressed the primary rule of the integrity of treaties by formulating exceptions to the basic principle.

32. The Polish delegation could not therefore support the Finnish proposal (A/CONF.39/C.1/L.144) that an exception to the principle of separability should not be made in the case of treaties conflicting with a peremptory norm. The Commission had convincingly proved in its commentary that that exception should be unconditional: rules of *jus cogens* were so fundamentally important that any conflict of a treaty with those rules was dangerous and inadvisable. Nor could his delegation support the Argentine amendment (A/CONF.39/C.1/L.244), which seemed to limit separability to cases of termination or suspension of the operation of a treaty in connexion with breaches of its provisions by the other party; that attitude did not reflect contemporary international law, since in many cases grounds for invalidating, terminating or suspending a treaty might relate to secondary provisions, which could be eliminated from the treaty without materially affecting the balance of interests of the parties.

33. On the other hand, the Polish delegation was in favour of the Hungarian amendment (A/CONF.39/C.1/L.246), which subjected separability in connexion with article 57 to the conditions laid down in article 41, paragraph 3. The United Kingdom amendment to paragraph 4 (A/CONF.39/C.1/L.257 and Corr.1) would have much the same effect as the Hungarian amendment, but the remainder of the United Kingdom amendment not to except from the principle of separability cases under articles 48, 49 and 50 of the draft convention was not acceptable for the reasons given by the International Law Commission in its commentary.

34. Mr. DADZIE (Ghana) said that, in his delegation's opinion, where the articles of a treaty differed so widely in their legal character as to make it possible for any part of the treaty to be considered as a unit and, consequently, as separable without fundamentally affecting the integrity of the treaty, the needs of justice would be better served if an offending clause or clauses could be given separate treatment. State practice and the decisions of judicial and arbitral tribunals testified to the frequency of the application of the principle of separability.

35. The United Kingdom amendments (A/CONF.39/C.1/L.257 and Corr.1) related both to drafting and to substance. Although his delegation could accept the drafting amendments to paragraphs 1 and 2, it preferred the International Law Commission's text of paragraph 3; however, the Drafting Committee might consider changing the introductory part of that paragraph to read: " If the ground relates solely to a particular clause or a particular group of clauses, it may only be invoked with respect to that clause or those clauses where: ... ".

36. The United Kingdom delegation's substantive proposals entailed the deletion of references to articles 48, 49 and 50 from paragraph 5, and there again, his delegation was in favour of retaining the Commission's text in its entirety. Repetition of the reference to article 57, in paragraph 4 of the United Kingdom amendment, was unnecessary, since the subject of that article, breach of a treaty, was different in kind from fraud and corruption, the subjects of articles 46 and 47. For similar reasons, his delegation could not support the Finnish amendment (A/CONF.39/C.1/L.144) to add a reference to article 59 at the end of paragraph 2.

37. His delegation was not in favour of the Argentine amendment (A/CONF.39/C.1/L.244) to replace the positive form of the article by a negative formulation, since that would affect the structural uniformity of the articles in Part V; moreover, the Argentine amendment restricted the scope of article 41 without increasing its clarity. Nor could his delegation agree to the Argentine proposal to delete paragraphs 3, 4 and 5. Similarly it could not support the Hungarian amendment (A/CONF.39/C.1/L.246), which merely repeated what was already expressed in the phrase " following paragraphs " in paragraph 2 of the Commission's draft. Finally, his delegation could not share the view that voting on article 41 should be postponed, for the article could stand or fall without affecting the rest of the draft.

38. Sir Humphrey WALDOCK (Expert Consultant) said that paragraphs 1 and 2 of the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) were practically identical with the corresponding provisions of the International Law Commission's text, and that the proposed paragraph 3 also seemed to be concerned with drafting changes. Nevertheless, he must point out that the proposal to substitute the phrase " article or group of articles " for " clauses " in sub-paragraph 3 (*a*), followed by a definition of " group of articles " in paragraph 5, had been considered by the International Law Commission, which had decided that the word " clauses " was broad enough to cover situations where treaties were divided into chapters, sections or groups of articles. The change proposed by the United Kingdom would tend to have a narrowing effect, for there might be cases where only clauses, or provisions of articles rather than whole

articles, would give rise to situations calling for separate treatment. Perhaps the word " provisions " could be used, but he doubted whether it was necessary to make the change.

39. The United Kingdom proposal for sub-paragraph 3 (*b*) would be acceptable if it really meant the same as the International Law Commission's text. The question was whether there might be cases where as a practical matter the remainder of the treaty might be capable of being applied without the clauses in question, but the provisions could not rightly be regarded as separable; that problem could be left to the Drafting Committee.

40. The real substance of the United Kingdom amendment lay in the reference to article 57. The Commission had quite deliberately referred to that clause as an excepted article in paragraph 2, and its reasons for doing so should probably have been stated in the commentary. It had been very anxious to make the provision on breach of a treaty as precise as possible, in view of the highly delicate nature of the question. Alleged breach was one technique for getting rid of a treaty, and the Commission had not wanted to make it easy to terminate a treaty in whole or in part on that ground. But in dealing with cases of breach, the right of the victim of a breach to suspend or terminate the treaty in whole or in part must be taken into account. The United Kingdom proposal to delete the reference to article 57 from paragraph 2 and the Hungarian proposal (A/CONF.39/C.1/L.246) to submit the article to the conditions set out in paragraph 3 would have the awkward result that, when a State committed a breach of one article, the other party might be precluded from suspending the operation even of that article, because it did not fall within the provisions of paragraph 3. The Commission had pondered the question, and had decided that breach must have its own régime; moreover, in seeking to narrow the scope of article 57 as far as possible, it had inserted the definition of breach as the violation of a provision essential to the accomplishment of the object or purpose of the treaty; obviously, the principle of separability could apply to very few such cases. It was important not to go too far in that delicate matter, and not to make the position of the victim of breach too difficult.

41. Finally, in answer to the Jamaican representative's question, he would point out that in cases both of fraud and of corruption, one of the States was a victim, whether or not the other State itself was innocent of any connivance in the acts of its representative. That was why the Commission had placed articles 46 and 47 on an equal footing.

42. Mr. KOVALEV (Union of Soviet Socialist Republics) said that he could not agree with the proposals to defer the vote on article 41. If any of the articles referred to in article 41 were later deleted, the Drafting Committee could deal with the situation. The procedural question whether a vote should be taken on article 41 and the amendments thereto should be put to the vote forthwith.

43. Mr. RUEGGER (Switzerland) said he supported the Soviet Union representative's procedural motion. He himself believed that no vote should be taken at the present stage, since to take a hasty decision while opinions were so much divided would be extremely dangerous. Article 41 referred to various other articles whose fate was as yet unknown.

44. Mr. SINCLAIR (United Kingdom) said he supported the Swiss representative's view. He would like to make it clear that the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr. 1) involved mainly drafting changes, but the proposal involving the deletion of paragraph 5 was a matter of substance. It would be premature for the Committee to take a decision until it had debated the articles referred to in that paragraph. He had no objection to the Soviet Union representative's procedural motion.

45. Mr. TAYLHARDAT (Venezuela) said that he too was in favour of deferring the vote, since amendments had been submitted to articles 46 and 47.

46. Mr. DE BRESSON (France) said he agreed that the vote on article 41 should be deferred for the time being, so that Part V of the draft could be discussed as a whole.

47. The CHAIRMAN put to the vote the Soviet Union motion that a vote be taken on article 41 and the amendments thereto forthwith.

At the request of the representative of Finland, the vote was taken by roll-call.

Senegal, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Afghanistan, Algeria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador, Ghana, Guinea, Hungary, Iraq, Mongolia, Poland, Romania.

Against: Senegal, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Zambia, Australia, Austria, Belgium, Cambodia, Canada, Ceylon, Chile, China, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Honduras, Indonesia, Iran, Israel, Italy, Jamaica, Japan, Lebanon, Liberia, Liechtenstein, Malaysia, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam.

Abstaining: Sierra Leone, Uruguay, Argentina, Brazil, Central African Republic, Congo (Democratic Republic of), Cyprus, Dahomey, Ethiopia, Holy See, India, Ivory Coast, Kenya, Kuwait, Madagascar, Morocco, Nigeria, Pakistan, Peru, Saudi Arabia.

The motion for an immediate vote was rejected by 51 votes to 22, with 20 abstentions.

48. The CHAIRMAN said that the Committee's decision on article 41 would be taken after the remaining articles in Part V had been considered. [2]

Article 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

49. The CHAIRMAN said that the discussion and voting on article 42 would be deferred for the same reasons as in the case of article 41.

50. Mr. MALITI (United Republic of Tanzania) asked whether the Committee was establishing the principle that,

[2] For resumption of discussion, see 66th meeting.

if an article contained references to later articles, its discussion would necessarily be deferred.

51. The CHAIRMAN replied that his decision on article 42 had been taken because its situation was identical with that of article 41.

52. Mr. SINCLAIR (United Kingdom) asked whether the Committee might perhaps at least discuss article 42 without taking a decision on it. Amendments to article 42 had already been submitted, and if the debate were postponed, there might be more amendments which would complicate matters still further. He was not, however, making a formal proposal.

53. Mr. TAYLHARDAT (Venezuela) said that he could not accept the Chairman's ruling. The Committee's decision on article 41 would not necessarily affect the voting on article 42. He was in favour of starting the discussion on article 42 and deferring the vote only if the course of the discussion showed that to be necessary.

54. The CHAIRMAN said he would ask the Committee to vote on the motion that the discussion on article 42 be opened forthwith, the vote on the article and the amendments thereto to be deferred to a later stage.

The motion for immediate discussion was rejected by 15 votes to 7, with 60 abstentions.

55. Mr. VARGAS (Chile) said that the large number of abstentions showed that the alternatives put by the Chair had not been clear. The vote should have been taken only on the question whether the discussion on article 42 should be deferred. The vote should be taken again.

56. Mr. TAYLHARDAT (Venezuela) said he supported the Chilean representative's comments.

57. Mr. TABIBI (Afghanistan) said that, while he agreed that the Chairman's ruling had not been clear, the Committee had taken its decision and must abide by it. The Chilean representative's suggestion must be rejected.

58. Mr. MALITI (United Republic of Tanzania) and Mr. MWENDWA (Kenya) said they supported the Afghan representative's view.

59. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation had abstained from voting because the Chairman's decision, involving as it did two separate questions, had not been clear. The decision had, however, been taken and the question could not be reopened.

60. The CHAIRMAN said that there was a Swiss amendment (A/CONF.39/C.1/L.120) to the titles of Part V and of section 2 of Part V, to replace the word "invalidity" by the word "invalidation". It was a drafting amendment that might be referred to the Drafting Committee.

61. Mr. ALCIVAR-CASTILLO (Ecuador) said he did not agree that the Swiss amendment was merely a matter of drafting; it involved a very considerable substantive change. He suggested that discussion of the Swiss amendment be deferred until the Committee had completed its consideration of Part V.

62. Mr. KOVALEV (Union of Soviet Socialist Republics) said he supported that suggestion.

It was so agreed.

The meeting rose at 12.55 p.m.

FORTY-THIRD MEETING

Monday, 29 April 1968, at 3.10 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 42 (Loss of a right to invoke a ground for invalidating, terminating withdrawing from or suspending the operation of a treaty) *(continued)*

1. Mr. ARMANDO ROJAS (Venezuela) requested that due note be taken of his delegation's official protest against the procedure followed by the Chairman in connexion with article 42 that had resulted in a vote in which sixty delegations had abstained. It would have been better to ask the Committee whether or not it wished to take up article 42.

Article 43 (Provisions of internal law regarding competence to conclude a treaty) [1]

2. The CHAIRMAN announced that the Philippine delegation had withdrawn its amendment (A/CONF.39/C.1/L.239).

3. Mr. SAMAD (Pakistan), introducing the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), said that the International Law Commission's text raised the question of how far the limitations of the internal law of a State might affect the validity under international law of the consent to a treaty given by an agent ostensibly authorized to express that consent.

4. The words "unless that violation of its internal law was manifest" constituted an exception to the general rule set out in article 43. According to paragraph (10) of the commentary, the majority of the members of the International Law Commission considered that the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties created too large a risk to the security of treaties. Some members seemed to have taken the view that it was undesirable to weaken that principle by admitting any exception to it. He thought that the application of the exception might give rise to practical difficulties since it would not be easy to determine cases of the manifest violation of the internal law of a State regarding competence to conclude a treaty. It was difficult to expect one contracting party to know in detail the constitutional provisions of another State regarding capacity to express its consent to be bound by a treaty.

5. The amendment related to a question of substance and its purpose was to promote the security of treaties.

6. Mr. CALLE Y CALLE (Peru) said that the amendment submitted by his delegation and that of the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.228 and Add.1) hardly called for an explanation.

[1] The following amendments had been submitted: Pakistan and Japan, A/CONF.39/C.1/L.184 and Add.1; Peru and the Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.228 and Add.1; Philippines, A/CONF.39/C.1/L.239; Venezuela, A/CONF.39/C.1/L.252; Australia, A/CONF.39/C.1/L.271/Rev.1; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.274; Iran, A/CONF.39/C.1/L.280.

7. Article 43 was based on the doctrine according to which international law left it to the internal law of each State to determine the organs by which the will of a State to be bound by a treaty should be formed and expressed. International law should take account only of the external manifestation of that will.

8. It was natural, therefore, for States which had participated in the negotiations to assume that each had complied with the provisions of its constitution and that there was no need to verify in each case the competence and constitutional regularity of the powers of each representative ostensibly authorized to express its consent to be bound by the treaty.

9. One exception to that rule was, however, admitted, namely when the other State had known that the representative of the State in question had no authority to bind his State owing to a violation of that State's constitutional provisions and that accordingly its consent was vitiated. Article 43 clearly recognized the exceptional possibility for a State to invoke a violation of its internal law as vitiating its content if the violation had been manifest, but it took no account of the degree of importance of the provision of internal law that had been violated. The expression " internal law " implied not only fundamental constitutional rules but also minor legal and even administrative provisions. It would be advisable to indicate that consent to be bound by a treaty could be considered as vitiated only if there had been violation of a constitutional provision of fundamental importance.

10. Mr. CARMONA (Venezuela), introducing his delegation's amendment (A/CONF.39/C.1/L.252), said that article 43, which dealt with the serious question of the relationship between internal law and international law, had given rise to very divergent views in the International Law Commission. Some members had been in favour of giving priority to internal law, while others had advocated a mixed system based on the pre-eminence of international law, except in the special case where the violation of internal law had been manifest. The compromise solution adopted by the Commission was acceptable, although there was always a certain difficulty in determining cases where violation had been manifest. The internal law should be precise, clear and indisputable and accessible to all, so that the other States would have no reason to question its meaning or to institute research in order to find out whether it was in force. That was true in the case of written constitutions which were always available to all States. The United Nations published a collection of laws and constitutional provisions in its Legislative Series; consequently, it was easy to verify whether the condition required by article 43 was fulfilled.

11. Many countries, however, including his own, could not recognize the primacy of any category of international obligations over constitutional rules. The Supreme Court of Venezuela had delivered a judgement on 29 April 1965 proclaiming the predominance of the Venezuelan Constitution over treaties. In those circumstances, although the solution adopted by the International Law Commission was correct in substance, it might prove very difficult to accept as far as form was concerned. There would seem to be no doubt that a large number of legislative organs would refuse to accept that treaties should take precedence over constitutional provisions. The question was more political than technical. For that reason, his delegation had proposed an affirmative wording for article 43 which did not in any way affect the principle of that article but allowed constitutional requirements to be taken into account.

12. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.271/Rev.1), said he doubted whether it was really desirable to include an article drafted in the terms of article 43. The Committee of the Whole had not specified, when article 6 had been adopted, what it understood by the expression "appropriate full powers ". In his delegation's view, it was clear that the expression was intended at least to mean full powers signed by the Head of State, Head of the Government or Minister for Foreign Affairs. It might be extremely difficult for a State to inquire into the regularity of those full powers and to study the internal law and constitution of another State. For that reason, he supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), but had doubts as to the usefulness of the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1).

13. With regard to the amendment submitted by Venezuela (A/CONF.39/C.1/L.252), he was in favour of the International Law Commission's text, which stated the rule in negative form, for the reasons explained in paragraph (12) of the commentary.

14. If the Committee decided to retain article 43, it should be made clear that the term " manifest " meant " objectively evident ", as stressed by the International Law Commission in paragraph (11) of the commentary. It was also essential to include a time-limit to prevent unreasonable delay. The suggestion in the Australian amendment was that the time-limit should be one year, but two years would be acceptable.

15. Mr. SINCLAIR (United Kingdom), introducing his delegation's amendment (A/CONF.39/C.1/L.274), said that although his delegation was in favour of the doctrine that international law was concerned only with the external manifestation of a State's consent to be bound by a treaty and that violations of a provision of internal law regarding competence to conclude treaties might not be invoked as invalidating consent to be bound, it recognized that the present text of article 43 represented a delicate compromise between opposing tendencies within the International Law Commission.

16. In its written comments the United Kingdom Government had expressed itself as being in general agreement with the article, but had pointed out that the proviso " unless that violation of its internal law was manifest " needed some clarification. [2]

17. The United Kingdom amendment took into account what was said in paragraph (11) of the International Law Commission's commentary, where the Commission had emphasized the significance it attached to the expression " when the violation of internal law... would be objectively evident to any State dealing with the matter normally and in good faith " by putting it in italics.

18. The United Kingdom delegation could not support the Venezuelan amendment (A/CONF.39/C.1/L.252).

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 344, comment on article 31.

It could support the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), but considered that the Committee would be ill-advised to upset the very delicate compromise achieved by the Commission. The Australian amendment (A/CONF.39/C.1/L.271/Rev.1) added useful clarification by requiring that the violation must be invoked within a specified time-limit.

19. He had some hesitation about the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), since it might add another element of uncertainty to the text, but it would perhaps have the advantage of narrowing the scope of the exception by excluding manifest violations of internal law which were not of fundamental importance. To the extent that the amendment really had such a purpose, the United Kingdom delegation could support it, but he must make it clear that if the Committee accepted the amendment, the need for some kind of impartial and objective machinery for settling disputes concerning the interpretation and application of that article and of other articles in Part V would become more and more obvious.

20. Mr. MATINE-DAFTARY (Iran) reminded the Committee that during the debate on article 6, to which his delegation and the delegation of Mali had submitted an amendment (A/CONF.39/C.1/L.64 and Add.1) which had not been adopted, he had announced his intention of reverting to the subject during the debate on article 43, which was the counterpart of article 6. The result of the vote on article 6 had impaired his freedom to submit an amendment which would adequately respect internal law. For that reason he was not fully satisfied with his delegation's amendment to article 43 (A/CONF.39/C.1/L.280). The International Law Commission had accepted the principle that internal law should not be violated by the conclusion of treaties, but the formulation it had proposed was not broad enough. The word " manifest " was too vague. Nor did the other amendments submitted throw further light on that term. The addition of the words " of fundamental importance " was not adequate, since the phrase was subjective.

21. The Iranian amendment provided a precise criterion, that of authorization by the Head of State. It had been objected that constitutions differed from country to country and that consequently, no formulation could be found which would take all internal laws into account. But the great majority of constitutions conferred on the Head of State powers for the conclusion of treaties. It was, moreover, the constant practice in international law, since all bilateral or restricted multilateral treaties began with an allusion to the full powers vested in the plenipotentiaries by the Head of State. Authorization by the Head of State, who was the gardian of the constitution, was deemed to be consonant with internal law. He did not insist upon the exact wording of his amendment as it stood, and it was only the principle which should be put to the vote. If the Committee did not approve any amendment of that sort, the Iranian deletation would not be able to vote for the International Law Commission's text.

22. Mr. SUAREZ (Mexico) observed that, under article 43, the fact that a State's consent had been expressed by its representative in violation of its internal law could not be invoked by that State as invalidating its consent to be bound by a treaty; but neither that article nor any other covered cases where a treaty had been concluded in violation of the constitutional laws of the State. The commentary seemed to imply, however, that article 43 referred to both those situations.

23. In some States, including Mexico, internal law upheld the principle that the constitution prevailed over laws and treaties and expressly ruled that only treaties concluded in conformity with the constitution had binding force. Some of those States, including Mexico, made provision for control by the judicial authorities over the other organs of the State in order to deprive unconstitutional laws, treaties or acts of legal effect.

24. Although the executive and the legislative authorities acted with the greatest caution and in all good faith to avoid infringing constitutional rules, it often happened that the supreme court of a country decided that laws were unconstitutional. Admittedly, it less frequently pronounced a treaty unconstitutional, but it could happen that a State might invoke the unconstitutionality of a treaty, not as a pretext to evade performing a contractual obligation, but because it must comply with the decision of a supreme court which had judged the provisions of that treaty unconstitutional.

25. The Mexican delegation considered that article 43 should be examined together with articles 58 and 61, which, with article 59, made up a system of legal rules.

26. Article 58 established the principle that a party might invoke an impossibility of performing a treaty as a ground for terminating it, but limited that impossibility to the permanent disappearance or destruction of an object indispensable for the execution of the treaty. His delegation considered that the article was incomplete. It was a principle universally accepted in internal law that *force majeure* excused a debtor from discharging an obligation, or at least allowed him to defer doing so. That principle should also apply in international law. *Force majeure* meant not only the material impossibility of performing an obligation, but also the legal impossibility.

27. In article 61 the International Law Commission was certainly contemplating the theory of legal impossibility of performance in a special case, namely when a new peremptory norm of general international law supervened after the conclusion of a treaty and made it legally impossible to perform it.

28. The Mexican delegation considered that those principles should also apply in cases where the supreme court of a country declared a treaty unconstitutional. It was indisputable that a State would in such a case find it legally impossible to fulfil its obligations. In order to solve that problem it would be sufficient to add to article 58 a provision that *force majeure* justified the failure to perform a treaty or the suspension of its performance.

29. The Mexican delegation reserved the right to submit a formal amendment to that effect when the Committee came to consider article 58.

30. Mr. DIOP (Senegal) said he accepted the idea of the invalidity of treaties, which was the subject of Part V, Section 2, of the draft convention, since it would protect developing States, which were unfortunately potential and obvious victims. He wished to make it clear, however,

that the idea should only be adopted if the grounds for invalidity were clearly defined and if an impartial tribunal could officially declare a treaty invalid. Unless those conditions were fulfilled, the proposed codification would do more harm than good and make international relations more insecure.

31. In his opinion, the violation of internal law with regard to competence to conclude treaties, material error, fraud, corruption and coercion could be accepted as grounds for invalidity. In the absence of all the necessary criteria, however, the same could not be said of the violation of a peremptory norm of international law. His delegation reserved the right to express its views on *jus cogens* when the Committee examined articles 50 and 61.

32. For the time being, he wished to point out that Part V, and in particular Section 2, would only be acceptable if recourse could be had to a court or arbitral tribunal offering all the necessary safeguards. The alternative of relying on article 62, which dealt with the procedure to be followed in the case of the invalidity of a treaty, was unsatisfactory. That article was inadequate, even though it referred to Article 33 of the Charter of the United Nations. In the event of a dispute, once conciliation or arbitration was exhausted—and without being unduly pessimistic, one could say that that was likely to be the case quite often—it was essential for the parties concerned to be able to resort to an authority responsible for declaring the law. When speaking of a court of law, it was natural to think in terms of the International Court of Justice. Despite the respect due to that august institution, in view of the recent decision in the *South-West Africa* case, his delegation would have to formulate the most explicit reservations with regard to any solution which entrusted final jurisdiction to such a court in the matters under consideration. Whatever body was responsible for officially declaring treaties invalid must be absolutely impartial.

33. With regard to the various amendments submitted to article 43, he did not think that the Australian amendment (A/CONF.39/C.1/L.271/Rev.1) should be rejected out of hand. The suggestion to fix a time-limit deserved careful consideration. On the other hand, he could not accept the amendment by Pakistan and Japan (A/CONF. 39/C.1/L.184 and Add.1), which would delete the words " unless that violation of its internal law was manifest ". As to the Venezuelan amendment (A/CONF.39/C.1/ L.252), he preferred the negative formulation employed by the International Law Commission because it emphasized the exceptional character of the cases in which the ground for invalidity in question could be invoked.

34. Mr. BLIX (Sweden) said he could not accept the Mexican representative's argument about legal impossibility, because it was contrary to the recently-adopted rule that a State could not invoke its internal law to justify the non-performance of a treaty.

35. The rule stated in article 43 should be viewed not against a background of constitutional or international doctrine but in the light of the practice of States. The invoking of a manifest violation of a provision of internal law regarding competence to conclude treaties would hardly be in accordance with the practice of States and might cause government serious difficulties. In that respect, the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) would certainly bring the article closer to reality.

36. If article 43 really expressed a rule of customary law, States might, before concluding a treaty, be expected to satisfy themselves that their treaty partners were not manifestly violating their internal law. But that was certainly not the case. States placed their confidence in the other government, provided that it was effectively exercising power. In so doing, they applied the rule of international law that a State could not invoke its internal law to establish the invalidity of a treaty.

37. Moreover, how could a State know the internal law of another State? The best method would be to ask the government of the other State, but the latter, by showing its readiness to conclude the treaty, had already indicated. that it considered itself competent to do so. An alternative would be to seek the opinion of lawyers of the country with which the State intended to conclude a treaty. If the lawyers decided that the projected treaty or the manner of its conclusion conflicted with the internal law, it would seem difficult for one government to point out to another that in virtue of certain provisions of its internal law it was not empowered to conclude the treaty. A rule requiring such interference in the internal politics of other States did not seem feasible.

38. It could be argued that manifest violation only existed if discoverable by simply reading the internal law of the foreign State. But it must be remembered that the internal law was difficult to interpret and that merely reading the texts of constitutions in certain international publications was not enough; practice had to be taken into account as well. To limit cases in which the violation of internal law could be invoked to manifest violation was a step in the right direction, and the United Kingdom amendment (A/CONF.39/C.1/L.274) would improve the article further in that respect.

39. The application of article 43 would also raise practical difficulties. It was generally acknowledged, in both theory and practice, that *de facto* governments, in other words governments effectively exercising power but disregarding constitutional rules, could bind their States by treaty. It was, however, precisely those governments which were most likely to enter into treaties in manifest violation of the constitutional rules on the conclusion of treaties.

40. His delegation would vote for the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) deleting the final sentence of article 43. If that amendment was adopted, the whole of article 43 could simply be deleted, since the commentary to article 39 indicated that the grounds of invalidity enumerated in Part V of the draft articles were exhaustive. The deletion of article 43 would mean that a manifest violation of the provisions of internal law regarding the conclusion of treaties would no longer be a ground for invalidity. That would be a practical solution to the problem. It was a technical question and might be referred to the Drafting Committee after the Committee of the Whole had voted on the amendment submitted by Pakistan and Japan.

41. If that amendment was not adopted, his delegation would vote in favour of the United Kingdom amendment (A/CONF.39/C.1/L.274) which improved the

wording of article 43 by defining the expression " manifest violation ". It would also vote for the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which introduced the notion of the fundamental importance of manifest violation. On the other hand, in view of article 42, his delegation failed to see the utility of the Australian amendment (A/CONF.39/C.1/L.271/Rev.1). With regard to the Venezuelan amendment (A/CONF.39/C.1/L.252), the wording proposed might turn the exception into a rule.

42. Lastly, he agreed with the representative of Senegal that the provision in article 43 necessitated the establishment of a body authorized to decide whether a violation was manifest or not. His delegation thought that the Committee could vote at once on article 43 as proposed by the International Law Commission.

43. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that article 43 dealt with an extremely complicated problem, namely the importance of internal law in determining the validity of international agreements, There could be not the slightest doubt that it was internal law which determined the organ empowered to express the will of a State when concluding a treaty and the conditions under which that will was to be expressed. The only question was how to identify the cases in which an agreement was concluded in violation of internal law.

44. In some countries, Norway and Belgium in particular, the State could not be bound by a treaty without parliamentary authorization. The constitutional rules of States should be respected. Article 43 of the United Nations Charter, indeed, contained a provision specifying that agreements between the Security Council and the Members of the United Nations " shall be subject to ratification by the signatory states in accordance with their respective constitutional processes ". Unfortunately, the provisions of internal law were often vague and complicated. The International Law Commission had therefore been right to base article 43 on the principle that the violation of a provision of internal law concerning competence to conclude treaties did not affect the validity of the treaty.

45. In his own view, the negative form in which article 43 was couched stressed the exceptional nature of cases in which the violation of a provision of internal law might be invoked as a ground for invalidity. He could not therefore support the amendment submitted by Venezuela (A/CONF.39/C.1/L.252). It was in order to strengthen the exceptional nature of the case that his delegation had associated itself with the Peruvian delegation in submitting the amendment (A/CONF.39/C.1/L.228 and Add.1) to insert the words " of fundamental importance " in the concluding phrase in the article.

46. Mr. FUJISAKI (Japan) said that, as a sponsor of the joint amendment in document A/CONF.39/C.1/184 and Add.1, he fully supported the explanation given by the representative of Pakistan. At the 29th meeting, when considering article 23 the subject-matter of which was the principle *pacta sunt servanda*, the Committee had decided by 55 votes to none to stipulate at an appropriate place in the convention that " no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty " (A/CONF.39/C.1/L.181). If that principle was applied to such a case as that contemplated in article 43, a party to a treaty could not invoke a violation of its own internal law for the purpose of invalidating its consent to be bound by that treaty. That was why he was proposing the deletion of the proviso " unless that violation of its internal law was manifest " at the end of the article.

47. Mr. ALVAREZ TABIO (Cuba) observed that article 43 took into account the fact that the consent of a State to be bound by a treaty was expressed by a representative invested with the will of the competent organs or acting in virtue of the functions inherent in his mission. It was internal law that defined and attributed the competences of the various organs of a State. If certain constitutional laws imposed restrictions on competence to bind a State or denied that competence in particular cases, it was evident that those norms must be scrupulously observed by the representative of the State and by the other States. Consequently, the last phrase in article 43 should be retained. The deletion proposed by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) would open the way to merely evading the problem without solving it. The text proposed by the International Law Commission was correct and should not be amended. The Cuban delegation would therefore vote for draft article 43.

48. Mr. CHEA DEN (Cambodia) said that although he considered that draft article 43 was acceptable, he supported the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1). The International Law Commission had considered that where there was a conflict between internal law and international law, international law should prevail. The Committee of the Whole had taken the same position, since if the internal law or the constitution of every country was taken into consideration, the result would be inextricable conflicts and controversies. The amendment submitted by Pakistan and Japan to delete the last phrase in article 43 would be one way of avoiding such difficulties.

49. Mr. JACOVIDES (Cyprus) said he approved of the basic principle embodied in article 43, namely that the violation of a provision of internal law regarding competence to enter into treaties did not affect the validity of a consent given in due form by a state organ or by an agent competent to give that consent. He considered that that principle should not be weakened by exceptions. In its present form, article 43 established a distinction between a manifest violation and a non-manifest violation of internal law, a distinction which presented difficulties both from the point of view of legal theory and practice. His delegation would therefore vote in favour of the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) to delete the last phrase in the article.

50. If the Committee did not adopt that amendment, his delegation would vote for the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which made it clear that a manifest violation must be of fundamental importance. It would also vote for the United Kingdom amendment (A/CONF.39/C.1/L.274), which specified what was meant by " manifest violation ", and the Australian amendment (A/CONF.

39/C.1/L.271/Rev.1), which set a time-limit for a State desiring to invoke a violation of its internal law as invalidating its consent. The object of all those amendments was to restrict the scope of the exception to the principle on which article 43 was based. The Cypriot delegation could not, therefore, support the amendment submitted by Venezuela (A/CONF.39/C.1/L.252).

51. Mr. RUIZ VARELA (Colombia) observed that the provisions in Part V contained elements of the progressive development of international law and should be considered very carefully, because to adopt them in an imprecise form might seriously undermine the stability of international relations based on treaties.

52. The Colombian delegation held that articles 43, 60, 61 and paragraph 3 of article 62 were debatable, but it would confine its comments for the moment to article 43. The meaning of " manifest violation of internal law " should be specified, because otherwise States might consider a violation of any constitutional, legal or even administrative internal rule relating to the competence of the State to conclude treaties as invalidating their consent to be bound by an international treaty. His delegation considered that article 43 dealt with a manifest violation of internal constitutional law relating to the competence of a State to conclude treaties and that it was only in that case that a defect in consent might be invoked. If that was the meaning of the article, he could vote for it, because it respected internal constitutional law in so far as it regulated the manner in which international obligations were assumed. It was not intended to permit States to invoke their constitutional law as a pretext for evading the scrupulous performance of obligations under treaties duly concluded and in force, but, on the contrary, to strengthen the regular performance of treaties; for it was logical that States should act in such a way as to avoid violating the constitutional norms of the other contracting States.

53. He supported the Venezuelan amendment (A/CONF. 39/C.1/L.252), which gave a positive form to the International Law Commission's text, and the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which, by specifying that the violation of internal law must be of fundamental importance, undoubtedly referred to constitutional law, and accordingly, made the Commission's text even stricter from the legal point of view.

54. Mr. DE BRESSON (France) said he regarded the principle laid down in article 43, that a State could not invoke a violation of its internal law as invalidating its consent to be bound by a treaty, as the height of wisdom. The principle was in conformity with the spirit of article 6 and the following articles, which subjected the validity of the expression of the consent of States to formal safeguards the existence of which the other contracting parties could easily verify. It was impossible to go further and to require the parties to verify the substantive validity under internal law of the powers of the negotiators presenting them.

55. Furthermore, it appeared that if there was a violation of internal law, that state of affairs was a fault for which only the State whose internal law had been disregarded could be blamed. That State, therefore, could hardly take advantage of the situation, more or less arbitrarily, to the detriment of the innocent party. Any weakening of that principle could only engender instability in treaty relations between States. The French delegation therefore supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) to delete the last phrase in article 43. The words " unless that violation of its internal law was manifest " introduced an exception which might in fact undermine the rule stated in article 43.

56. Mr. DONS (Norway) said that his delegation could not accept the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), for Norwegian constitutional law and the Constitution itself were based upon the presumption that international law left it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty should be formed and expressed. From that point of view, internal laws limiting the power of state organs to enter into treaties were to be considered as part of international law, if it was desired to consider as void, or at least voidable, consent to a treaty given on the international plane in violation of a constitutional limitation.

57. If the last part of article 43 were deleted, the article would be based on views opposed to the rules of international law and would be in contradiction to the Norwegian Constitution as at present interpreted.

58. The rule proposed by the International Law Commission was more flexible and therefore more acceptable. Nevertheless, his delegation would abstain in the vote on article 43, as the adoption of that article would require a revision of the Constitution or at least a reconsideration of the prevailing interpretation of Norwegian constitutional law. His delegation would vote against the United Kingdom amendment (A/CONF.39/C.1/L.274) as the proposed addition reduced still further the possibility of invoking a violation of constitutional law.

59. Mr. MARESCA (Italy) said that the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) was attractive since it offered an easy solution to the extremely complex problem raised in article 43. Unfortunately, that problem did not admit of an easy solution. International law could hardly ignore internal law, and constitutional rules were of international importance.

60. Under the Italian constitution, for example, certain essential conditions must be met before the State could assume obligations on the international plane. For certain treaties, the Head of State could not express the State's consent without the authorization of Parliament. Every constitution contained provisions concerning the conclusion of treaties, and it would therefore be difficult for the Committee to affirm that violation of a provision of internal law could not be considered as a ground for invalidity.

61. The formula proposed by the International Law Commission struck a balance between the conflicting requirements of international law and internal law. It implied, on the one hand, the presumption that the State had expressed valid consent from the constitutional point of view, and made it clear, on the other, that a State could invoke a violation of its internal law as vitiating its consent only where such violation had been manifest.

62. If it decided to delete the final phrase of article 43, the Committee would revert to the stage of international law when Heads of State had enjoyed absolute power. For that reason, his delegation would have to vote against the amendment by Pakistan and Japan and in favour of the International Law Commission's text, although it was not perfect and could be improved. The United Kingdom amendment (A/CONF.39/C.1/L.274) raised certain difficulties, but it deserved to be adopted, since it helped to clarify the idea of "manifest violation". The same applied to the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), which introduced the idea of a time-limit into international law in which there was no period of limitation. Nevertheless, the International Law Commission's text offered the best solution to the problem.

63. Mr. MIRAS (Turkey) thought that the problem of imperfect ratifications raised in article 43 would be solved if treaties contained a provision similar to the one in Article 110 of the United Nations Charter which provided for ratification of that instrument by the signatory States in accordance with their respective constitutional processes. In the absence of such a provision, a treaty the ratification of which was not in accordance with the internal law of a State might be invoked or not against the ratifying State according as one accepted the theory of the primacy of international law over internal law or the converse. The former ensured the stability of treaties, while the latter ensured security in the conclusion of treaties.

64. Article 43 recognized the principle of the primacy of international law in the ratification of treaties except in the case of a manifest violation of internal law. That rule corresponded to the generally accepted idea that an international treaty entered into by a Head of State in disregard of constitutional provisions did not commit the State when those rules were sufficiently well known.

65. Although he approved of article 43, he feared that the formula "unless that violation of its internal law was manifest" would raise practical difficulties. If that exception to the general rule according primacy to international law was not expressed in clearer and more precise terms, it might open the way to certain abuses. The Drafting Committee should therefore revise the wording in the light of the various amendments proposed.

66. Mr. TALALAEV (Union of Soviet Socialist Republics) said that although the question dealt with in article 43 was a very complex one, it formed but one aspect of the general and still more complex problem of the links between internal law and international law. He merely wished to draw attention to the rule that it was impossible for States to invoke the provisions of their internal law as an excuse for not carrying out a treaty. The discussion of article 23 had given prominence to that rule and his delegation had expressed its support for the amendment to article 23 submitted by Pakistan (A/CONF.39/C.1/L.181), in which it was expressly laid down. With regard to article 43, however, it should be noted that a treaty was the result of an agreement between States and was therefore the expression of the will of those States. Relations between State organs in the process of the formation and manifestation of the will of States on the international plane were a matter for internal law and were therefore an internal affair for the State concerned, in which no interference could be tolerated. In certain circumstances, however, the process of the formation and external manifestation of that will might contain such an important flaw that the will expressed could not be considered as the real will of the State in question. But it was not the manifest nature of the violation which should be brought into relief, as had been mistakenly done in the United Kingdom amendment, for a violation could be manifest and at the same time insignificant. On the other hand, his delegation supported the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which provided that the violation should be not only manifest but also of fundamental importance, before the validity of a treaty could be contested. During the discussion in the International Law Commission, the question had been raised whether a rule should not be formulated stating that a treaty was invalid if entered into by a Head of Government without the agreement of the people when the treaty affected the very existence of the State in question. In short, the principle involved was that of self-determination. Finally, the International Law Commission had adopted the rule in article 43, which was in line with contemporary international law. His delegation could not support the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), since it was not always possible to observe a time-limit in order to invoke the fact mentioned in article 43. Neither was it in favour of the amendment proposed by Iran (A/CONF. 39/C.1/L.280), as the question dealt with in article 43 was one of competence and not of powers.

67. Mr. TENA IBARRA (Spain) said that he was in favour of article 43, so far as substance was concerned, because it gave greater importance to the practical issues at stake than to the dispute over doctrine, in which the supporters of the primacy of international law were ranged against the supporters of internal law. He merely wished to state, where that dispute was concerned, that his country favoured the primacy of international law.

68. In fact, articles 43 and 44 were linked with article 6, in that they constituted actual exceptions to the principle embodied in that article. It was certain that a State could not avail itself of a notorious violation of internal law in order to obtain international advantages. His delegation was not in favour of the amendment by Pakistan and Japan (A/CONF.39/C.1/ L.184 and Add.1), which, by deleting the exception provided at the and of article 43, would encourage interference that was still more dangerous than that presupposed by the requirement to examine the existing law of each State on the conclusion of treaties.

69. On the other hand, he considered that the United Kingdom amendment (A/CONF.39/C.1/L.274) judiciously introduced the element of good faith. His delegation also supported the Venezuelan amendment (A/CONF.39/C.1/L.252), since in its judgement it was preferable to use affirmative phrasing rather than the negative form adopted by the International Law Commission.

70. It had no objection of substance to the Peruvian amendment (A/CONF.39/C.1/L.228 and Add.1). The fact that the violation must be an important one was

implicit in the context of article 43, but there was no harm in mentioning it expressly. Lastly, his delegation wished to stress that, although the hypothesis at the end of article 43 was entirely exceptional, it would be better to retain that exception in the draft.

71. Mr. YASSEEN (Iraq) said that the International Law Commission's text was a successful compromise between the internationalist theory which asserted the supremacy of international law and the constitutionalist theory which recognized the supremacy of constitutional rules by virtue of international law. The constitutionalist theory, which had been fashionable at one time, had had to give way for such practical reasons as the increasing number of treaties and the complexity of treaty relations between States.

72. The Commission had introduced article 43 with a statement of the principles of the internationalist theory, but in the second part of the article it gave a reasonable place to the constitutionalist theory in order to avoid sacrificing vital interests in certain situations. Though there could be no question of international law admitting the general supremacy of internal law in all spheres, that supremacy might be justified in some particular cases. Thus Article 110 of the United Nations Charter referred to the " respective constitutional processes " of States. That reference found further justification in the limits set by article 43, for it related neither to the whole of internal constitutional law nor even to the whole of the law of treaties in internal law, but only to the provisions concerning competence to conclude treaties. From the point of view of international law, it was for internal law to determine the rules for a State's competence to conclude treaties. Further, article 43 did not deal with violations of all kinds, but was concerned solely with manifest violation. The reasonable limits set by the International Law Commission solved difficulties which certainly existed without creating new ones. If a State which had not complied with its internal law had committed a fault, a State which concluded a treaty in full knowledge of a manifest violation of constitutional provisions of the other State was not acting in good faith, which was also a serious fault in international law.

73. It was essential to give internal law, by virtue of international law, the place assigned to it by the Commission. The Iraqi delegation could not accept article 43 unless it contained an exception relating to manifest violation.

74. His delegation could not support the amendment by Peru and the Ukrainian SSR, the result of which would be to reduce still further the place assigned to internal law by international law. Nor did it support the United Kingdom amendment, inasmuch as it infringed the role of the interpreter. In any event, the interpreter of a legal situation of that kind was obliged to take into account good faith and the objective nature of the violation, but an explicit reference would not be desirable in the text of article 43. His delegation did not support the Australian amendment either, as a certain flexibility was needed and the question should preferably be left to the wisdom of States and those responsible for interpretation.

75. Mr. RUEGGER (Switzerland) said he could not accept the compromise reached within the International Law Commission and therefore supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1). It was inconsistent with the stability of law to hold that a State must examine in detail the constitution of States with which it was negotiating. That was true even if such an analysis was limited to the basic rules, as it was not possible to know where to draw the line in complying with the requirement to make such an examination. The exception referred to in article 43 might become a source of endless complications and disputes. It would not only be unjustified in law but contrary to the *comitas gentium*. It was normal and necessary to examine the full powers of the representative of another contracting State, but plenipotentiaries could not be obliged to furnish proofs of their State's capacity to enter into contracts. A State might, of course, undertake commitments *ultra vires*; but that fell outside the scope of the law of treaties and came within the sphere of the international responsibility of the State assuming the obligation.

76. If the amendment by Pakistan and Japan was rejected, the Swiss delegation would support the United Kingdom amendment (A/CONF.39/C.1/L.274) because it provided for the necessary flexibility and gave fewer opportunities of evading the general rule. His delegation would then accept the establishment of machinery for adjudication, and the principle of a time-limit proposed in the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), but that time-limit should not be set rigidly; what was needed was a reasonable time-limit left to the discretion of the body responsible for the adjudication.

77. The Swiss delegation considered that the Iranian amendment (A/CONF.39/C.1/L.280) was out of place in article 43 and should rather be submitted to the plenary Conference in connexion with some other article in the draft. It was opposed to the joint amendment by Peru and the Ukrainian SSR and the Venezuelan amendment. It supported the United Kingdom amendment simply as a second best, as it hoped very much that the amendment by Pakistan and Japan would be adopted.

78. Mr. EVRIGENIS (Greece) said he approved of article 43 as drafted by the International Law Commission, since it achieved a harmonious balance between the interests involved.

79. The United Kingdom amendment (A/CONF.39/C.1/L.274) had the merit of defining the notion of manifest violation and his delegation supported it. It also agreed with the idea of the time-limit in the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), but had doubts about the starting point chosen, namely the occurrence of the violation. Such an event was sometimes difficult to identify; it might continue for some time, or again it might occur at a preliminary stage in negotiations, so that the time-limit might expire before the signing of the treaty. If the principle embodied in the amendment was adopted, the Greek delegation would propose that the time-limit be calculated from the adoption of the treaty.

80. Mr. MAKAREWICZ (Poland) said he fully supported the principle that the non-observance of provisions of the internal law of a State regarding competence to conclude treaties did not affect the validity of a consent

given in due form by an organ or agent of that State competent under international law to give such consent. Without that principle, there would be great risk and uncertainty, particularly since some countries did not even have written rules regarding the conclusion of treaties.

81. Nevertheless, taking into account the need for some flexibility in international relations, an exception could be admitted without compromising the principle, provided that the exception was strictly limited. His delegation therefore supported the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which required the violation to be not only manifest but also of fundamental importance.

82. The United Kingdom amendment (A/CONF.39/C.1/L.274) seemed to have a similar purpose, but it was inadvisable to refer to good faith in only one article of the draft because it could be inferred *a contrario* that the principle of good faith did not apply to the other articles. That point had been raised during the discussion on article 15.

83. The Polish delegation could not support the Iranian amendment (A/CONF.39/C.1/L.280), because it subordinated the possibility of invoking a violation of internal law to the official status of the individual who authorized a person to express the consent of the State, and it suggested that a Head of State could never act in contravention of the constitution of the State. The International Law Commission had pointed out in paragraph (10) of its commentary that it had admitted an exception having in mind past cases where a Head of State had concluded a treaty in contravention of an unequivocal provision of the constitution.

84. Mr. TEYMOUR (United Arab Republic) said he favoured the retention of article 43 as drafted by the International Law Commission, because, as the representative of Iraq had pointed out, it was the outcome of lengthy discussions between the supporters of two opposing legal doctrines.

85. Article 43 provided the necessary safeguards for developing countries and countries lacking internal legislation on the conclusion of treaties. His delegation could not support the amendment submitted by Pakistan and Japan, which would radically alter the meaning of the article. It was not opposed to the idea of a time-limit for invoking a violation, as proposed in the Australian amendment, provided that it was a reasonable one.

86. Mr. AMADO (Brazil) said that it was essential to use precise language. It might well be asked what a manifest violation was. The notion was so obscure that it would be necessary to consider the establishment of some body to provide a reply to that question. Violation came about as a result of tortuous and secretive intrigues; it seldom displayed itself openly. He was therefore against making an exception of manifest violation, which was the result of a compromise in the Commission which he could not accept; accordingly, he supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1).

87. Mr. MATINE-DAFTARY (Iran) announced that after hearing the various speakers, particularly the Swiss representative, he was withdrawing his amendment (A/CONF.39/C.1/L.280), but intended to revert to the matter at the second session in plenary. The Iranian delegation would abstain on the International Law Commission's text.

88. Mr. CARMONA (Venezuela) said that his delegation was withdrawing its amendment (A/CONF.39/C.1/L.252) and would vote for the International Law Commission's text.

89. The CHAIRMAN put the amendments before the Committee to the vote.

The amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) was rejected by 56 votes to 25, with 7 abstentions.

The Australian amendment (A/CONF.39/C.1/L.271/Rev.1) was rejected by 44 votes to 20, with 27 abstentions.

The amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1) was adopted by 45 votes to 15, with 30 abstentions.

The United Kingdom amendment (A/CONF.39/C.1/L.274) was adopted by 41 votes to 13, with 39 abstentions.

90. The CHAIRMAN said that article 43 would be referred to the Drafting Committee together with the joint amendment submitted by Peru and the Ukrainian SSR and the amendment submitted by the United Kingdom. [3]

91. Mr. BADEN-SEMPER (Trinidad and Tobago), explaining his delegation's vote for the United Kingdom amendment, said he hoped that the Drafting Committee would also consider whether the word "manifest" should be retained or deleted.

The meeting rose at 6.5 p.m.

[3] For resumption of discussion, see 78th meeting.

FORTY-FOURTH MEETING

Tuesday, 30 April 1968, at 11.00 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 44 (Specific restrictions on authority to express the consent of the State)

1. The CHAIRMAN invited the Committee to consider article 44 of the International Law Commission's draft. [1]

2. Mr. SEPULVEDA AMOR (Mexico) said that the Mexican amendment (A/CONF.39/C.1/L.265) was based on the suggestion by the Secretary-General in his comments on article 44 (A/6827/Add.1) that, in the circumstances of modern multilateral conventions, the full powers of a representative could hardly ever be brought to the

[1] The following amendments had been submitted: Mexico (A/CONF.39/C.1/L.265); Japan (A/CONF.39/C.1/L.269); Ukrainian SSR (A/CONF.39/C.1/L.287); Spain (A/CONF.39/C.1/L.288).

notice of the other States concerned, but only of the depositary. If a State, in drawing up full powers to authorize its representative to make a binding signature or to execute and deposit an instrument expressing consent to be bound, made specific restrictions upon his authority, it seemed only just to allow that State to invoke those restrictions if its representative failed to observe them and if the depositary had examined the full powers. In such cases the Secretary-General had not considered that the State was bound unless it confirmed it, and he had taken the initiative to clarify the matter before making notification of the signature.

3. Mr. FUJISAKI (Japan) said that the Japanese amendment (A/CONF.39/C.1/L.269) was in full conformity with the Commission's statement in the first sentence of paragraph (3) of its commentary to article 44. Instructions given by a State to its representatives were not usually brought to the knowledge of the other negotiating States and might be kept secret in whole or in part. The instructions might be changed, or failure to observe them might not be important enough to nullify the State's consent. His delegation's view was that, in order to safeguard the security of international transactions, a State should not be able to invoke its representative's failure to observe a specific restriction unless that restriction had been " expressly notified " to the other negotiating States.

4. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that although the Commission's texts had great merit, that of article 44 was by no means clear and his delegation had accordingly proposed an amendment (A/CONF.39/C.1/L.287) in order to indicate that the authority was restricted by instructions from the representative's government.

5. Mr. TENA IBARRA (Spain) said that the Spanish amendment (A/CONF.39/C.1/L.288) contained two elements, one purely formal, the other an element of substance. The purpose of the formal element was to produce a clearer and more concise text which would, in the Spanish version, be more grammatically correct and drafted in more appropriate legal terminology, while at the same time preserving all the elements of the Commission's text. The purpose of the element of substance was to emphasize, by substituting for the expression " brought to the knowledge of " the expression " notified to ", the seriousness of the nature of the exception which the article provided to article 6, on full powers. Article 6 contained a very serious *de jure* presumption and the expression " brought to the knowledge of " was not sufficiently formal and solemn for the purpose of establishing an exception to such a presumption. In that respect, the Spanish delegation's amendment was closely akin to that submitted by the representative of Japan and he hoped it would be given serious consideration by the Drafting Committee.

6. Mr. RATTRAY (Jamaica) said that, although he agreed with the principle formulated by the Commission in article 44, he doubted whether it had been adequately expressed. The article dealt with specific limitations on the authority of a representative to express his State's consent to be bound and was not concerned with the problem dealt with in article 43, which established a special régime for dealing with constitutional limitations imposed by domestic law on the competence of States to conclude treaties. That competence could only be expressed through its representative, whether a person or an organ. The régime laid down by article 43 was extensive enough to include a limitation on the treaty-making capacity of a particular representative, subject to the procedural formalities imposed in specific restrictions. It was theoretically possible for domestic law to provide that treaties might be concluded by representatives not belonging to the categories specified in article 6, but requiring a resolution of parliament before they could be authorized to sign a treaty.

7. There appeared to be some overlapping between articles 43 and 44, since the former dealt with the competence to conclude treaties and the latter with specific restrictions on the authority of the representative; but article 43 was not necessarily co-extensive with article 44, since the restrictions on the authority of a State's representative were not confined to limitations imposed by domestic law *stricto sensu* but also extended to any restrictions properly imposed in any other manner, such as by administrative action for example.

8. In the light of those considerations it seemed necessary, or at least desirable, to make clear that the restrictions referred to in article 44 did not include those covered in article 43, and it would be more intelligible if, by means of a drafting amendment, the provisions of the two articles could be made mutually exclusive. Perhaps the Expert Consultant could indicate whether that had been the Commission's intention.

9. Though ideally it should be the duty of each State to bring restrictions to the attention of the other parties, in the case of multilateral treaties particularly it should be sufficient if notification were made to the depositary. Under article 72 (*e*), it was the duty of the depositary to inform States entitled to become parties to a treaty of acts, communications and notifications relating to it. It would not be unduly burdensome to regard receipt by the depositary of notice of a restriction as constituting constructive notice to the parties. Bearing in mind the duty of the depositary to bring the restriction to the actual notice of the parties, it would hardly be just to penalize a party which had notified a restriction to a depositary merely because the depositary had failed to discharge its duty of notifying the other parties. The Mexican amendment (A/CONF.39/C.1/L.265) was practical and he supported it.

10. He was not satisfied that the formula proposed in the Ukrainian amendment (A/CONF.39/C.1/L.287) exhausted all possible means by which a restriction might be imposed, and he therefore preferred the more flexible formulation adopted by the Commission.

11. Mr. ROSENNE (Israel) said he was prepared to accept the Commission's text and doubted whether there was any need for the detailed amendment proposed by the Ukrainian delegation (A/CONF.39/C.1/L.287). The Japanese amendment (A/CONF.39/C.1/L.269), though appearing to be a little severe, should be scrutinized by the Drafting Committee. With regard to the Spanish amendment, the question of constructive notice was perhaps covered in article 73; the introduction of a

requirement concerning formal notice in article 44 might give rise to difficulties.

12. He had no objection in principle to the Mexican amendment (A/CONF.39/C.1/L.265) but it would need to be clarified as to whether the depositary referred to was the depositary of the instrument embodying the treaty itself or the depositary of the credentials, since they might not always be one and the same. Assuming it was the former, some modification might be needed in article 72. If the Mexican amendment were accepted, it should be modified by the insertion of the words " of the treaty " after the word " depositary ". That would correspond with his Government's observation in paragraph 5 of its note of 15 May 1964, the principle of which had been accepted by the Special Rapporteur in his redraft of the former article 32 in his fourth report.

13. Mr. SEPULVEDA AMOR (Mexico) said he could accept the Israel representative's amendment.

14. Mr. CUENDET (Switzerland) said he agreed with the principle contained in the Commission's draft but did not think that the expression of it was entirely clear. He therefore supported the Ukrainian and Spanish amendments; the former explained the nature of the special restrictions, while the latter was more concise than the Commission's version. He also supported the Japanese amendment, which strengthened the Commission's text and would contribute to the stability of treaties.

15. He could not support the Mexican amendment since it gave a misleading idea of the function of a depositary, which was to register the declarations of parties. Though the depositary could have the role ascribed to it in the Mexican amendment, there was no need to make specific mention of the fact at that point in the convention.

16. Mr. WERSHOF (Canada) said he hoped he was right in thinking that the restriction in article 44 had nothing to do with the restrictions imposed on the actions of a representative at earlier stages of negotiation and signature of the text, but only to restrictions on the actions performed when expressing the State's consent to be bound.

17. The Mexican amendment was certainly essential. At the close of a conference to conclude a treaty, presumably the Secretary-General or his representative functioned as a depositary, if designated in the final clauses, and then full powers would be handed to him. He approved of the Israel amendment to the Mexican amendment.

18. The Japanese amendment seemed rather strict and he wondered what was meant by the expression " expressly notified ".

19. Mr. MARESCA (Italy) said that full powers and instructions were two entirely different categories of diplomatic documents. A full powers was a diplomatic document in the true sense, whereas instructions were a domestic matter between a representative and the authorities of his State. If full powers were brought to the knowledge of another State, that knowledge should not be limited to the parties but should be communicated to all other States.

20. He could not accept the Ukrainian amendment introducing the idea of instructions; that was out of place and had nothing to do with full powers.

21. He supported the Japanese amendment, also the Spanish amendment, which was particularly felicitous in its wording. The Mexican amendment, introducing the notion of a depositary, should be accepted.

22. Mr. SMALL (New Zealand) said that there would be no practical difficulty in applying article 44 if the restriction on the authority of a representative were brought to the attention of the State concerned in writing, by means either of a note or of a clause in the full powers.

23. Practical difficulties could, however, arise if article 44 were applied to the very common case where, during the negotiation of a treaty, a representative stated that he was not empowered to make concessions beyond a certain point. Negotiations might then proceed, a more generous concession be actually made and in due course the treaty be signed. It would undoubtedly hamper good faith and the freedom of negotiations if, in a case of that type, a representative had to be cross-examined closely and, if need be, his Government consulted in order to ensure that the restriction mentioned earlier in the negotiations had in fact been rescinded. If, of course, by the time of signing the treaty, the representative had produced unconditional full powers, or conditional powers, the condition of which was satisfied, that would be the end of the matter. However, it was quite common for full powers not to be produced at all. In that particular case, it might well become relevant to consider whether statements by the representative during his negotiations in fact indicated a limitation on his power to express consent to be bound. In regard to that kind of circumstance, the New Zealand delegation therefore differed somewhat from the Canadian representative, who had considered that article 44 could never have any relevance to the earlier negotiating stage. With respect to that one problem, however, common sense required that article 44 be given a reasonable interpretation which would embrace only those particularly obvious restrictions which, if orally expressed, were put to the other Government in such a way that no Government negotiating normally and in good faith could fail to see that a definite standing restriction was present which it could only disregard at its peril.

24. Subject to those remarks, he favoured article 44 and supported the amendment by Mexico (A/CONF.39/C.1/L.265) and also that of Japan (A/CONF.39/C.1/L.269), which would go some way towards clarifying the point he had raised.

25. He did not favour the Ukrainian amendment (A/CONF.39/C.1/L.287); the provisions of article 44 should be flexible enough to cover restrictions imposed on the authority of the representative otherwise than in the " instructions " by his Government. He had considered the Spanish redraft (A/CONF.39/C.1/L.288), but on balance did not favour it.

26. Sir Humphrey WALDOCK (Expert Consultant), in reply to the question by the Jamaican representative, said that the question was not so much whether article 44 was exclusive of the cases covered by article 43; the point was that the two articles dealt with quite different situations. Nevertheless, there was some overlap between the provisions of the two articles, because it was not inconceivable that a restriction placed on the authority of a representative, under article 44, might derive from

internal constitutional requirements which, from another point of view, were the subject of the provision in article 43.

27. With regard to the point raised by the New Zealand representative, the language of article 44 made it clear that its provisions related to a situation where the consent of a State to be bound was being expressed by the representative. A distinction should clearly be made between instructions for the purpose of negotiations and instructions in relation to the expression of consent. That question was to some extent connected with the concluding proviso "unless the restriction was brought to the knowledge of the other negotiating State prior to his expressing such consent". Amendments had been submitted by Japan (A/CONF.39/C.1/L.269) and Spain (A/CONF.39/C.1/L.288) for the purpose of making that language more formal. The International Law Commission's wording would allow any kind of proof of the restriction. It would be for the Committee and the Drafting Committee to consider the appropriateness of making the provision more strict.

28. With regard to the Ukrainian amendment (A/CONF.39/C.1/L.287), he did not believe that the International Law Commission would have favoured the introduction of a reference to Government instructions, because the Commission had been careful not to distinguish between States and Governments. Personally, he did not feel that the introduction of a reference to Government instructions would assist much in regard to the provisions of article 44.

29. On the question of the depositary, he said that the International Law Commission, in all its references to the "depositary", had meant the depositary of the treaty. The proposal of the Mexican amendment (A/CONF.39/C.1/L.265) to introduce a specific reference to the depositary would be in line with the intentions of article 44. If, however, the language of article 44 were amended so as to introduce the concept of notification, the point would be covered by the provisions of articles 72 and 73, relating to the functions of the depositary.

30. The CHAIRMAN said he would invite the Committee to vote on the various amendments to article 44, beginning with the Mexican amendment (A/CONF.39/C.1/L.265) as orally modified by Israel.

The Mexican amendment was adopted by 53 votes to 3, with 35 abstentions.

31. The CHAIRMAN invited the Committee to vote on the principle contained in the Spanish amendment (A/CONF.39/C.1/L.288) that the restriction must be "notified" or as in the Japanese amendment (A/CONF 39.C.1/L.269) "expressly notified", rather than simply "brought to the knowledge of" the other negotiating States.

The principle of notification was adopted by 30 votes to 23, with 35 abstentions.

32. The CHAIRMAN invited the Committee to vote on the Ukrainian amendment (A/CONF.39/C.1/L.287).

The Ukrainian amendment was rejected by 46 votes to 16, with 30 abstentions.

33. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 44 to the Drafting Committee with the two amendments which had been adopted and the drafting elements in the Spanish amendment (A/CONF.39/C.1/L.288).

It was so agreed. [2]

Article 45 (Error)

34. The CHAIRMAN invited the Commission to consider article 45 of the International Law Commission's draft. [3]

35. Mr. KEARNEY (United States of America), introducing his delegation's amendment to article 45 (A/CONF.39/C.1/L.275), said that it would bring about two changes in paragraph 1 of the article. The first was a minor one and consisted of the deletion of the words "in a treaty" after the opening words "A State may invoke an error". As the text now stood, it could be interpreted as meaning that the error must be specifically embodied in the text of the treaty. In fact, a situation could arise in which the error was not reflected in the text. For example a treaty for the sharing of hydroelectric power might be based on wrong calculations of the capacity of the turbines used. The capacity would not be stated in the treaty, but all the calculations having been based on it, the error would affect the consent to the treaty. By deleting the words "in the treaty", error would be tied to the question of consent to the treaty rather than to the actual text.

36. The second proposed change in paragraph 1 was a more important one. The present text limited the class of error that could be invoked as invalidating consent to an error relating to a fact or situation which "formed an essential basis" of the consent given to the treaty. The expression "essential basis" could be interpreted either subjectively or objectively. Paragraph (1) of the commentary referred to "errors on material points of substance", but the value of that comment was reduced because paragraphs (6) and (7) of the commentary failed to pursue it.

37. The present wording seemed to suggest that any error would suffice to vitiate consent if it related to a point which the State concerned alleged to have been essential, without regard to the question whether another State in a similar situation would have considered the subject-matter of the error as an essential basis of consent to the treaty. It would be difficult to disprove such an allegation, and the interpretation of the provision would rely on the subjective appreciation of the interested State. It was important to make the essentiality test subject to objective requirements. The State claiming invalidity should prove that the matter would have been considered as important by any State similarly situated. For that purpose, the text should be clarified and the United States amendment accordingly introduced a new requirement in the form of an additional sub-paragraph reading "The assumed fact or situation was of material importance to its consent to be bound or the peformance of the treaty". Those words incorporated the objective test mentioned in paragraph (1) of the commentary. Claims of invalidity could be disruptive of treaty rela-

[2] For the resumption of the discussion of article 44, see 78th meeting.

[3] The following amendments had been submitted: United States of America (A/CONF.39/C.1/L.275); Australia (A/CONF.39/C.1/L.281).

tions and the provisions on the subject should therefore be made as clear as possible so that claims of that nature could not be made on other than well-defined grounds. His delegation was not wedded to the language used in its amendment and would accept any other formulation, provided an objective test was introduced.

38. His amendment would also insert in paragraph 2, after the words " the error ", the words " or could have avoided it by the exercise of reasonable diligence ". The purpose of that insertion was to remedy the defects of the language used in paragraph 2, which was drawn from the judgment of the International Court of Justice in the *Temple* case.[4] In paragraph (8) of its commentary, the Commission had itself pointed out that the Court's formulation of the exception now set forth in paragraph 2 was " so wide as to leave little room for the operation of the rule " contained in paragraph 1.

39. Mr. HARRY (Australia) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.281) was to make it clear that a party wishing to invoke the ground of invalidity laid down in article 45 must do so without unreasonable delay. His delegation had already mentioned its reservations concerning the attempt made in Part V of the draft convention to lay down extensive grounds for invalidating and terminating treaties before their normal expiry. But if the attempt was to be made, the formulations adopted should not be couched in unduly sweeping terms, but should contain the qualifications appropriate to the particular ground being considered. The Australian delegation therefore supported the United States amendment (A/CONF.39/C.1/L.275) to state with greater particularity the conditions under which error could be invoked as a ground of invalidity.

40. Any mature legal system contained certain general principles of law whereby a party might, on general grounds of equity, forfeit its right to invoke a particular legal ground; under the common law system, those were, for instance, the doctrine of estoppel, statutes of limitation and doctrines of the effect of unreasonable delay and acquiescence. If the Conference was to act on the basis that the international legal order was sufficiently mature to lay down the extensive grounds of invalidity proposed in Part V, appropriate recognition should be given to doctrines of that kind. The International Law Commission had itself made a valuable proposal in article 42, sub-paragraph (*b*), dealing with acquiescence.

41. The Australian amendment was designed to deal with the situation which arose after the party in question was aware of the error. The situation was more clear-cut than in article 43, where there might be some doubt as to the time of violation of internal law. Where the party was actually aware of the error, it should not be allowed to delay indefinitely its decision on whether or not to claim invalidity, but should bring its claim within a reasonable time. The Australian delegation did not insist on the period of twelve months tentatively proposed in its amendment.

42. Mr. COLE (Sierra Leone) said that, although his delegation was in favour of the inclusion in the convention of error as a ground for invalidating a State's consent to be bound by a treaty, it would have preferred the article to cover cases of error of law, rather than just cases of error of fact, for a clear distinction would then have been made between cases of error which would make a treaty void *ab initio*, and cases which would make a treaty merely voidable. On the other hand, it might be said that all errors were in the final analysis errors of fact, and the Commission's formulation of article 45 had merit.

43. The Australian amendment (A/CONF.39/C.1/L.281) was premature, and would be more appropriate in connexion with article 62, relating to the procedure to be followed in cases of invalidity, particularly since it contained the phrase " the procedure for claiming invalidity ". His delegation would therefore abstain from the vote on the Australian amendment.

44. The United States amendment to add a new sub-paragraph 1 (*b*) (A/CONF.39/C.1/L.275) seemed to be unnecessary, since the point was adequately covered by paragraph 1 of the Commission's draft: the words " formed an essential basis of its consent to be bound by a treaty " restricted the errors in question to those which went to the root of the matter and depended entirely on the exercise of good faith in the interpretation of treaties. He had some sympathy with the United States amendment to add a further criterion in paragraph 2, particularly since it was based on a judicial decision, but owing to the difficulty of determining what constituted " reasonable diligence ", and for the reasons given by the Commission in paragraph (8) of the commentary, it could not support the amendment and would vote for the Commission's text as it stood.

45. Mr. DADZIE (Ghana) said that his delegation would support the International Law Commission's draft of article 45, which represented a re-statement of existing international law combined with a minimal degree of progressive development. It could be contended that the article would be difficult to apply, since it was the State invoking invalidity which was primarily concerned with the degree of emphasis placed on the fact claimed to be an error, but his delegation did not consider that the element of subjectivity involved in that criterion *ipso facto* rendered the article impossible to apply. The Committee had already approved other articles containing subjective elements, because even in customary international law there were many rules whose essential subjectivity had not precluded their objective interpretation. Moreover, the State invoking factual error bore the burden of proving that the error had formed an essential basis of its consent to be bound by the treaty.

46. Although his delegation appreciated the principle underlying the Australian amendment (A/CONF.39/C.1/L.281), it felt that it was unnecessary, since the same end would be achieved, in a different manner, by the adoption of article 42. It could support the drafting changes proposed by the United States amendment (A/CONF.39/C.1/L.275) to the first part of paragraph 1, but did not regard its new sub-paragraph 1 (*b*) as an improvement, since the criterion " material importance " was open to the same charge of subjectivity as the Commission's draft. That criticism also applied to the "reasonable diligence " test in paragraph 2 of the amendment.

[4] *I.C.J. Reports 1962*, p. 26.

47. His delegation would abstain from voting on most of the United States amendment, but would ask for a separate vote on the words " or the performance of the treaty " at the end of its proposed sub-paragraph 1 (*b*), which drastically changed the entire concept of article 45. His delegation would vote against that phrase.

48. Mr. ALVAREZ TABIO (Cuba) said that paragraph 1 of article 45 gave a balanced definition of material error. Seen as a defect of consent, error undoubtedly corresponded to some extent to the concept of a mistake, whether intentional or unintentional, leading to a belief in a non-existent fact deciding a State to consent to be bound. On the other hand, consent could rest on a cause that had been misrepresented in order to conceal the real cause, which might be illicit or immoral. That case came under article 46, relating to fraud. His delegation supported the retention of both articles, which embodied essentially different principles.

49. Paragraph 2, however, was not acceptable, because it contained an exception expressed in such broad and imprecise terms that it left little room for the application of the general rule. In particular, the concluding proviso " if the circumstances were such as to put that State on notice of a possible error " would leave it to the interpreter to assess subjectively the significance of those circumstances. The assumptions on which that passage was based were logically and legally untenable. For that reason, his delegation would have to vote against paragraph 2, unless the second clause were put to the vote separately. Paragraph 3 was acceptable.

50. The United States amendment (A/CONF.39/C.1/L.275) would not improve the text since it introduced such subjective concepts as " material importance " and " reasonable diligence ", while retaining the ambiguous concluding proviso of paragraph 2. His delegation would therefore vote against that amendment, and also against that of Australia (A/CONF.39/C.1/L.281), which would have the effect of enabling an essential defect of consent to be covered merely by the passage of time and not as a result of the express consent of the party concerned.

51. He would ask that the various paragraphs of article 45 be voted on separately.

52. Mr. PINTO (Ceylon) said that, although his delegation was broadly in agreement with the Commission's text of article 45, it wished to ask the Expert Consultant a question in connexion with the article.

53. Article 46 dealt with the effect of misrepresentations made fraudulently, and provided that a treaty induced by fraudulent conduct was voidable at the option of the victim of the fraud. On the other hand, no specific reference was made to the effect on a treaty of misrepresentation made innocently. In his delegation's view, no misrepresentation, whether innocent or fraudulent, should be permitted to operate to the detriment of the other negotiating State. It might have been the International Law Commission's intention to provide for the effects of innocent misrepresentation through article 45, for if an error in a treaty was the result of an innocent misrepresentation, such error might be invoked to void the treaty; but that was not clear from the commentary, which stressed the error rather than the conduct that had brought it about. Where the whole treaty had been based on an innocent misrepresentation, it might still be covered by the phrase " error in a treaty " in article 45. His delegation would appreciate the comments of the Expert Consultant on the matter, particularly in view of the categorical restriction in article 39, which made Part V exhaustive of the means of impeachment of the validity of treaties.

54. Mr. VOICU (Romania) said that his delegation was in favour of the International Law Commission's text of article 45. Although sub-paragraph 1 (*a*) of the United States amendment (A/CONF.39/C.1/L.275) improved the text, the Romanian delegation had considerable doubts as to the advisability of including the new sub-paragraph 1 (*b*). The idea stated in that sub-paragraph was already covered by the preceding provision, which referred to the " essential basis " of the State's consent to be bound by a treaty, while the change in terminology proposed in sub-paragraph 1 (*b*), which referred to facts or situations " of material importance " to consent, seemed to be merely a change of emphasis. On the other hand, the term " of material importance " lent itself to subjective interpretation, which could not promote stability in treaty relations.

55. The proposed reference to " reasonable diligence " in paragraph 2, although perhaps useful in domestic law, raised problems in international law which were out of all proportion to those it was intended to solve. It would be hard to determine the exact meaning of the term in international law, and even if it could be established theoretically, it could hardly be applied in practice.

56. His delegation appreciated the reasons for the Australian amendment (A/CONF.39/C.1//L.281), but believed that a State which discovered an error would automatically set in motion the procedure for claiming invalidity, in accordance with article 62 of the draft. The exact time when the State initiated that procedure would depend on the case; to introduce a specific time-limit would make the provision too rigid.

57. The Romanian delegation would vote for the Commission's text, subject to some purely drafting amendments which could be referred to the Drafting Committee; it supported the Ghanaian proposal for a separate vote on the words " or the performance of the treaty ", in the United States amendment to paragraph 1.

57. Mr. SINCLAIR (United Kingdom) said that not all the problems raised in article 45 were fully solved by the text of the article. Presumably, no one would seriously dispute Lord McNair's proposition that " a treaty concluded as the result of a fundamental mistake induced in one party ... by circumstances involving no negligence on its part ... is voidable by that party ".[5] The effect of error had also been considered by the Permanent Court of International Justice in the *Eastern Greenland* case [6] and by the International Court of Justice in the *Temple of Preah Vihear* case.[7]

59. The Commission had rightly decided not to consider such municipal analogies as the distinction between mutual and unilateral errors of fact, but the United Kingdom delegation doubted whether all examples of possible error were covered by the article. Moreover,

[5] McNair, *The Law of Treaties*, p. 211.

[6] *P.C.I.J.* (1933), Series A/B, No. 53.

[7] *I.C.J. Reports 1962*, p. 26.

the article referred to errors " in a treaty ", but there might be errors not involving fraudulent conduct concerning the basis of a treaty which might not be covered by the Commission's text. His delegation therefore supported the United States amendment (A/CONF.39/C.1/L.275) to delete the phrase " in a treaty ".

60. It also supported the United States amendment because it seemed to develop the effect of error on the validity of treaties more fully than did the original article. It was clear from the commentary, particularly from paragraph (4), that the *dicta* quoted from the *Eastern Greenland* and *Temple* cases merely threw light on the conditions under which error would not vitiate consent, rather than on those under which it would do so. That made it most important to consider the exact wording of the article very carefully. His delegation had some hesitation over the phrase " formed an essential basis of its consent to be bound by the treaty " for, although the phrase had been used in other provisions of the draft, the criterion was rather subjective. It seemed preferable to clarify the idea by adding a clause along the lines of the sub-paragraph 1 (*b*) proposed by the United States.

61. It also seemed desirable to include in paragraph 2 a rule to the effect that a State might not invoke an error if it could have avoided it by the exercise of reasonable diligence. Since, however, such an addition might give rise to further difficulties of interpretation, his delegation wished to re-emphasize the need to establish some objective machinery for the settlement of disputes which might arise in connexion with the interpretation or application of article 45, as well as of other provisions in Part V.

62. The United Kingdom delegation supported the Australian amendment (A/CONF.39/C.1/L.281), for the reasons which it had advanced in connexion with article 43. It should be noted that the proposed time-limit would begin to run only from the date when the State in question discovered the error, so that the interests of any State wishing to invoke that ground of invalidity were fully protected. Although the Ghanaian representative's comments on the relevance of sub-paragraph (*b*) of article 42 were pertinent, the United Kingdom delegation considered that there was some advantage in setting a definite time-limit.

63. Mr. WERSHOF (Canada) said that his delegation could support the United States amendment (A/CONF.39/C.1/L.275) for the reasons given by its authors and subsequently by the United Kingdom representative. The Canadian delegation could also support the Australian amendment (A/CONF.39/C.1/L.281).

64. The main reason why the Canadian delegation had asked to speak was that article 45 was the first of a series of provisions in Part V setting out grounds for invalidating a treaty. Although Canada supported some of those articles, including article 45, in principle, that support was conditional on the Committee's final decision on article 62: the Canadian Government wanted to be sure that adequate provisions for adjudication on disputes relating to those articles would be provided for in revised article 62. His delegation had thought it advisable to enter that caveat at the outset of the Committee's consideration of that group of articles, in order to avoid having to repeat it in subsequent debates.

65. Mr. MARESCA (Italy) said that error could be invoked as a ground for the invalidation of a treaty if it was excusable, but not in cases of serious negligence, which might be regarded as deliberate error. Moreover, from the practical point of view, a situation where error was discovered could not be maintained indefinitely while the State concerned made up its mind whether or not to claim invalidity.

66. The Italian delegation could therefore support the United States amendment (A/CONF.39/C.1/L.275) to delete the phrase " in the treaty ", which was rather more than a drafting amendment. It could also vote for the United States amendment to add a new sub-paragraph 1 (*b*); the reference to the performance of the treaty was perfectly relevant, since the will of the State to invalidate a treaty extended beyond consent to be bound to performance. Further, the proposal to add the criterion of the exercise of reasonable diligence was sound, particularly since that criterion had constituted the basis of a decision of the International Court of Justice. Finally, the Italian delegation could support the Australian amendment (A/CONF.39/C.1/L.281), for although the International Law Commission had decided against including any time-limit in the draft, the gravity of any prolonged delay in claiming invalidity warranted an exception to that negative rule.

The meeting rose at 1 p.m.

FORTY-FIFTH MEETING

Tuesday, 30 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 45 (Error) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 45 of the International Law Commission's draft.

2. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that the United States amendment (A/CONF.39/C.1/L.275) raised important problems. The deletion of the words " in a treaty " in paragraph 1 was not a drafting amendment; it was linked with paragraph 1 (*b*) of the amendment and was tantamount to saying that the error might relate not only to the treaty, but also to its performance. That was a new element and was dangerous, especially for the principle *pacta sunt servanda*. A State wishing to avoid performance of a treaty might claim that the treaty had not brought it the advantages expected.

3. With regard to the second part of the amendment, which introduced the idea of " reasonable diligence " into paragraph 2, practice in internal law and in private law had shown that it was extremely difficult to determine whether a person had shown diligence or not. The United States representative had himself acknowledged

that machinery involving subjective elements would be required to settle disputes.

4. The Ukrainian delegation considered that article 45 as drafted by the International Law Commission was satisfactory and reflected the present state of the law in a realistic manner.

5. With regard to the Australian amendment (A/CONF. 39/C.1/L.281), the Ukrainian delegation considered that a procedure as complicated as that it provided for could hardly be carried through within twelve months.

6. Mr. IPSARIDES (Cyprus) said he was in favour of article 45 as drafted by the International Law Commission.

7. With regard to the United States amendment (A/CONF.39/C.1/L.275), he was not against the deletion of certain words, purely for drafting purposes, in order to improve the text. That part of the amendment could be referred to the Drafting Committee. He had reservations, however, about the addition of the proposed sub-paragraph (*b*). The notion of " material importance " was already contained in the expression " essential basis ", which it thus duplicated, while making the text unduly rigid.

8. The idea of " reasonable diligence ", to be inserted in paragraph 2, would not be appropriate in the convention, as it would make matters more complicated and difficult. That proposal could be considered in greater detail by the Drafting Committee.

9. He supported the Australian amendment (A/CONF. 39/C.1/L.281) because it described the application of the procedure contemplated in article 45 more precisely and introduced an element of stability. That amendment too should be referred to the Drafting Committee.

10. Mr. REUTER (France) said that the French delegation endorsed the comments made by the Canadian delegation on the articles dealing with invalidation of consent. In the Commission's draft, those articles were based on principles of private law in force in every country in the world. The French delegation was not against the transference of private law to public international law, but in all systems of private law there were impartial bodies to apply the rules of law. The French delegation's final position would therefore be determined by the solution adopted for procedure, particularly in article 62.

11. The French delegation fully supported article 45 as drafted by the International Law Commission. Nevertheless, the amendments submitted by Australia (A/CONF.39/C.1/L.281) and the United States (A/CONF. 39/C.1/L.275), though not absolutely essential, were worth considering. The Australian amendment would introduce the formalism of a time-limit into the operation of the principles. The safeguard of formalism had to be weighed against the flexibility of the Commission's formula.

12. The first part of the United States amendment to paragraph 1, to delete the words " in a treaty ", was acceptable because it simplified the text. The second part, to add a sub-paragraph 1 (*b*), seemed to be intended to introduce an objective element into the determination of the essential nature of the error. But that objective character was self-evident; it must be assessed from the joint negotiations, not from any concealed or unknown intentions. The French delegation could accept the principle of the United States amendment, but if the principle was adopted, the wording should be referred to the Drafting Committee, for the text was not explicit enough, especially in the French version.

13. The United States amendment to paragraph 2 was implicit in the Commission's text, but it might be as well to make it explicit.

14. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that his delegation approved article 45 of the Commission's draft and was opposed to the amendments submitted.

15. The United States amendment (A/CONF.39/C.1/ L.275) was unsatisfactory because it would delete the words " in a treaty ", and it was precisely in the text of a treaty that an error appeared most clearly. In paragraph 2, the amendment introduced the notion of " reasonable diligence ", which must be interpreted subjectively and was not a legal expression. And who could decide what constituted " diligence " ?

16. The Australian amendment (A/CONF.39/C.1/L.281) was not acceptable either. It contained a contradiction, for it provided that the State in question must initiate the procedure " without delay " and then stipulated an arbitrary time-limit of twelve months.

17. Mr. MOUDILENO (Congo, Brazzaville) said that his delegation, while recognizing the need to take error into account, did not approve of the way in which the International Law Commission had formulated the idea. The Commission had considered only one element, the " essential basis " of consent, whereas there was a much more fundamental basis, namely, the object and purpose of the treaty. That gap should be filled by including a strong provision stipulating the invalidity of a treaty when there had been an error relating to its object and purpose.

18. He subscribed to the principle of relative nullity embodied in paragraph 2, but did not approve of its formulation, which was ambiguous. He did not see how the two elements " conduct " and " circumstances " could be separated in practice, since conduct was deduced from an analysis of the circumstances. The amendments to paragraph 2 did not remove its ambiguity, as the Cuban representative had very clearly explained, so the delegation of the Congo (Brazzaville) did not support them. It would vote against paragraph 2.

19. Mr. DELPECH (Argentina) said he supported article 45 as drafted by the International Law Commission. Two points in the article should be stressed: first, an error did not invalidate consent unless it concerned an essential element; secondly, an error did not *ipso facto* avoid the treaty, but entitled the party misled by it to invoke the error as invalidating its consent, in the same way as in the cases covered by articles 46 and 47, for example. His delegation could not support the United States amendment (A/CONF.39/C.1/L.275) because in its paragraphs 1 and 2 it introduced two eminently subjective concepts which added nothing to the article and whose interpretation might have consequences that were difficult to foresee.

20. On the other hand, his delegation supported the Australian amendment (A/CONF.39/C.1/L.281), because the stipulation of a time-limit would be a useful contribution to the stability of law.

21. Mr. SEVILLA-BORJA (Ecuador) said that, on the whole, he approved of article 45 of the draft which contained no element of progressive development, but simply codified the practice established in various judgments of the Permanent Court and the International Court of Justice. The text of the article clearly brought out the right of a State to invoke an error in a treaty as invalidating its consent, if that error related to a fact or situation which had been assumed in good faith by that State to exist at the time when the treaty was concluded.

22. However, the words " formed an essential basis of its consent " were rather vague and imprecise; the United States amendment (A/CONF.39/C.1/L.275) improved the text in that respect by stipulating that the assumed fact or situation must be " of material importance to (the State's) consent to be bound or the performance of the treaty ". His delegation would therefore vote in favour of that amendment. There was no reason not to express clearly a State's right to invoke the invalidity of its consent when, the treaty having been concluded in good faith, it subsequently proved impossible to perform by reason of an error.

23. He agreed with the Cuban representative that the concluding words of paragraph 2 should be deleted because they might give rise to dangerous interpretation.

24. His delegation did not support the Australian amendment (A/CONF.39/C.1/L.281).

25. Mr. HARRY (Australia) said he should explain that the time-limit of twelve months proposed in his delegation's amendment would run from the day the error was discovered.

26. Sir Humphrey WALDOCK (Expert Consultant) said he would reply first to the question put to him concerning innocent misrepresentation. The International Law Commission had considered that innocent misrepresentation, as opposed to fraudulent misrepresentation, would not affect validity unless it led to an error invalidating consent. In other words, it had considered that cases of misrepresentation would naturally be covered by the provisions relating to error. Of course, when the other State had to some extent contributed to the error the situation could be said to be slightly different from a purely unilateral error. His own opinion was that, in such a case, innocent misrepresentation could have effect under paragraph 2 by helping to defeat the suggestion that the misled State ought to have discovered the error or otherwise ought not to have allowed itself to be misled.

27. The United States amendment (A/CONF.39/C.1/L.275) raised an important point of substance, for if the words " in a treaty " were deleted in paragraph 1 and at the same time the proposed new paragraph 1 (*b*) were added, the scope of article 45 would be dangerously extended. The International Law Commission had included the words " in a treaty " to make it clear that the error must relate to the treaty; if cases of error were not confined to questions relating to the treaty, there was a danger that States might invoke errors of fact totally unrelated to the treaty as having played an important part in their consenting to it. Consequently, the deletion of the words " in a treaty ", far from being a drafting amendment, raised a broad question of interpretation of the article, especially if the deletion was considered in conjunction with the new paragraph 1 (*b*), which provided that an error could be invoked if it was of material importance for the performance of the treaty. That amendment would excessively extend the scope of article 45, which would then go far beyond the normal concept of *error in substantia*. By " essential basis of its consent ", the Commission had meant " which was of the essence of its consent ". He did not think that the repetition of that idea in a different form in the new paragraph 1 (*b*) made it more objective; besides, the words " material importance " contained the same subjective element as the word " essential ". On the other hand, the words " or the performance of the treaty " would make the idea more specific; but, again, it might be doubted whether a fact of material importance for the performance of the treaty could be taken into consideration in that context unless, by reason of its role in the performance of the treaty, it had contributed to the formation of consent, for that was the very basis of the rule of invalidity on the ground of error. The United States amendment to paragraph 1 should therefore be viewed with caution.

28. In paragraph 2, the International Law Commission had at first intended to include the full formula used by the International Court of Justice in the *Temple of Preah Vihear* case,[1] including the phrase " or could have avoided it ", so as to cover all the three cases in which the right to invoke an error was rejected by the Court. But later it had decided that legitimate examples of that type of case were sufficiently covered by the other two phrases and that if it used all the Court's three phrases, article 45 might be largely deprived of value, for there were few errors that could not be avoided in one way or another. The United States amendment reintroduced that formula and attempted to make it easier to apply by adding the words " by the exercise of reasonable diligence ". The International Law Commission had discussed such a solution, but had been unable to agree on a form of words and objection had been taken by some members to including a formula of that kind in an international instrument.

29. Mr. KEARNEY (United States of America) said that, in view of the Expert Consultant's explanations concerning the words " in a treaty ", his delegation was prepared to agree to the retention of those words in article 45, paragraph 1. The United States amendment relating to that particular point was therefore withdrawn.

30. The CHAIRMAN said he would now put to the vote the remainder of the United States amendment (A/CONF.39/C.1/L.275). Since the representative of Ghana had asked for a separate vote on the words " or the performance of the treaty " in paragraph 1 (*b*) of the amendment, in accordance with rule 40 of the rules of procedure, that part of the amendment must be put to the vote first.

The words " or the performance of the treaty " were rejected by 45 votes to 12, with 30 abstentions.

[1] *I.C.J. Reports 1962*, p. 26.

31. The CHAIRMAN put to the vote the remainder of paragraph 1 of the United States amendment and then paragraph 2 of the United States amendment.

The remainder of paragraph 1 of the United States amendment was rejected by 38 votes to 20, with 31 abstentions.

Paragraph 2 of the United States amendment was rejected by 45 votes to 25, with 20 abstentions.

32. The CHAIRMAN put the Australian amendment (A/CONF.39/C.1/L.281) to the vote.

The Australian amendment was rejected by 40 votes to 23, with 27 abstentions.

33. Mr. ALVAREZ TABIO (Cuba) said that, at the previous meeting, he had asked for a separate vote on the second clause of paragraph 2, reading " or if the circumstances were such as to put that State on notice of a possible error ", which should be deleted.

34. The CHAIRMAN put the Cuban oral amendment for the deletion of the second clause in paragraph 2 to the vote.

The Cuban amendment was rejected by 69 votes to 8, with 7 abstentions.

35. The CHAIRMAN said that draft article 45 would be referred to the Drafting Committee.[2]

36. Mr. MOUDILENO (Congo, Brazzaville) said that, when he had spoken earlier in the meeting, he had asked the Committee to consider including in article 45 a provision stipulating the invalidity of the treaty if the error related to its object and purpose. Such a provision could read: "An error is a ground of invalidity of a treaty if it relates to the object and purpose of the treaty ". The error referred to was of a particular nature and could not be assimilated to other errors. His amendment could be referred to the Drafting Committee.

37. The CHAIRMAN said that, under rule 30 of the rules of procedure, since the delegation of Congo (Brazzaville) had not submitted its amendment in writing, it could not be discussed at that time.

Article 46 (Fraud) and *Article 47* (Corruption of a representative of the State)

38. The CHAIRMAN invited the Committee to consider articles 46 and 47 together.[3]

39. Mr. CARMONA (Venezuela) said that some delegations had already pointed out in the Sixth Committee of the General Assembly that the terms used in articles 46-50 of the draft were obscure, vague and confused. In article 45, error, article 46, fraud, and article 47, corruption of a representative of the State, it was said that the State " may invoke ", which suggested relative nullity. In article 48, the wording used was " shall be without any legal effect ", and in articles 49 and 50, "A treaty is void ".

40. The doctrine generally accepted internationally was that an act became a relative nullity in less serious cases such as fraud, and an absolute nullity, *ab initio*, in more serious cases of deliberate fraud involving fraudulent intent, such as the *dolus malus* of Roman law and the " wilful misconduct " of English law, in cases of corruption of officials, or coercion of a representative of a State, or violation of the international public order. The effects of the invalidity of a treaty might thus be different and should not be confused, as they were in articles 65 and 39 of the draft. It was therefore important to use precise and uncontroversial terms.

41. Where the nullity was absolute, the treaty was void *ab initio*, regardless of when the nullity was recognized, and the act was without any legal effect. The previous situation had to be restored unless that was physically impossible. There could be neither confirmation of the treaty nor any act remedying the invalidity. A new instrument would have to be concluded. That had been the doctrine supported by the Special Rapporteur in 1963, but it had unfortunately been abandoned by the Commission in the 1966 draft.

42. When the act was tainted with relative nullity, the injured party was free to invoke or not to invoke the invalidity of its consent; it could agree to confirm the act and, in addition, third parties were entitled to recognition of acts concerning them already performed in good faith. In that case, the provisions of article 65, paragraphs 2, 3 and 4 were justified, whereas they were not justified in the case of absolute nullity, which had effect *erga omnes*. Articles 43, 44 and 45 could apply to cases of relative nullity, whereas the cases of absolute nullity covered by articles 46-50 ought to be classed together as being subject to the same procedure and having the same consequences. Aggravated fraud, resulting from the fraudulent conduct of a State, was an extremely serious matter in public and private law, and in international and internal law, since it invalidated consent and made the act null and void *ab initio*. That was not true of either minor misconduct or major misconduct, which did not prevent the act from being confirmed and could not therefore be included in the article on fraud proposed by Venezuela.

43. Corruption of officials was a form of fraud and should have the same consequences. It had been said that it did not occur but that was unduly optimistic. Because of its seriousness it should be mentioned in the convention.

44. Those were the reasons why the Venezuelan delegation had submitted amendments to articles 46 (A/CONF. 39/C.1/L.259 and Add.1) and 47 (A/CONF.39/C.1/L.261 and Add.1). The two amendments could perhaps be combined.

45. Mr. HARRY (Australia) said that the amendments to articles 46 and 47 submitted by his delegation (A/CONF.39/C.1/L.282 and L.283) had the same purpose as its amendments to articles 43 and 45. The Australian delegation would support the joint amendment by Chile, Japan and Mexico to delete article 47 on corruption of a representative of the State (A/CONF.39/C.1/L.264 and Add.1), and its own amendment to that article need be considered only if the article was retained.

[2] For the resumption of the discussion of article 45, see 78th meeting.

[3] The following amendments had been submitted:

To article 46—Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1); Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.259 and Add.1); Chile and Malaysia (A/CONF.39/C.1/L.263 and Add.1); United States of America (A/CONF.39/C.1/L.276); Australia (A/CONF.39/C.1/L.282).

To article 47—Peru (A/CONF.39/C.1/L.229), Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.261 and Add.1); Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1); Australia (A/CONF.39/C.1/L.283).

46. Mr. PHAN-VAN THINH (Republic of Viet-Nam) said that his delegation had submitted an amendment to article 46 (A/CONF.39/C.1/L.234/Rev.1) because the title " Fraud " did not correspond to the content of the article, which referred to " fraudulent conduct ". In French law there was a difference between " *dol* " and " *fraude* ". The word " *frauduleux* " might therefore be replaced by the word " dolosif ". In addition, the word " conduct " did not seem precise enough. It might cover various elements: not only facts and acts, but also intentions. Some States might take advantage of the latitude that left them to evade their obligations. The word " devices " therefore seemed preferable.

47. The Viet-Namese delegation had suggested that the word " through " be substituted for the word " by ", in order to stress cause and effect and to show clearly that it must be the fraudulent devices which had induced the State to conclude the treaty.

48. Mr. VARGAS (Chile) introducing his amendment to article 46 (A/CONF.39/C.1/L.263), said that the Chilean delegation had already expressed its apprehension about the mechanical and unconsidered application of rules of internal private law to public international law. There was indeed no precedent, either in doctrine or in practice or in international jurisprudence to justify the introduction of a provision on fraud into a convention on the law of treaties. There was no analogy with private law in that instance. The complex procedure for the conclusion of treaties and the necessity of ensuring the stability of treaties called for a treatment of fraud different from that applied to fraudulent conduct in private law. A treaty was an instrument of fundamental importance, in the negotiation and signature of which officials participated who were usually more capable and experienced than the private persons who signed contracts. It was for governments to take the necessary precautions to protect their interests, and that was what they did in practice. Moreover, even if a State had been deceived, it would be reluctant to admit publicly that its officials had been incompetent. What might happen was that a government might claim that the previous government had been duped, in order to discredit it.

49. In its commentary, the International Law Commission, referring to " fraudulent conduct ", said that that expression was designed to include any false statements, misrepresentations or other deceitful proceedings. What was really involved was errors relating to a fact or situation which a State had assumed to exist at the time when the treaty was concluded, and that case was dealt with in article 45. Article 46 therefore appeared unnecessary.

50. Moreover, there was no definition of fraud in the International Law Commission's draft. The concept was not always the same in internal law and that gave rise to considerable difficulties. The Chilean delegation considered that it was the duty of international tribunals to apply or interpret an agreement when it had been concluded, not to perform the functions of subsidiary legislators. Consequently it was not for them to define the concept of fraud, as the International Law Commission suggested in its commentary. It was in the light of those considerations that the Chilean delegation had proposed the deletion of article 46.

51. Mr. KEARNEY (United States of America) said that the amendment to article 46 submitted by his delegation (A/CONF.39/C.1/L.276) was motivated by the same concerns as its amendment to article 45. It should be clearly stated that a State invoking error or fraud could do so only if it had acted reasonably in the circumstances. The additions proposed were even more important in article 46, which might give rise to divisive claims if some limitations were not incorporated in the very loose language of the draft. The suggestions made were largely drafting changes which could be considered by the Drafting Committee, but the United States delegation was not opposed to a vote on its amendment.

52. The requirement that the fraudulent conduct must relate to " a fact or situation " had been adopted by the International Law Commission in article 45 for the reasons explained in paragraph (6) of its commentary to that article. That requirement had been left out of article 46, apparently because the Commission had thought that the expression " fraudulent conduct " was a sufficiently precise guide in itself. In fact, the present text of article 46 would dangerously weaken the stability of treaties.

53. It was well known that internal law was a fact in the international context. It was also known that international law might be the subject of different interpretations by the parties during the negotiations. It would therefore be disruptive of stable treaty relations to allow a State to invalidate its consent to be bound on the ground that another State had misled it concerning the relevant rules of international law.

54. Mr. CALLE Y CALLE (Peru) said that it was possible to imagine the corruption of a representative during negotiations or at the time of signature, but hardly so in the case of ratification or accession. For it was the organs of a State which decided to ratify or accede to a treaty and it was impossible to imagine the corruption of all the persons who took part collectively in the acceptance of a treaty. The Peruvian delegation had therefore submitted an amendment (A/CONF.39/C.1/L.229) which stipulated that corruption of a representative might not be invoked as invalidating consent if the treaty had been subsequently ratified by the State concerned.

55. It could be argued that article 42 implied that corruption of the representative of a State could not be invoked as invalidating consent if the State, after becoming aware of the facts " shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation ". Acceptance was not, however, as formal an act as ratification. It was therefore preferable to state clearly that if a treaty had been ratified, the corruption of an official could no longer be invoked as invalidating the consent of the State to be bound by the treaty.

56. Mr. SUAREZ (Mexico), speaking on behalf of the co-sponsors of the amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1), said that article 47 was unnecessary, since it was obvious that a treaty obtained by the corruption of a representative was voidable. It was true that there had been cases in the past in which the representatives of certain States had received valuable gifts as an inducement to act against

the interests of the State they represented, so that the rule was not unnecessary in itself. But the matter was already dealt with in article 46, for corruption was only another form of fraud. Nobody could maintain that corruption was a legal act—a lawful means of negotiation. Moreover, corruption was so rare nowadays that it was unnecessary to devote a special article to it. If a case did occur, recourse to article 46 would suffice.

57. In its commentary the International Law Commission had emphasized that a small courtesy or favour could not be invoked as a pretext for invalidating a treaty. Representatives of States often received decorations at the end of important negotiations. In the eyes of a true diplomat, however, that was not a small courtesy or favour, but rather a mark of esteem. There could be no question of corruption in such cases, for the State giving the decoration was not rewarding the representative for his docility, but for his honesty and good faith. Since article 47 was unnecessary, it should not be included in the convention.

58. Mr. NAHLIK (Poland) said that articles 45, 46, 47 and 48 formed a homogeneous and indivisible whole, since they dealt with the three classical grounds for invalidating consent which had been invoked from Roman law times. In its commentary, the International Law Commission drew attention to the rarity, in international practice, of cases in which it had been possible to invoke one of those three grounds. That was no doubt why certain governments had contested the need to include all or some of those articles in the convention.

59. His own opinion was that no advanced system of law could regard as valid legal acts based on essential error, fraud or coercion. That might be said to be one of the general principles of law referred to in Article 38 of the Statute of the International Court of Justice. Consequently, if any one of those grounds for invalidity were omitted from the convention, it would be deduced that there were grounds for invalidity other than those mentioned in it, and doubt would be cast on the principle stated at the beginning of article 39, that " the validity of a treaty may be impeached only through the application of the present articles ". Such an omission might thus represent a far greater danger to the stability of treaties than that apparently feared by those delegations which wished to limit the enumeration of grounds of invalidity.

60. It had been stated that the grounds of invalidity referred to in those articles had been borrowed from civil law. That was only because civil law had come into existence much earlier than international law; if the chronological order had been reversed, civil law would have had to borrow those grounds from international law.

61. At a pinch, corruption could be regarded as a special case of fraud, coming under article 46. But as the unfortunate experience of some countries had shown, cases of corruption were more frequent than any of the other cases mentioned in that group of articles. It was therefore important to devote a special article to that particular ground for invalidity.

62. Unlike certain delegations, he did not think it advisable to go into too much detail in those articles. The basic principle was certainly common to all legal systems, though its formulation might differ from one system to another, so that going into detail would make it difficult to agree on a common formulation. In his view, the International Law Commission's text was perfectly satisfactory and should not be changed. The Polish delegation was opposed to the deletion of any of those articles, and therefore to the Chilean amendment (A/CONF.39/C.1/L.263) to delete article 46 and the joint amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1) to delete article 47. With regard to the Peruvian amendment (A/CONF.39/C.1/L.229), the case was sufficiently covered by article 42. The amendments by Venezuela (A/CONF.39/C.1/L.261 and Add.1) and the Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1) did not appear to make any appreciable improvement in the text of article 46. The same applied to the United States amendment (A/CONF.39/C.1/L.276), which complicated the problem which the International Law Commission had presented as clearly as could be wished. The text proposed in that amendment would raise serious difficulties of interpretation and unduly reduce the scope of article 46. The addition to articles 46 and 47 proposed by Australia (A/CONF.39/C.1/L.282 and L.283), fixing a twelve-months' time-limit, made the procedure too rigid. Further, the conditions in which a State could be deprived of its right to invoke a ground for invalidity were set forth in article 42. With regard to the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), which referred to the " deliberately fraudulent conduct of a negotiating State ", he would point out that if the fraudulent act was not deliberate, it was no longer a case of fraud, but of error.

63. Mr. QUINTEROS (Chile), speaking as the co-sponsor of the amendment to delete article 47 (A/CONF.39/C.1/L.264 and Add.1), said he shared the views expressed by the Mexican representative. In his opinion, the article should be deleted because of its imprecision and of the unfortunate consequences it might have for treaty relations. The definition of the term " corruption " given in the commentary confirmed his fears; for how was it to be determined whether the influence was substantial and whether it had been exercised, directly or indirectly, on the disposition of a representative to conclude the treaty? The constituent elements of corruption could be of a moral or even a psychological nature; consequently, its assessment as a ground of invalidity could only be based on vague and uncertain criteria. Moreover, it was difficult, both for a State alleging corruption and for a State claiming injury, to establish a presumption of moral integrity of the representative who had been corrupted. Similarly, the establishment of responsibility raised serious difficulties, and there was no international body competent to rule on the application of article 47.

64. In its present form, article 47 represented a constant threat to the stability of inter-State relations. Its adoption might lead to serious abuses on the part of governments, which would be tempted to invoke corruption as having invalidated their consent to the conclusion of a treaty they wished to terminate. Though his delegation might accept the principle of article 47 from the moral standpoint, it could not, for the reasons he had explained, accept it as a ground of the invalidity of an international treaty *ab initio*, and accordingly proposed that article 47 be dropped from Part V of the draft.

65. Mr. PLANA (Philippines) said he noted that some delegations supported the use of the phrase " fraudulent conduct " in the text proposed by the International Law Commission for article 46, whereas others wished to substitute the words " fraudulent devices ". In his opinion, the problem might be solved by amending the text of article 46 to read: " A State which has been induced to conclude a treaty by fraud committed by another negotiating State may invoke such fraud as invalidating its consent to be bound by the treaty ". The term "fraud" bore a precise meaning: it suggested deceit or wilful misrepresentation. It suggested a deliberate act committed with full awareness of the effect and consequences. It connoted the intention of one party to gain something at the expense of another.

66. In his view, fraud as contemplated in the article only existed when the fraudulent act was so serious that it would have ended the negotiations if it had been discovered before the conclusion of the treaty. Consequently, there was no need to go into further detail on the general concept of fraud applicable in the law of treaties. It would be preferable, as stated in the commentary to article 46, " to leave its precise scope to be worked out in practice and in the decisions of international tribunals ".

67. Mr. TALALAEV (Union of Soviet Socialist Republics) said he did not agree with the representatives of Chile and the United States of America that cases of fraud and corruption were very unlikely to occur in contractual relations between States. From the earliest times, States had often had recourse to fraud and corruption, as well as to force, in order to conclude iniquitous treaties which were characterized by a disproportion between the rights and obligations of the two parties. The history of international law testified to that fact.

68. A well-known example quoted by Professor Guggenheim in his treatise on international law *Lehrbuch des Völkerrechts* [6] was the treaty concluded between Italy and Ethiopia in 1889. That treaty had been drawn up in Italian and Amharic. The Amharic text of article 17 said that the Emperor of Ethiopia " may " have recourse to the services of the Italian Government for all matters to be negotiated with other governments, whereas the Italian text used the word " shall " instead of " may ". Italy had taken advantage of the Italian version to establish its protectorate over Ethiopia. Another example was given by Professor Alfaro in his study of relations between Panama and the United States, [7] in which he explained how, and in what circumstances, the Government of Panama had been deliberately misled about the treaty on the Panama Canal which it had been made to sign in 1903. Among the judicial precedents was the decision of the Nuremberg Military Tribunal, which had declared void *ab initio* certain treaties whose conclusion Nazi Germany had obtained by fraudulent devices.

69. Some delegations had argued that the notion of fraud did not exist in international law. However, Sir Gerald Fitzmaurice had given a very interesting definition of fraud in his third report. [8] In any event, it was impossible to require a State whose representative had been deceived or corrupted to perform a treaty. Such a requirement would undermine the legality of international relations and would be tantamount to protecting neo-colonialism. Fraud and corruption were little better than the use of force. Treaties thus concluded could not have any legal effect and should be declared void *ab initio*.

70. The amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1) improved the text of articles 46 and 47 because it took account of the fact that dependent States were not in a position to invoke fraud or corruption to invalidate a treaty. If it were adopted, articles 41 and 42 would have to be amended consequentially.

71. It followed from what he had said that the Soviet delegation could not accept the amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1) to delete article 47. Nor could it accept the Australian amendment (A/CONF.39/C.1/L.283), for it weakened the provisions of the draft article. The Soviet delegation would also vote against the United States amendment to article 46 (A/CONF.39/C.1/L.276).

72. Mr. DUPUY (Holy See) said that he would like to make a few general remarks not specifically related to articles 46 and 47.

73. The draft convention met a fundamental need of the modern world. The universality of the law of nations had been challenged in recent years as a result of the disruption of the structure of international society. The establishment of a régime for the conclusion of treaties accepted by all nations would provide them with a common language. That showed how desirable it was that the draft convention should secure general assent.

74. Part V of the draft restated the doctrine of defects in consent which had been evolved in national systems from ancient times. The text proposed by the International Law Commission introduced into the law of treaties notions which hitherto had appeared in it only occasionally. The Holy See was bound to support any attempt to subordinate power to certain fundamental principles. It took the view that that role belonged to natural law. Of course, *jus cogens* must not be confused with natural law, since its rules were not immutable, although it contained natural law. Principles such as the prohibition of slavery and genocide had entered positive law; but those rules of natural law had been ratified and sanctioned by positive law without losing their value as fundamental dictates of the universal conscience. It could even be said that such progressive integration of natural into positive law was highly desirable, because of the increased precision it gave to positive law.

75. With regard to article 50, he wondered whether it might not be possible, even without enumerating the norms constituting *jus cogens*, to derive a principle of interpretation which would give that concept a more concrete value. The Holy See saw such a common denominator in the principle of the primacy of human rights, to which the United Nations had given universal recognition and to which it had devoted the year 1968. The convention on the law of treaties provided an opportunity of further promoting human rights in the sphere of international treaties. Why not interpret article 50 as referring essentially to human rights, since contemporary

[6] Vol. I, p. 88.

[7] "Medio Siglo de Relaciones entre Panama y los Estados Unidos", in *Lotería*, February-March 1964.

[8] *Yearbook of the International Law Commission 1958*, vol. II, p. 26.

international law tended to repudiate practices inspired by discrimination and domination and to replace them by arrangements based on mutual understanding and collaboration? Such an interpretation would come close to the common ideal of justice shared by all men of goodwill regardless of their differences.

The meeting rose at 5.55 p.m.

FORTY-SIXTH MEETING

Tuesday, 30 April 1968, at 8.55 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 46 (Fraud) and *Article 47* (Corruption of a representative of the State) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 46 and 47 of the International Law Commission's draft.

2. Mr. TABIBI (Afghanistan) said that the International Law Commission had been right in allotting an important place to the notion of fraud, thereby following the advice of three special rapporteurs on the law of treaties. Fraud had always existed and the growing number of technical and scientific treaties, together with the low technological level of the developing countries that were primarily affected by those treaties, increased the opportunities for fraudulent practices. The International Law Commission had rightly drawn a distinction between fraud and error. Fraud was characterized by the element of intention. It was normal that such an intentional act should make it possible for the injured party to terminate the treaty. Consequently, his delegation was in favour of retaining the text of article 46 as drafted by the International Law Commission.

3. Mr. GYEKE-DARKO (Ghana) said he approved of the principle in article 46. It was confirmed by eminent authorities such as McNair, and the International Law Commission had rightly noted in its commentary that fraud " destroys the whole basis of mutual confidence between the parties ". Fraud was a legal reality and the Commission had done right to formulate an article on it.

4. Those delegations that advocated the deletion of article 46 had based themselves on the paucity of precedents and on the fact that doctrine offered little guidance. Aware of those limitations, the International Law Commission had confined itself to formulating the broad notion of fraud, using the expression to include any false statements, misrepresentations or other deceitful proceedings intended to inveigle a State into giving its consent to a treaty. In defining the notion of fraud in international law, it had acted as a pioneer.

5. He was not in favour of the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1), since the expression " fraudulent devices " seemed less precise than that of " fraudulent conduct " used in the draft of article 46.

6. He was opposed to the Venezuelan amendments (A/CONF.39/C.1/L.259 and Add.1) and A/CONF.39/C.1/L.261 and Add.1), which, in the case of a multilateral treaty, would vitiate the treaty vis-à-vis all parties, whereas the Commission's text of articles 46 and 47 had the merit of saving the treaty as between the other parties, whose consent had not been obtained either by fraud or corruption. The Commission's text was also preferable in that it subordinated the invalidation of a treaty to the exercise by the injured State of the right to invoke defective consent. Finally, it was pointless to qualify fraudulent conduct by the adverb " deliberately ", as intention was implicit in the notion of fraud.

7. Although he understood the concern felt by the United States delegation, he could not support its amendment (A/CONF.39/C.1/L.276) for the reasons already explained in connexion with article 45. Difficulties would arise when it came to defining what was meant by the words " in reasonable reliance upon ". For the same reasons as those given in connexion with paragraph 1 (*b*) of article 45, his delegation would ask for a separate vote on the expression " or to the performance of the treaty " in the United States amendment.

8. With reference to the Australian amendments (A/CONF.39/C.1/L.282 and L.283), he believed that the adoption of article 42 would meet the situation envisaged in those amendments.

9. His delegation was in favour of retaining articles 46 and 47 of the draft, although the Peruvian amendment (A/CONF.39/C.1/L.229) to article 47 would be acceptable.

10. Mr. FUJISAKI (Japan) said that his delegation, with those of Chile and Mexico, proposed the deletion of article 47 (A/CONF.39/C.1/L.264 and Add.1) for three reasons. First, the idea of corruption was quite new in international law; the International Law Commission's commentary did not cite any case that could justify such an innovation. Secondly, it was to be expected that sovereign States would be represented by men of integrity. In contrast with the case of coercion, a person could not be corrupted against his will. Therefore the State that had chosen a representative who was susceptible to temptation should suffer the consequences of its mistaken choice. Thirdly, in the absence of precedents and universally accepted criteria, it might be difficult to differentiate between acts intended to weigh heavily on the will of the representative, and normal acts of courtesy or small favours. His delegation was opposed to a provision which it deemed not only unnecessary and unfair, but, to say the least, undignified.

11. Mr. POP (Romania) said that the rules defining the consequences of fraud, the purpose of which was not only to invalidate acts resulting from such practices but also to prevent them, were inherent in every legal system, including, of course, the international legal system. Since international relations were increasingly based on ethics, and in particular on good faith, it was consistent with that trend to include the notion of fraud as a ground of invalidity in the future convention. The intention was to eliminate the methods of so-called traditional diplomacy. The International Law Commission had merely applied the well-known maxim *fraus omnia corrumpit.*

12. Fraud was distinct from error and should therefore be the subject of a separate provision. Not only was the notion of fraud discussed at great length in international

law text-books, but fraud was met with in practice, even if examples were little known, for obvious reasons.

13. The Romanian delegation was in favour of retaining article 46 and was opposed to any restriction which might hamper its application to the various forms of fraud.

14. Mr. BENYI (Hungary) said he too thought that States which resorted to fraudulent devices in the negotiation of treaties should be dealt with severely; the Latin maxim cited by the previous speaker might be applied in international law in the language adopted by the International Law Commission. It was natural to require States to conduct themselves correctly and the Commission had been right in holding that fraud struck at the root of treaties and destroyed the whole basis of mutual confidence between the parties.

15. With regard to the legal consequences of the noxious practices covered by articles 46 and 47, the Hungarian delegation shared the view expressed in the amendments of Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.259 and Add.1, and A/CONF.39/C.1/L.261 and Add.1). In cases of fraud, corruption and coercion, the injured State was the victim of an unlawful act committed by the other party, but that was not so in cases of error. It followed, therefore, that the effects of fraud and corruption should be the same, from the legal point of view, as in the cases covered by articles 48 and 49. By stating that treaties concluded as a result of such practices were void, the two amendments by Congo (Brazzaville) and Venezuela were likely to give greater security to a State which had been victimized in that way. The Hungarian delegation therefore opposed the amendments by Chile (A/CONF.39/C.1/L.263 and Add.1 and L.264 and Add.1) to delete articles 46 and 47 and supported the amendments by Congo (Brazzaville) and Venezuela.

16. Mr. MARTINEZ CARO (Spain) said that in article 46 the International Law Commission had stated clearly and simply a fundamental rule of the law of treaties. It was once again an application of the principle of good faith. The Spanish delegation therefore whole-heartedly supported it. The rule in article 47 met the requirements of both justice and ethics. It reflected the fundamental idea of the law of treaties that the consent of States must be perfectly free and flawless. It had been objected that the rule was an innovation and had disadvantages from the legal as well as from the sociological and political standpoints. From the legal standpoint, it had been said that the notion of corruption was vague and difficult to prove. But the internal criminal law of all States contained provisions relating to the corruption of officials, including those most worthy of respect, namely the judges. There were two essential elements in corruption: first, the existence of inducements, promises or gifts before the expression of consent and, secondly, the existence of a relationship between those inducements, promises or gifts and the result sought, namely, to divert the representative's will in a direction advantageous to the corrupter. The difficulties with regard to evidence were no greater than in the case of other articles already adopted and, in any event, the problem was not insuperable.

17. Another objection had been that corruption was a form of fraud and that its legal effects were the same as those of coercion. In fact, fraud related to the will of the State itself, whereas corruption concerned the representative of a State. Obviously, in the last analysis, the will of the State might be impaired, but the Commission had rightly stated in its commentary that corruption was a special case which demanded separate treatment, all the more since cases of corruption might be far more frequent than cases of coercion, fraud or error.

18. The sociological arguments were no more decisive than the legal arguments. They were evidence of a false modesty and a refusal to face international realities. He could not understand how it could be maintained that article 47 endangered the stability of treaties by introducing an additional ground of invalidity, based on a non-existent practice, and on which doctrine threw little light. As long ago as the first Hague Peace Conference, the Russian Government had proposed a rule that an arbitral award obtained by corruption should be void. A speaker in the International Law Commission had claimed that corruption had been current practice in the colonialist epoch and was still frequent in neo-colonialist activities. The argument based on the lack of precedents was unconvincing. The criminal codes of all countries contained provisions relating to various offences which were very seldom committed. Even if corruption was relatively infrequent, that did not mean that a provision in the convention was unnecessary. The deletion of article 47 would be a retrograde step in international morality, which it was the purpose of the future convention to safeguard. Article 47 was not engendered by a pessimistic view of the conduct of States. It was merely a warning, which was all the more necessary now that the role of ratification was shrinking while the number of technical and economic treaties was increasing.

19. Mr. KEMPFF MERCADO (Bolivia) said he supported the amendment to article 46 submitted by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1) because when a State was deliberately guilty of fraudulent conduct, the resulting treaty was an absolute nullity. It was no longer a question of a defect of consent; the treaty was non-existent once the essential element of good faith disappeared. If that amendment was rejected, his delegation would support article 46 as drafted by the International Law Commission, because it offered legitimate protection to the State which was the victim of fraud. The same was true of article 47. Those articles would only be applied rarely but it was essential to include provisions to that effect in a convention of such scope.

20. His delegation congratulated the Commission on its innovating and progressive attitude to the topics dealt with in Part V of the draft. The Commission had produced a wise and balanced text embodying principles which would contribute to the development of positive treaty law.

21. Mr. JIMÉNEZ DE ARÉCHAGA (Uruguay) said he opposed the amendment by Chile and Malaysia (A/CONF.39/C.1/L.263 and Add.1) to delete article 46; one of the reasons why article 46 was necessary was that fraud could take widely different forms. On the other hand, he supported the amendment to delete article 47 submitted by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1), because corruption was a form of fraud. The corruption by one State of the representative of another State who was negotiating with it, was obvi-

ously fraudulent conduct on the part of the first State and came within the provisions of article 46. He did not share the view of the Chilean representative that article 46 would duplicate article 45. Fraud certainly created an error, but it was an error provoked by a State and quite separate from a mere unintentional error. Moreover, article 41, paragraph 4, gave the State that was a victim of fraud a remedy not granted to a State that was a victim of an error, that of invalidating either the whole or a part of the treaty.

22. He opposed the United States amendment (A/CONF. 39/C.1/L.276), which introduced a reservation which would be appropriate in the case of error but not in that of fraud, and the Australian amendment (A/CONF. 39/C.1/L.282), the content of which was closely linked with that of article 42, about which the Committee of the Whole had postponed its decision. Originally, the International Law Commission had inserted clauses of that kind in each article, but they had been consolidated in article 42, to which the Australian proposal could relate. He also opposed the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1), which introduced a notion, taken directly from the French civil code, that had recently been set aside by the French courts. He could not support the Peruvian amendment (A/CONF. 39/C.1/L.229), because he favoured the deletion of article 47.

23. The amendments to article 46 (A/CONF.39/C.1/L.259 and Add.1) and article 47 (A/CONF.39/C.1/L.261 and Add.1), submitted by Congo (Brazzaville) and Venezuela involved a radical alteration in the structure of those articles. In the amendment to the article on fraud, fraud was transformed into a vitiating factor which determined the absolute nullity of all the clauses of the treaty with respect to all the contracting parties. His objection to those amendments was not merely that there was no system of internal law in which fraud entailed absolute nullity but also that, at the international level, the Venezuelan text might injure rather than benefit the victim of the fraud. The International Law Commission's wording offered the defrauded State two possibilities: the continuation of the treaty or the choice between the partial or total invalidity of the treaty. The proposed formula was also too wide, since with a multilateral treaty one State might have been defrauded by another contracting State, but the treaty might nevertheless remain in force for the other contracting parties. The Venezuelan amendments declared the treaty absolutely void *erga omnes* and thus impaired the legitimate rights of other States. That would conflict with one of the fundamental legal principles on the subject, namely, that fraud should only harm its perpetrator.

24. Mr. SINCLAIR (United Kingdom) said that in its written comments his Government had expressed doubts about the value of including article 46 in the draft. After a careful study of the International Law Commission's documents, his delegation continued to doubt the need for retaining the article, because although it was prepared to accept the principle that fraud could vitiate consent, it wished to point out that examples of fraud were exceedingly rare and that the retention of article 46 might encourage States to invoke grounds of fraud more frequently. The Soviet representative had been unable, on the evidence of various textbooks, to cite more than two cases of fraud, which showed that fraud in treaties was extremely rare and that it was not really necessary to insert a provision on fraud in the convention.

25. He was not satisfied with the wording of article 46, because the terms "fraudulent conduct" and "fraud" were not defined in the International Law Commission's text and had no precise meaning in international law. The commentary rightly pointed out that those terms should not be defined in terms of the conceptions of internal law. There were wide differences of meaning between the notion of "fraud" and that of "*dol*".

26. Moreover, the commentary said: "These words are not intended to convey that all the detailed connotations given to them in internal law are necessarily applicable in international law. It is the broad concept comprised in each of these words, rather than its detailed applications in internal law, that is dealt with in the present article." But what was meant by "broad concept"? A case of "*dol*" or "fraud" could be identified when it occurred, but there was a risk that the vagueness of the terminology might be a source of unfounded allegations of fraud in the future.

27. It was noteworthy that neither the commentary to article 47 nor the legal textbooks which dealt with diplomatic history mentioned cases of corruption. There was a difference between the problem of corruption and that of coercion of the representative of a State, dealt with in article 48. In his opinion, the Committee should adopt the conclusion that corruption was such a rare occurrence that it should not be regarded as a separate ground of invalidity. Moreover, the notion of corruption was very imprecise and difficult to define. Retention of the existing wording of article 47, particularly of the word "indirectly", might represent an unnecessary threat to the stability of treaties.

28. He supported the amendment by Chile and Malaysia (A/CONF.39/C.1/L.263 and Add.1) for the deletion of article 46. If that amendment were rejected, he would vote for the United States amendment (A/CONF.39/C.1/L.276), which usefully clarified the text of the article, and the Australian amendment (A/CONF.39/C.1/L.282). But he was opposed to the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), which radically transformed the effect of the article by providing that fraudulent conduct was a ground of invalidity *ab initio*.

29. With regard to article 47, he supported the amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1) for its deletion. If that amendment were rejected, he would vote in favour of the amendments by Australia (A/CONF.39/C.1/L.283) and Peru (A/CONF.39/C.1/L.229). He was opposed to the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.261 and Add.1), which repeated the ideas expressed in their amendment to article 46.

30. Mr. CUENDET (Switzerland) said he was opposed to the amendment by Chile and Malaysia (A/CONF.39/C.1/L.263 and Add.1) to delete article 46 because he considered that a general article on fraud had its place in the convention alongside articles on error and coercion.

31. On the other hand, an article on corruption did not seem to him to be essential, as the convention was not

intended to serve as a penal code and the reference to specific forms of fraudulent conduct, among which corruption should be included, was displeasing. Article 47 was wrong in exaggerating the role of the plenipotentiary and the influence he could exercise today. For those reasons, his delegation supported the amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1) to delete article 47.

32. Some amendments sought to clarify the notion of fraud. That notion was not defined in internal codes and however detailed a definition might be, it could only be useful if applied by an independent and impartial body which, if formed, would easily be able to establish whether or not there had been fraud.

33. His delegation must oppose the two amendments by Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.259 and Add.1, L.261 and Add.1), in the light of the directly conflicting amendment submitted by Switzerland to article 39 (A/CONF.39/C.1/L.121). In civil law, the sanction for defect of consent had always been invalidation and there was no need to depart from the system adopted by the International Law Commission which made no difference between the two cases of invalidity, to which it applied the same procedure. He supported the principle of the Australian amendment (A/CONF.39/C.1/L.283).

34. Mr. ARIFF (Malaysia) said that in the contemporary practice of international law, States were usually represented by officials of high standing. Was it conceivable that such persons, who were specially chosen for their competence and integrity, would stoop so low as to commit fraud in order to procure the conclusion of a treaty that would be advantageous to the State they represented. The International Law Commission itself recognized in its commentary to article 46 that cases of fraud were likely to be rare and it did not cite a single case in support of its proposed innovation. It seemed inconceivable, at least in the present practice of States, that representatives should resort to deceit and fraud. There was a danger that an article like article 46 would cast doubt on the integrity of representatives. It ought to be possible to rely, purely and simply, on the principle of good faith. Consequently, his delegation supported the amendment to delete article 46, submitted by Chile and Malaysia (A/CONF.39/C.1/L.263 and Add.1) and the amendment to delete article 47 submitted by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1).

35. Mr. MARESCA (Italy) said that at first, when reading the text of article 46, he had thought that it was impossible for a State to induce another State to conclude a treaty by fraudulent devices, but after some reflection, he had come to the conclusion that codification should not stop half-way. Certain defects in consent, such as fraud and error, could not be left out. The rules concerning fraud should aim at giving real protection to a State which was a victim of fraud and should be couched in traditional language.

36. He was opposed to the amendment by Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.259 and Add.1), since fraud was not a ground of absolute nullity, but a ground for invalidating consent. With regard to the amendment of the Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1), he could see no reason for departing from the formula of the International Law Commission. The advantage of the United States amendment (A/CONF.39/C.1/L.276) was that it made the possibility for a State to invoke fraud conditional on the fact that the fraudulent conduct of another State concerned a situation of material importance to its consent to be bound by the treaty; if the fraud concerned only something of minor importance, it could not, in his opinion, be invoked.

37. The Italian delegation considered that fraud should not cover other cases, such as the interpretation of a treaty. It was a distortion of historical truth to quote as an example of fraud a certain treaty concluded by Italy. The text of the treaty in question had been drawn up in different languages and had given rise to different interpretations, a case covered by article 29. However, the mere fact that it had been possible to cite a difference in interpretation resulting from the use of two different languages as a case of fraud showed how necessary it was to provide some adequate procedure to decide cases of invalidity.

38. Mr. GARCIA-ORTIZ (Ecuador) said that the cases covered by article 47, though very unlikely, might nevertheless occur. To penalize corruption by invalidating the treaty was logical. Corruption, when discovered, should entail the absolute nullity of a treaty, since it was hardly likely that the injured State would be prepared to validate such an immoral proceeding by subsequently ratifying the treaty.

39. It should be noted in connexion with the Peruvian amendment (A/CONF.39/C.1/L.229) that ratification was one of the stages in the conclusion of treaties which was the fruit of the negotiation, and it could not remedy the defects in a treaty. The Peruvian amendment would confer upon ratification a retroactive effect which it did not possess, since the effects of ratification could not occur before ratification, unless the treaty expressly so provided. The Ecuadorian delegation was in favour of article 47 and therefore could not support the Peruvian amendment.

40. He could support the Congo (Brazzaville) and Venezuelan amendment (A/CONF.39/C.1/L.261 and Add.1) and the Australian amendment (A/CONF.39/C.1/L.283), but was opposed to the joint amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1), since it must be admitted that the possibility of the corruption of the representative of a State still existed.

41. With regard to article 46, the Ecuadorian delegation was in favour of the Congo (Brazzaville) and Venezuelan amendment (A/CONF.39/C.1/L.259 and Add.1); if that amendment was not adopted, it would vote for the retention of the existing text of article 46.

42. Lastly, it was wrong to assimilate fraud with error, since they afforded two completely different grounds of invalidity.

43. Mr. MOUDILENO (Congo, Brazzaville) said he did not accept the view that the notion of fraud was hard to define, since everyone knew exactly what it covered. Fraud could not be treated on the same footing as error because, though both of them led to the same result, each took an entirely different course. Fraud differed from error in that it implied wrongful intent. Moreover, article 45

dealt only with cases of relative invalidity and did not cover fraud, which could not result in the same kind of invalidity. Some representatives had argued that cases of corruption were so rare that they did not merit the Committee's attention, but he himself believed that statistics would provide evidence to the contrary. And it was no more unseemly to mention corruption than it was to speak of fraud or error.

44. He did not agree with the Italian representative that fraud and corruption should be subject to the sanction of relative nullity, since instances were increasingly frequent and should entail absolute nullity, which would protect small States, the chief victims.

The meeting rose at 10.40 p.m.

FORTY-SEVENTH MEETING

Thursday, 2 May 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 46 (Fraud) and *Article 47* (Corruption of a representative of the State) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 46 and 47 of the International Law Commission's draft.

2. Mr. MWENDWA (Kenya) said that his delegation fully supported the International Law Commission's texts of articles 46 and 47. Some delegations had claimed the scarcity of precedents for fraud and corruption as a ground for deleting the articles, while others had put forward the integrity and honesty of high State officials for the same purpose. But the suggestion that fraud and corruption did not exist was unrealistic, and his delegation categorically rejected the idea that fraud and corruption should not be eliminated from international relations.

3. It was not surprising that there were few precedents in the matter, for fraudulent and corrupt agreements were made with extreme caution and great guile. No talk of lofty ideals could wipe out the memory of treaties induced through corruption to secure concessions, treaties induced through fraud to gain territorial advantage. Now that "gunboat" diplomacy was becoming a thing of the past, it was to be feared that fraud and corruption would be used more extensively as a substitute. Indeed, the intelligence services of some States seemed to be almost exclusively engaged in devising methods of corruptly and fraudulently imposing their will on other States, and it was hardly to be expected that in so doing, the sphere of treaties would remain unexploited. The Commission had therefore been right to include provisions on fraud and corruption among the elements which vitiated consent, since they affected the very essence of treaty relations.

4. The amendments submitted by Venezuela and the Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1 and L.261 and Add.1) had some technical merit, since consent to a treaty induced by fraud and corruption was worthless *ab initio* for the purpose of concluding a treaty. But the Commission's view that the treaty was voidable at the option of the State whose consent had been procured by fraud or corruption was more realistic, for the offending State should not be enabled to benefit in any way, even negatively, from its action; it was not impossible for a treaty fraudulently or corruptly induced to be a benefit to the aggrieved State and a burden to the State which had used fraud and corruption, and in such cases, if the treaty were declared void, the offending State would automatically be released from its obligations under the treaty. The Commission's proposal that such treaties should be voidable at the option of the aggrieved State was more practical, and the Kenyan delegation would accordingly abstain from the vote on the two Venezuelan amendments. It would vote against the other amendments, believing that they would impair the effectiveness of the Commission's draft.

5. Mr. EVRIGENIS (Greece) said that scarcity of precedents might at first sight appear to be a strong argument for deleting articles 46 and 47, as might the fact that the basic concepts of those provisions were so difficult to specify that attempts to invoke them might open the way to abuses liable to weaken international contractual obligations. That argument applied less to article 46, since the concept of fraud was already rooted in all national legal systems, than to article 47, which boldly inaugurated a new institution of international law.

6. Despite some hesitation, the Greek delegation would vote for the retention of the two articles as drafted by the International Law Commission, for two reasons. First, deletion of the provisions would upset the balance of Part V of the draft which, with the present wording of article 39, was intended to contain, in principle, an exhaustive list of the grounds of invalidity: even if some delegations attached little importance to some of those grounds and others none, the reasonable solution would be to retain them in accordance with the principle of exhaustive enumeration. Secondly, the moral effect of the articles in question on international relations should not be underestimated. His delegation nevertheless reserved the right to return to those provisions during the discussion of article 62, on the procedure for their application, since it attached great importance to the ultimate text of the guarantees for the implementation of Part V.

7. His delegation would vote for the Australian amendments (A/CONF.39/C.1/L.282 and L.283). The United States amendment to article 46 (A/CONF.39/C.1/L.276) was inspired by a legitimate concern to delimit fraud and base it on objective criteria. But the Commission's text should, he thought, itself be understood as relating to fraud involving some aspect of the object of the treaty of major importance, the importance to be determined by objective tests. If the Expert Consultant would confirm his interpretation of the Commission's text, his delegation would vote for it with greater confidence.

8. Mr. MATINE-DAFTARY (Iran) said his delegation could not agree with the arguments advanced in favour of deleting articles 46 and 47. The scepticism of the representatives of some western countries with regard to those articles was understandable, for they probably

considered cases of fraud and corruption to be rare in treaty relations among themselves; but the situation was very different in the history of diplomatic relations between the western countries and the countries of Asia and Africa.

9. His delegation could vote for the amendment submitted by Venezuela and the Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), but did not consider that the other amendments would improve the International Law Commission's text.

10. One point in connexion with article 47 did not seem quite clear to his delegation. It was stated in paragraph (5) of the commentary that " the phrase ' directly or indirectly by another negotiating State ' is used in order to make it plain that the mere fact of the representative having been corrupted is not enough; corruption by another negotiating State, if it occurs, is unlikely to be overt. But in order to be a ground for invalidating the treaty, the corrupted acts must be shown to be directly or indirectly imputable to the other negotiating State. " In some cases, however, corruption could be imputable not to the contracting State, but to beneficiaries of certain provisions of a treaty, who might be individuals or large companies. It would be interesting to know whether the Commission's text covered such cases of corruption. Perhaps the Expert Consultant could clear up that point; otherwise the Drafting Committee could deal with it.

11. Mr. BREWER (Liberia) said it was essential to include in the draft convention a specific provision on fraud, which should be treated differently from other grounds for invalidating consent to be bound by a treaty. As the Commission had stated in paragraph (1) of its commentary to article 46, fraud, unlike error and corruption, " strikes at the root of agreement in a somewhat different way from innocent misrepresentation and error. It does not merely affect the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties ". Despite that statement, however, article 46 was placed on the same level as articles 45 and 47, on error and corruption, respectively, so that in all three cases a State had the same right to invoke the situation in order to invalidate a treaty. The Liberian delegation considered that fraud was a more serious offence than the other two, and that the effect of discovery of fraud should be to render the treaty void *ipso facto* with regard to the injured State.

12. Although the concept of fraud was not defined in international law, it was found in most national legal systems, and in any case, the Conference was concerned with both the codification and the progressive development of the law of treaties. The time had now come to make a distinction between the various grounds for invalidating a treaty. The Liberian delegation would therefore support the amendment by Venezuela and the Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), provided it was reworded to read: " If the conclusion of a treaty has been procured by the fraudulent conduct of a negotiating State, it is void as regards the injured State. " If that modification were accepted, the Liberian delegation would vote for the amendment; if not, it would abstain from voting.

13. His delegation could also support the Chilean, Japanese and Mexican amendment (A/CONF.39/C.1/L.264 and Add.1) to delete article 47. The article as drafted seemed to refer to the corruption of a representative by another State with a view to obtaining the consent of the corrupted official's State to be bound by the treaty; it did not refer to the possibility of subsequent corruption of the official during negotiations. The Liberian delegation did not see how the representative of a State could be corrupted with a view to obtaining that State's consent to be bound by a treaty, especially since, under article 6, a person was considered as representing a State for the purpose of adopting or authenticating the text of a treaty, or for the purpose of expressing the consent of the State to be bound by a treaty, if he produced appropriate full powers: according to that provision, article 47 might be held to refer to corruption in obtaining the appropriate full powers. The Liberian delegation was therefore in favour of deleting article 47; if the three-State amendment were not adopted, it would vote for the Peruvian amendment (A/CONF.39/C.1/L.229).

14. Mr. KEBRETH (Ethiopia) said that, since the Treaty of Uccialli of 2 May 1889 between Ethiopia and Italy [1] had been cited by the USSR representative at the forty-fifth meeting as an example of a treaty procured by fraud, he would like to add a few details. It was of course unpleasant for any representative to have a treaty concluded by his country cited as one in which that country had appeared as the victim of fraud, particularly when the International Law Commission had spoken in its commentary of the paucity of precedents and lack of guidance either in practice or in the jurisprudence of international tribunals. The charge of fraud was harmful to the dignity of both States.

15. In denouncing the Treaty of Uccialli, the Emperor Menelik II had not made any allegation of fraud in so many words; indeed, for him to have done so would have been quite out of character. The treaty had been one of friendship and alliance, drawn up in Amharic and in Italian, both texts being considered equally authentic. After its conclusion, differences had arisen concerning the meaning to be given to article XVII of the treaty. The Emperor Menelik had argued, on the basis of the Amharic text, that the article did not bind him to avail himself of the intermediary of the King of Italy in his dealings with other governments, but the Italian Government, relying on the Italian text of the treaty, [2] had argued that the Emperor had agreed to avail himself of the King of Italy's intermediary in all his dealings with foreign governments. In Decembrr 1889, the Emperor Menelik had informed the governments of European countries of his coronation directly, and not through the intermediary of the King of Italy, an act at which the Government of Italy had taken offence. Some time later, the Emperor had formally denounced the treaty in a circular letter addressed to various European governments, and the treaty had subsequently been formally annulled under article II of the Treaty of Peace concluded between Ethiopia and Italy in 1896.

16. It was thus clear that the starting-point in the chain of events that had led the Emperor Menelik to denounce the treaty had been the difference between the Amharic and Italian texts, a difference which must have arisen

[1] *British and Foreign State Papers*, Vol. 81, p. 733.

[2] *Trattati e Convenzioni fra il regno d'Italia e gli altri Stati*, Vol. 12, p. 77.

from an error striking at the very root of the treaty and therefore representing an absence of *consensus ad idem* on a highly important point of that instrument.

17. But the Emperor had had an even stronger ground for denouncing the treaty, in connexion with which he had not alleged fraud, and that was that article XVII had been interpreted by the other party in a sense which could have implied the surrender of Ethiopia's treaty-making capacity. The Emperor's denunciation of the treaty had been prompted by a love of independence which, from the modern standpoint, might be regarded as an assertion of a principle of *jus cogens*.

18. The Ethiopian delegation would vote in favour of the International Law Commission's drafts of articles 46 and 47.

19. Mr. VEROSTA (Austria) said that his delegation would vote in favour of the International Law Commission's text for article 46, and for the Australian amendment to it (A/CONF.39/C.1/L.282). On the other hand, it would vote in favour of the Chilean, Japanese and Mexican proposal (A/CONF.39/C.1/L.264 and Add.1) to delete article 47.

20. The debate had shown that there was no clear agreement on whether the term " representative " meant a diplomatic official engaged in negotiation, or a member of a government. Whatever interpretation was accepted, the provision was unacceptable in the convention. Since all civil servants were exposed to certain professional risks, no professional discrimination should be made in the convention between members of the foreign service negotiating treaties and other civil servants. Moreover, where members of the Government were concerned as negotiators, the situation dealt with in article 47 should be left to the discretion of the negotiating State. The behaviour both of civil servants, including diplomats, and of members of the Government was a domestic matter for the negotiating State. The importance of the role of individual negotiators should not be over-estimated, for they always acted under instructions and returned with results which had to be approved by their governments. Vigilant governments would always notice it if their instructions had been disregarded.

21. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that diplomatic history provided a number of examples of fraud and corruption, so that rules against such practice were needed, although not all self-respecting governments would want to admit that they had been deceived. There was no doubt that the articles were difficult and called for scrutiny by experts.

22. He supported the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259/Add.1), which would render the article more precise, but he could not support the Chilean and Malaysian amendment to delete the article (A/CONF.39/C.1/L.263), or the United States amendment (A/CONF.39/C.1/L.276), which repeated the formula included in its rejected amendment to article 45 (A/CONF.39/C.1/L.275). For similar reasons he could not support the Australian amendment either.

23. Mr. RATTRAY (Jamaica) said the question was whether a treaty should stand despite the fact that a State's consent had been obtained through fraud or through the corruption of its representatives. The Committee had been proceeding on the premise that the grounds of invalidity to be laid down in the convention would be exhaustive, and if no provision were made about fraud or corruption as grounds of invalidity, such reprehensible forms of conduct would be encouraged. Notwithstanding the alleged scarcity of judicial decisions or examples in State practice of cases of fraud or corruption, their invalidating effect was generally recognized by civilized nations as a principle of law.

24. It had been argued that fraud was merely a causative factor giving rise to error and that corruption was an instance of fraudulent conduct, and that consequently both were already covered in article 49, but he doubted whether that was so. The fraud contemplated in article 45 was one in which the defrauded State was wholly innocent. If article 47 were deleted, the corruption of the State's representative could be imputed to the State in such a way that it would be unable to rely on fraud, including fraud by its own agent, as a ground for withdrawing from the treaty, and article 46 might not apply. There appeared to be no disagreement that fraud and corruption ought to be recognized as a ground for invalidating a treaty; the disagreement in the Committee seemed to be purely on the question whether it was necessary to make express provision for those two grounds in separate clauses in the light of the other clauses of the convention. Those who supported the deletion of article 46 would be gravely perturbed if it transpired that fraud was not covered in other articles of the convention. He therefore favoured express provisions on both fraud and corruption.

25. In its written observations on the Commission's text, his Government had supported the idea that a defrauded State should be able to take steps to invalidate its consent to a treaty within a stated time after the discovery of the fraud. It should not be at liberty to continue to adhere to a treaty for an indefinite period after the discovery of the fraud and at the same time retain the right to repudiate the treaty whenever it wished. The circumstances of fraud were so varied that it might be difficult to lay down *a priori* an acceptable time-limit, especially one of very short duration. The principle underlying the fixing of a time-limit was that a defrauded State which did not take steps to withdraw its consent should be deemed to have acquiesced. He would not oppose the Australian amendment (A/CONF.39/C.1/L.282) and would be content to rely on the principle of acquiescence set out in article 42.

26. The CHAIRMAN said he would put the various amendments to article 46 to the vote, beginning with the Chilean and Malaysian amendment (A/CONF.39/C.1/L.263 and Add.1).

The Chilean and Malaysian amendment was rejected by 74 votes to 8, with 8 abstentions.

27. The CHAIRMAN put the Venezuelan and Congo (Brazzaville) amendment (A/CONF.39/C.1/L.259/Add.1) to the vote.

The Venezuelan and Congo (Brazzaville) amendment was rejected by 51 votes to 22, with 16 abstentions.

28. The CHAIRMAN said that, since the representative of Ghana had asked for a separate vote on the words " or to the performance of the treaty " in the United States amendment (A/CONF.39/C.1/L.276), he would put that phrase to the vote first.

29. Mr. BRIGGS (United States of America) said that his delegation wished to withdraw that phrase.

30. The CHAIRMAN put to the vote the United States amendment (A/CONF.39/C.1/L.276) as thus modified.

The United States amendment was rejected by 46 votes to 18, with 27 abstentions.

31. The CHAIRMAN put the Australian amendment (A/CONF.39/C.1/L.282) to the vote.

The Australian amendment was rejected by 43 votes to 18, with 32 abstentions.

32. The CHAIRMAN put the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.234) to the vote.

The amendment of the Republic of Viet-Nam was rejected by 52 votes to 1, with 32 abstentions.

Article 46 was approved and referred to the Drafting Committee.[3]

33. The CHAIRMAN said he would now put the various amendments to article 47 to the vote.

At the request of the representative of Congo (Brazzaville), the vote on the Chilean, Japanese and Mexican amendment (A/CONF.39/C.1/L.264 and Add.1) to delete article 47 was taken by roll-call.

Uruguay, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Uruguay, Argentina, Australia, Austria, Belgium, Canada, Chile, Denmark, Federal Republic of Germany, France, Guyana, Italy, Japan, Lebanon, Liberia, Liechtenstein, Mexico, Monaco, New Zealand, Norway, Peru, Portugal, Republic of Korea, San Marino, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America.

Against: Afghanistan, Algeria, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, Ceylon, China, Colombia, Congo (Brazzaville), Democratic Republic of the Congo, Cuba, Cyprus, Czechoslovakia, Dahomey, Ecuador, Ethiopia, Ghana, Guatemala, Guinea, Holy See, Hungary, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Jamaica, Kenya, Kuwait, Madagascar, Mali, Mongolia, Morocco, Netherlands, Nigeria, Pakistan, Philippines, Poland, Republic of Viet-Nam, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Zambia.

Abstaining: Finland, Gabon, Honduras, Turkey.

The Chilean, Japanese and Mexican amendment was rejected by 61 votes to 28, with 4 abstentions.

34. The CHAIRMAN put to the vote the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.261 and Add.1).

The amendment by Venezuela and Congo (Brazzaville) was rejected by 54 votes to 23, with 16 abstentions.

35. The CHAIRMAN put the Peruvian amendment (A/CONF.39/C.1/L.229) to the vote.

The Peruvian amendment was rejected by 54 votes to 10, with 27 abstentions.

36. The CHAIRMAN put the Australian amendment (A/CONF.39/C.1/L.283) to the vote.

The Australian amendment was rejected by 41 votes to 20, with 31 abstentions.

Article 47 was approved and referred to the Drafting Committee.[4]

37. Mr. WERSHOF (Canada) said that the kind of conduct contemplated in articles 46 and 47 was reprehensible and evil, but he did not think it was in the interests of world order for one party to a treaty, on a purely subjective basis, to allege fraud or corruption as a ground for unilaterally invalidating a treaty. Such a provision would not be compatible with the rule *pacta sunt servanda* which had already been approved.

38. The Canadian delegation had therefore voted in favour of the United States and Australian amendments to article 46 and against the Venezuelan amendment. It had abstained on the Chilean and Malaysian amendment to delete the article, because it considered that a suitably drafted provision on the subject of fraud should appear in the convention; the present article was not suitably drafted.

39. His delegation had voted in favour of the deletion of article 47 for the reasons given by those who had proposed such action but when that proposal had been rejected, it had voted for the Peruvian and Australian amendments but against the Venezuelan amendment.

40. His delegation's final attitude on those two articles would depend on what happened to article 62. If a reasonable procedure for the impartial adjudication of allegations of fraud and corruption could be included in the convention, that would make acceptance of articles 46 and 47 easier.

41. Mr. MATINE-DAFTARY (Iran) said that, as the Expert Consultant was absent, he hoped that in due course the Drafting Committee would be able to give some reply to his question about the scope of article 47.

Article 48 (Coercion of a representative of the State)

42. The CHAIRMAN invited the Committee to consider article 48.[5] The printed title of the article in the International Law Commission's report on its eighteenth session (A/6309/Rev.1, page 16) should be corrected to read "Coercion of a representative of the State".

43. Mr. BRIGGS (United States of America), introducing the United States amendment (A/CONF.39/C.1/L.277), said that there had unfortunately been cases in which coercion had been employed against the representative of a State in order to compel him to express the consent of his State to be bound by a treaty. His delegation therefore fully agreed that the future convention on the law of treaties should contain an article protecting States against so reprehensible a practice.

44. The Commission's text of article 48, however, was open to improvement in three respects and that was the

[3] For the resumption of the discussion on article 46, see 78th meeting.

[4] For the resumption of the discussion on article 47, see 78th meeting.

[5] The following amendments had been submitted: United States of America (A/CONF.39/C.1/L.277); Australia (A/CONF.39/C.1/L.284); France (A/CONF.39/C.1/L.300).

purpose his delegation's amendment was designed to fulfil. First, the amendment would make it clear that only the injured State could invoke coercion against its representative as a ground for invalidating the treaty. The present text, which merely provided that a treaty procured by such coercion " shall be without any legal effect ", would make it possible for the State guilty of coercion to invalidate the treaty. Secondly, the amendment would also make it clear that the coercion must have been exercised by another negotiating State, rather than by a third State or even by a third person. And thirdly, the amendment would have the effect of making the treaty voidable at the option of the injured State rather than void *ab initio*. The injured State should have the option either to take steps to invalidate the treaty or to retain it if it decided that, on balance, despite the vice of coercion, the benefits of maintaining the treaty in force outweighed the loss which it would incur if the treaty were terminated.

45. The case covered by article 48 was that of coercion directed against an individual who purported to give the consent of his State, and not against a State as such. Accordingly, there should be no automatic nullity, but the injured State should be allowed to decide where, on balance, its real interests might lie. That approach had been adopted in articles 43, 44, 45, 46 and 47, all of which dealt with very serious questions in which the injured State was given a choice of invoking, or not invoking, a ground of invalidity or termination.

46. In the International Law Commission's discussions, it had been argued that international law knew only the concept of absolute nullity and that the concept of voidability existed only in certain municipal law systems. In fact, the Commission, in adopting articles 43 to 47, had clearly recognized that some treaties were not necessarily void *ab initio*, but were voidable under international law in certain circumstances. The Committee should be careful not to limit the freedom of action of States by adopting a rule designed to apply mechanically the rigidities of a misconceived juristic logic.

47. Mr. HARRY (Australia) said that his delegation wished to modify its redraft of article 48 (A/CONF.39/C.1/L.284), by changing the concluding proviso to read " ... provided that it initiates the procedure for claiming invalidity without unreasonable delay after it discovers the coercion ". His delegation had originally proposed a twelve-month time-limit for article 48, as for previous articles, but had now decided to change the text of its redraft in order to give the Committee the opportunity to confirm that it would favour some flexible provision in article 42 or in article 62, both of which would be examined by the Committee at a later stage. Clearly something more was required than the provisions now contained in article 42 (*b*). The matter was not simply one of acquiescence; mere lapse of time did not of itself constitute acquiescence, although it could be an element in that process. The purpose of the Australian amendment was to defend the security of treaties by precluding the possibility that a State might delay indefinitely before taking action that might be open to it under article 48.

48. Articles 43 to 48 had a common theme in that each of them dealt with cases where the consent expressed by a State was defective. There was therefore no reason for the change of language and structure in article 48, compared to the other articles. In article 48, for the first and only time in that group of articles, the expression " without any legal effect " was used. The use of that expression was unnecessary because the point would be made clear under article 65 that a treaty established as void or invalid under the procedure of article 62 had no legal effect.

49. The Australian amendment, like the United States amendment (A/CONF.39/C.1/L.277), would bring article 48 more into harmony with the situation which existed under other articles in Part V; the ground of invalidity set forth in article 48, like all the other grounds in Part V, was subject to the procedure to be laid down in article 62. As now drafted, it might create the mistaken impression that a State could make its own unilateral judgment on whether a ground for invalidity existed.

50. With regard to article 62, his delegation shared the views of those who found the existing provisions of the article far from adequate. More suitable provisions for objective, impartial and prompt settlement of disputes would have to be formulated.

51. Mr. TALALAEV (Union of Soviet Socialist Republics) said he supported the International Law Commission's text of article 48, which corresponded to the existing international law in the matter and expressed a long standing rule. It had been recognized for centuries by writers on international law that a State should be released from all obligation in respect of a treaty signed by its representative when the latter was deprived of his personal freedom. History offered more than one example of such practices.

52. He was opposed to both the United States amendment (A/CONF.39/C.1/L.277) and the Australian amendment (A/CONF.39/C.1/L.284), which would introduce the concept of voidability into article 48. That suggestion was not new; it had already been made by a number of governments in their observations on article 35, the corresponding article of the 1963 draft, which stated that an expression of consent to a treaty obtained by the coercion of a representative " shall be without any legal effect ".[6] The International Law Commission had considered those comments and the suggestions to dilute that text during the second part of its seventeenth session in January 1966 and had decided to adopt the present text which made a treaty obtained through the coercion of a representative void *ab initio*. The text adopted by the Commission drew the appropriate conclusions from the fact that coercion was illegal under international law.

53. Mr. MENDOZA (Philippines) said he supported the United States and Australian amendments, which made coercion of a representative a ground of invalidity rather than a ground for declaring a treaty to " be without any legal effect ". Since the object of coercion was the representative and not the State itself, the case covered by article 48 was similar to that covered by article 47. The identity of the representative with his State was not absolute or permanent, and the coercion

[6] *Yearbook of the International Law Commission, 1963*, vol. II, p. 197.

of a representative was therefore one step removed from the coercion of the State itself. In the circumstances, it was appropriate to make the treaty voidable rather than void. The State must be presumed to have retained its free will, if not at the time of the conclusion of the treaty, then at least at a later stage, and should therefore be able to decide then on the conclusions to be drawn from the act of coercion with regard to the validity of the treaty.

54. It was suggested in the commentary that the gravity of the means employed in the case envisaged in article 48 warranted declaring the treaty null and void. It was essential, however, to take into account not only the gravity of the means but also the effect which the use of those means had. In the case in point, the effect was neither direct nor immediate and perhaps not even continuous. That being so, the circumstances mentioned in article 48 should be a basis only for invalidating the consent of the State concerned.

55. Mr. DE BRESSON (France), introducing his delegation's redraft of article 48 (A/CONF.39/C.1/L.300), said that it did not purport to alter either the scope or the substance of the article. His delegation considered that, where consent had been obtained by the coercion of a representative, it was just and right that the treaty should be invalid.

56. Article 48 dealt with a defect of consent which was in essence similar to those mentioned in the previous articles. For that reason, his delegation's redraft (A/CONF.39/C.1/L.300) did not use the expression " shall be without any legal effect ", which did not appear in any of the articles 45 to 47 and which would introduce an element of uncertainty with regard to the exact scope and implementation of the provisions of article 48. He feared that, if those words were retained, they might be construed, in combination with the wording of the second sentence of paragraph 1 of article 39, as indicating that, in the circumstances envisaged in article 48, the treaty was null and void *de plano* without the need to have recourse to the procedures set forth in article 62. Since that interpretation had been repudiated by the majority of delegations and was not favoured by the Expert Consultant, his delegation felt that it was necessary to remove all ambiguity on the subject.

57. His delegation's amendment (A/CONF.39/C.1/L.300) also made it clear that it was for the injured State, and the injured State alone, to decide on the inference to be drawn from the circumstances in question with regard to the treaty. In view of the many possible degrees of coercion and the varying effects of such acts on the behaviour of the representative concerned, the injured State might well feel that it was in its interest not to question the validity of the treaty. In any case, it was a matter for that State to decide.

58. By thus proposing a redraft of article 48 which would bring its wording more into line with articles 45 to 47, the French delegation did not wish to prejudge the question of the effects of the nullity set forth in article 48, in particular that of determining whether the case was one of relative nullity or of nullity *ab initio*. In his delegation's view, that question did not arise with respect to article 45 and the following articles, all of which were intended to enumerate cases of invalidity of treaties. The issue should be settled by including suitable provisions on the subject in article 65, a matter to which his delegation would revert at the appropriate time.

The meeting rose at 12.55 p.m.

FORTY-EIGHTH MEETING

Thursday, 2 May 1968, at 3.10 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 48 (Coercion of a representative of the State) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 48 of the International Law Commission's draft.

2. Mr. SINCLAIR (United Kingdom) said that whereas the commentary to article 47 contained no reference to historical examples, that on article 48 pointed out that history provided a number of instances of the employment of coercion against a representative to induce him to sign, accept or approve a treaty. The idea underlying article 48 therefore had its source in customary international law.

3. The United Kingdom delegation agreed with the views put forward by the French and United States representatives. He saw no reason for providing for absolute invalidity when the consent of a State was procured by the coercion of its representative, and only relative invalidity when it was obtained by fraud or the corruption of the representative. Coercion was obviously serious, but was it so serious as to deprive the consent expressed of any legal effect?

4. He assumed that in the case of a multilateral treaty, only the consent of the State procured by the coercion of its representative would be vitiated and that the treaty should remain in force with regard to the other contracting States. He therefore supported the amendments submitted by the United States (A/CONF.39/C.1/L.277), France (A/CONF.39/C.1/L.300) and Australia (A/CONF. 39/C.1/L.284).

5. Mr. MARESCA (Italy) said that article 48 was necessary for the general economy of the convention and should follow the terminology employed in the articles which preceded it. It should take due account of the interests of the State whose representative had been coerced. Like a series of other articles related to it, it required the application of an appropriate procedure, without which there would be a great risk of arbitrary action.

6. He supported the amendments submitted by the United States (A/CONF.39/C.1/L.277), France (A/CONF.39/ C.1/L.300) and Australia (A/CONF.39/C.1/L.284), which made the article clearer.

7. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that article 48 played the same part in the

system of the convention as articles 45-47. His delegation supported paragraph 1 of the United States amendment (A/CONF.39/C.1/L.277), but not paragraph 2, which substituted relative for absolute invalidity, and if adopted would greatly impair the juridical value and moral force of article 48. His last remark also applied to the French amendment (A/CONF.39/C.1/L.300).

8. He agreed with Mr. Briggs that a State guilty of an act of coercion should not be allowed to benefit from article 48 by itself claiming that the treaty was invalid if it was in its interests to do so. However, that rule should not be laid down in article 48 but should be inferable from the general principles of international law.

9. He could not agree with the insertion of a procedural time-limit as proposed in the Australian amendment (A/CONF.39/C.1/L.284).

10. Mr. NAHLIK (Poland) said he was in favour of the existing wording of article 48. The coercion of a representative of a State was such a flagrant violation of the principles of law and morality that its consequences must be regarded as without any legal effect *ab initio*.

11. The Australian representative, when introducing his delegation's amendment (A/CONF.39/C.1/L.284), had mentioned that the Polish delegation, during the discussion of articles 46 and 47, had noted that articles 45-48 formed a homogeneous group. What the Polish delegation had had in mind had merely been the origin of the articles and certain features common to all of them; it had not meant to imply that they should all be modelled on the same pattern and lose their individual character.

12. Mr. BISHOTA (United Republic of Tanzania) said he fully agreed with the opinion expressed by the International Law Commission in paragraph (2) of the commentary to article 48.

13. Mr. HARRY (Australia) said he wished to modify his delegation's amendment (A/CONF.39/C.1/L.284) by deleting the words " and at the latest within (twelve) months " and adding the word " unreasonable " before the word " delay ".

14. The CHAIRMAN said he would put the Australian amendment (A/CONF.39/C.1/L.284), as modified, to the vote.

The Australian amendment was rejected by 56 votes to 17, with 13 abstentions.

15. The CHAIRMAN said that paragraph 1 of the United States amendment (A/CONF.39/C.1/L.277) would be referred to the Drafting Committee; he would put paragraph 2 to the vote.

Paragraph 2 of the United States amendment was rejected by 44 votes to 26, with 18 abstentions.

16. The CHAIRMAN put the French amendment (A/CONF.39/C.1/L.300) to the vote.

The French amendment was rejected by 42 votes to 33, with 10 abstentions.

17. The CHAIRMAN said that draft article 48, together with paragraph 1 of the United States amendment, would be referred to the Drafting Committee.

Article 49 (Coercion of a State by the threat or use of force)

18. The CHAIRMAN invited the Committee to consider article 49 of the International Law Commission's draft.[1]

19. Mr. MOUDILENO (Congo, Brazzaville) said he wished to point out that his delegation was not in fact a co-sponsor of the amendment circulated under symbol A/CONF.39/C.1/L.67/Rev.1.

20. Mr. TABIBI (Afghanistan) moved the suspension of the meeting, in accordance with rule 27 of the rules of procedure, to enable him to consult the co-sponsors of the amendment he wished to introduce (A/CONF.39/C.1/L.67/Rev.1).

The motion to suspend the meeting was adopted by 71 votes to none, with 9 abstentions.

The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.

21. Mr. TABIBI (Afghanistan), introducing the joint amendment by nineteen States (A/CONF.39/C.1/L.67/Rev.1/Corr.1), said that according to paragraph 3 of its commentary to article 49, the International Law Commission had " decided to define coercion in terms of the ' threat or use of force in violation of the principles of the Charter' ", although some members had expressed the view that other forms of pressure, including economic pressure, ought to be mentioned in the article as falling within the concept of coercion.

22. The main distinction between the Covenant of the League of Nations and the Charter of the United Nations was that the latter recognized the role of economic force in the life of the nations. That was the reason for the growing importance of the economic organs of the United Nations. The economic plight of more than three-quarters of the world community was becoming steadily worse and causing ever more powerful reactions, and the legal relations and structure of the law of nations were affected by that socio-economic force, which was the real force of the present era.

23. Faced with that reality, the developing countries had held a number of meetings at which they had expressed their growing concern at the deterioration of their economic situation, and decided to strengthen their mutual relations at all levels, in particular at international conferences. It was in order to abide by the spirit of that decision that the representative of the developing countries had submitted their joint amendment to article 49 (A/CONF.39/C.1/L.67/Rev.1/Corr.1). Although it might appear odd to refer to economic facts at a conference on law such as the present one, it must be remembered that the very existence of States, in particular the smaller ones, was based on economic needs. The real force today was the economic force which, in view of the deplorable

[1] The following amendments had been submitted: Afghanistan, Algeria, Bolivia, Congo (Brazzaville), Ecuador, Ghana, Guinea, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, United Arab Republic, United Republic of Tanzania, Yugoslavia and Zambia (A/CONF.39/C.1/L.67/Rev.1/Corr.1); Peru (A/CONF.39/C.1/L.230); Bulgaria, Ceylon, Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Ecuador, Finland, Greece, Guatemala, Kuwait, Mexico, Spain and Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.289 and Add.1); Australia (A/CONF.39/C.1/L.296); Japan and Republic of Viet-Nam (A/CONF.39/C.1/L.298 and Add.1); China (A/CONF.39/C.1/L.301).

situation of a large number of countries, might play a vital role.

24. In paragraph 4 of Article 2 and in other provisions, the Charter of the United Nations prohibited the threat or use of force in international relations, but long before the Charter had been drafted, the Latin American countries had recognized in theory and applied in practice the rule prohibiting all recourse to force in any form. Articles 15 and 16 of the Charter of the Organization of American States [2] prohibited not only armed force but also any other form of interference or attempted threat against the personality of the State, including the use of coercive measures of an economic or political characer in order to force the sovereign will of another State, for economic and political pressure had frequently had far more harmful effects than armed intervention itself.

25. At Belgrade in 1961 and at Cairo in 1964, the Heads of State or Government of the non-aligned countries had adopted a declaration prohibiting the use of economic and political pressure in relations between States. That was a principle of law within the meaning of Article 38 of the Statute of the International Court of Justice and of articles 15 and 16 of the Charter of the Organization of American States, as well as of the Draft Declaration on Rights and Duties of States prepared by the International Law Commission. [3]

26. Economic and political pressure was contrary to the right of political and economic self-determination of nations and to the rule of equality of States recognized by the Charter and by numerous United Nations resolutions and declarations. Those were the grounds on which the joint proposal of the Latin American, African and Asian countries was based (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

27. Mr. JAGOTA (India) said he entirely agreed with the remarks of the representative of Afghanistan. The purpose of the amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), of which his country was a co-sponsor, was to define the scope of article 49 and to stipulate that the expression " threat or use of force " included economic and political pressure. The additional explanation was necessary because history had proved that economic and political pressure had been used as much as the threat or use of armed force to enable strong nations to impose their will on weaker nations. In paragraph 3 of its commentary to article 49, the International Law Commission had expressed the view that the precise scope of a " threat or use of force in violation of the principles of the Charter " should be left to be determined in practice by interpretation of the relevant provisions of the Charter. But the Conference was quite competent to define the expressions used in the articles it considered and adopted.

28. The thesis that " the threat or use of force " included economic and political pressure had been widely accepted by statesmen, diplomatists and jurists and was supported by State practice. It had been recognized by the Asian-African Legal Consultative Committee when considering article 49 at its ninth session, held at New Delhi in December 1967 (A/CONF.39/7, p. 11). Moreover, the United Nations General Assembly had adopted various resolutions in favour of the abolition of economic and political pressure and coercion in inter-State relations, in particular resolutions 2131 (XX) and 1803 (XVII). The sovereignty of States over their natural wealth and resources was proclaimed in article 1 of each of the two International Covenants on human rights, namely, the Covenant on Economic, Social and Cultural Rights, on the one hand, and the Covenant on Civil and Political Rights, on the other.

29. The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had been studying that question since 1964. At its 1967 session, a proposal had been submitted by ten countries which stated in substance that the expression " force " comprised, in particular, all forms of pressure, including those of a political and economic nature, that threatened the territorial integrity or political independence of a State.

30. Outside United Nations organizations, that principle had been affirmed in the practice of States. To cite but two examples, the Second Conference of Heads of State or Government of non-aligned Countries, held in 1964, and the tripartite meeting of October 1966, between President Tito, President Nasser and Prime Minister Mrs. Indira Ghandi, had singled out economic and political pressure as a form of force exercised by certain powers over the developing countries, and had condemned the use of economic and financial aid as an instrument of pressure. To fail to recognize that principle would be to contradict history and to refuse to establish a rule which would ensure the equality of States and freedom in the conclusion of treaties.

31. Mr. KEMPFF MERCADO (Bolivia) said that article 49 proclaimed the nullity *ab initio* of any treaty if its conclusion had been procured by a threat or use of force in violation of the principles of the Charter of the United Nations. His country, like many others, had repeatedly affirmed in the Sixth Committee of the United Nations General Assembly that the notion of the threat or use of force to procure the conclusion of international agreements included not only armed force, but also other forms of coercion that sought to bring pressure to bear on the sovereign will of a State and violated the fundamental principle of free consent. The amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) was intended to define the scope of article 49 in that respect.

32. Such forms of coercion might include economic pressure, blocking of communications and various other measures that seriously impaired the economy, development and free activity of a State. Precedents were not wanting in that field, and although the Commission had been right not to cite them in its commentary, so as to avoid controversy, it was nevertheless essential to affirm categorically the absolute invalidity of treaties imposed by coercion, in order to ensure respect for the principles of the United Nations Charter and the principle of justice on which contemporary international law was based.

33. Mr. BISHOTA (United Republic of Tanzania) said that his delegation supported article 49. It was not really an innovation, since Article 2, paragraph 4, of the United Nations Charter already proscribed the threat or use of force in relations between States. Although the use of armed force to procure the conclusion of a treaty was now unlikely, other means, including economic pres-

[2] *United Nations Treaty Series*, Vol. 119, p. 52.

[3] *Yearbook of the International Law Commission 1949*, p. 287.

sure, had been used and would be used again to procure consent. Such means included the withdrawal of aid or of promises of aid, the recall of economic experts and so on. The adoption of the nineteen-State amendment (A/CONF. 39/C.1/L.67/Rev.1/Corr.1) would help to strengthen the economic and political independence of poor countries.

34. It might be contended that the expression " economic pressure " was not clearly defined, but that was true of other expressions used in the draft articles and, as in their case, definition would result from practice. Moreover, the grounds of invalidity specified in Part V of the draft were exhaustive, and unless economic pressure was expressly mentioned in article 49, it would not be covered by that article. The Committee should therefore adopt the amendment.

35. Mr. ALVARADO (Peru), introducing his delegation's amendment (A/CONF.39/C.1/L.230), said that article 49 covered a specific case within the more general framework of articles 50 and 61. The latter articles dealt with the peremptory norms of *jus cogens* and with new peremptory norms which might emerge in general international law. The principles of the Charter referred to in article 49 came within the scope of article 50. Consequently, since on the one hand there was a general rule, article 50, and a specific rule, article 49, the latter should be expressed in concrete and precise terms. That was why the Peruvian delegation proposed to replace the word " principles " by the words " relevant norms ".

36. The other change proposed by his delegation, namely, the addition of the words " it is established that ", was designed to emphasize the connexion between articles 49 and 62, and was also based on the International Law Commission's commentary. It was essential to lay down legal safeguards and to stipulate the procedure that would govern disputes concerning the validity of a treaty, whatever the grounds involved. The existing wording of article 49 was not absolutely clear. It did not sufficiently stress the fact that cases of *ipso facto* invalidity were subject to the procedure contemplated in article 62.

37. His delegation therefore supported the retention of article 49 as amended in accordance with the changes it had proposed, which were technical and concerned procedure. The relevant norms in the United Nations Charter were a clear example of norms of international law which had acquired the character of *jus cogens* by virtue of the Charter, and his delegation agreed with the statement in paragraph (8) of the commentary that article 49 " by its formulation recognizes by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter ".

38. Mr. SMEJKAL (Czechoslovakia) said he fully agreed with the principle in article 49 that a treaty was void if its conclusion had been procured by the threat or use of force.

39. The main purpose of the amendment of which Czechoslovakia was a co-sponsor (A/CONF.39/C.1/L.289 and Add.1 and 2) was to specify the time-element for the effect of the prohibition of resort to the threat or use of force. The International Law Commission itself had said in paragraph (8) of its commentary to article 49 that " it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties ". In other words, it accepted the retroactive effect of the rule and the Czechoslovak delegation fully shared that opinion.

40. The text of the draft article seemed somewhat restrictive, however, and its effects appeared to contradict the views of the Commission. Though the United Nations Charter was the most peremptory declaration of the principles of modern customary law, it was neither the first nor the only instrument, as was clear from the Commission's commentary to article 49. Those principles had been expressed in other treaty instruments before and after the United Nations Charter, in Latin America in particular.

41. In preparing the joint amendment (A/CONF.39/C.1/L.289 and Add.1 and 2), the sponsors had borne in mind the Commission's view that it was not part of its function, in codifying the modern law of treaties, to specify on what precise date an existing general rule in another branch of international law had come to be established as such, and it was for that reason that the amendment read " ... in violation of the principles of international law embodied in the Charter of the United Nations ". The wording of the amendment brought out better than the Commission's wording that the application of article 49 was not restricted to Members of the United Nations.

42. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.296), said that it should be read with the related Australian amendment to article 65 (A/CONF.39/C.1/L.297). The Australian delegation accepted the fact that where the ground of invalidity referred to in article 49 was established under procedures to be laid down in the convention, the result was the voidance *ab initio* of the treaty. It could not agree, however, that the mere allegation by a State that when it had expressed its consent to be bound by a treaty it had been acting under coercion *ipso facto* entitled it to regard the treaty as void.

43. The word " void " in article 49 might be misleading as tending to obscure the fact that the ground of invalidity stated in article 49, as well as all the other grounds of invalidity in Part V, section 2, were subject to the procedures to be laid down in article 62. The Australian delegation was proposing that the word " invalid " used in the heading of Part V and in the introductory provision in article 39 should be substituted for the word " void ". The amendment was a technical one, in line with the Peruvian amendment (A/CONF.39/C.1/L.230). The Australian delegation was not asking for a vote on its amendment, but would like it to be referred to the Drafting Committee.

44. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) and the comments on it by the representatives of Afghanistan and the United Republic of Tanzania raised a fundamental question of interpretation of the United Nations Charter. If the canons of interpretation adopted in articles 27 and 28 of the draft were applied to Article 2 of the Charter, the thesis that the use of force meant anything other than armed force could only be rejected. That idea did not include economic pressure or political pressure today, any more than it had done in 1945. The Committee could not throw to the winds in Part V the rules of interpretation

it had adopted in Part III, and the amendment could not therefore be accepted. The Australian delegation agreed that economic or political pressure was morally reprehensible and politically undesirable, but it could not support a provision that such pressure must *ipso facto* make a treaty void and could certainly not agree that it was already *lex lata*.

45. Mr. FUJISAKI (Japan) said that in modern times a State threatened by the use of force would certainly bring the matter before a competent organ of the United Nations in the hope that the requisite steps would be taken to remove the threat; it would never simply succumb to the threat and conclude a treaty against its will. Similarly, it was hard to imagine that the aggressor country would nowadays be able to procure the conclusion of a treaty in its favour by the actual use of force and that nothing would happen until the victim of the aggression claimed that the treaty was void by alleging that its conclusion had been procured by the use of force. Article 49 gave the impression that whereas it recognized the existence of the United Nations Charter, it somehow overlooked the existence of the United Nations as the international organisation charged with the duty to maintain peace and security. The role of the United Nations should not be disregarded.

46. It seemed reasonable to require a State that was a victim of the threat or use of force to do its part to prevent the commission of such an international crime in the interest of the community of nations as well as in its own interest, before allowing it, by virtue of the present article, to declare a treaty void on the ground that it had been concluded as a result of the threat or use of force. Such were the considerations that had led the Japanese delegation to submit its amendment (A/CONF.39/C.1/L.298).

47. The Japanese delegation could not support the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), not because it considered that political and economic pressure was not reprehensible, but because the notion of " political and economic pressure " had not yet been adequately defined and established in law to be included in the convention as a ground for invalidating a treaty. The invalidation of a treaty was a very serious act in international law.

48. Mr. HU (China) said that his delegation attached very great importance to article 49, because for over a hundred years China had been bound by treaties procured by the threat or use of force. The necessary steps must now be taken to prevent the recurrence of such situations. His delegation therefore fully supported the article and was ready to approve it in its present form. That, however, did not mean that it could not be improved.

49. His delegation would vote in favour of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), which, by the addition of a few words, considerably strengthened the original text. The fourteen-State amendment (A/CONF.39/C.1/L.289), on the other hand, would limit the application of the principles of the Charter and weaken the article; his delegation could not accept it. It approved the Peruvian amendment (A/CONF.39/C.1/L.230) to add the words " if it is established that ". To allege that a State had had recourse to the threat or use of force was a serious accusation; a simple allegation should not be sufficient to secure the invalidation of the treaty.

50. It would seem that, in the draft, the word "void" had been used in different senses. His delegation had therefore proposed in its amendment (A/CONF.39/C.1/L./301) that the words " *ab initio* " be inserted immediately after the word " void " so as to remove all possible doubt. That addition would be still more necessary if the Peruvian amendment were adopted in its present form.

51. In the same amendment (A/CONF.39/C.I/L.301), his delegation had also proposed the addition of a new paragraph. Its proposal was based on the very simple idea that since the object of the convention was to ensure stability of contractual relations between States, it was better to prevent an evil than to remedy it. In other words, refusal to conclude a treaty imposed by coercion was preferable to terminating it at a later date. Of course, refusal might be difficult if the victim of coercion was a small State, but in that case it would be possible for such a State to have recourse to the competent United Nations organs. The question deserved serious consideration by the Committee.

52. Mr. AL-RAWI (Iraq) said that one of the most important tasks of the international community was to maintain peace and ensure respect for the sovereignty of all States, by enabling them to enter into treaties freely without being subject to the threat or use of force. Freedom of consent and equality were two elements of the sovereignty of States, which were very important for ensuring the stability of treaties and their performance in good faith. Consequently, if the conclusion of a treaty had been procured by the threat or use of force or any other form of economic or political pressure, the treaty must be void. Article 23, which had been approved by the Committee, stated that every treaty must be performed by the parties to it in good faith. But how could a treaty be performed in good faith if it had been imposed on the State by force?

53. The fundamental rights of all States must be respected. That principle had been recognized by the international community. The use of force had already been prohibited by the Covenant of the League of Nations and the Briand-Kellogg Pact; the idea of the invalidity of treaties procured by illegal means had already been studied and recognized in the practice of States. The Charter of the United Nations had subsequently proclaimed, in paragraph 4 of Article 2 and in other articles, the notion of the prohibition of force. In the nineteenth century, the threat and use of force had been considered a legitimate means of concluding treaties, but that was no longer the case because such methods were prohibited under the Charter.

54. Prohibition of recourse to the threat or use of force was today a principle of international law and the word " force " implied not only armed force, but all other forms of economic or political pressure. That was the opinion of the majority of nations as stated in General Assembly resolution 2131 (XX). The Conference of non-aligned Countries held in Cairo in 1964 had also condemned the application of political and economic pressure in the field of international relations. The threat or use of force, including economic and political pressure, must be condemned or prohibited if it was desired to ensure the stability of international relations.

55. It was difficult to reject that principle although certain authors and certain States refused to recognize its existence in international law in order to justify their illegal acts, safeguard their interests and ensure their supremacy. They criticized it in order to impose their will on weaker States or to maintain a situation created by illegal means and imposed by force or pressure. That involved a serious risk of instability that might lead to situations constituting a threat to security and peace. Thus treaties the conclusion of which had been procured by coercion should be considered void. The present text of article 49 did not correspond to the position adopted by the Iraqi delegation. For that reason his delegation would support the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

56. Mr. ALCIVAR-CASTILLO (Ecuador) said there was nothing new in article 49; it merely stated a rule of positive law which went back to the days of Cicero. But it was not until the First World War in 1914 had shown the dimensions which wars could assume that it was realized that a system of international security had to be found to prevent future wars; and so the League of Nations had been born. Its principles were expressed in its Covenant, which prohibited war as a means of settling disputes between States and prescribed their solution by peaceful means. It had been held that the Covenant prohibited recourse to war but not the use of force. That did not seem a serious argument. In the Covenant of the League of Nations the prohibition of recourse to war had become a norm of international law. To argue that the norm had repeatedly been violated was to regard such violations as a normal process of derogation from the law. It should also be remembered that the Charter of the United Nations had itself been violated on several occasions when it came to defending special interests of a political nature.

57. The Briand-Kellogg Pact represented a conclusive stage in the prohibition of the use of force. In that Pact, the contracting States renounced recourse to war as an instrument of national policy and agreed that the solution of all disputes and all international conflicts, of whatever nature or origin, should never be sought except by pacific means. The Pact prescribed an unconditional obligation to solve conflicts by peaceful means and prohibited war as a means of settling disputes, so that, once it entered into force, the use of force was absolutely unlawful and could not therefore create rights of any kind. From the Briand-Kellogg Pact onwards, the prohibition of the use of force had become a peremptory norm of international law admitting of no exception, and therefore partaking of the nature of *jus cogens*.

58. The Briand-Kellogg Pact had had considerable repercussions on the American continent. It was true that America had prohibited territorial conquest by force a century earlier. In 1829, Sucre, the disciple of Simon Bolívar, had proclaimed that victory conferred no rights. The principle of the prohibition of force had been strictly laid down in the various instruments drawn up at the Congress of Panama of 1826, the first Congress of Lima of 1847, the Pact of Washington of 1856 and the second Congress of Lima of 1864. The first Pan-American Conference, which met at Washington in 1889, had proclaimed that no territory in America was *res nullius*, that wars of conquest between American nations were injustifiable acts of violence, and that insecurity of territory would inevitably lead to the deplorable system of armed peace. It had been accepted that the principle of conquest was eliminated from American public law and that cessions of territory were null and void if obtained by the threat of war or the pressure of armed force.

59. The Seventh International Conference of American States, which had met at Montevideo in 1933, had drawn up the Convention on the Rights and Duties of States, article 11 of which laid down that the contracting States established as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages obtained by force. The territory of States was inviolable and could not be the subject of military occupation or other measures of force by another State.[4]

60. The Committee should particularly note the statement in the Declaration of Lima of 22 December 1938 in which the Eighth International Conference of American States reaffirmed as a fundamental principle of American public law that the occupation or acquisition of territories or any other frontier modification or settlement procured by conquest or by force or otherwise than by peaceful means would be deemed void and would have no legal effects. The undertaking not to recognise situations deriving from such facts was an obligation which could not be evaded either unilaterally or collectively.

61. A law obviously could not have retroactive effect, and to insist on that point in the articles in the convention was otiose. The rule stated in article 49 did not originate with the United Nations Charter; it was a legal norm coeval with the establishment of modern law, as the International Law Commission had noted. The fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), of which Ecuador was a co-sponsor, did not introduce any new element into the text of the draft articles, but seemed more in conformity with legal thinking and the International Law Commission's intention.

62. Regionally, in Latin America, international agreements had been concluded prohibiting the use of force and territorial conquests by violence long before the emergence of instruments concluded on a world-wide scale. Such regional agreements too appeared to be subject to the *pacta sunt servanda* rule. There was reason, therefore, to think that those obligations, once assumed and translated into the legal norms which governed the American continent, must necessarily be taken into consideration in the interpretation and for the legal effects of the rule laid down in article 49, at least with respect to regional issues.

63. The purpose of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), of which also Ecuador was a co-sponsor, was to extend the scope of the notion of force to include economic and political pressure. The argument that at San Francisco the notion had been limited solely to armed force was well-known. The United Nations Charter was not, however, a historical monument, but a living instrument which continued to advance because of the dynamic movement of a progressive international society and that dynamism was even more marked when the aim was to achieve the prime objective of the United Nations, namely the maintenance of international peace and security.

The meeting rose at 5.55 p.m.

[4] *League of Nations Treaty Series*, Vol. 165, p. 27.

FORTY-NINTH MEETING

Thursday, 2 May 1968, at 8.40 p.m

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 49 of the International Law Commission's draft.

2. Mr. NACHABE (Syria) said that the articles in Part V relating to the invalidity, termination and suspension of the operation of treaties, represented the minimum required for the progressive development of international law. The Committee should not destroy that minimum by trying to limit its scope, and should endeavour to build on the basis it provided. It was with that aim in view that his delegation had joined with other delegations from Asia, Africa and Latin America in submitting a joint amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

3. That amendment would not have been necessary if all the participants in the Conference had been agreed on the meaning to be given to the term " force ". To attempt to limit that term to the strict meaning of " armed force " was to exclude from the rule stated in article 49 essential elements such as economic and political pressure, the importance of which must not be under-estimated. Such pressure had proved just as dangerous and harmful to inter-State relations as the use of armed force. That was why it had been condemned by the United Nations General Assembly, several regional organizations and a number of international conferences. The Asian, African and Latin American States which had taken part in the Conference of non-aligned Countries in Cairo in 1964 had been unanimous in declaring that the word " force ", as used in Article 2, paragraph 4, of the United Nations Charter, should be interpreted as including such pressure. Since that time, the representatives of an increasing number of States had reiterated that view in the United Nations, in particular in the Sixth Committee, thus preparing the way for a complete and adequate formulation of the legal rule.

4. Some members of the International Law Commission had said that the wording of article 49 was flexible enough to allow of a broad interpretation; they had also maintained that the present text of the Charter did not prevent the United Nations from developing. That was an attractive and even reassuring argument, but it should not be allowed to obscure the point that the legal rule must be adequate to prevent situations that were now unacceptable.

5. Other delegations had referred to the difficulty of defining those pressures and had pointed out that the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had not succeeded in defining the word " force " in connexion with the principle that States must refrain from its use. But even though it was difficult to define those pressures, an economic pressure was not a subjective phenomenon, but a concrete fact; it was manifested in acts that could be identified. Moreover, it was an exaggeration to say that the Special Committee had failed; it could have achieved positive results if, as it was entitled to do, it had decided to settle the question by a majority vote.

6. As to the other amendments to article 49, he supported the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) on the understanding that the word " force " should be interpreted, not in the strictest sense, but as he had suggested. On the other hand, he could not accept the Peruvian amendment (A/CONF.39/C.1/L.230) or the Japanese amendment (A/CONF.39/C.1/L.298), which weakened the content of the article.

7. Mr. EL DESSOUKI (United Arab Republic), speaking as a co-sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), said he thought that the rule in article 49 should expressly mention economic and political pressures. Article 49 marked a turning point in modern international law. Its adoption might do away with the old idea that coercion invalided consent when it was used against a representative, but not when it was used against the State itself.

8. Article 49 showed that the International Law Commission had tried to widen the notion of coercion, but unfortunately it had not gone far enough. As forms of coercion invalidating the consent of a State, article 49 mentioned only the threat or use of force in violation of the principles of the United Nations Charter. But coercion could be exercised by other means, such as economic or political pressure, which were all the more to be feared because they might pass unperceived. Economic pressure could be more effective than the threat or use of force in reducing a country's power of self-determination, especially if its economy depended on a single crop or the export of a single product.

9. The recognition of economic and political pressure as a ground for the invalidity of treaties would increase the confidence of the newly-independent States in international law. The States which had taken part in the Conference of non-aligned Countries in Cairo in 1964 had condemned economic and political pressure, and declared that the word " force ", as used in Article 2, paragraph 4, of the United Nations Charter, should be interpreted as including such pressure.

10. His delegation was not yet in a position to give an opinion on the other amendments to article 49, but would study them carefully. It would, however, be unable to accept any substantive amendment to the text proposed for article 49 in the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

11. Mr. ALVAREZ TABÍO (Cuba) said that, since the fourteen-State amendment of which he was a co-sponsor (A/CONF.39/C.1/L.289 and Add.1) had been admirably defended by the representatives of Czechoslovakia and Ecuador, he would confine himself to a few points concerning article 49, which stated what was already recognized as a norm of *jus cogens*.

12. By stating that the principles referred to in article 49 were " principles of *international law embodied in* the Charter of the United Nations ", the amendment showed that the principle of absolute nullity of a treaty whose conclusion had been procured by the threat or use of force

had been recognized before the establishment of the United Nations. Since the League of Nations Covenant and the Pact of Paris, the threat or use of force were no longer accepted as a legitimate basis for international relations. Since the adoption of those instruments, threats and coercion had come under international criminal law and the *jus ad bellum* had become *jus contra bellum*. Then, in formulating that ground for a treaty being void *ab initio*, it was logical to refer to the general principles of international law, which had been further strengthened by their incorporation in the United Nations Charter.

13. The exceptional importance of article 49 lay in the fact that it abolished the long-established practices of the ruling powers, which jurists had treated as universally accepted doctrine, and rejected as contrary to international law all treaty provisions based on a relationship of subjection imposed by strong and unjust pressure.

14. In defining the forms of coercion or threat, care should be taken not to restrict the practical effects of the principle; for contemporary neo-colonialism resorted to subtle means of applying pressure in order to create unjust situations. Economic and political pressure should therefore be mentioned in article 49 on the same footing as the threat or use of force not for purely theoretical reasons, but to take account of facts. The progressive development of international law called for the unequivocal condemnation of all forms of pressure, in order to place international relations and treaty law on a firm and equitable basis.

15. The Cuban delegation would therefore vote for the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), which included economic and political pressure among the forms of coercion which made a treaty void.

16. Mr. RIPHAGEN (Netherlands) said that the comments he wished to make on article 49 also applied to article 50.

17. A treaty concluded and applied in accordance with articles 5-22 of the draft convention was *prima facie* a valid treaty, and as such should produce all the legal effects summarized in the title of article 23 in the words *pacta sunt servanda*. The rules laid down by such a treaty were " the law " between the parties. Two kinds of grounds might nevertheless be invoked for not giving all those legal effects to a treaty which was *prima facie* valid: first, certain circumstances surrounding the conclusion of the treaty, such as fraud and corruption, and secondly, certain circumstances connected with the application of the treaty, such as the permanent disappearance or destruction of an object indispensable for the execution of the treaty. In both cases, the legal consequences could be the same, namely, that the rules laid down in the treaty were no longer, or no longer fully, the law between the parties; in other words, the " pactum " was no longer " servandum ".

18. Such a deviation from the very basis of the law of treaties could only be founded on the argument that application of the rules laid down by the treaty would conflict with the application of other rules independent of the treaty, which should prevail. That was particularly apparent from articles 49 and 50. According to article 49, the application of a treaty whose conclusion had been procured by the threat or use of force conflicted with the norm which stated that the threat or use of force otherwise than in self-defence was illegal. According to article 50, the application of a treaty conflicting with a peremptory norm of general international law was a breach of a rule of *jus cogens*.

19. In law, such a hierarchy of norms was not exceptional; it existed in all national legal systems. However, the establishment of hierarchies in the sphere of international law presented certain difficulties due to the very structure of international society, which consisted of sovereign and independent States. With some degree of oversimplification, it could be asked whether a hierarchy of international rules could be established when there was no hierarchy in the relations between the States or group of States forming the international community. But the real problem was to determine which rules should prevail and who would decide whether they were applicable in a particular case. If those questions were not answered clearly and conclusively, the adoption of the principle of hierarchy, which was implicit in articles 49 and 50, would undermine the fundamental rule of *pacta sunt servanda*, which was the pivot of the whole of the law of treaties.

20. It was obviously extremely difficult to enumerate in advance the whole range of rules of international law which prevailed over rules laid down in particular treaties concluded by two or more States. Nevertheless, it was necessary to make sure that the invalidation of a particular treaty rule was not left to the unilateral decision of one of the parties to the treaty. Without that safeguard, the principle *pacta sunt servanda* would be reduced to a pious wish.

21. In itself, the rule stated in article 49 was perfectly clear and precise. He supported the principle underlying the article, namely, the principle that an aggressor State should not, in law, benefit from a treaty it had forced its victim to accept. Nevertheless, it must be borne in mind that there was a fundamental difference of opinion as to the meaning of the words " threat or use of force " in Article 2, paragraph 4, of the United Nations Charter. If those words could be interpreted as including all forms of pressure exerted by one State on another, and not just the threat or use of armed force, the scope of article 49 would be so wide as to make it a serious danger to the stability of treaty relations. To condemn pressure was one thing; to declare void treaties allegedly concluded under pressure was another thing. Even in municipal systems, where the stability of contractual relations was of far less importance than in the international society, it was only the judiciary which could grant relief in cases of undue influence of one party on the other, and even then the judge had to strike a delicate balance between the interests of sanctioning reprehensible behaviour of one of the parties to a contract, and the interests of upholding the validity of contracts.

22. His delegation could therefore accept article 49 as proposed by the International Law Commission only if it was limited to treaties whose conclusion had been procured by the threat or use of armed force, and if the invalidation of the treaty was not left to the unilateral assertion of one of the parties.

23. With regard to article 50, he was firmly convinced that international law contained rules of *jus cogens* which should prevail over any obligation a State might contract under a treaty. On the one hand, those rules prohibited

any act constituting a threat to peace and any act of aggression, and on the other they prescribed respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion. Any treaty conflicting with either of those peremptory norms should be without legal effect. He could not accept article 50 as it stood, however, because it gave no indication of the content or sources of the rules of *jus cogens*, so that a State which had concluded a treaty could always invoke *jus cogens* to evade the obligations it had accepted under the treaty. That danger was all the more serious because, under the system adopted in Part V, Section 4, of the draft articles, a State was not bound to accept an objective determination of the existence of the rule of *jus cogens* it invoked or of the applicability of that rule.

24. His delegation had not yet submitted any amendments, as it thought it was still too early to do so; he hoped, however, that the Committee would take his remarks into consideration. The concept of *jus cogens* should be more accurately defined in the draft, and a procedure should be established for the objective determination of the invalidity of a treaty regarded by one of the parties to it as being in conflict with a peremptory norm of international law.

25. Mr. HADDAD (Algeria) said that as a co-sponsor of the amendment submitted by a number of African, Asian and Latin American countries (A/CONF.39/C.1/L.67/Rev.1/Corr.1), he shared the views expressed by the representative of Afghanistan. He would like to have seen countries from other continents co-sponsoring the amendment, and hoped they would at least give it favourable consideration.

26. The action of the International Law Commission in adopting the principle of the invalidity of any treaty whose conclusion had been procured by the threat or use of force in violation of the principles of the United Nations Charter, marked a step forward in international law. Unfortunately, some delegations hesitated or refused to accept the principle as a rule of law, on the pretext that it would open the door for any State wishing to evade its obligations under a treaty. He himself thought that the article proposed by the International Law Commission would constitute a real advance if it referred expressly to economic pressure as a ground for absolute nullity, on the same footing as the threat or use of force. Economic pressure took many forms, and its effects on the victim were obviously of the same nature as those of the threat or use of force.

27. It was true that the era of the colonial treaty was past or disappearing, but there was no overlooking the fact that some countries had resorted to new and more insidious methods, suited to the present state of international relations, in an attempt to maintain and perpetuate bonds of subjection. Economic pressure, which was a characteristic of neo-colonialism, was becoming increasingly common in relations between certain countries and the newly independent States.

28. Political independence could not be an end in itself; it was even illusory if it was not backed by genuine economic independence. That was why some countries had chosen the political, economic and social system they regarded as best calculated to overcome under-development as quickly as possible. That choice provoked intense opposition from certain interests which saw their privileges threatened and then sought through economic pressure to abolish or at least restrict the right of peoples to self-determination. Such neo-colonialist practices, which affected more than two-thirds of the world's population and were retarding or nullifying all efforts to overcome under-development, should therefore be denounced with the utmost rigour.

29. It could never be sufficiently repeated that it was in the interests of all the nations of the world that the fight against under-development should be won. To achieve that end, honest and fruitful collaboration serving the mutual interests of the parties must be established in international relations, on the basis of the equality of States. Such collaboration was bound to increase the stability of international relations, ensure real and lasting peace and open the way to progress.

30. For all those reasons, the Algerian delegation considered that a provision on economic pressure as a ground for the absolute nullity of treaties should be included in article 49.

31. Mr. STREZOV (Bulgaria) said that the amendment of which his delegation was one of the co-sponsors (A/CONF.39/C.1/L.289 and Add.1) was intended to make the text of article 49 more precise. The words " in violation of the principles of the Charter of the United Nations " did not reflect the facts as accurately as was desirable. The principle stated in article 49 had been formulated long before the establishment of the United Nations. At San Francisco the authors of the Charter had incorporated in it recognized principles of international law. The nullity of a treaty procured by the threat or unlawful use of force had at that time already become *lex lata* in modern international law. It was therefore important to state in article 49 that the " principles of international law embodied " in the Charter of the United Nations were intended.

32. He believed that article 49 fulfilled the requirements of international law and hoped that the Conference would adopt its substance unanimously. The text could undoubtedly be improved, and he had therefore examined the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) with great care. The Bulgarian delegation could not accept the Peruvian amendment (A/CONF.39/C.1/L.230), since it introduced elements of imprecision and doubt. That also applied to the Japanese amendment (A/CONF.39/C.1/L.298), which would only complicate rather than clarify the problem.

33. Mr. JIMÉNEZ DE ARÉCHAGA (Uruguay) said that his delegation was in favour of article 49 as drafted by the International Law Commission or, alternatively, of the formulation proposed in the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), which did not make any radical change in the article and preserved its main merit. The article was a compromise between differing points of view and offered a text which alone was likely to secure the general agreement needed for effective recognition of the principle that a treaty was void if its conclusion had been procured by coercion. Such a remarkable advance should not be hampered by an excessive desire for perfection.

34. The Uruguayan delegation would find it hard to vote for the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) for five reasons.

35. First, the notion of economic and political pressure was too vague to rank as a defect in consent. It was not always the greatest Power which exerted that form of pressure. A member of the International Law Commission from a large industrial country had said that his country had negotiated many trade agreements from a position of weakness, because it had had to provide a country with a large population and a small territory with raw materials and food.

36. Secondly, the expression " the threat or use of force " was a time-honoured and broad term embodied in the United Nations Charter, which did not exclude particularly serious cases of economic or political coercion, such as economic blockade, for example, to which the Afghanistan amendment (A/CONF.39/C.1/L.67) specifically referred in its written explanation of reasons; economic blockade was one of the means of coercion expressly mentioned as such in the Charter.

37. Thirdly, the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), by expressly introducing a reference to economic and political pressure, might give the impression *a contrario* that those forms of pressure, if of a grave character, were not at present covered by Article 2, paragraph 4, of the Charter. On the other hand, the wording used by the International Law Commission was flexible enough and did not prejudge the content of the Charter. It could be interpreted progressively in accordance with the particular circumstances of each case, in harmony with the conditions and opinions prevailing from time to time. The resolutions of United Nations organs would naturally be taken into account in the settlement of any dispute which might arise over the application of the article. Care must be taken that the formula adopted with respect to the invalidity of treaties did not weaken a rule which governed the even more important and delicate affairs of collective security.

38. Fourthly, the principle of non-intervention which was laid down in the Charter of the Organization of American States and was the foundation of the international law of the American continent, had been cited in support of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1). But the principle of non-intervention in political and economic affairs had no relevance to article 49, and the need for expressly specifying economic and political pressure in that article as a ground for the voidance of a treaty was not deduced from it. If a treaty had been concluded by a State with all the safeguards required by the present convention, that was to say, if there had been no resort either to the threat or use of force, nor fraud, nor corruption, nor coercion of a representative of that State, the principle invoked did not apply, because then it was a case not of intervention, but of a treaty freely consented to.

39. Fifthly, in a conference for the codification of international law, the legitimate economic and social claims of the developing countries—claims which were fully supported by Uruguay—were out of place. Care should be taken to avoid establishing legal norms liable to vary with the economic power of States. Roman law had protected the weaker by the theory of " *lésion* " but, in practice, since that protection had become exaggerated, no State was willing any longer to enter into contracts with States enjoying such protection, since it established at their expense a form of *de facto* contractual incapacity. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) might lead to a discriminatory legal system. But the codification of international law was based on the principle of the equality of all States before the law, regardless of their power, and in article 5, which had already been adopted, the draft convention recognized the full capacity of all States to conclude treaties and protect their own interests.

40. Mr. KASHBAT (Mongolia) said that his delegation attached great importance to the principle stated in article 49 and considered that the very fact that the principle was stated in a separate article emphasized that importance, both for international law in general and for the law of treaties in particular. Though couched in general terms, the article well expressed the basic idea that the unlawful use of force or the threat of force was prohibited, particularly in concluding international agreements.

41. In the light of contemporary realities, however, the idea of coercion could not be restricted to armed force. Other forms of coercion, particularly economic and political forms, must be taken into account, as they were just as dangerous and perhaps more frequent than resort to armed force. Such an interpretation of the idea of coercion was wholly consistent not only with Article 2, paragraph 4 of the United Nations Charter, but also with the principles or provisions of many international instruments subsequent to the Second World War, in particular with General Assembly resolution 2160 (XXI), of 30 November 1966, which stated that " armed attack by one State against another or the use of force in any other form contrary to the Charter of the United Nations constitutes a violation of international law ". His delegation considered that in article 49 the notion of force covered all forms of coercion, including economic coercion, and it therefore supported the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

42. His delegation strongly supported the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) for the reasons given earlier by the Czechoslovak representative. The principle of prohibiting resort to force had been in existence in international law before the establishment of the United Nations; the Charter had merely taken it over and developed it. The amendment in no way limited the principle in the Charter by adding that further detail; on the contrary it made it more universal.

43. His delegation could not support the Japanese amendment (A/CONF.39/C.1/L.298) especially because under Article 39 of the Charter it was only the Security Council, not simply any organ, that was competent to determine the existence of any threat to peace and to decide what measures should be taken. Nor could it support the Australian amendment (A/CONF.39/C.1/L.296), which did not improve the International Law Commission's text. The Peruvian amendment (A/CONF.39/C.1/L.230) required that it should be established that the conclusion of a treaty had been procured by the threat or use of force, but did not specify how it was to be established.

44. Mr. CRUCHO DE ALMEIDA (Portugal) said that article 49 raised three basic questions, namely the content of the word " force ", the sanction for the use of force, and the limits of application of the article *ratione temporis*.

45. Apart from some very personal opinions, it had always been agreed that " force " in international law meant " armed force ", whether used overtly or in well-known indirect forms. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), however, reflected a recent trend towards extending that traditional interpretation to include the notion of other forms of pressure, both economic and political.

46. The Portuguese delegation could not support the amendment because, first, no method of interpretation, textual, historical or teleological, gave any ground for deducing such an extended meaning of the word " force " from the provisions of the Charter; any such extension would deprive of all meaning the solemn assertion by the Committee of the *pacta sunt servanda* rule and the principle of good faith. The purpose of the amendment was, it was said, to protect smaller States; but it must be remembered that in Europe, for example, powerful and weak States had always existed and that nevertheless no one had ever contemplated protecting the weak States by introducing principles which might undermine the stability of treaties and afford a pretext for the breach of obligations which had been assumed in due form.

47. Secondly, it might reasonably be asked whether the sanction of absolute nullity laid down in article 49 was compatible with the special structure of international law. Absolute nullity had three particularly important effects. First, an act subject to absolute nullity could not be confirmed. Draft article 49 accepted that effect of nullity, but in international law the difference between confirmation and the conclusion of a new treaty had no real significance in practice. Secondly, absolute nullity operated *ipso jure*, in other words, automatically or, as some preferred to call it, *ab initio*. That effect was explicitly rejected in the International Law Commission's draft, which implied that any ground of nullity must be subject to the verification procedure set out in article 62. Article 2, paragraph 3, of the Charter imposed on States the duty to settle their disputes by the peaceful means enumerated in Article 33 of the Charter. Those Articles manifestly excluded any possibility of unilateral action.

48. Thirdly, absolute nullity had effects *erga omnes*. That appeared to have been accepted by the International Law Commission, which had accordingly used a special wording in articles 49 and 50. The Commission, however, was thereby embarking on a dangerous course which might lead not to the progressive development of international law but to the partial denial of one of its fundamental principles, namely non-intervention. Any State or international body might use that effect of nullity as a pretext for intervening in a dispute between two States regarding an alleged ground of absolute nullity. The two Hague Conventions for the Pacific Settlement of International Disputes recognized that an offer of mediation, and that alone, was not to be regarded as an unfriendly act, and those Conventions, as well as the Statutes of the Permanent Court of International Justice and the International Court of Justice made the intervention of third States before an international court subject to very restrictive conditions. Lastly, India, the United Arab Republic and other States had submitted to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States a text (A/AC.125/L.12/Rev.1 and Corr.1) which affirmed that no State had the right to intervene directly or indirectly in the internal or external affairs of another State. For those reasons, which also applied to article 50, the attempt to introduce into international law the notion of absolute nullity seemed debatable. His delegation, therefore, strongly supported the Australian amendment.

49. With regard to the application *ratione temporis* of article 49, the International Law Commission's report indicated that the use of force had been condemned by modern international law, but it had refrained from specifying the date when that law had been established. The Portuguese delegation considered that certainty on that point had been attained only after the formation of the law of the United Nations Charter, which stated the principle explicitly in Article 2, paragraph 4.

50. In view of the foregoing, and also in view of the links between the article and the acceptance of the arbitral safeguards essential for its operation, the Portuguese delegation considered that it would be wiser to refer article 49 to a working party with a view to removing the ambiguities and doubts to which, as at present drafted, it gave rise.

51. Mr. BLIX (Sweden) said that his delegation supported the rule in article 49, which was the logical consequence of the modern outlawing of the threat or use of force. To recognize the validity of treaties whose conclusion had been procured by such means would put an inconceivable premium on their use. The rule was therefore necessary. It might further serve to put States on notice that any treaty they sought to procure by those prohibited means would constitute a precarious gain.

52. Nevertheless, his delegation was aware that although that rule deprived treaties procured by such actions of all legal force, it did not prevent recourse being had to such actions. It shared the weakness of all policies of non-recognition: if such policies did not yield results within a reasonable time, they were liable to be interpreted as refusals to recognize not only illegal acts, but also realities.

53. With regard to the application in time of article 49, the International Law Commission, basing itself on Article 2, paragraph 4, of the Charter, considered that the principle formed part of *lex lata* and that it was applicable at any rate to all treaties concluded since the entry into force of the Charter. Without wishing to go into the question of exactly when the principle had become a principle of international law, he thought it would be wise to decide, at some stage of the Conference's work, that the articles of the convention on the law of treaties would be applicable only after the entry into force of the Convention. In that case, article 49 would not have retroactive effect. That would not, however, prevent States from invoking the principle laid down in the article, in connexion with any treaty the conclusion of which had been procured by the threat or use of force after that principle had become *lex lata*, but before the entry into force of the convention.

54. Unfortunately the threat or use of force in violation of the principles of the Charter of the United Nations was not a well-defined notion, and the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) did not help in that respect, though the meaning of the text,

according to paragraph (5) of the commentary, was definitely that stated in the amendment.

55. The Japanese amendment (A/CONF.39/C.1/L.298) might, by the qualification it introduced in article 49, reduce the risk of a State's invoking the article in an unjustified manner simply to escape from undesirable obligations. But cases of the threat or use of force might arise which, even though they had not been notified to the United Nations, might nevertheless have existed. The Japanese amendment deserved, however, to be considered during the process of consultation and conciliation to which it would be indispensable to have recourse for the purposes of the article.

56. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) also developed the notion of the threat or use of force by extending it to cases of economic or political pressure. That proposal rested on a disputed interpretation of the Charter and gave rise to a divergence of views which there was little hope of reconciling at the present stage. For that reason, the International Law Commission had preferred to leave it to practice to determine the forms of coercion covered by article 49. His delegation thought it would be just as controversial to introduce expressly the notion of economic and political pressure as to limit expressly the formulation of article 49 to the use of armed force. In any case, on a question of such importance, it would be unwise to impose a majority decision which would not have the support of all the groups of States. Accordingly, his delegation hoped that the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) would not insist that it be put to the vote. On the other hand, it might be considered along with the other amendments in the process of consultation.

57. If, as his delegation would suggest, the scope of the notion of the threat or use of force should be left to be settled by practice, it would be most important to have available a mechanism for the settlement of disputes which would contribute to the solution of the problem raised by that definition.

58. His delegation thought that the Peruvian amendment (A/CONF.39/C.1/L.230) was unnecessary. It was true that there was a difference in the terminology used in articles 43 to 47, on the one hand, and articles 49 and 50 on the other. But that did not entail any legal consequence, for in both cases the ground of invalidity must be invoked—whether it had been correctly invoked would only appear if that fact was established in accordance with the procedure laid down in article 65, in which case nullity would always operate *ex tunc*.

59. The Australian amendment (A/CONF.39/C.1/L.296) would slightly improve the text by making the terminology used in the English version of the articles more consistent, without, however, changing the substance; even with the use of the word " invalid ", nullity would have to be established, and once established, would operate *ex tunc*.

60. His delegation considered that it was essential to effect a considerable improvement in the procedure for establishing nullity, and at the appropriate time it would consider the desirability of establishing conciliation and arbitration machinery. Questions of terminology were of secondary importance.

61. Mr. JACOVIDES (Cyprus) said that he attached great importance to maintaining and strengthening the principle of article 49. Whereas before the Covenant of the League of Nations, traditional doctrine did not consider the threat or use of force as a ground for invalidating a treaty the conclusion of which had been procured by such means, several international instruments, in particular the Charter of the United Nations, had since established that principle as *lex lata*. As early as 1963, in commenting on the relevant draft article, his delegation had expressed the view, before the Sixth Committee, that " if a treaty was imposed upon a State without its free consent, contrary to the spirit of the Charter and its fundamental principles, it would be for the State concerned to take its free decision in regard to the maintenance or not of that treaty, once it found itself in a position of legal equality with the other State ". In general, it was the view of his delegation that the private law analogy of contracts concluded under duress or undue influence should be borne in mind in determining the validity of international agreements arrived at when the parties were in an unequal bargaining position.

62. The notion of force had been the subject of diverse interpretations in the past. It clearly included armed force and any coercion short of the use of armed force which precluded freedom of choice. His delegation approved the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) which expressly stated that the term " force " also included economic and political pressure. Political pressure, in particular, should be expressly covered to the extent that, even without the use of armed force, it constituted coercion which violated the principles of the Charter, such as sovereign equality or self-determination. He was especially in favour of that amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) because certain States had tried to give the word " force " an excessively restrictive interpretation, and the amendment would remove all shadow of doubt on that point. Moreover, that approach corresponded to the attitude adopted by the participants at the Cairo Conference in 1964.

63. The Cypriot delegation was one of the co-sponsors of the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), which slightly altered the text of the article in order to emphasize that the principle of the prohibition of the use of force in international relations existed before the Charter, since it had been affirmed in various international instruments already mentioned, and was a valid rule of customary international law. The adoption of that amendment could only strengthen the juridical value of that principle.

64. Without wishing to discuss the juridical force of General Assembly resolutions as rules of law, he would remind the Committee that resolution 2160 (XXI) had stressed the principle in question. That showed that it was a living principle, capable of evolution and development by interpretation.

65. His delegation regretted that it was unable to support the Australian amendment (A/CONF.39/C.1/L.296), as it considered that a treaty procured by force should be void *ab initio*. It approved the position adopted by the International Law Commission on that point.

66. With regard to the amendments by Peru (A/CONF.39/C.1/L.230), Japan (A/CONF.39/C.1/L.298) and China

(A/CONF.39/C.1/L.301), he thought that, with the exception of paragraph 1 of the last-mentioned, they did not improve the present text. Paragraph 1 of the Chinese amendment, which proposed the addition of the words "*ab initio*" after the word "void" in the first line, represented a drafting improvement.

67. Mr. DE LA GUARDIA (Argentina) said that he had moderate views on article 49. He had no doubt that the principle was *lex lata* in international law and could therefore be included in the convention. On the other hand, the terms used by the International Law Commission showed a serious lack of precision. There were, in fact, cases where the use of force might be legitimate, for example, when it was used on behalf of the international community in conformity with the Charter of the United Nations. There was no definition of aggression in international law and therefore the application of the principle of the condemnation of the use of force was hazardous.

68. Moreover, the notion of force was itself badly defined. His delegation did not think that it could be extended to all types of economic and political pressure and did not favour proposals to that effect. Such an extension would only enlarge the area of imprecision. In his second report, Sir Humphrey Waldock had stated in paragraph 6 of his commentary to article 12 that "if 'coercion' were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure for example, the door to the evasion of treaty obligations might be opened very wide".[1]

69. On the other hand, his delegation had carefully considered those amendments which sought to give juridical meaning to the formulation or application of that principle, for example, the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) and the Peruvian amendment (A/CONF.39/C.1/L.230). As for the arguments that certain delegations believed they could deduce from the juridical institutions of the inter-American system, he agreed with the reply given by the representative of Uruguay.

70. The area of application *ratione temporis* of article 49 was another matter requiring solution. His delegation approved of the view expressed in the International Law Commission's commentary, that the article should not be applicable to treaties the conclusion of which had been procured by the threat or use of force at a time when the prohibition of those methods had not yet been introduced into international law, for a juridical act should be interpreted in terms of the law of its time, but the text of article 49 did not express that criterion clearly and thus opened the door to interpretation and doubt. There was a choice between the date of entry into force of the Charter of the United Nations and that of the convention on the law of treaties as the point of departure for applying the principle of article 49. He did not propose to submit a formal proposal to that effect, so as not to complicate the debate, but his delegation was willing to co-operate with those delegations who shared the same concern, in order to find a solution.

The meeting rose at 10.35 p.m.

[1] *Yearbook of the International Law Commission 1963*, Vol. II, p. 52.

FIFTIETH MEETING

Friday, 3 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 49 of the International Law Commission's draft.

2. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that the provisions of article 49 were the outcome of the progressive development of international law during the past decade. The principle of the sovereign equality of States, which was at the basis of modern international law, involved a new approach to the problem of unequal treaties obtained by coercion and in violation of *jus cogens* rules of international law. In accordance with the principles of the Charter of the United Nations, a treaty procured by the threat or use of force in any form was void. Contrary to what had been suggested, the duty of States to "refrain in their international relations from the threat or use of force" set forth in Article 2 paragraph 4, of the Charter, applied to all forms of force and not merely to armed force. It included, in particular, economic and political pressure. The language of Article 2, paragraph 4, was quite different from that used in such provisions as Article 51, on the right of self-defence, where the reference was specifically to "armed attack", in other words, to the use of military force as distinct from other forms of force.

3. Of course, it was only the threat or use of force in a manner inconsistent with the principles and purposes of the United Nations which was illegal. The use of force was legal if it was resorted to in accordance with the United Nations Charter, whence article 70 of the draft dealing with obligations imposed on an aggressor State in consequence of measures taken in conformity with the Charter. A treaty imposed by the threat of force on an aggressor in such circumstances was valid and must be respected. The position was quite the reverse where a treaty had been procured by an aggressor and incorporated the results of the aggression. For example, the cession of territory to an aggressor by virtue of such an imposed treaty was null and void.

4. The text of article 49 was generally acceptable but could still be improved. His delegation had therefore joined those of thirteen other States in sponsoring an amendment (A/CONF.39/C.1/L.289 and Add.1) for that purpose. His delegation opposed amendments such as the one by Japan (A/CONF.39/C.1/L.298) which dealt essentially with matters of procedure, which fell within the competence of the Security Council.

5. Mr. WERSHOF (Canada) said that if his delegation were to vote in favour of some version of article 49, its vote would be subject to reconsideration by the Canadian Government on the basis of the outcome of the discussion on article 62, the present provisions of which were inadequate. Article 49, which was intended to give

expression to a sound and necessary principle, must not be adopted in a context that would in effect permit a State unilaterally to claim coercion and to insist on being judge and jury in its own claim.

6. He strongly opposed the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) because the reference in the Charter to " threat or use of force " referred to military force and nothing else; it was therefore wrong to say that it included " economic or political pressure ". Moreover, the proposed inclusion of the vague expression " economic or political pressure " would threaten to destroy the *pacta sunt servanda* rule. Except where a treaty was negotiated between two super-powers of equal enormous economic and political strength, or between two small States of equal weakness, the inclusion of that expression would be an invitation to States to invalidate treaties by using it as an excuse whenever a State party to a treaty decided later that it had made a bad bargain. The long-term interests of small and new States, and those of the world order as a whole, would not be served by the inclusion of the excessively broad language thus proposed.

7. Canada had always strongly opposed the use of pressure, whether military, economic or political, except in support of the United Nations or in accordance with the Charter provisions, but at the same time, it wished the future convention on the law of treaties to preserve respect for treaties.

8. Though it had been demonstrated, by the many technical assistance projects and peace-keeping operations they had financed and carried out, that States were capable of genuinely disinterested acts, nevertheless most treaty relations were based on self-interest of an economic or political nature. In the negotiation of treaties, States actively sought to further their own aims and, for that purpose, brought political and economic pressure to bear on each other. Treaties were contractual in nature and many of them were based on bargaining. In such bargaining, one of the weapons available to a State was to withhold its agreement. That alone constituted in a sense an act of pressure, either economic or political, depending on the nature of the treaty. It was unthinkable that such a treaty should in future be subject to the arbitrary will of the party which first became dissatisfied with it and chose to allege that it had entered into it because of illegitimate economic or political pressure.

9. Voting on article 49 should be postponed for the time being and some kind of working group should be established to try to reconcile the strongly divergent views expressed during the debate. That hope applied to several articles in Part V. If the controversial provisions in Part V were to be adopted at the second session of the Conference, even by a two-thirds majority, against the reasoned, deep and sincere opposition of an important minority, the future convention on the law of treaties would not express accepted doctrines of international law.

10. Mr. OSIECKI (Poland) said that, at the beginning of the discussion on Part V, misgivings had been expressed by some delegations that its provisions did not rest on as firm a basis of existing international law as other parts of the draft. The discussion on article 49 had shown that those misgivings were unfounded.

11. The International Law Commission had drafted article 49, like the other articles on invalidity, on the basis of principles of international law which were already in force, and in particular on the principle of the sovereign equality of States. The article set forth in clear terms the consequences in the law of treaties of the general principle that, in their mutual relations, States must refrain from the threat or use of force. Any treaty concluded in violation of that principle, which was set forth in the United Nations Charter, was null and void. In the last sentence of paragraph (1) of its commentary to article 49, the International Law Commission had stressed " that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today ".

12. Article 49 had a very special role to play in preventing unequal treaties from being imposed on weak States by means of coercion in any of its many diverse forms, in violation of the United Nations Charter. His delegation was therefore satisfied generally with article 49, but at the same time would like to see certain improvements made to the text, such as that proposed in the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), which would make the reference to the principles of the Charter of the United Nations clearer by amending the wording to read " principles of international law embodied in the Charter ". It was not only treaties which violated the Charter itself which were null and void, but also treaties concluded in a manner inconsistent with the principles of international law embodied in the Charter. The Charter had not been created *ex nihilo*; it represented the outcome of a long process of development of international law. The provisions of Article 2, paragraph 4, had their roots in the Covenant of the League of Nations of 1919 and the Pact of Paris of 1928. The prohibition of the use of force in international relations had thus been established as a rule of international law well before the drafting of the Charter, and had been endorsed in the judgments of the Allied military tribunals for the trial of the war criminals of the Second World War. The Charter was but one of many expressions, although of course the most important one, of an already existing principle of contemporary international law.

13. His delegation also supported the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), to introduce into article 49 an express reference to economic or political pressure. That amendment deserved close attention, because it reflected the true meaning to be given to the terms of article 49. The prohibition of the " threat or use of force " meant that a treaty procured by any form of coercion was null and void. There was no reason to confine the meaning of that expression to certain forms of force, thereby leaving outside the prohibition other types of coercion which were equally unlawful.

14. His delegation had serious misgivings regarding those amendments (A/CONF.39/C.1/L.230, L.298, and L.301) which diverged from the approach adopted by the International Law Commission in its formulation of Part V of the draft. The purpose of the various articles in Part V was to set forth the various grounds of invalidity and termination from the point of view of substance. It would serve

no useful purpose to introduce procedural provisions into any of those articles.

15. His delegation also opposed the Australian amendment (A/CONF.39/C.1/L.296), since it would detract from the capital importance of article 49 by removing the concept of absolute nullity which alone was appropriate to the legal and moral injury done to the international community by the violation of the principles of international law embodied in the United Nations Charter.

16. Mr. HARRY (Australia) said that he would like to begin by pointing out to the supporters of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) that it had been made abundantly clear in the Special Committee on Friendly Relations that the correct interpretation of the relevant Articles of the Charter was that the prohibition therein contained on the use of force referred to physical force, armed force of the type used by the aggressor powers in the war that was still raging when the Charter was drafted at the San Francisco Conference. The authors of the Charter had not dealt with economics or politics in that context. Their countries were still engaged in collective self-defence against an aggressive armed attack. Economic objectives were dealt with in other parts of the Charter and in other terms. That interpretation was confirmed by the preparatory work of the United Nations Conference on International Organization, at which a Brazilian amendment to add a reference to economic pressure in Article 2, paragraph 4, of the Charter had been rejected. The records of that Conference showed that the amendment had been proposed precisely because the text did not deal with economic pressure; it had been rejected because the United Nations had not wished to equate economic pressure with armed force.

17. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) had been introduced because its authors were fully aware that the International Law Commission, in referring to the " threat or use of force " had not intended to include economic or political pressure. The authors of the amendment hoped thereby at one and the same time to enlarge the meaning of the Commission's text and to put a gloss on the Charter.

18. Some of the supporters of the amendment contended that, although the Charter, at the time it was ratified, did not clearly prohibit economic pressure, a rule of prohibition had since become generally accepted, and in support of that contention, had referred to a number of resolutions of the General Assembly. But the Assembly was not a legislative body; if it had had law-making powers, the supporters of the amendment would not be relying on declarations of regional meetings or of the heads of a group of States in support of their contention.

19. Nor had it been seriously argued that a rule of customary law had developed, which prohibited economic pressure. Such a proposition could not be sustained, because a substantial section of the international community flatly denied the existence of any such rule.

20. The supporters of the amendment were thus asking the Conference to do what the Charter had not done, what the General Assembly could not do, and what the International Law Commission had not attempted to do, even *de lege ferenda*. The only question before the Conference was whether it would itself attempt to draft a rule which the International Law Commission had not recommended. If the sponsors of the nineteen-State amendment were prepared to put forward an independent draft article defining precisely the type and degree of economic and political pressure which, in their view, amounted to such a threat to the territorial integrity or political independence of a State as to have the same effect as armed force in coercing the State, the Australian delegation would be prepared to consider such a proposal. Any proposal on those lines could be examined in detail by the working group suggested by the Canadian delegation. Alternatively the Australian delegation would be prepared to try and formulate, in a working group, some kind of declaration on economic threats or attacks.

21. He supported the suggestion by the Swedish representative that, at some stage, the Committee should decide that the draft articles would apply only to treaties concluded after the entry into force of the future convention on the law of treaties. That proposition would conform with the general principle of non-retroactivity; it would not, of course, prejudice the application to earlier treaties of any rules that were already *lex lata* before the convention's entry into force. The point was particularly relevant to the subject-matter of article 49.

22. Mr. HARASZTI (Hungary) said that, in drafting article 49, which was one of the most important articles of the whole draft, the International Law Commission had drawn the necessary conclusions from the prohibition of the threat or use of force contained in Article 2, paragraph 4, of the Charter and had abandoned the out-of-date theory according to which coercion vitiated the consent given to a treaty only when it was directed against the representative of the State whose consent was expressed. His delegation therefore strongly supported article 49.

23. But the wording of the article could still be improved in order to remove ambiguities. In particular, the incorporation of the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) was fully in line with the purpose of the article. It would make it clear that, as indicated in paragraph (5) of the commentary to the article, the prohibition of the threat or use of force was " a rule of general international law " which was of " universal application " and " not... confined in its application to Members of the United Nations ". It was not simply a case of violation of the Charter, but an obvious example of a breach of a rule of general international law having the character of *jus cogens*.

24. His delegation also favoured the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), which would serve to remove all doubt regarding the meaning of the prohibition of the threat or use of force. On that point, there had been differences of interpretation. His delegation rejected the restrictive interpretation which would confine the prohibition to armed force, and strongly supported the broad interpretation, based on the terms of Article 2, paragraph 4, of the Charter, which clearly did not limit the concept of the use of force to armed attack, as did Article 51 on the right of self-defence. The inclusion of all forms of coercion would safeguard the interests of the large majority of States, particularly of the developing States, which were more exposed to political and economic pressure.

25. His delegation could not support the amendment submitted by Peru (A/CONF.39/C.1/L.230), which would limit considerably the application of article 49 and was not consistent with the provisions of article 62. It also opposed the amendment by Japan (A/CONF.39/C.1/L.298 and Add.1), which would introduce a preliminary requirement that was at variance with the concept of the absolute nullity of a treaty obtained by measures of coercion.

26. Mr. SINCLAIR (United Kingdom) said that, since article 49 clearly derived from the principle laid down in Article 2, paragraph 4, of the United Nations Charter, the Committee was concerned with, *inter alia*, a point of Charter interpretation. Although the consequences of the use of force in treaty law were perhaps not so clearly established as the general prohibition contained in the Charter, there was considerable authority for the view expressed by Lord McNair that, in modern circumstances, it would " be the duty of an international tribunal ... to decline to uphold [the treaty] in favour of a party which had secured another party's consent by means of the illegal use or threat of force ".[1] On the question of the precise meaning of the word " force " in that context, it was stated in paragraph (3) of the commentary that some members of the Commission had expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion; that approach was now expressed in the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

27. Since the Commission had decided to define coercion in terms of the " threat or use of force in violation of the principles of the Charter ", the Committee was bound to consider the question of Charter interpretation in the light of the general rule of interpretation set out in article 27 of the draft. If the interpretation left the meaning ambiguous or obscure, or led to a result which was manifestly absurd or unreasonable, recourse was permissible under article 28 to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

28. Where the interpretation of the word " force " in Article 2, paragraph 4, of the Charter was concerned, it would be seen that the seventh preambular paragraph of the Charter expressed the determination of the peoples of the United Nations " to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ". One of the principles referred to in that paragraph was clearly the one set out in Article 2, paragraph 4, and the methods whereby the principle was to be maintained were set out in Chapters VI and VII of the Charter.

29. Article 39 authorized the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression, and in making such determination the Security Council clearly must have regard to the principle laid down in Article 2, paragraph 4. The collective response which the United Nations might make to any breach by a Member State of its fundamental obligation under Article 2, paragraph 4, involved the application of collective measures, which, under Article 41, might include measures not involving the use of armed force, such as complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication; if such measures proved inadequate, the Security Council might, under Article 42, take action by air, sea or land forces in accordance with special agreements to be negotiated under Article 43. It would be noted that Article 44 began with the words " When the Security Council has decided to use force ", and there could be no doubt that, in the context of that Article, the word " force " could only mean armed force. The whole structure of Chapter VII of the Charter was based on the proposition that collective measures which might ultimately involve the use of armed force in the common interest were the appropriate response to a breach of the fundamental obligation set out in Article 2, paragraph 4: in general, it was a breach of the individual obligation not to resort to the threat or use of force which provoked the collective response which lay at the discretion of the Security Council.

30. The interpretation of the term " force " as used in Article 2, paragraph 4, had given rise to heated controversy in the Special Committee on Friendly Relations. The United Kingdom delegation was convinced that the obligation to refrain from the threat or use of force under Article 2, paragraph 4, related to the threat or use of physical force. Any extended interpretation of that phrase went beyond the sphere of interpretation into the sphere of amendment or modification of the Charter. And the Committee would remember that it had recently decided to delete article 38 of the draft, providing for modification of treaties by subsequent practice.

31. The United Kingdom fully agreed that economic and political pressure might have disturbing consequences for the maintenance of friendly relations between States, but considered that the term " economic and political pressure " had no objective content. It might be unfortunate that there were considerable differences in the size, resources, productivity and wealth of the nations of the international community, but those differences did exist, and since they existed, it would be only too easy for any State to maintain that a particular treaty had been procured by the use of economic or political pressure. Of course, there might be cases where flagrant economic or political pressure amounting to coercion could justify condemnation of a treaty, but the principle *pacta sunt servanda* would be seriously jeopardized if such a vague concept as economic or political pressure were accepted as a ground for the voidance of treaties.

32. Although his delegation did not question the fact that there had unfortunately been cases in the past where treaties had been procured by the threat of force, and did not seek to uphold the continued validity of such treaties, it could not agree that the concept of the threat or use of force, as used in Article 2, paragraph 4, of the Charter, extended to so broad a concept as economic or political pressure. If it were maintained that the terms of the Charter were unclear in their reference to " force " or " armed force ", then the preparatory work of the Charter showed convincingly that Article 2, paragraph 4, was to be interpreted as referring only to physical force. The Australian representative had drawn attention to that point during the present debate. For all those reasons, the United Kingdom delegation strongly opposed the nineteen-State amendment, in the belief that the

[1] McNair, *The Law of Treaties*, p. 210.

economic problems underlying that proposal by a number of developing countries would not be solved by the adoption of a text which must inevitably create a serious threat to the stability and security of treaty relations.

33. It would be seen from paragraphs (7) and (8) of the commentary that the temporal application of one of the rules laid down in the draft was raised for the first time in connexion with article 49. His delegation agreed with the Commission's statement in paragraph (8) of its commentary to the article that " the invalidity of a treaty procured by the threat or use of force was a *lex lata* principle, and that the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4 ... authoritatively declares the modern customary law regarding the threat or use of force ". As the Swedish representative had pointed out at the previous meeting, the Committee was not discussing the general retroactivity of the draft articles, but merely the temporal application of the rule in article 49 against the background of the development of customary international law in the matter.

34. With regard to the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), his delegation had some hesitation as to the date from which the modern law prohibiting the threat or use of force could be regarded as established. The Pact of Paris was certainly a landmark in the emergence of the law laid down in Article 2, paragraph 4, of the Charter, but it was difficult to agree on the exact date, and the fourteen-State amendment provided no guidance as to the temporal application of the customary rule set out in Article 49.

35. The United Kingdom delegation saw some merit in the amendments submitted by Peru (A/CONF.39/C.1/L.230) and by Japan and the Republic of Viet-Nam (A/CONF.39/C.1/L.298 and Add.1), and considered that the Australian amendment (A/CONF.39/C.1/L.296) clarified the Commission's text.

36. Before concluding, he would like to emphasize again the over-riding need for some kind of objective machinery to determine whether or not a treaty had been procured by the threat or use of force. A charge of coercion against another State was very serious, and could not be left simply to allegation and counter-allegation, for that would introduce an unacceptable element of uncertainty into the law of treaties. His delegation's position on article 49 would therefore be finally determined in the light of the decisions reached on the text of article 62, which in its present form was clearly inadequate and unsatisfactory; the United Kingdom was prepared to take part in any consultations which might be undertaken to revise article 62.

37. It wished to point out, however, that adoption of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) would seriously jeopardize the prospect of producing a convention which would command the support of many delegations. The purpose of the Conference was to produce a convention on the law of treaties which would be an historic landmark in the movement towards the progressive development and codification of international law; future jurists would judge the success of the Conference by the extent to which participants had been able to unite their endeavours. He therefore appealed to the supporters of the nineteen-State and fourteen-State amendments not to press their proposals to the vote, and hoped that some of the suggestions made by the Australian delegation would be further explored.

38. Mr. SAULESCU (Romania) said that the experience of centuries of human suffering and of untold destruction of material and spiritual values had demonstrated the great danger to civilization and progress of wars of aggression and of the use of force. It was therefore obvious that war and the use or threat of force should be outlawed as a means of settling disputes between States. That principle of general international law, proclaimed by a number of international instruments before the Second World War, had been reaffirmed with renewed vigour with the adoption of the United Nations Charter. The formal prohibition of recourse to the threat or use of force in Article 2, paragraph 4, of the Charter had crystallized the development of that law. Not only could force not create law, but any case of force as such constituted a negation of law; that was why some provisions of the Charter permitted recourse to force only in the exceptional circumstances of legitimate defence against armed attack or, under stipulated conditions, for the restoration of peace.

39. In connexion with article 49, the Romanian delegation subscribed to the view of the International Law Commission that the invalidity of a treaty procured by the threat or use of force was a *lex lata* principle, based on international custom and recognized in the many conventions and other international instruments referred to in the Commission's report on its 1966 sessions. His delegation considered that article 49 rendered void all treaties concluded in violation of the principle of international law embodied in the United Nations Charter and concerned all treaty relations, bilateral or multilateral, between States Members of the United Nations or other States. It was therefore in favour of the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1).

40. Invalidity should apply to any treaty which had been concluded by the threat or use of force " against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations ", to use the terms of Article 2, paragraph 4, of the Charter. In his delegation's opinion, under the system of the Charter, all forms of coercion which could be exercised against another State with a view to concluding a treaty, such as economic, political and other pressure, should entail invalidity of the treaty in question, and those forms of coercion should be stated specifically in article 49, as was proposed in the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1). The States which had submitted the amendment and a number of others had made similar representations in the United Nations General Assembly, in order to express more specifically an idea accepted by the international community when it had unanimously adopted General Assembly resolution 2131 (XX). That resolution had clearly proclaimed that no State might use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to receive from it advantages of any kind.

41. By including economic and political pressure among the forms of violation of the principle prohibiting the

use or threat of force, article 49 would gain in efficacy; its preventive force would be increased, and it would represent a sounder and more certain legal means of substituting the rule of law for the rule of force. Adoption of the rule in article 49, strengthened by the nineteen-State and fourteen-State amendments, would mark a crucial point in the progressive development of international law.

42. Miss LAURENS (Indonesia) said that, although the International Law Commission had shown itself to have an open mind for the realities of modern international relations by including article 49 in the draft convention, her delegation considered that the text could be further improved by an expansion of its scope which would render it even more in keeping with those realities. Indonesia therefore welcomed the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) in the belief that it complied fully with the last part of Article 4, paragraph 2, of the Charter.

43. According to paragraph (2) of the commentary to article 49, international jurists had expressed their fears on two points, namely, that to recognize the principle as a legal rule might open the door to the evasion of treaties by encouraging unfounded assertions of coercion, and that the rule would be ineffective, because the same threat or compulsion that had procured the conclusion of the treaty would also procure its execution. The Indonesian delegation did not believe that there were any valid grounds for those fears. First, article 23, recently approved by the Committee, provided an adequate safeguard and, in view of the strength of public opinion, a country would be unlikely to invoke a rule in article 49 without well-founded reasons, since it would otherwise lose its prestige in the eyes of the world. Secondly, a strongly and explicitly worded article 49 could serve as a deterrent against such conduct by a State contemplating the use of force, because its intended victim would have a strong legal basis for action.

44. With regard to the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), her delegation did not feel so strongly about the need to include the words " of international law embodied in ", since that would seem to be implicit in the International Law Commission's text, and the commentary was clear on the point; it had, however, no objection to that amendment. It would vote on the remaining amendments in the light of the considerations she had just expressed.

45. Mr. VARGAS (Chile) said that his delegation strongly supported the principle set out in article 49. It was convinced of the importance of developing that rule in the convention as explicitly as possible, so as to preclude any possibility of subjective interpretation. So, although his delegation fully agreed with the substance of the International Law Commission's text, it considered that the provision might give rise to certain doubts which, although they could be dispelled by recourse to the interpretation procedure, should preferably be resolved clearly and unequivocally in the article itself.

46. The Commission's text gave rise to two main problems: the meaning of the concept of " force " and the date on which the rule set out in the article should come into effect. The purpose of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) was to settle the first problem by mentioning economic and political pressure as a ground for avoiding a treaty. Chile decisively rejected the use of economic and political pressure in international life because it was a reprehensible form of intervention, liable to involve the international responsibility of the State exercising it.

47. It was not sure, however, that the means proposed in the nineteen-State amendment was the best way of handling the problem, because the amended text would link the new provision with the principles of the Charter, thus implying that those principles, particularly that in Article 2, paragraph 4, contained a formal prohibition of economic and political pressure in the same terms as the prohibition of the threat or use of physical force. His delegation did not consider that that was the case, or that the contention could be proved by precedent. The Brazilian delegation to the 1945 San Francisco Conference had proposed the inclusion of an express reference to the prohibition of economic pressure, and its proposal had been rejected. Consequently, any reference to the principles of the Charter in that respect must be a reference to the kind of force which all the Member States had agreed to prohibit, namely, physical or armed force.

48. The Chilean delegation would be prepared to support any proposal which contained an accurate definition of economic pressure, but could not agree to the inclusion of the phrase proposed by the nineteen States in their amendment. Those considerations also applied to political pressure, for unless that term were described much more specifically, considerable difficulties of interpretation could arise: for example, severance of diplomatic relations might be regarded by some as a form of political pressure, whereas article 60 of the draft convention provided that severance of diplomatic relations between parties to a treaty did not in itself affect the legal relations established between them by the treaty.

49. The second main problem raised by the article was that of the date when the rule would enter into force. His delegation considered that, by and large, the rules on invalidity should not be retroactive, but that article 49 might be given exceptional treatment because it was concerned with a rule of *lex lata*. It accordingly considered that the date of entry into force of the rule should be the date when the international community had outlawed the threat or use of force, namely, 24 October 1945, the date of entry into force of the United Nations Charter. Although before that date the Covenant of the League of Nations and the Pact of Paris had marked progress over the traditional law in the matter, they had not laid down a broad and comprehensive prohibition binding on all States. That date would, moreover, stress the fact that article 49 of the Commission's draft was a corollary to Article 2, paragraph 4, of the Charter.

50. Although that date seemed to be implicit both in the discussions in the International Law Commission and in the commentary to article 49, the Chilean delegation would prefer to see it specified more explicitly and would therefore vote for the Peruvian amendment (A/CONF.39/C.1/L.230), which seemed to clarify the situation. On the other hand, it could not support the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), which, although it implied that certain principles of international law in the matter had existed before the entry into force

of the Charter, did not state exactly when the rule had been recognized.

51. Nor could his delegation support the Chinese amendment (A/CONF.39/C.1/L.301), not because it was opposed to the idea of recourse to a competent organ of an international organization, but because it believed the amendment to be unnecessary: any State subjected to coercion had the unassailable right under the Charter to have recourse to the United Nations, but failure to have such recourse might be interpreted as loss of the right to invoke the invalidity of the treaty, a result which ran counter to the first part of the Chinese amendment. Moreover, in many cases the State was not in a position to resist coercion and if it could have resisted, would not have brought the case to the attention of the United Nations; it would simply have refused to subscribe to the treaty.

52. Finally, his delegation could not support the Japanese and Viet-Namese amendment (A/CONF.39/C.1/L.298 and Add.1), which vitiated the principle contained in the Charter and the draft convention, that a treaty was void if its conclusion had been procured by the threat or use of force; that principle could not be made dependent on recourse to the United Nations.

53. Mr. JELIC (Yugoslavia) said that the threat or use of force should include economic and political pressure and he therefore regarded the nineteen-State amendment as well-founded. Its adoption should not in any way undermine the security of treaties.

54. Mr. DE BRESSON (France) said that article 49 was undoubtedly one of the most important provisions in Part V and his delegation supported its inclusion, which would be in conformity with the Charter. As it touched upon delicate matters, the wording must be carefully chosen so as to avoid, for example, upsetting territorial settlements. The text should be rendered more explicit in order to make clear that the application of the article would depend upon the will of the injured State and that the procedure of article 62 would apply.

55. The fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) might clarify the meaning of the use of force. On the other hand, the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) could lead to confusion because of divergent views as to what constituted economic and political pressure. Such a provision would seriously threaten the stability of treaties and that risk must be carefully considered.

56. He was in favour of the other amendments being referred to a working group, together with the related provisions.

57. Mr. PINTO (Ceylon) said he supported the nineteen-State amendment, which made specific mention of political and economic pressure being brought to bear on a State in violation of the principles of the United Nations Charter. Such pressures were declared to constitute grounds for avoiding a treaty *ab initio*. Whether a narrow or a broader view was taken, it was difficult to discern in the Charter an explicit prohibition of political and economic pressure, but there were several propositions which by clear implication outlawed such action. The elaboration of the phrase " use of force " in the Charter indicated that its meaning was the use of force against the territorial integrity or political independence of a State by means of armed or physical force. The phrase " force in violation of the principles of the Charter " would be interpreted as comprehending economic and political pressure. Such action should be regarded as nullifying the treaty and should be the subject of a rule in the convention.

58. He wondered why it had been thought desirable to use the term " coercion " in article 48, which contemplated various types of acts and threats of force not exclusively of a physical nature, and the word " force " in article 49, which might without further explanation be understood in the narrow sense of armed force alone.

59. He was aware of the problems of interpretation to which the nineteen-State amendment could give rise. The determination of the existence of economic and political pressure vitiating consent could be a most complex task. Where, for example, was the line to be drawn between the normal give-and-take of negotiation and pressure? A country supplying economic aid to another might require as part of the consideration for its contribution that the recipient take a number of politically unpopular steps to strengthen some sectors of its economy. Would such a requirement be regarded as a legitimate bargaining counter, based on sound business and financial principles, or would it be regarded as political and economic pressure vitiating consent and voiding the agreement *ab initio*? It would be difficult to know which economic yardstick to apply so as to determine whether the donor's requirements would be of real benefit to the recipient.

60. The text of the nineteen-State amendment was not less clear than the Commission's, and might even be clearer. The Commission had considered that the precise scope of the acts covered by the definition should be left to be determined in practice by the interpretation of the relevant provisions of the Charter, but the amendment set some guidelines for such interpretation. However, some proper machinery for the prompt and final settlement of any disputes that might arise over the interpretation of article 49 and others was needed, particularly with respect to Part V of the draft.

61. Finally, he commended the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) to the Committee.

62. Mr. MULIMBA (Zambia) said that the Commission had stated in its commentary to article 49 that it had been guided by the conviction that the use of coercion to procure the conclusion of a treaty was a matter of such gravity that any treaty so obtained must be void *ab initio*. It had further stated in paragraph (3) of its commentary that the precise scope of the acts to be covered by the definition of the phrase " threat or use of force in violation of the principles of the Charter " should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

63. No jurist had denied the moral value of inserting such a principle in the convention, though some delegations had expounded the traditional view that business should not be mixed up with politics or morality. The need to include the moral principle contained in article 49 was imperative, because recent developments in international relations required new and loftier norms in a convention designed to codify progressive rules. The article was

not a mere escape clause for the evasion of treaty obligations, and misgivings that in practice it would open the door to evasion by encouraging unilateral and unfounded assertions of coercion were unjustified. The convention did not leave the door open, because any claim to invalidate a treaty on the ground that coercion had been used must follow the procedural rules set down in article 39, paragraph 1, and the invalidity had to be established under the rules laid down in article 62.

64. All progressive lawyers admitted that the term " force " included economic and political as well as other forms of pressure or coercion falling short of armed force. Non-military forms of pressure were often more potent in their effects than actual armed force, and the Commission in its commentary to article 47, when comparing the efficacy of corruption and coercion as forms of pressure, had admitted that in practice attempts to corrupt were more likely to succeed than attempts to coerce.

65. If the nineteen-State amendment were not adopted, he wished to make it clear that in his delegation's opinion the term " force " included economic and other forms of pressure.

66. An appeal had been addressed to the developing countries not to insist on the inclusion of economic pressure in article 49. They had already evinced their faith in the whole body of customary and established principles of international law without question, though some had no relation to their own concepts of law, but it would be difficult, in view of their economic circumstances, to maintain in force the international obligations they had accepted. He hoped that older States would not destroy their faith in international law by declining to consider the inclusion of new concepts in the draft articles.

67. Mr. MARTYANOV (Byelorussian Soviet Socialist Republic) said that a rule must certainly be inserted in the convention stipulating that a treaty procured by force or threat of the use of force was absolutely void. That was a matter of *lex lata* and was laid down in Article 2, paragraph 4, of the Charter. Force must be considered as a wider concept than purely physical force and as including economic pressure, particularly embargoes. The rule set out in article 49 was unquestionably correct and took account of recent changes in international law. He would support any amendment which reflected the fundamental ideas set out in article 49, but he could not subscribe to the amendment by Japan (A/CONF.39/C.1/L.298), which would only complicate matters; nor did he consider that the Peruvian (A/CONF.39/C.1/L.230) or Australian amendments (A/CONF.39/C.1/L.296) were an improvement on the Commission's text.

68. Mr. MENDOZA (Philippines) said that, in order to give rise to rights and obligations and establish conditions for justice and contribute to friendly relations, a treaty must be the product of freely given consent, and free will was totally incompatible with coercion in whatever form. Economic pressure could as effectively induce consent, and it would be incongruous to declare that a treaty might be rendered void by armed force but not by equally effective economic pressure. He did not consider that article 49 should be confined to physical and armed force and he therefore endorsed the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1), which would not unduly expand the scope of the article, particularly in view of the qualification referring to principles of the Charter. The essence of the provision was " coercion ", and even those who did not endorse the amendment conceded that economic and political pressure amounting to coercion should be condemned.

69. Mr. DEVADDER (Belgium) said that, according to article 49, any treaty procured by the threat or use of force in violation of the United Nations Charter was void because it was contrary to a principle of *lex lata* of modern international law. The use of force could take different forms and be of differing degrees, so that it might sometimes be difficult to establish whether the use of force had been of such a kind as to result in invalidating the treaty.

70. Economic or political pressures could vary widely, and in most cases it would be difficult to determine whether it had actually taken place; he therefore believed that reference to those forms of pressure would render the article impossible to apply and would create a regrettable uncertainty about the status of treaties regularly concluded. It was essential to provide that all cases of invalidity be submitted to adjudication by an impartial body in accordance with the procedures laid down in article 62.

The meeting rose at 1 p.m.

FIFTY-FIRST MEETING

Friday, 3 May 1968, at 3.45 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 49 of the International Law Commission's draft.

2. Mr. DADZIE (Ghana) said that his delegation was a co-sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) and fully associated itself with the arguments advanced by the delegations which had introduced that amendment. There was no denying that article 49 was one of the most important and controversial articles in the whole draft. Most delegations accepted the basic principle embodied in the article, but there was disagreement on the scope and interpretation of the expression " threat or use of force ".

3. Before the League of Nations Covenant, international law had disregarded the effect of coercion in the conclusion of a treaty imposed by the victor upon the vanquished, but the position had changed after war had been prohibited by the League of Nations Covenant and the Briand-Kellogg Pact. The formulation of a

legal principle generally took account of the circumstances prevailing at the time when it was formulated. That was probably why the States which had framed the Charter at the end of the Second World War had used the terms " threat " and " use of force " in the sense of military force.

4. But whatever meaning those words had been intended to have in the Charter, today they could have only the meaning attributed to them by modern practice and contemporary circumstances. The word " port ", used in several extradition treaties, provided an example. Formerly it had meant a sea port; but now there were airports, and no one could maintain that an extradition treaty did not apply to a person arriving at an airport.

5. The use of armed force to threaten a country was so patent an act that it raised comparatively few problems. Economic and political coercion was not always so obvious, even to the victim itself, and that was why it must be condemned. Not a single speaker had denied the need to protect the less economically developed States from political and economic pressure. The position of such States during the negotiation of a treaty, whether it was for the food, the medical supplies or the building materials they needed, was well known. Many delegations had expressed their sympathy with the cause defended in the amendment. But sympathy was not enough. It must find expression in action, in the present case by a vote in favour of the amendment.

6. Mr. THIAM (Guinea) said that his delegation had joined with those of the Asian, African and Latin American countries which had submitted the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1). It therefore supported the arguments advanced by the Afghan representative and the other co-sponsors.

7. His delegation fully approved of the principle that all coercion should be banned from international relations, but it regarded the present wording of article 49 as no more than a declaration of principle. The International Law Commission's aim had been to sanction with complete nullity any treaty a State's consent to which had been invalidated by coercion against the State. In article 48, the notion of coercion had been used in its widest sense, as appeared from paragraph (3) of the Commission's commentary to that article. In article 49, on the other hand, the Commission had thought it should make it clear that coercion against a State could invalidate its consent only if it took the form of the threat or use of force. The Commission had thus opened the way for an unduly restrictive interpretation of the principle it had stated. It would have been more logical to recognize all the forms which coercion could take, as in article 48.

8. During the discussion, many delegations had maintained that the prohibition of the use of armed force should now be regarded as a rule of *jus cogens*. Article 49 would then duplicate article 50, unless it was changed as proposed in the nineteen-State amendment, which specified that the use of force included economic and political pressure.

9. No one could deny that economic and political pressures were exercised; although difficult to define, they were easy to detect objectively. In modern times it had become difficult to resort to brute force. Economic pressure had thus become the favourite weapon of certain Powers, which sought to impose their will on many States, so as to retain advantages which in the past had generally been secured by the use of force. That situation was all the more serious because the gap between the rich and poor countries was growing wider and wider.

10. It was clearly necessary to put an end to a situation which conflicted with any idea of justice and seriously undermined the sovereign equality of States. The sole purpose of the sponsors in submitting their amendment had been to eliminate certain injustices from international relations and to encourage the harmonious development of true international co-operation. Article 49 should expressly state the unassailable principle that any coercion, whatever form it took, invalidated the consent of the State against which it was exercised.

11. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation attached exceptional importance to article 49 because it declared void *ab initio* any treaty whose conclusion had been procured by the threat or use of force. Cases of physical coercion had become very rare, but a powerful State often exerted economic or political pressure on a weaker State.

12. In the past, legal theory had not questioned the validity of a treaty whose conclusion had been procured by the threat or use of force. At the beginning of the twentieth century, an attempt had been made to introduce the principle into international relations, and since the October Revolution the USSR had always taken a stand against the use of force in relations between States. The Briand-Kellogg Pact had prohibited war as a means of settling international disputes. That principle had been confirmed in many legal textbooks published before and after the Second World War, and by the Nuremberg Tribunal. It had been embodied in the United Nations Charter and in various General Assembly resolutions. Several Conferences, including those at Bandung, Belgrade and Cairo, had called on States to refrain from any form of coercion. It was therefore a matter for satisfaction that the International Law Commission had dealt with the question in article 49. The inclusion of such an article would strengthen international law and protect weak States which could be subjected to pressure.

13. Some delegations had maintained during the discussion that the inclusion of such an article might impair the stability of treaties. That was not so, because the principle applied only to treaties concluded by force. It was an additional legal means of preventing the use of force in the conclusion of treaties. The principle did not weaken the rule *pacta sunt servanda*. The International Law Commission had been right to refer to the " use of force in violation of the principles of the Charter of the United Nations "; it had thus drawn a very proper distinction between coercion exercised by an aggressor and the measures which could be taken against an aggressor.

14. The text of article 49 could be improved, however. The Soviet delegation supported the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) and associated itself with the very convincing arguments which the Czechoslovak delegation had put forward on the subject. The proposal to add the words " including economic or political pressure " (A/CONF.39/C.1/L.67/

Rev.1/Corr.1) was justified, for in the opinion of the Soviet delegation, the word " force " covered all the different forms of coercion. The Japanese amendment (A/CONF.39/C.1/L.298 and Add.1) dealt with a matter of procedure rather than of substance; it complicated the article and the Soviet delegation could not support it. The other amendments did not improve the article.

15. Mr. MARESCA (Italy) said that delegations should be grateful to the International Law Commission for having introduced into the convention an article which was a remarkable advance in international law, for it provided that the use of force or the mere threat of force in the conclusion of a treaty was a ground of absolute nullity. The Commission had been right to link that principle to the United Nations Charter, which expressly prohibited the use of force.

16. The Italian delegation understood why certain delegations had submitted the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), but a rule of international law, which was something lasting, could not be based on feelings or passion; what was needed was logic and legal technique. The introduction of the words " including economic or political pressure " posed a dilemma. Either that idea was considered to be implicit in the Charter, in which case it was unnecessary to specify in article 49 what forms the threat or use of force might take; or the Charter referred only to the use of armed force, in which case the proposed addition raised the question of development of the principles of the Charter. It was true that the Charter could be amended, but the Conference was not competent to do that. For those reasons the Italian delegation, though favourable to the idea expressed in the amendment, would not be able to support it.

17. As for the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), it must be acknowledged that it showed most commendable legal rigour, for it introduced the idea of international law embodied in the Charter. But if the international law embodied in the Charter was invoked, the same would have to be done in other articles which reflected principles already existing in the international legal order. It seemed better to refer to the principles of the Charter with all their power and future possibilities.

18. The addition of the words " it is established that ", proposed in the Peruvian amendment (A/CONF.39/C.1/L.230), seemed extremely useful. It would prevent arbitrary decisions. The Japanese amendment (A/CONF.39/C.1/L.298 and Add.1) raised certain legal problems; for if the competent organ of the United Nations had given its decision and the treaty had been ratified, the question arose whether the invalidity of the treaty was established and what procedure would have to be applied to establish it. It was not, for example, the procedure followed by the Security Council for the maintenance of peace. A completely different procedure would have to be worked out. Consequently, the Italian delegation had some reservations about the amendment.

19. The Committee had reached a very delicate and crucial point in its work of codification. If it adopted the method of voting, as was customary, it might not do its work properly. In the Italian delegation's opinion, it would be better not to vote on the amendments, but to refer them to a small group which would examine them to see what could usefully be retained. The Committee would then be able to submit to the Conference a text which could be adopted unanimously.

20. Mr. MWENDWA (Kenya) said that in a world where violence was increasing and the spirit of fraternity was on the wane, the notion of force could not apply solely to armed force and should undoubtedly extend to economic and political pressure.

21. The principle of the sovereign equality of States made it necessary to reject any provision which might help one State to dominate another. The road to equality was rugged and the vestiges of degradation and humiliation resulting from oppression could not be eradicated overnight; but nothing should be done to encourage their perpetuation. It was in the light of those considerations that the Kenyan delegation had agreed to become a co-sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1.)

22. Some delegations had maintained that that part of international law was not yet ready for codification. If that argument was accepted, it would raise insuperable difficulties both for the codification and for the progressive development of international law in all its branches, not just in that particular case. One representative had argued that, according to the rule of the " *acte contraire* ", the nineteen-State amendment showed that its sponsors had recognized that the term " force " in Article 2, paragraph 4, of the United Nations Charter could only mean armed force. The Kenyan delegation could not accept either that erroneous interpretation of the sponsors' position, or the very narrow and retrograde interpretation of the term " force " given by delegations which wished to limit that notion to armed or physical force. The amendment of which the Kenyan delegation was a co-sponsor should be understood as having been introduced *ex abundante cautela.*

23. Mr. SMALL (New Zealand) said he fully understood the problem of the economic and developmental needs of the countries whose representatives had supported the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1). The economic question was of special interest to New Zealand, a country which was geographically isolated and entirely dependent on the export of a few products.

24. His delegation believed, however, that the amendment did not merely raise a matter of economics, but went much further in seeking to construe and make explicit the meaning of one of the crucial terms of the United Nations Charter, and to indicate its entire scope in a short formula to be inserted in article 49. That task had already been attempted by various bodies, including the Sixth Committee of the General Assembly and the Committee on Friendly Relations, but they had been unable to reach agreement beyond a recognition of the prime type of force with which the Charter clearly dealt.

25. If the amendment were adopted and the definition of the word " force " were incorporated in an article of an instrument likely to become one of the most significant of modern times, that definition would inevitably have some reflection upon the Charter itself, and might make it politically assertable that whatever was settled at Vienna would be taken to be the normal operational

meaning of the Charter. The delegations participating in the Conference, however, were not authorized to settle that question in the context of a specialized draft convention on the law of treaties.

26. In order to avoid dividing the participants in the Conference, it was hoped that the co-sponsors of the amendment would not insist on its being put to the vote. His delegation was in favour of establishing in article 62 a more suitable system of judicial or arbitral settlement of disputes arising from the application of Part V, especially in relation to article 49, because of the inherent gravity of any allegations about the use of force against a State. His delegation's final attitude to article 49 woul depend on its assessment and balancing of the text of that article as it might be settled by the Conference, with the eventual form of article 62 or its equivalent.

27. Some of the amendments contained useful elements, in particular those submitted by Japan and the Republic of Viet-Nam (A/CONF.39/C.1/L.298 and Add.1) and by China (A/CONF.39/C.1/L.301), and he hoped that those amendments and the draft article itself could be examined by a group for conciliation and consultation which might be set up outside the Committee. According to the interpretations put on it by its co-sponsors, the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) apparently concerned the temporal application of the principle stated in the article. If that was so, the question should be dealt with more explicitly. Again, the temporal bearing of the whole convention itself was a separate issue which should be studied by the Conference in due course.

28. Mr. DE CASTRO (Spain) said that Part V of the draft showed remarkable progress in the formulation of modern and progressive international law and was in conformity with the spirit of the Charter and United Nations resolutions. Article 49 overtly and clearly proclaimed that conception of international law. Unfortunately, because of its wording and certain expressions used in the International Law Commission's commentary, it was to be feared that it might be regarded as reflecting the retrograde idea of consolidating the *status quo*, in contradiction with the general system of the draft and the principles of the Charter itself.

29. Paragraph (7) of the commentary to article 49 had been interpreted in a most contradictory manner. Some representatives had maintained that it meant that treaties procured by force before the principles of the Charter had been accepted were fully valid, not only *ab initio*, but also without any limit as to duration. Others thought it meant that article 49 did not void *ab initio* a treaty imposed by force or acts carried out before the establishment of the new international law, but that as from that date the treaty lost all legal force and no longer satisfied the necessary conditions for the application of a legal instrument, because its invalidity had been declared *ex nunc*.

30. The advocates of the first interpretation had cited in support of their thesis the general principle of non-retroactivity, and especially the tendency to maintain the *status quo*, even at the cost of overlooking the defects of a treaty. The supporters of the second interpretation had relied on the concept of non-retroactivity adopted in article 24, and on the effect given by the draft to the new norms of *jus cogens* in article 61. The reference to the principles of the Charter in article 49 would thus be merely a reminder that the use of force could sometimes be lawful and that treaties imposed by force could be valid, as provided in article 70, which dealt with the case of an aggressor State.

31. It was essential to know what scope was to be attributed to the principle of non-retroactivity. The temporal scope of article 49 would be restricted by the need to respect treaties concluded in accordance with the old law, which were regarded as valid even if they had been imposed by force. That affirmation must be qualified, as it might lead to incorrect or even unjust conclusions. Moreover, to assert the full and unrestricted validity of old treaties would be tantamount to establishing a new rule with retroactive effect and giving those treaties a validity they had never had. The traditional doctrine was not accurately summed up by the mere statement, in paragraph (1) of the commentary, that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. The writers clearly taught that threats and coercion invalidated treaties, but as there had been no means other than private justice to ensure the application of the law, it had been necessary to recognize the lawfulness of war in general and to regard as valid a treaty that had ended a war. Unjust treaties involving oppression or exploitation, imposed solely by coercion by the stronger party, had been considered unlawful. War to impose such a treaty had been considered " unjust ", whereas war to put an end to such a treaty, a war of liberation, had been regarded as " just ".

32. Modern law had radically changed the legal situation of the international community. The condemnation of war extended to wars of conquest as well as to wars of re-conquest. That development had set new conditions for the exercise of rights based on international norms. The old treaties which had been invalidated by force and which it had been possible to terminate by the exercise of private justice, as in the case of a just and successful war, should continue to be void and voidable. Today, the instrument for voiding them could not be war, but the peaceful means provided by the new law. There would thus be no legal justification for retroactively strengthening treaties which had been invalidated from the outset by the fact that their conclusion had been procured by force. Such treaties, which had previously been terminated by force, would be voidable by another procedure.

33. The effect given to the principle of non-retroactivity was in conformity with the system of the draft; the acts and effects of the treaty prior to the declaration of invalidity would be regarded as valid. On the other hand, from the moment the new law became applicable, a treaty procured by the threat or use of force could be declared void. For example, under articles 50 and 61, a treaty on the slave trade, considered valid *ab initio*, would be declared invalid as soon as the new law came into force. A treaty imposed by force, which exploited a nation and reduced it to slavery, might be considered valid *ab initio*, but its invalidity could be claimed under the new law. Such treaties conflicted with the principles of the Charter, which affirmed, in its preamble, that respect for the obligations arising from treaties was subject to the

determination " to establish conditions under which justice ... can be maintained ". A treaty in which obviously unjust conditions had been imposed by force could not be considered permanently binding without going against the spirit and object of the Charter.

34. The purpose of the amendment co-sponsored by Spain (A/CONF.39/C.1/L.289 and Add.1) was to prevent article 49 from being interpreted as rendering unassailable treaties which had been concluded illegally and were condemned by United Nations resolutions. The Spanish delegation was aware that such an amendment might be regarded as a potential threat to international peace and security. But according to article 49, a declaration of invalidity of an old treaty would relate only to situations based solely on the vitiated treaty; it would in no way affect situations which also had a different basis, or were based on a treaty whose defects had been remedied in conformity with article 42 of the draft.

35. Further, article 49 would not create fresh grounds for concern in international life. Situations that still existed by reason of a treaty imposed by force constituted a latent and persistent danger to peace. Article 49 would provide a means of removing such causes of instability and disputes once and for all. The aim of the amendment co-sponsored by Spain was to respect the text of the draft as far as possible, but to stress that article 49 had no undesirable retroactive effect—that it did not validate, by rendering them unassailable, treaties concluded before the date on which war had been outlawed by the Charter. The use of the word " embodied " was calculated to show that principles, including those for the maintenance of justice, had existed before the Charter had been drawn up. Treaties based on force alone must be considered void regardless of the date of their conclusion and could be declared void by the competent international tribunal on the application of the State entitled to make such application. The cases of old treaties covered by article 49 would be few, but the declaration of principle contained in the article must be retained, in conformity with the requirements of justice and the sovereign equality of States.

36. The idea behind the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), that international treaties must always respect the freedom, independence and dignity of all peoples, deserved the sympathy of every State. But it did not seem possible, for the time being, to give that idea the formulation proposed in that amendment, since it was not likely to receive general approval. In the general concept of pressure, various possible cases must be distinguished: there was wrongful pressure, which was unlawful; pressure that was legally and morally justified, such as that used to repel aggression; and pressure which the Romans called *dolus bonus*, such as that normally applied in the negotiation of trade agreements. Moreover, if the nineteen-State amendment were adopted, it might be deduced that the formula " the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations " used in the amendment co-sponsored by Spain (A/CONF.39/C.1/L.289 and Add.1) referred only to physical force or war. But that was not the case, for a proper interpretation of the spirit of the Charter condemned all unlawful use of force of any kind whatever, and might in some cases include the abuse which consisted in exploiting the development needs of nations.

37. For those reasons, as well as for those given by the Uruguayan representative, the Spanish delegation could not support the nineteen-State amendment, which, in its present form, might provide the basis for a restrictive interpretation of the word " force " as used in the Charter.

38. Mr. SAMAD (Pakistan) said he fully endorsed the arguments advanced by the representative of Afghanistan. Economic and political pressures were much stronger than military pressure and involved the use of force prohibited by Article 2, paragraph 4, of the Charter. The purpose of the nineteen-State amendment co-sponsored by Pakistan (A/CONF.39/C.1/L.67/Rev.1/Corr.1) was to ensure the stability and security of international treaties by making the text of article 49 clearer. The concept of political or economic pressure had been accepted long before the United Nations Charter had been drawn up and had been reaffirmed by the General Assembly in resolution 2160 (XXI).

39. He supported the principle embodied in the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1).

40. Mr. RUEGGER (Switzerland) said that the direct, unqualified reference to the principles of the United Nations Charter in article 49 of the draft might raise a serious problem, from the strictly legal point of view, for a country such as Switzerland which was not a signatory of the Charter and was not a Member of the United Nations as a political organization. The problem could be solved either by Switzerland's entering a reservation, or by amending the text of article 49 on the lines of the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1). Switzerland was in favour of that amendment, which might be made more specific by saying " ... in violation of the rules of international law generally recognized as such and embodied in the Charter of the United Nations ". That wording would make it clearer that the rules were declaratory rather than constitutive; it reproduced the formula proposed by Syria and adopted for article 34 (A/CONF.39/C.1/L.106).

41. Switzerland recognized the great value and importance of the principles of the United Nations Charter, which were derived in large part from the principles of the League of Nations Covenant, to which Switzerland, as a Member of the League, had subscribed. In the San Francisco Charter, signed after the Second World War, there had been no place for the complete neutrality of Switzerland; but the practice of the United Nations had recognized the value and effect of permanent neutrality in certain cases in which the Charter could not operate, and the importance of an independent, impartial and neutral intermediary such as Switzerland.

42. The discussion on the meaning to be given to the term " force " in article 49 had been mainly concerned with interpretation of the provisions of the Charter. The Swiss delegation considered, however, that the Conference was not called upon to go into such matters when drafting the convention on the law of treaties. The principles of the Charter would evolve: it was difficult to include in a purely legal convention a reference to imprecise elements that were liable to changes based on other than strictly legal criteria.

43. The Swiss delegation was not questioning the present or future principles of the Charter, but only their application. To give only one example, a paramount principle for Switzerland was the protection of the human person in accordance with the Geneva Conventions;[1] but events had shown that there could be a conflict between the humanitarian law of those Conventions and certain coercive and military operations of the United Nations. That problem had been examined by the Institute of International Law, which had concluded that the rules of humanitarian law were fully applicable in all circumstances, even in the case of coercive action by the United Nations against an aggressor.[2]

44. It was of the utmost importance that the convention on the law of treaties should be as universal as possible and should gain the widest possible support. The Swiss delegation was therefore renewing the proposal it had made at the thirty-ninth meeting, that a special group be set up to reconcile, as far as possible, the wider differences of opinion, in order to avoid a vote in plenary meeting which would only crystallize such differences. In the present case, that method would make it possible to avoid further consideration in plenary meeting of the amendment on which the Committee was divided. The special group should not be appointed until article 62, which was the essential complement of article 49, had been examined. France, Italy, the Netherlands, Sweden and the United Kingdom had given that proposal their support.

45. Mr. KEARNEY (United States of America) said he thought that article 49 should be approved as it stood and that the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) should be rejected. He wished to explain the reasons for his opposition to that amendment, because article 49 was one of the key articles in the proposed convention and its final text could play a large part in determining the position of the United States delegation with regard to the convention as a whole.

46. Paragraph (5) of the commentary to article 49 stated that " The Commission considered that the rule should be stated in as simple and categorical terms as possible ". The Commission had reached that conclusion after considering whether to include in the article the substance of some of the amendments before the Committee of the Whole.

47. In his fifth report, submitted in December 1965, the Special Rapporteur had taken note of the fact that in 1963 the United Nations General Assembly, by resolution 1966 (XVIII), had established a Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, composed on the basis of the principle of equitable geographical representation and of the necessity that the principal legal systems of the world should be represented. Among the principles referred to the Special Committee for study had been " the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations ".[3] The Special Rapporteur had observed that if the International Law Commission were itself to attempt to elaborate the rule contained in what was now article 49 by detailed interpretations of the principle, it would encroach on a topic which had been remitted by the General Assembly to the Special Committee.[4]

48. The United States delegation believed that the Commission had properly followed the advice of the Special Rapporteur in the matter. At its 1964, 1966 and 1967 sessions, the Special Committee had examined the question whether the obligation to refrain from the threat or use of force embraced political and economic pressure. Moreover, on 6 December 1967, the General Assembly, by resolution 2287 (XXII), had convened the first session of the United Nations Conference on the Law of Treaties, and a week or two later, by resolution 2327 (XXII), it had requested the Special Committee to complete the formulation of the principle prohibiting the threat or use of force in violation of the Charter. That sequence of events made it absolutely clear that the Conference of Plenipotentiaries on the Law of Treaties was not charged with formulating the principle stated in article 49 of the International Law Commission's text.

49. The sponsors of the nineteen-State amendment had claimed that, as the Conference would be defining the use of force for the purposes of the present convention, there would be no conflict with the work undertaken by other United Nations organs. But the Conference was not called upon to interpret the United Nations Charter, particularly parts of it having an important and dangerous political content. The participants' sole task was to adopt a convention on the law of treaties which would help to unify international relations. Attempts to resolve questions of definition or political issues relations to the Charter in the context of a convention on the law of treaties might cause States which disagreed with the proposed definition to refuse to adopt the convention.

50. Moreover, the concept of " economic or political pressure " referred to in the amendment was so lacking in juridically acceptable content as to cast grave doubts on any article containing it. Many States would use it as a pretext to rid themselves of treaties whose obligations had become burdensome to them.

51. With regard to the intervention of the Afghan representative, the United States was the first to recognize that the common objective should be to narrow the gap between rich and poor countries and it had given adequate proof of that; but it did not see how the amendment could help to achieve that objective, quite the contrary. Investors would regard the amendment as increasing their risks and would raise the cost of their investments. The amendment was therefore likely to hurt those it was supposed to help.

52. The fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) raised the question of the time element in the application of article 49, a subject which the Commission had dealt with in paragraphs (7) and (8) of its commentary to that article. The way in which the amendment tried to solve that problem was unsatis-

[1] *United Nations Treaty Series*, Vol. 75.

[2] *Annuaire de l'Institut de droit international*, 1963, vol. 50, tome I, p. 120, and *ibid.*, 1965, vol. 51, tome I, p. 354.

[3] *Yearbook of the International Law Commission, 1966*, Vol. II, p. 19, para. 3.

[4] *Ibid.*, para. 5.

factory, for it raised two questions: to what existing treaties was the convention to apply, and when had the principle in the Charter condemning the use of force become general international law? The first question would have to be decided in the final articles of the convention on the law of treaties. As for the second, the fourteen-State amendment could be interpreted as meaning that the principle stated in Article 2, paragraph 4, of the Charter antedated the Charter itself. It was difficult for the United States delegation to support an amendment which could be so interpreted and which was insufficiently precise to settle the issues it raised.

53. The Peruvian amendment (A/CONF.39/C.1/L.230) was not one of substance and could be considered after the other amendments had been disposed of, when the drafting of the article came to be examined.

54. With regard to the amendment submitted by Japan and the Republic of Viet-Nam (A/CONF.39/C.1/L.298 and Add.1), his delegation supported the first requirement, that the threat or use of force must have been reported to a competent organ of the United Nations, but thought it impossible to apply the second, namely, that the organ had failed to take the necessary action.

55. Mr. TABIBI (Afghanistan), speaking on behalf of the sponsors of the nineteen-State amendment (A/CONF. 39/C.1/L.67/Rev.1/Corr.1), said he wished to thank the many delegations which had supported it; they represented the majority of the participants in the Conference.

56. Some delegations, while recognizing that the text of article 49 was elastic enough to cover economic and political pressure as a ground for invalidity, had argued that the notion of economic and political pressure was vague and that the Committee should adhere to the International Law Commission's text. But if that notion was vague, the same was true of the notion of military pressure. The sponsors of the amendment were not seeking to introduce a new element into article 49, but merely to make the text more precise by wording which would be acceptable to the majority of States throughout the world; they were proposing the insertion of a reference to economic and political pressure, which in some cases was stronger than the threat or use of armed force.

57. The representatives of Australia and the United Kingdom had stated that Article 2, paragraph 4, of the United Nations Charter could only mean armed force and that, consequently, only armed force could be recognized in the context of article 49. But a reading of the text of the article and of the commentary was enough to show that the International Law Commission had had in mind not only Article 2, paragraph 4, but also all the other provisions of the Charter. In paragraph (3) of its commentary it had recorded the view of those members who had been in favour of an express reference to economic pressure, but it had concluded that the scope of the acts covered should be determined by interpretation.

58. The United Kingdom representative had relied on the seventh paragraph of the Preamble to the Charter, but had not referred to the eighth paragraph, which mentioned economic advancement, or to Article 1, paragraph 3. He had also cited Chapter VII of the Charter, in particular Articles 41 and 42, but had not mentioned the measures not involving the use of armed force which could be taken on the decision of the Security Council; those were precisely the measures which a State might use to procure the conclusion of a treaty and which were referred to in the amendment.

59. The Australian representative should not forget that great changes had taken place in the world since the adoption of the Charter, that the Charter itself had been amended several times, and that since the adoption of the "uniting for peace" resolution the interpretation of the peace-keeping role of the Charter had developed considerably.

60. At the San Francisco Conference, the Brazilian proposal to include an express reference to economic pressure had been rejected, but not because the Conference had refused to recognize economic pressure; if that had been so, the Charter would not have mentioned the economic and political measures referred to in Article 41. Furthermore, the importance of economic problems was recognized in the preamble and in many articles of the Charter, particularly in Chapters IX and X.

61. The sponsors of the nineteen-State amendment considered that the fourteen-State amendment (A/CONF. 39/C.1/L.289 and Add.1) was not, in principle, incompatible with their own, or with the Commission's text, and they would vote in favour of it.

62. With regard to proposals for conciliation, the sponsors of the nineteen-State amendment were willing to accept any reasonable suggestions. They did not wish to take advantage of their majority to impose their point of view on the minority, but they did ask it to try to understand their position and not to demand that they sacrifice their interests because the minority was powerful.

63. Mr. RIPHAGEN (Netherlands) said that informal consultations might help to solve the problem of article 49 in a manner acceptable to the whole Committee. The Netherlands delegation therefore proposed that article 49 and the amendments thereto be not put to the vote at that stage, but that informal consultations be held between representatives of the various groups with a view to reaching agreement on a resolution to accompany article 49, which would facilitate its adoption; the results of the consultations would be reported to the Committee not later than Monday evening, 6 May.

It was so agreed.[5]

The meeting rose at 6 p.m.

[5] For the resumption of the discussion on article 49, see 57th meeting.

FIFTY-SECOND MEETING

Saturday, 4 May 1968, at 10.30 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 50 (Treaties conflicting with a peremptory norm of general international law *(jus cogens)*)

1. The CHAIRMAN invited the Committee to con-

sider article 50 of the International Law Commission's draft.[1]

2. Mr. JAGOTA (India) said that the purpose of the Indian amendment (A/CONF.39/C.1/L.254) was to incorporate the substance of article 61 in article 50 as a new paragraph 2. It would entail some consequential changes in articles 67 and 41, but would bring all the provisions on *jus cogens* together. However, as the Commission had arrived at the present placing of the articles with good reason, he would now withdraw the amendment, as well as the various consequential amendments (A/CONF.39/C.1/L.255, L.256, L.253), but hoped his delegation's suggestion would be considered in the Drafting Committee.

3. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the norms of *jus cogens* were those from which no derogation was permitted and which could only be modified by a subsequent norm of general international law having the same character. Treaties that conflicted with such norms were unlawful and must be regarded as void *ab initio*. The principle was recognized by the Commission and by many eminent jurists, such as those who had met at a conference on international law held in Greece in April 1966. However, there could be disagreement as to the nature of those norms, though everyone would admit that they included such principles as non-aggression and non-interference in the internal affairs of States, sovereign equality, national self-determination and other basic principles of contemporary international law and Articles 1 and 2 of the United Nations Charter.

4. The purpose of the amendment submitted jointly by Romania and the Soviet Union (A/CONF.39/C.1/L.258/Corr.1) was to clarify the wording of article 50, which must certainly be retained as it was one of the most important in the whole draft.

5. Mr. SUÁREZ (Mexico), introducing his delegation's amendment (A/CONF.39/C.1/L.266), said that it was more one of form than of substance and his delegation would support the International Law Commission's article 50.

6. It was not easy to formulate with all due precision a rule on the subject of *jus cogens*. The text as it stood involved a *petitio principii* when it stated that States were precluded from validly concluding a treaty in breach of a norm " from which no derogation is permitted ", in other words a norm that the parties could not modify by treaty. That remark was not intended as a criticism of the Commission; perhaps it was not possible to arrive at a better wording. Although no criterion was laid down in article 50 for the determination of the substantive norms which possessed the character of *jus cogens*—the matter being left to State practice and to the case law of international courts—the character of those norms was beyond doubt.

7. In municipal law, individuals could not contract out of legislative provisions which were a matter of public policy. In international law, the earliest writers, including the great Spanish forerunners and Grotius, had been deeply imbued with the principles of the then prevailing natural law. They had therefore postulated the existence of principles that were derived from reason, principles which were of absolute and permanent validity and from which human compacts could not derogate. Without attempting to formulate a strict definition suitable for inclusion in a treaty, he would suggest that the rules of *jus cogens* were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development.

8. There had always been principles of *jus cogens*. Although few in number at the time when inter-State obligations were equally few, they had been increasing since and would continue to increase with the expansion of human, economic, social and political relations. The norms of *jus cogens* were variable in content and new ones were bound to emerge in the future, for which provision was made in article 61. Others might cease in due course to have the character of *jus cogens*, as had happened in Europe in regard to the doctrine of religious unity and the law of the feudal system.

9. In view of the varying character of the rules of *jus cogens* it was essential to stress that the provisions of articles 50 and 61 did not have retroactive effect. The emergence of a new rule of *jus cogens* would preclude the conclusion in the future of any treaty in conflict with it; the effects already derived from earlier treaties, however, were not affected, in accordance with the general principle of non-retroactivity recognized in article 24, which the Committee had already approved. In that connexion, the provisions of article 67, paragraph 2 (*b*), were also relevant.

10. The purpose of the Mexican amendment (A/CONF.39/C.1/L.266) was simply to introduce into article 50 an express provision embodying the non-retroactivity rule, which had been recognized by the International Law Commission. He would not press for a vote on it, but would merely ask that it be referred to the Drafting Committee.

11. Mr. CASTRÉN (Finland) said that article 50 correctly stated an important principle, which must be retained in the draft. The Commission had formulated the article with great care and had rightly refrained from trying to list the different rules of international law which could be qualified as *jus cogens*.

12. If the article could be rendered more precise, he would certainly be the first to accept any such improvement. For instance, it should be emphasized in article 50 that *jus cogens* was concerned with fundamental rules which were universally recognized by the international community. But it was even more important to provide for a means for the impartial settlement of disputes about the conformity of the provisions of a treaty with *jus cogens*. The Belgian representative's suggestion about referring such problems to a committee of enquiry deserved careful examination. Alternatively, some arbitral or judicial procedure might be considered.

13. The Finnish amendment (A/CONF.39/C.1/L.293) sought to extend the application of the principle of the separability of treaty provisions to the cases covered

[1] The following amendments had been submitted: India (A/CONF.39/C.1/L.254); Romania and Union of Soviet Socialist Republics (A/CONF.39/C.1/L.258/Corr.1); Mexico (A/CONF.39/C.1/L.266); Finland (A/CONF.39/C.1/L.293); United States of America (A/CONF.39/C.1/L.302); Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add. 1 and 2); United Kingdom of Great Britain and Northern Ireland (A/CONF.39/C.1/L.312).

by article 50, for reasons of flexibility. Thus, if an important treaty dealing with, say, human rights or the treatment of prisoners of war contained only a few provisions incompatible with *jus cogens* which were separable from the remainder of the treaty, it would be preferable, instead of the whole treaty falling to the ground, as would be the case under the present provisions of article 50, simply for those particular provisions to be regarded as void.

14. He entirely agreed that the principle of the integrity of a treaty should prevail in the cases regulated by articles 48 and 49, but the case dealt with in article 50 was different. A treaty concluded under pressure would fall under the provisions of articles 48 and 49 and become a total nullity, but he considered that the principle of separability should apply in the case of article 50, despite the criticism levelled against his delegation's proposal concerning article 41. Article 50 started from the hypothesis that the partners had freely concluded the treaty but had violated some peremptory norm of *jus cogens* which harmed the interests of the international community, of a third State, or of individuals.

15. Mr. SWEENEY (United States of America) said that a State could not seek release from a treaty by suddenly adopting a unilateral idea of *jus cogens* in its international rules, and could not pretend to assert against other States its own opinion of the higher morality embodied in *jus cogens*.

16. The United States amendment (A/CONF.39/C.1/L.302) accepted the principle of *jus cogens* and its inclusion in the convention. The amendment did not seek to change the conception of *jus cogens* adopted by the Commission, and maintained the very fundamental proposition of the Commission that *jus cogens* included rules from which no derogation was permitted; it did not seek to go beyond the Commission's text. In its commentary, the Commission had given examples of what was covered by *jus cogens*, such as treaties contemplating or conniving at aggressive war, genocide, piracy or the slave trade, but had decided against the inclusion of examples in the article itself, and his delegation abided by that decision.

17. The amendment tried to make the text more explicit by stating that individual States and groups of States should have a voice in formulating *jus cogens*, and that regard must be had in determining what *jus cogens* was to the will expressed in the national and regional legal systems of the world. A rule of international law was only *jus cogens* if it was universal in character and endorsed by the international community as a whole. Unless that point were made explicit, the Commission's text would be open to abuse.

18. Mr. EVRIGENIS (Greece) said that article 50 enunciated a principle which was of the essence of the legal order and which indicated the boundaries that could not be violated by the contractual will. There was universal recognition of the existence of a *jus cogens* corresponding to a given stage in the development of international law, but there were still some doubts about its content. Two methods of definition seemed to be possible; either a casuistical definition or a general and abstract definition. The first method was hardly practicable, for it would entail sifting a theoretically unlimited number of rules which, moreover, were customary rules. Certain rules of positive international law were however universally recognized as rules of *jus cogens*, for instance the rules on the prohibition of the threat or use of force, and they were mentioned as illustrations in the International Law Commission's commentary. But it would be inexpedient to list them, since an enumeration of the rules would doom *jus cogens* to ossification.

19. The Commission had followed the other method, that of a general and abstract definition. The concept of *jus cogens* as set out in article 50 consisted of three elements: the rule in question must be a rule of general international law, it must be one from which no derogation was permitted and it must be a rule which could be modified only by a subsequent norm having the same character. In his view the third element led to a vicious circle, for the fact that a rule of *jus cogens* could be modified only by a rule " having the same character " could not be one of the conditions governing the " character " of the rule. On the other hand, the two remaining elements in the definition seemed to express the essence of the concept. In particular, prohibition of derogation from the rule was the indispensable, if not the sole, element of the concept of *jus cogens* in municipal law. National *jus cogens* prevailed over the contractual will of individuals, whilst international *jus cogens* defined the boundaries of the contractual will of States. Viewed from that angle, the question was merely one facet of the problem of the hierarchy of the rules of international law. A *jus cogens* rule in the meaning of article 50 in principle prevailed over a treaty. But there was an exception: the treaty would prevail if it was a general multilateral treaty. The essential element of international *jus cogens* therefore lay in the universality of its acceptance by the international community. Peremptory international law was expressed in rules from which by general consent no derogation was permitted. Although that aspect was mentioned in article 50, it was necessary that more stress should be laid upon it.

20. The amendment which his delegation had submitted jointly with those of Spain and Finland would have precisely that effect. Once adopted, article 50 would be a touchstone for testing the validity of treaties. Accordingly, the rules to which it referred must be acceptable as law to the international community as constituting an international public order, and they must be put into operation by means of procedures to be set out in article 62 of the draft.

21. Mr. YASSEEN (Iraq) said that the contents of article 50 were an essential element in any convention on the law of treaties. The article expressed a reality by setting forth the consequences in the realm of treaty law of the existence of rules of *jus cogens*. The existence of such rules was beyond dispute. No jurist would deny that a treaty which violated such rules as prohibition of the slave-trade was null and void. Article 50, however, did not purport to deal with the whole broad problem of the rule of *jus cogens*: its sole purpose was to set forth the effect of those rules on treaties.

22. One effect was to limit the scope of the contractual autonomy of States; that limitation had some analogy with that which domestic law imposed on private persons, with respect to freedom of contract, in the interests of

public policy. The most important effect, however, was that the existence of *jus cogens* rules created a hierarchy of international legal norms. It could be said that some rules of international law were more binding than others, or that some were more imperative than others; so that a lesser norm could not derogate from a greater norm.

23. Treaties were the conventional methods of creating international legal norms; but States could not, by treaty, override those higher norms which were essential to the life of the international community and were deeply rooted in the conscience of mankind. A treaty which violated any such "peremptory norm" was rightly declared by article 50 to be null and void. State practice made it possible to identify those peremptory norms. However, not all rules from which no derogation was possible had the character of *jus cogens*. If a number of States agreed in a treaty to preclude the parties from contracting out of certain clauses, the violation of that prohibition in a later treaty did not make the offending treaty void: it simply involved the responsibility of the State committing the breach.

24. During the discussion on earlier articles, misgivings had been expressed because the international community did not have the necessary institutions for the prompt and clear-cut settlement of any disputes that might arise from the provisions of those articles. The same objection had now been made to article 50. It was true that the international community, especially in respect of its institutions, was not as developed as the domestic legal order: there was no court with jurisdiction for the settlement of all inter-State disputes, though in theory it would be an admirable institution, and no compulsory arbitration; the general opinion was against it. However, the international legal order had functioned so far with the existing means for the pacific settlement of disputes, which of course included the option to resort to the International Court of Justice and to arbitration.

25. It was accordingly dangerous to subordinate the development of the substantive rules of the international legal order to the development of its institutions. If the absence of institutional machinery were to be invoked as a ground for not formulating substantive rules which were already part of contemporary international law, the development of the international legal order as a whole would be placed in jeopardy.

26. He was not suggesting that the present Conference should refrain from considering institutional problems relating to the settlement of disputes. His delegation was fully prepared to join in the search for adequate solutions to such problems as those dealt with in article 62, but that search should not be allowed to impede the formulation of substantive rules. The development of substantive law had often paved the way for institutional development.

27. For those reasons, his delegation supported the retention of article 50; amendments of a drafting character should be referred to the Drafting Committee.

28. Mr. MWENDWA (Kenya) said that, by including in the draft a provision on *jus cogens*, the International Law Commission had at one and the same time recognized a clearly existing fact and made a positive contribution to the codification and progressive development of international law.

29. The fact that in the domestic law of most, if not all States, contracts concluded for certain purposes were void, was an adequate justification for including article 50. Moreover, the term "impossibility of performance" hitherto used in the law of treaties left a gap which the concept of "*jus cogens*" would fill. The law of treaties had been clear on objective impossibility, as in the case of the extradition of a person who had died, and also on practical impossibility, as in cases of *force majeure*, but not on legal impossibility. Express provision for *jus cogens* in the convention on the law of treaties would clarify that area of international law. At a time when the international community was developing mutual co-operation, understanding and inter-dependence, the will of the contracting States alone could not be made the sole criterion for determining what could lawfully be contracted upon by States.

30. Article 50 would strengthen the weaker aspects of traditional international law, which had to a large extent been founded on the concept of sovereignty pure and simple. The concept of *jus cogens* would help to stabilize fundamental norms of existing international law and thus to maintain legal security in the international community. His delegation therefore strongly supported article 50 in the direct, simple and brief form in which it had been drafted by the International Law Commission.

31. Although it was neither feasible nor desirable to attempt an enumeration of the rules of *jus cogens*, the existence of certain of those rules was readily acknowledged by all. No one would dispute that a treaty contemplating the use of force contrary to the Charter should be void. In its Advisory Opinion in the *Reservations to the Convention on Genocide* case, the International Court of Justice itself had referred to principles which were recognized by all nations "as binding on States, even without any conventional obligation".[2] The suggestion that the body of law "concerning the protection of human rights may be considered to belong to the *jus cogens*" had also been made in the dissenting opinion of Judge Tanaka in the *South West Africa, Second Phase* case.[3] The wise decision of the International Law Commission to refrain from giving examples in article 50 would make for free development of the law by inter-State practice and interpretation by competent international bodies.

32. The fear had been expressed that the inclusion of the rule in article 50 might encourage States to seek release from treaty obligations, and also that a rule which lent itself to subjective evaluation might impair treaty stability. However, the benefits to be derived by the international community from the rule would justify taking those risks.

33. He agreed with the representative of Iraq that the issue should not be confused with that of machinery for the settlement of disputes. In domestic law, the examination of such procedural questions was not a prerequisite for enacting substantive legislation.

34. Mr. ALVARES TABIO (Cuba) said that article 50 represented an important contribution to the progressive development of international law and his delegation

[2] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[3] *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 296.

strongly supported it. Despite the difficulty of identifying rules of *jus cogens*, no one could today dispute the peremptory character of certain norms, which had the effect of overriding any other rules that came into conflict with them. That result obtained even where the lesser rule was embodied in a treaty, as it was not permissible to contract out of a peremptory norm of general international law. Although it was not easy to agree on an enumeration of the rules of *jus cogens*, they did undoubtedly include the Purposes and Principles of the United Nations set forth in Articles 1 and 2 of the Charter and in its Preamble, not only by virtue of the content of those provisions but also by virtue of Article 103, which specified that Charter obligations prevailed over " obligations under any other international agreement ".

35. Difficulties of implementation had been invoked as a ground for not formulating the rule in article 50 without first establishing safeguards against abuse. That argument could be disregarded, since an abuse was possible in regard to any rule of substantive law.

36. The essential difference between *jus cogens* rules and other rules of international law lay not in their source but in their content and effects. It was true that many *jus cogens* rules had their origin in the United Nations Charter or in other general multilateral treaties, but some of them still rested on customary international law. The text of article 50 reflected the dynamic character of the rules of *jus cogens*, in that it did not embody an enumeration of those rules.

37. His delegation could not accept the Mexican amendment (A/CONF.39/C.1/L.266). A treaty which conflicted with an existing rule of *jus cogens* was void *ab initio*; that point did not need any further elaboration. If, however, the purpose of the amendment was to provide that nullity should not operate *ex tunc*, it should be categorically rejected. A decision which found a treaty to be null and void because it conflicted with a rule of *jus cogens* was purely declaratory; the void treaty was a nullity from the start and the decision would merely acknowledge that fact. Nor could his delegation accept the proposition that article 50 should not affect treaties already concluded before its provisions entered into force. No breach of the principle of non-retroactivity was involved where a legal norm was applied to existing questions or matters, even if they had originated earlier.

38. His delegation opposed the United States amendment (A/CONF.39/C.1/L.302), which would subordinate the rules of *jus cogens* of international law to " national and regional legal systems ". That approach would enable a State to thwart any rule of *jus cogens* by invoking its domestic legislation.

39. His delegation also opposed the Greek amendment (A/CONF.39/C.1/L.306 and Add.1), which would introduce new elements liable to lead to complications, and the Finnish amendment (A/CONF.39/C.1/L.293), which would implicitly delete paragraph 5 of article 41, on which the Committee had not yet taken a decision. In any event, the International Law Commission had advisedly precluded separability in the case of a treaty which violated a rule of *jus cogens*.

40. The Indian amendment (A/CONF.39/C.1/L.254) would improve the text by placing the provisions of article 61 in their proper context but, at the present stage of the discussion, it might give rise to difficulties.

41. The useful drafting improvements in the amendment by Romania and the USSR (A/CONF.39/C.1/L.258) should be referred to the Drafting Committee.

42. Mr. FATTAL (Lebanon) said that, for the first time in history, almost all jurists and almost all States were agreed in recognizing the existence of a number of fundamental norms of international law from which no derogation was permitted, and on which the organization of international society was based. The norms of *jus cogens* had a long history but had crystallized only after the Second World War. In spite of ideological difficulties, a shared philosophy of values was now emerging, and the trend had been sharply accelerated by the growth of international organizations.

43. *Jus cogens* was a body of general peremptory norms from which no derogation was permitted. The norms generally regarded as being part of *jus cogens* fell into two groups: the first, based on morality, comprised the most important rules of humanitarian law, such as the prohibition of slavery or genocide, and the wartime treatment of prisoners and wounded and of the civil population; the second group comprised the most important rules of international constitutional law, in particular, those listed in Article 2 of the United Nations Charter. Unlike certain delegations, his delegation excluded from that category the principle of good faith; it did not answer the definition in article 50 and could not be modified by a new peremptory rule of general international law.

44. It was curious that neither the International Law Commission nor jurists in general had managed to find a modern equivalent for the Latin term *jus cogens*. That only showed how imprecise were the norms it covered. The International Law Commission had chosen an obscure term in order to denote an obscure notion. Recognition of the existence of *jus cogens* was the first step towards the establishment of an embryonic universal " public order ". He had not been convinced by the arguments against the use of that term, which he preferred to the term *jus cogens*.

45. Several delegations considered that *jus cogens* was dangerous, owing to the lack of an appropriate tribunal with jurisdiction to settle any disputes to which it might give rise. It was argued that an article such as article 50 would give States a pretext for evading their obligations unilaterally by alleging some violation of a peremptory norm. That was nothing new; any norm of international law could be used for such a pretext. The International Law Commission had not been able to avoid the difficulty. The article 62 it proposed was the most disappointing in the draft. Its reference to Article 33 of the Charter was not reassuring. The problem could not be solved so long as certain States continued to reject a compulsory jurisdiction for the settlement of disputes.

46. The Conference might be on the wrong track. It was making a great effort to develop the principles of international law and at the same time an equal effort to prevent positive law from coming into being. Legal technique was dangerously incomplete if it had no corresponding jurisdictional function. It was no use curbing the autonomy of the contractual will of a State if it was then left free to decide the legality or illegality of its legal instruments unilaterally and subjectively; that was either short-sightedness or juridical demagogy.

47. Article 62 should provide for an organic procedure for the settlement of disputes arising out of Part V of the draft. Legal policy, like all policy, meant a choice of the lesser evil. His delegation would therefore vote for article 50 as it stood, unless a more satisfactory definition of *jus cogens* could be found. On the other hand, it strongly urged that article 62 should be amended and that the vote on article 50 should be combined with that on article 62, which was the keystone of the whole edifice.

48. Mr. OGUNDERE (Nigeria) said that the idea of minimum concepts which could not be derogated from by parties *inter se* had developed from the norm of the law of nature, later known in the Digests as *jus publicum*, in contrast to *jus dispositivum* from which the parties might derogate by agreement *inter se*. *Jus publicum* was rooted in municipal law and in its later developed form became known as " public policy ", or *ordre public*. The concept of *jus ad bellum*, generally recognized in international relations before the First World War, had necessarily restricted the growth of the idea of *jus cogens* in international law at a time when international morality was something unknown. The Covenant of the League of Nations had, however, signalled a change of direction. In the period between the two world wars, jurists had recognized that the international legal order, like any municipal legal order, must contain rules of *jus cogens* if a stable world order was to be established. International morality had become accepted as a vital element of international law, and eminent jurists had affirmed the principle of the existence of *jus cogens*, based on the universal recognition of an enduring international public policy deriving from the principle of a peremptory norm of general international law. In more recent times, the General Treaty for the Renunciation of War, of 1928, generally known as the Briand-Kellogg Pact, and the Charter of the United Nations had established beyond doubt that rules of *jus cogens* were recognized as part of international law.

49. The Nigerian delegation held that *jus cogens* was an evolutionary, not a revolutionary, juridical concept and therefore agreed with the remarks of the International Law Commission in paragraph (4) of its commentary to article 50. The rule was best stated as the International Law Commission had stated it, because, as Sir Gerald Fitzmaurice had written in his commentary to article 17 of the 1958 draft, "*jus cogens* rules involve not only legal rules but considerations of morals and international good order ".[4] Some States had expressed concern about the acceptance of *jus cogens* in article 50, but the International Law Commission had provided a remedy in article 62, by laying down rules for the invalidation of a treaty on the ground that it was contrary to the rules of *jus cogens* as well as on other grounds.

50. The Nigerian delegation would have to vote against the Finnish amendment (A/CONF.39/C.1/L.293) and preferred the Commission's text to the Mexican amendment (A/CONF.39/C.1/L.266). With regard to the latter, the Commission had made it quite clear in paragraph (6) of its commentary that the provision was non-retroactive. The amendment by Romania and the USSR (A/CONF. 39/C.1/L.258) seemed to be of a purely drafting nature and could therefore be referred to the Drafting Committee. The United States amendment (A/CONF.39/C.1/ L.302) raised another difficulty, since it linked *jus cogens* in international law with municipal and regional legal systems; the Nigerian delegation accordingly could not support it. The Greek amendment (A/CONF.39/C.1/L.306) was substantially of a drafting nature and should be referred to the Drafting Committee; if, however, it were put to the vote, the Nigerian delegation would vote against it, as it preferred the International Law Commission's text.

51. Mr. MEGUID (United Arab Republic) said it was impossible to deny the importance of the rules of *jus cogens* in international law. As previous speakers had acknowledged, they did exist and they must be respected.

52. The International Law Commission's text was well-conceived, clear and well-balanced, but might be improved. The amendments submitted jointly by the delegations of the USSR and Romania (A/CONF.39/C.1/ L.258/Corr.1) and by Greece and Finland (A/CONF.39/ C.1/L.306 and Add.1) were of a drafting nature. The Indian amendment (A/CONF.39/C.1/L.254) raised no problem and might also be considered a drafting amendment. Those by Mexico, Finland and the United States of America (A/CONF.39/C.1/L.266, L.293 and L.302) raised points of substance but retained the principle. His delegation would support the Commission's text; the drafting amendments should be referred to the Drafting Committee.

53. Mr. BARROS (Chile) said that, although *jus cogens* was a rule whose importance no one denied, it was also a fairly recent notion both in doctrine and in international jurisprudence. Indeed, a member of the International Law Commission had admitted that it was in the Commission itself that he had learnt of the existence of the term, and then only in 1962. Undoubtedly, however, the idea had existed from very ancient times, without being precisely defined, that there was a body of norms placing obligations on States which took precedence over treaty obligations. The various schools of thought did not agree on the origin of those norms; some held that it lay in natural law, others that it came from the will of States as expressed in treaties or in custom.

54. The content of *jus cogens* had not been defined and was not easily definable. The Chilean delegation shared the view expressed in 1963 by Mr. Yasseen in the International Law Commission that peremptory norms did exist but were hard to identify and apply.[5] That threw some light on the difficulties inherent in norms of *jus cogens*.

55. Further difficulties arose over the effects of *jus cogens*. The International Law Commission's draft of article 50 stated that a treaty was void if it conflicted with a peremptory norm of general international law from which no derogation was permitted. That immediately raised difficulties of interpretation. Recent cases showed that the principle could be invoked, and had been invoked, with slight variations, for ideological reasons or merely for reasons of foreign policy. Thirty years previously, the world had suffered from what had begun as an invocation of *jus cogens* and had subsequently turned out to be a use of force in the interests of a personalist policy. Sir Hersch Lauterpacht had issued a warning

[4] *Yearbook of the International Law Commission, 1958*, vol. II, p. 41.

[5] *Yearbook of the International Law Commission, 1963*, vol. I, p. 63.

that the possibility of invoking the invalidity of immoral treaties was a constant invitation to unilateral evasion of an irksome obligation. It was true that Lauterpacht seemed to have changed his view of *jus cogens* after the horrors of the Second World War, but it was certain that he had continued to hold that the problems deriving from the incompatibility of the terms of a treaty with the principles of international law should be brought before an international tribunal.

56. More recently, Schwarzenberger had drawn attention to the perils of *jus cogens* and of the formulation of article 50. In a well-known article [6] he had written that "apparent 'progressiveness' can readily be made to serve sectional interests not apparent at first sight". And he had gone on to warn that the "public action" of article 50 would enable any State to invoke the invalidity of a treaty and would "provide splendid opportunities for the expression of moral indignation by third parties on matters which, otherwise, would clearly not be their business".

57. But it was not just in the theoretical writings of jurists that anxiety had been displayed over the scope of *jus cogens*. In the International Law Commission itself, in 1963, there had been an interesting debate on the question of the inclusion of *jus cogens* in the draft convention on the law of treaties. Mr. Tunkin had said that the text of the article should mention "unequal treaties", even though the case was already covered in general terms, "since unequal treaties were contrary to rules of international law having the character of *jus cogens*." [7] Mr. Jiménez de Aréchaga had disagreed and had added that "from the point of view of international relations, the introduction of the concept of unequal treaties would be fraught with danger. In Latin America, for example, many States would be able to claim that their various frontier treaties had resulted in a manifest inequality of obligations". [8] Mr. Bartoš and Mr. Yasseen had claimed that even *rebus sic stantibus* was a rule of *jus cogens*, but Mr. Tunkin had disagreed. That debate had shown how widely opinions differed over the scope of the article, even within the International Law Commission which had drafted it.

58. Article 50 as at present worded seemed to go round and round. It began by saying that a treaty was void if it conflicted with a peremptory norm of general international law from which no derogation was permitted, but it then went on to say that the norm from which no derogation was permitted could itself be modified by a subsequent norm of general international law having the same character. That sounded like a contradiction in terms. The only help given by the commentary was an indication that what it meant was that those peremptory norms from which no derogation was permitted might be modified by general multilateral treaties. If article 50 in its present form were debated in parliament, it would undoubtedly meet with the objection that it seemed to state that a treaty which violated *jus cogens*, a norm from which no derogation was permitted, was void unless it was a general multilateral treaty which conflicted with a norm of *jus cogens*. That was what he had meant by saying that the article seemed to go round and round.

59. It might be argued that that was merely a matter of drafting, and he wished that were the case, but there were more serious matters. Throughout its debates, the Committee had been careful to try to find language which would make the rules adopted as specific as possible, in order to prevent any threat to the stability of treaties from creeping in through any looseness of wording. And yet now, after all that precaution, it seemed to wish to include a rule that could be invoked for every sort of purpose —for offensive treaties, which were merely another way of looking at defensive treaties, for supra-national economic treaties, for *rebus sic stantibus*, and so on— and to give the effect of absolute nullity to violations of rules of *jus cogens* which were indeterminate and ill-defined.

60. Much had been made of the overwhelming majority in the International Law Commission in favour of the rule and also of governments' reactions to it. But those reactions were only to be expected. If the Committee were asked to vote on democracy, it would vote unanimously in favour of it, but it would be found later that there were all sorts of different interpretations of individual votes. Something of the same sort was doubtless true of the reaction, or lack of reaction, of most governments to article 50.

61. The Chilean delegation did not deny absolutely the existence of *jus cogens*; in the case of slavery or piracy, it would be inconceivable to revert to primitive forms which were rejected by the conscience of the international community. But it must be made clear that representatives of governments were in duty bound to analyse article 50 carefully, to improve its wording and, above all, to define with the utmost precision a ground of absolute nullity which was open to so many different interpretations. Nor must the Committee forget that it was essential to hedge the rule about with the most stringent procedural safeguards, since *jus cogens* could be invoked not only by the parties to a treaty but—what was far more dangerous—by any State.

62. The Chilean delegation would support any attempt to reformulate article 50 so that it combined the higher juridical interests of the community of States with the international stability to which the Conference aspired.

The meeting rose at 1.5 p.m.

FIFTY-THIRD MEETING

Monday, 6 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*) *(continued)* [1]

1. Mr. MIRAS (Turkey) pointed out that the notion of the peremptory rule of general international law, called

[6] "International *jus cogens*", *Texas Law Review*, March 1965, p. 477.

[7] *Yearbook of the International Law Commission, 1963*, vol. I, p. 69, para. 28.

[8] *Loc. cit.*, p. 71, para. 47.

[1] For the list of the amendments submitted, see 52nd meeting, footnote 1.

jus cogens in the draft, and the terms used in articles 50 and 61 codifying that notion, were entirely new. They formed part of the cases of invalidity contained in Part V which the International Law Commission had borrowed from the private law of contract. Thus the International Law Commission had transposed from civil law to the law of treaties all the grounds of invalidity existing in the law of contract, except cases in which the contract was burdensome *(lésion)*.

2. Such borrowings might add to and promote the development of international law, but on two conditions. First, the rule must lend itself to such transposition, and second, it was essential to take certain precautions.

3. The similarity of settings was an essential condition which assumed particular importance when transferring rules of internal law to international law. An international treaty was a complicated act that differed basically from the simple contract in private law.

4. The commentary to articles 50 and 61 was not sufficiently explicit concerning the existence of *jus cogens* in international law. It asserted that, although opinions were divided in doctrine, the view which denied the existence of *jus cogens* in international law had become increasingly difficult to sustain, that the law of the Charter concerning the prohibition of the use of force presupposed the existence of *jus cogens*, that the emergence of rules having the character of *jus cogens* was relatively recent and that there was as yet no criterion by which to identify a general rule of international law as having the character of *jus cogens*.

5. Basing itself on those premises, the International Law Commission had decided to include articles on *jus cogens* and to leave it to State practice and the jurisprudence of international tribunals to determine the " full content of this rule ".

6. The foregoing remarks showed that the Conference was dealing, not with a well-established rule, but with a new rule by means of which an attempt was being made to introduce into international law, through a treaty, the notion of " public policy "—*ordre public*. The intention was to establish a hierarchy of juridical norms. Such a hierarchy presupposed a hierarchy of sources in law; but the sources of international law were sovereign and equal States. Unlike internal law, international law had no legislator who imposed his orders. Treaty rules came into being through the consent of States, to which, moreover, the contents of the rule must be known. What could be done in the present state of international law was to establish through a convention the priority of certain specific rules, as first the Covenant of the League of Nations and then the United Nations Charter had done.

7. But such treaty priority differed from the notion of public policy under internal law, for only a legislator having no need for the consent of subjects of law could decree that a rule was of the character of public policy and that its violation would entail nullity. Moreover, the notion of legality in internal law was closely linked to the existence of a court. But the procedure provided for in article 62 contained a reference to Article 33 of the Charter, which was one of the weak points of that instrument, as it merely enumerated methods of settling disputes, without establishing any obligation to use them. The element of assessment was not a question of simple procedure but an essential element in any ground of invalidity.

8. Accordingly, by introducing into international law a rule borrowed from civil law without adapting it to the particular conditions of the international setting and by cutting out the safeguards it had in internal law, the International Law Commission had submitted a text that opened the door to all kinds of abuse. Consequently, his delegation regretted that it was unable to support the retention of articles 50, 61 and 62, which, as drafted, were calculated to undermine the stability of treaties and create confusion in the international sphere.

9. Mr. COLE (Sierra Leone) said that he strongly supported the rule laid down in article 50 of the draft. He was pleased to see that the Committee did not have before it any proposal for the deletion of that very important rule, which represented a logical step in the progressive development of international law. It provided a golden opportunity to condemn imperialism, slavery, forced labour and all practices that violated the principle of the equality of all human beings and of the sovereign equality of States, by affirming the peremptory character of the rules of international law concerning fundamental human rights, the principle of self-determination and all the inviolable principles of the Charter, embodied, in particular, in Articles 2, 33, 51 and 103.

10. It had been objected that article 50 might lend itself to abuse, since it left everybody free to admit or deny the imperative character of any particular rule of international law, in default of the institution of the compulsory jurisdiction of the International Court of Justice or of any other tribunal. All rules of international law could give rise to abuse. But that was not a sufficient reason for renouncing codification and the progressive development of international law; the establishment of a compulsory machinery for the settlement of disputes was not necessarily either the best solution or in any case an absolute condition for the adoption of the rules laid down in the draft. Few States had accepted the procedure for the compulsory settlement of disputes provided for in the Optional Protocols to the Vienna Conventions of 1961 and 1963. That showed that the eagerness of certain delegations to make the compulsory settlement of disputes a condition for including certain rules in the convention was perhaps only a pretext.

11. In view of the circumstances and in particular of the profound shock received by the international community as a result of the judgement of the International Court of Justice in the South West Africa case, from which it had not yet recovered, it seemed useless, at the present stage, to press for the inclusion in the convention of a system for the compulsory settlement of disputes. That would indeed be the ideal solution, but in the present circumstances it would be totally unrealistic. The delegation and Government of Sierra Leone believed that States should settle their disputes by peaceful means. That was the positive and logical corollary to the prohibition of the threat or use of force. Provision should be made for a system that would make for an objective, prompt and just settlement of a dispute, based on the consent of the parties, and adapted to the circumstances and nature of the case, always bearing in mind the obligation of good faith that was incumbent on all States in their treaty relations.

Those requirements were amply met in article 62 of the draft.

12. With reference to the amendments, he supported the Mexican proposal (A/CONF.39/C.1/L.266), which expressly confirmed that article 50, as was clearly indicated in the commentary, should not have retroactive effect. He also supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which improved the text. On the other hand, he was not in favour of the Finnish amendment (A/CONF.39/C.1/L.293), as he considered that the violation of a peremptory rule of international law was such a serious matter that it should lead to the invalidation of the whole of the treaty; it was open to the parties concerned to conclude a new agreement. He would vote on the other amendments in the light of the comments which he had made.

13. Mr. DADZIE (Ghana) said that *jus cogens* was an essential and inherently dynamic ingredient of international law. The debate should prove that such was the general opinion.

14. The rules governing relationships between States did not spring from the fertile imaginations of professors, legislators or government officials. To be accepted and respected, they had to be based on the philosophical and ethical conceptions of the society for which they were intended and keep pace with its constant evolution.

15. Although the notion of *jus cogens* had appeared only recently in the writings of the publicists, *jus cogens* itself had existed in international law since the time of the most primitive societies. The international law of past eras might not have prohibited aggressive wars, genocide or slavery, but neither had it sanctioned every act of international banditry.

16. In the twentieth century, some of humanity's most bitter experiences had led it to recognize the peremptory character of an ever-increasing number of rules, such as the principles of self-determination and the sovereign equality of States, and the prohibition of genocide and slavery and its bastard son, racial discrimination.

17. His delegation thought the rule in article 50 eminently desirable and approved it unreservedly. Some had claimed, however, that article 50 might give rise to abuse and undermine the stability of treaty relations between States because it failed to define and enumerate peremptory norms.

18. With regard to definition, he endorsed what the Iraqi representative had said at the 967th meeting of the Sixth Committee: "That was a theoretical point of general international law and had no place in a draft on the law of treaties".[2] As to the enumeration of the rules constituting *jus cogens*, his delegation considered it unnecessary, for the indisputable reasons set forth in paragraph (3) of the commentary to article 50.

19. Interpretations might vary, of course, but the peremptory nature of a rule would normally be obvious. The rule would therefore be recognized as such by a sufficient majority for it to be accepted and respected. Moreover, the customary rules of international law, which had been established by a few, usually the most powerful, States, whose ideas they reflected, had nevertheless been recognized by new States. Likewise, it was sufficient if *jus cogens* represented the preponderant will of the community of States. Unanimity of interpretation was unnecessary.

20. His delegation was therefore strongly opposed to anything likely to weaken article 50; its attitude towards the amendments would be based on his statement.

21. Mr. RATSIMBAZAFY (Madagascar) said he was aware of the far-reaching nature and complexity of the problem involved in the notion of *jus cogens*. He had no doubt that once the notion was established and recognized as such, it would become increasingly important in the law and life of the international community. His delegation had been struck, however, by the vagueness of the notion, despite its proponents' endeavours to clarify it, particularly at the Lagonissi Conference, held in April 1966 under the auspices of the Carnegie Endowment.

22. Peremptory norms or superior rules of law prohibiting certain acts rebuked by the conscience of mankind could, of course, be found in contemporary international law, particularly in the principles laid down in the United Nations Charter. Some jurists attempted to define those rules according to their effects. In his delegation's opinion their peremptory character depended on their content, but no criteria yet existed for determining that content with precision.

23. Another criticism which might be levelled against the theorists of *jus cogens* was the absence of any jurisdiction or sanction, because article 62 referred only to the means indicated in Article 33 of the Charter, which relied on the goodwill of the parties.

24. The notion of *jus cogens* was not without some danger, in so far as it implied the superiority of certain provisions of the Charter over others, and also because such a theory seemed to involve some kind of arbitrary "growth" of international law, which could only be based on subjective and unilateral interpretation. The nullity of international instruments would thus to some extent be left to the goodwill of the parties. The notion of *jus cogens* might therefore seriously undermine the traditional principle of the rule *pacta sunt servanda.*

25. There could be no question of denying the existence of *jus cogens* in such a highly organized structure as contemporary society, in which good faith was the rule. But the rules reflecting that notion, their scope and the competent jurisdiction in the event of disputes, ought to be defined more clearly. Any amendment to that end would have the support of the Malagasy delegation.

26. Mr. RUIZ VARELA (Colombia) said that the existence of certain general principles of international law was recognized by doctrine, positive law and the practice of States, and that those principles, which had a firm moral basis in what had been the *jus gentium* of the Romans, had become the rules of the universal legal conscience of civilized countries. However, divergent interpretations arose in any attempt to enumerate those principles. With regard to the peremptory rules of international law or *jus cogens*, the Colombian delegation believed that in principle the entire world recognized the existence of a public international order consisting of rules from which States could not derogate. The question arose, however, who would define that brief code of peremptory rules and decide whether a new rule of that kind had emerged.

[2] See document A/CONF.39/5, under article 50.

27. Should that task be entrusted to an independent body, to enable the provisions concerning *jus cogens* to become effective? If so, the International Court of Justice would offer the best safeguards against an arbitrary decision. At all events, the procedure prescribed in article 62 seemed inadequate.

28. With regard to the amendments submitted, his delegation was opposed to combining articles 50 and 61 into one article, as proposed in the Indian amendment (A/CONF.39/C.1/L.254), for they dealt with two quite separate situations. It regretted that it could not support the Finnish amendment (A/CONF.39/C.1/L.293) either, because it regarded separability as inapplicable to a treaty which was void *ab initio* in virtue of article 50.

29. On the other hand, it supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which gave greater prominence to the character and legal nature of peremptory rules. It also supported the Mexican amendment (A/CONF.39/C.1/L.266), which it did not consider superfluous although the non-retroactivity of articles 50 and 61 was already affirmed in the International Law Commission's commentary and emphasized by article 67.

30. His delegation favoured the amendments submitted by the United States (A/CONF.39/C.1/L.302) and by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), which clarified the notion of a peremptory norm by requiring it to be generally recognized as such.

31. Lastly, the United States amendment justifiably deleted the concluding portion of article 50, since the idea it contained was already expressed in article 61.

32. Mr. NAHLIK (Poland) said he thought article 50 showed contemporary international law to be more orderly and better balanced than " traditional " international law. His delegation was glad to find that the participants in the Conference seemed to agree that rules of *jus cogens* existed in international law. The objections of the Turkish representative in that respect seemed largely based on a misunderstanding. The hierarchy of rules in contemporary international law, which article 50 expressed, had nothing to do with any civil law concepts and was a logical outcome of the modern development of international law. He quoted several authorities who had acknowledged at recent international conferences that the existence of peremptory rules in international law could no longer be doubted. That had been the conclusion reached, for instance, at the Lagonissi Conference of 1966 on *jus cogens*, which he had attended.

33. The notion of *jus cogens* was not so new as had sometimes been claimed. The existence of some superior rules had indeed been recognized in the past by the law of nations and they had only disappeared with nineteenth-century positivism. They had reappeared in the twentieth century but on an entirely different basis, less controversial than before. The realities of international life expressed in the conscience and will of States constituted their basis in contemporary international law.

34. The form or source of such rules was not of essential importance in determining their peremptory character. Some were conventional and some customary. Some first emerged as custom and were later codified in multilateral conventions. Some, on the other hand, first appeared in conventions and only passed later into customary law, a process recognized by article 34 of the International Law Commission's draft.

35. To say that peremptory rules existed was one thing; to enumerate them was another. Some of the principles of the United Nations Charter, particularly those in Article 2, undoubtedly formed part of *jus cogens*. By giving those principles greater legal value than any other commitments of Member States, Article 103 of the Charter laid down the principle of a hierarchy of rules in the international legal order. The freedom of the high seas, the prohibition of slavery and genocide and some of the rules of land warfare were also among those superior rules from which it was inconceivable that any group of States could lawfully derogate. He shared, however, the view already expressed by a few other speakers that it would be inappropriate to insert examples in a general codification.

36. With regard to the relationship between articles 50 and 62, his delegation would explain its point of view when the latter article was discussed.

37. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) clarified the text of article 50 by establishing a link between its two parts and by making its latter part explain the words " peremptory norm of general international law ". Since it was a drafting amendment, it could be referred to the Drafting Committee.

38. The Mexican amendment (A/CONF.39/C.1/L.266) might complicate matters instead of elucidating them, since it dealt with a subject which concerned article 67 rather than article 50.

39. His delegation was opposed to the Finnish amendment (A/CONF.39/C.1/L.293) for the reasons it had already given at the 42nd meeting [3] in connexion with a similar amendment (A/CONF.39/C.1/L.244) concerning article 41.

40. The amendment submitted by Spain, Finland and Greece (A/CONF.39/C.1/L.306 and Add.1 and 2) was somewhat equivocal. The proposed addition might seem tautological in that no norm of international law could be considered to be " general " unless recognized by States constituting the international community. But the statement by the Greek representative suggested that the purpose of the amendment was to require some special form of recognition by the international community. In that case, the amendment would create more difficulties than it would solve.

41. The Polish delegation could not accept the United States amendment (A/CONF.39/C.1/L.302). Despite the explanations of its sponsor, what counted was the text of the amendment. The reference to " national and regional legal systems " would make it extremely difficult in practice to determine the contents of many peremptory norms. Moreover, the amendment seemed to be based on the notion of the supremacy of the national over the international legal order and of the regional international over the general international legal order, a controversial issue on which the Conference would do well not to adopt any position.

42. Mr. VEROSTA (Austria) said that the draft articles implicitly distinguished between three kinds of rules of

[3] Para. 32.

international law: rules and obligations based on treaties, rules of general international law based on custom or on multilateral treaties from which derogation was permitted, and peremptory rules of general international law from which no derogation was permitted, and which could be modified only by subsequent norms having the same character.

43. The question arose whether the recognition of that superior category of norms of international law in article 50, with its consequences in articles 61 and 67, were a matter of the codification of existing international law or of the progressive development of international law. Paragraph (1) of the commentary on article 50 showed that the International Law Commission had initially hesitated somewhat on that point, but encouraged by the fact that only one Government had questioned the existence of rules of *jus cogens*, it had finally ventured to submit articles 50, 61 and 67 as belonging to the codification of international law.

44. Most of the representatives who had so far spoken in the debate on *jus cogens* had expressed themselves in favour of the principle underlying article 50. The Austrian delegation had noted with great interest the attitude of the United States, a permanent member of the Security Council. His delegation hoped that the discussion would result in general agreement on the matter.

45. In paragraphs (2) and (3) of the commentary, the Commission had listed a number of negative criteria concerning rules of *jus cogens*: first, there was no simple criterion for identifying such a norm; second, the majority of the rules of international law did not have that character; third, a provision in a treaty was not *jus cogens* merely because the parties had stipulated that no derogation from that provision would be permitted; fourth, it was not the form of a rule but the particular nature of the subject matter with which it dealt that might give it the character of *jus cogens*; and fifth, peremptory norms of international law were not immutable. Of those five criteria, the fourth, concerning subject matter, was particularly important.

46. The nullity contemplated in article 50 applied not only to a treaty conflicting with a norm of *jus cogens* but also to any act or action conflicting with a peremptory norm of general international law and to an eventual recognition of such an illicit act by one or several States. The fact that article 50 would have that consequence once it had been adopted showed the importance of the rule it laid down.

47. While accepting article 50, despite its general character and lack of precision, the Austrian delegation considered that its unilateral application might endanger the stability of international treaty relations, which the draft articles as a whole sought to safeguard, in particular through article 23. It was to be hoped that the adoption of a suitable procedure might mitigate that danger. His delegation therefore reserved the right to speak on the matter again at a later stage in the discussion.

48. Mr. JIMENEZ DE ARECHAGA (Uruguay) said he strongly supported article 50, for he believed that that ground of nullity should be included in the convention. In supporting the principle, care must be taken not to exaggerate its scope, either in a positive direction, by making of it a mystique that would breathe fresh life into international law, or in a negative direction, by seeing in it an element of the destruction of treaties and of anarchy. In the Uruguayan delegation's view, article 50 was simple and would have relatively limited effects. The international community recognized certain principles which chimed with its essential interests and its fundamental moral ideas, such as the prohibition of the use of force and aggression, genocide, racial discrimination and the systematic violation of human rights. It was not enough to condemn the violation of those principles; it was necessary to lay down the preventive sanction of absolute nullity in respect of the preparatory act, namely the treaty whereby two States came to an agreement to carry out together acts constituting a violation of one of those principles. It was in the nature of things that, in practice, that type of treaty, a flagrant challenge to the international conscience, would be infrequent and that instances of treaties that would be null and void as the result of the application of that rule would be rare. Nevertheless, there should be a precise criterion for identifying the rules of *jus cogens*, since each time it was proclaimed that a given principle was a rule of *jus cogens*, the scope of one of the basic principles of international law—the rule that what States had agreed upon constituted the law for the parties *(pacta sunt servanda)* — was diminished.

49. His view of the Indian amendment (A/CONF.39/C.1/L.254), which amounted to combining articles 50 and 61, was that the International Law Commission had been right to keep the two articles separate. The emergence of a new rule of *jus cogens* was closer to grounds for the termination of a treaty by derogation than to grounds of nullity, from the point of view both of the effects in time and of the question of separability. It did not avoid acts or situations which had been performed or established at a time when they had been in conformity with international law: *tempus regit actum*. Contrary to the opinion of the Finnish delegation (A/CONF.39/C.1/L.293), it was understandable that the effect of a conflict with an existing rule of *jus cogens* should be the nullity of the treaty as a whole, whereas the emergence of a new rule of *jus cogens* could affect only a part of a treaty.

50. The Mexican amendment (A/CONF.39/C.1/L.266) should be considered together with article 67, as it was more relevant to the idea expressed in the first sentence of paragraph 2(*b*) of that article. The effectiveness *ratione temporis* of rules of *jus cogens* in force depended on the date when they were accepted as such; the Mexican amendment might undermine that principle.

51. The United States amendment (A/CONF.39/C.1/L.302) was composed of two parts. The first specified that the conflict must exist at the time of the conclusion of the treaty if the rule was to operate; that idea was implicit in the draft, but might well be made more explicit. The second part contained the idea that a peremptory rule of general international law was universal and accepted by the international community as a whole; that was true, but the idea was not, perhaps, expressed as well as it might have been; the proposed wording was both too flexible and too rigid. A rule accepted by national systems of law might become a general principle established in domestic law without necessarily being part of *jus cogens*. For example, the principle that every injury must be redressed did not preclude the conclusion of international agreements restricting liability. Again the reference to regional systems was not very happy. For example, if a

regional international organization embarked upon a policy of aggression, that would not mean that the rule prohibiting the use of force ceased to be a rule of *jus cogens*.

52. The amendment by Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) introduced the element of general recognition by the international community which was lacking in the United States amendment and should therefore be considered.

53. Mr. SINCLAIR (United Kingdom), introducing the United Kingdom sub amendment (A/CONF.39/C.1/L.312) to the United States amendment, said that his delegation agreed that in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out. That conception was fundamental in developed internal systems of law, but in those systems it was not difficult to ascertain which rules had a peremptory character and which had not. He would not dispute that international law now contained certain peremptory norms, in the sense in which that term was used in article 50, but international society and international law had not yet developed to a stage where it was possible to be reasonably confident as to where the border-line between peremptory norms and other rules of international law lay. The International Law Commission's proposals concerning the content of article 50 had given rise to a wide divergency of opinions. Some eminent international jurists denied the very existence, in current international law, of norms of the kind described in article 50. The question of knowing how peremptory norms were created and how they could be subsequently modified was also very obscure and gave rise to a great deal of controversy. His delegation viewed with concern the uncertainty to which article 50 would give rise, in the absence of a sufficiently clear indication of the means of identifying the peremptory norms in question. Article 50 did not provide a definition of peremptory norms, but instead laid down the legal sanctions for their violation.

54. In paragraph (3) of its commentary, the International Law Commission recommended that it should be left to State practice and the jurisprudence of international tribunals to work out the full content of the rule. The adoption of such a course would be equivalent to providing in a penal code that crimes should be punished without specifying which acts constituted crimes. In the absence of a tribunal having jurisdiction or of a procedure for defining which rules of international law had the character of peremptory norms, the application of the rule in article 50 would be at the mercy of unilateral assertions and counter-assertions made by the States concerned.

55. If the article were retained, that difficulty might be overcome in three ways. The first would be to include in the article an exhaustive list of the rules or principles of contemporary international law which constituted *jus cogens*. The Commission appeared to have considered that that solution would raise too many difficulties, but his delegation did not consider that it should be rejected out of hand.

56. The second course would be to include in the article a list of peremptory norms which did not purport to be exhaustive. That course would at least have the advantage of giving some indication of the scope of the rule contained in the article; the fuller the list, the more the area for potential dispute would be reduced. The Commission had considered establishing such a list, but had rejected the idea, for two reasons which were explained in paragraph (3) of its commentary. Perhaps the force of the first objection, that the enumeration of certain cases would lead to misunderstanding as to the position concerning other cases had been overrated. In any event it would not be such a disadvantage if the onus of proof were in some degree weighted against the State that alleged the existence of a peremptory norm not mentioned in the article. The other reason advanced by the International Law Commission, namely that the establishment of a list would necessitate a prolonged study of questions which fell outside the scope of the articles, was not a very sound one, for it was difficult to maintain that the definition of the scope of article 50 fell outside the scope of the draft articles.

57. If the Conference decided that it would be desirable to establish a list of peremptory norms, whether exhaustive or not, it might request the International Law Commission to undertake the task as a matter of urgency: that would be to impose on it an obviously very difficult burden, but it should not be assumed that the Commission could not succeed.

58. The third course would be to write into article 50 some means or test whereby peremptory norms could be identified. The United States amendment proceeded in that direction. It had the advantage of stressing the notion of general international law by stating that peremptory norms must be recognized by the various national and regional legal systems of the world. It was his understanding that the reference in the amendment to national and regionallegal systems was a reference, not to domestic legal systems, but rather to the fact that there must be universal recognition by States or groups of States that a rule of international law had the character of a peremptory rule. In view of the importance of that new conception of peremptory norms, from which no derogation was permitted, the amendment was valuable. However, it did not provide for a sufficiently clear and easily applicable means of identifying peremptory norms. The United Kingdom proposal, which was a sub-amendment to the United States amendment, might also be considered in relation to other amendments to article 50, such as those of Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

59. The United Kingdom sub-amendment recognized that Part V of the Commission's draft enunciated at least one peremptory rule: that was obviously the rule set forth in article 49, concerning the threat or use of force. Bearing in mind the debate which had taken place on article 49, and the views expressed by his delegation in that debate, the United Kingdom sub-amendment was based on the proposition that the peremptory rule set forth in article 49 would render void any treaty procured by the threat or use of force in the meaning of Article 2 (4) of the United Nations Charter, read in the context of the Charter as a whole.

60. Further, the United Kingdom sub-amendment proposed that peremptory norms should be defined in pro-

tocols to the convention, which would be negotiated after the conclusion of the convention. In other words, his delegation believed that peremptory norms, representing the higher international morality and the international public order of the future, should themselves be codified. It was unsatisfactory to leave it solely to the ambivalent processes whereby customary international law gradually emerged to determine the existence of those higher rules. That was particularly so since there were serious difficulties in securing universal compulsory adjudication of all international disputes by a permanent international judicial organ. In any event, the problems which would arise in connexion with the application of article 50 would not be entirely solved even if all the questions concerning the interpretation and application of the present convention were referred to the International Court of Justice at the instance of a party to a dispute. Such a procedure would facilitate the solution of those problems—and for that reason, his delegation strongly supported the inclusion of a provision to that effect in the convention. But in the case of article 50, it would be placing too heavy a burden on the Court to request it to determine whether a particular rule of international law had the character of a peremptory rule and when it had achieved that character. It would be like asking a court to establish the content of a penal code.

61. The Conference would be failing in its duty if it did not prescribe some clear-cut mechanism whereby the existence and content of peremptory rules of general international law could be properly identified and defined. The dangers of article 50 as it stood would not be very much greater for old established and developed States than for others. Treaties concluded between, or applying as between, newly independent States might also be placed in jeopardy by the operation of that article. Incidentally, paragraph 1(*a*) of article 67 might be construed in the case of a boundary treaty as meaning that the boundary established under the treaty must be eliminated.

62. It was true that paragraph (6) of the commentary on article 50 described the rule in that article as non-retroactive. The Commission, however, appeared to have regarded article 50 as a codifying article rather than a measure of progressive development, and consequently, as applying to an existing treaty which offended against a peremptory norm in existence at the time of its conclusion. That interpretation was supported by paragraph (7) of the commentary to article 49 which stated that " there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law ".

63. The temporal application of article 50 was a very important matter. Like article 49, article 50 dealt with law in the process of evolution. In the case of article 49, there was no doubt that the prohibition of the threat or use of force was firmly established; the only doubt concerned the date on which that rule was established. In the case of article 50, views differed as to whether a rule of international law constituted a peremptory rule from which no derogation was permitted, and there were even more serious difficulties in determining the date on which a new peremptory norm might be said to have been recognized by the international community. Those difficulties could be overcome by the mechanism envisaged in the United Kingdom sub-amendment. In the absence of such a mechanism, States would have absolutely no means of knowing whether their treaty relations with other States were likely to be disrupted by allegations that a particular treaty was contrary to a peremptory rule.

64. He would not express any views on the various rules that had been referred to in the debate as having the character of *jus cogens*, but would merely draw attention to the difficulties involved in defining *jus cogens*: what might be *jus cogens* for one State would not necessarily be *jus cogens* for another.

65. In conclusion, his delegation considered article 50 unacceptable in its present form but was prepared to participate in consultations with a view to formulating an article which would meet the major preoccupations he had just mentioned. It did not deny the existence of *jus cogens*, but hoped that the Conference would establish a means whereby its content could be determined. Its attitude towards the article would depend on the outcome of those consultations. It would suggest therefore that the vote on that article and the amendments thereto should be postponed until consultations had taken place.

66. Mr. JACOVIDES (Cyprus) said the principle stated in article 50 was of fundamental importance and, if adopted by the Conference, would be a landmark in the law of treaties. As early as October 1963, the Cypriot delegation had whole-heartedly supported the International Law Commission's proposed text in the Sixth Committee of the General Assembly and had since had the opportunity of repeating its support on several occasions.

67. As early as the middle of the eighteenth century, eminent writers like Wolff and Vattel had drawn a distinction between " necessary law ", which nations could not alter by agreement, and " voluntary law ", created by the will of the parties. In more recent times, the Covenant of the League of Nations and the Charter of the United Nations had reinforced the notion that beside *jus dispositivum* there was a *jus cogens* which rested upon the conscience of mankind and existed in order to protect the higher interests of the international community as a whole. The smaller States had an even greater interest than the larger ones in the adoption of that rule of international public order which placed checks upon the freedom to conclude treaties and safeguarded small States against the dangers to which they might be exposed by " unequal and inequitable " treaties. The notion of *jus cogens* was not merely theoretical; it had a very real practical value.

68. The principle in article 50 corresponded to the rule in internal law that an agreement contrary to public policy was null and void and could not confer any right upon the parties to it. In recognizing the existence of a corresponding rule in public international law the International Law Commission had made a very great contribution both to the codification and to the progressive development of international law. The Commission's records, the commentary accompanying the text, the debates in the Sixth Committee of the General Assembly, particularly at the eighteenth and twenty-second sessions, the comments by Governments, the proceedings of learned societies and the debate at the present Conference showed that, despite certain reservations, the principle met with general approval, even if not complete unanimity. The time had come to adopt it formally.

69. There was more difference of opinion about which specific rules of international law should be recognized as having overriding force, as laid down in article 50. The prohibition of the threat and use of force and other criminal acts such as the slave trade, piracy and genocide had been cited; it had also been said that article 50 would apply to treaties violating human rights or the right to self-determination, and to " unequal and inequitable " treaties. There was also the principle of the pacific settlement of international disputes, of non-intervention in the domestic affairs of a State and of the sovereign equality of all States. Any treaty violating any of those principles should be void, and void in its entirety.

70. Leaving the content of *jus cogens* to be worked out in State practice and jurisprudence had the merit of giving the greatest possible flexibility to a notion one of whose characteristics was that it was dynamic and living. On the other hand, it opened the door both to unduly broad interpretations which might lead to abuses and to unduly narrow interpretations which would rob the principle of any real meaning. Of the two reasons given by the International Law Commission in the commentary for its decision not to include any example of a peremptory norm, the first was not very convincing, for the Commission might have been able to give some examples in order to put the significance of the principle in concrete form. The second reason presented a much more serious difficulty; reduced to its simplest terms, the problem was to define illegality in international law. In view of the divergent theories and interests involved, it was indeed a formidable task and touched upon other areas of international law. But was there any body which could take up the Commission's work at the point at which it had left off? The Sixth Committee of the General Assembly or the Conference itself, whether directly or through a committee or a special working group, would come up against the same difficulties as the International Law Commission, but would at least have the advantage of being able to take a decision, since they were composed of representatives of States. There might have been a case for such an approach, but the lack of success in defining aggression and the setbacks experienced by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States were hardly encouraging. In the present imperfect state of international society it would be plainly unrealistic to tie the principle in article 50 to adjudication by the International Court of Justice. The Cypriot delegation would revert to that point in connexion with article 62. A satisfactory solution must be found to the general problem, which did not relate solely to article 50. He agreed with the representative of Iraq that the evolution of the norms of international law should not be made to depend upon the existence of a procedure or machinery for enforcement.

71. The Cypriot delegation was in favour of the adoption of the text of article 50 as it stood. It was perfectly willing to contemplate defining its scope, but was afraid that that might prove impossible. The principle stated in article 50 should be adopted independently of questions of procedure.

72. Amendments to improve the drafting, such as that by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), might be referred to the Drafting Committee. Contrary to what had been stated by certain speakers, however, the amendment by Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) was not wholly concerned with drafting. If the idea was to stress the fact that a peremptory norm must be generally binding upon all members of the international community, that idea was already contained in the present text of the article in the reference to " general international law ". The addition of the words " recognized by the international community " introduced a subjective criterion which distorted the nature of the rule. To make the criterion objective, the words " binding upon " would have to be substituted for " recognized by ". In its present form the amendment substantially altered article 50 in the same direction as the more explicit amendment by the United States (A/CONF.39/C.1/L.302). That should be borne in mind if those amendments were referred to the Drafting Committee.

73. The Finnish amendment (A/CONF.39/C.1/L.293) was not acceptable, since the violation of a peremptory norm was such a serious matter that the sanction of nullity should extend to the entire treaty.

74. The idea expressed in the Mexican amendment (A/CONF.39/C.1/L.266) was already contained in the text, as was made clear in paragraph (6) of the commentary.

75. He reserved the right to give his views on the United Kingdom sub-amendment which had just been introduced.

The meeting rose at 1.5 p.m.

FIFTY-FOURTH MEETING

Monday, 6 May 1968, at 3.25 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*) *(continued)*.[1]

1. Mr. EEK (Sweden) said his delegation was in favour of including an article on *jus cogens* in the convention on the law of treaties.

2. The article gave rise to two problems: first, the definition of a peremptory norm of international law. The International Law Commission did not offer any definition of *jus cogens* in article 50. In paragraph (2) of its commentary to the article it observed that there was no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* and that it was not the form of a general rule of international law but the particular nature of the subject matter with which it dealt that might give it the character of *jus cogens*.

3. The Swedish delegation considered, however, that it was rather the fact that a particular norm was held by the international community to be of such importance that it could not tolerate any derogation from it, even if only

[1] For the list of the amendments submitted, see 52nd meeting, footnote 1.

by two States by agreement *inter se*, which gave that norm the character of *jus cogens*. For that reason the Swedish delegation agreed with the idea behind the amendment proposed by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

4. His delegation felt that it would be desirable to give a closer definition of the peremptory norms referred to in article 50 in order to make the article more acceptable to the majority of countries. That seemed to be the purpose also of the United States amendment (A/CONF.39/C.1/L.302), which the Swedish delegation viewed with interest. It might be useful to attach the international notion of peremptory norms to the notions of *jus cogens* belonging to national and regional legal systems. It must be noted, however, that all types of action which the international community might have to outlaw absolutely would not find their equivalent in the internal law of States. But a reference to the fundamental principles of law recognized in the main political, economic and social systems of the world might at least help to clarify the norms of general international law which were recognized by the present-day international community as norms from which no derogation was permitted. The United States amendment, the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to that amendment and the amendment by Greece, Finland and Spain deserved consideration.

5. The second problem presented by article 50 was the presence and applicability of a peremptory norm in a specific situation. If a peremptory norm was defined as a norm recognized as absolutely binding in accordance with the principles of law and justice of all the peoples of the contemporary world, the denial of the existence and applicability of such a norm in a specific situation might as such be enough to deprive that norm of its peremptory character. That would however lead to anarchy rather than to the unity for which everyone hoped. It was essential, therefore, to provide for some method of solving differences either by third party or by community participation. The participation of a third party in the settlement of a dispute must be looked upon not as a curb on the sovereignty of States, but as useful guidance for the exercise of sovereign rights within the world community in accordance with the principles of law it held in common.

6. Mr. KEMPFF MERCADO (Bolivia) said that his delegation supported article 50 as drafted by the International Law Commission. It had closely studied the amendments submitted to that article, but found that none of them improved the text, which stated clearly and categorically the peremptory character of the norms of *jus cogens* from which no derogation was permitted. The Bolivian delegation would therefore vote for article 50 of the Commission's draft without change.

7. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that there was ample evidence of the existence of peremptory norms in contemporary international law. Since those norms existed and governed relations between States, it was only proper that a clause on the connexion between treaties and *jus cogens* should be included in the convention on the law of treaties.

8. Many speakers had pointed out that the main difficulty in that respect was the absence of criteria for the definition of the norms of international law which had the character of *jus cogens*. It was to meet that difficulty that some amendments had been submitted, that by the United States (A/CONF.39/C.1/L.302) in particular. The Byelorussian delegation considered that the norms of international law could not, as in that amendment, be made contingent on national law. Moreover, the amendment did not specify what regional legal systems were meant. Some of those systems had no connexion with international law; there were some, indeed, which dealt only with relations in civil law. There might be, in the relations between States of a given geographical region, apart from the generally recognized norms of international law, norms which were peculiar to that group of States, but those norms could not be in contradiction with the fundamental principles of international law laid down in the United Nations Charter. The United States amendment, which gave only second place to the principles of the United Nations Charter, was therefore unacceptable.

9. It was in the United Nations Charter that the Conference should seek simple and clear criteria to distinguish between ordinary norms and peremptory norms. The task would be easy if the Conference, in considering article 50, were guided by the need to confer upon mankind all the benefits which would result from an obligation upon all States to make their treaties comply with the principles and norms of *jus cogens*. Among the principles of *jus cogens* in the Charter there might be cited the maintenance of peace among peoples, the struggle against colonial domination and the sovereignty of States. The Byelorussian delegation agreed that it would be unwise to attempt to list all the principles of *jus cogens*, for that would be impossible in practice and moreover unnecessary, since the Conference's task was not to codify the norms of *jus cogens* but to codify the law of treaties.

10. With regard to the Finnish amendment (A/CONF.39/C.1/L.293), the Byelorussian delegation could not accept separability for treaties which were void *ab initio* because they were incompatible with peremptory norms. Moreover, article 41, paragraph 5 specified that separability was not permitted in cases falling under article 50.

11. The Byelorussian delegation was in favour of article 50 of the draft, though, admittedly, the wording should be improved. That was the purpose of the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which his delegation supported.

12. Mr. JAGOTA (India) said he was glad that the principle laid down in article 50 was generally recognized. The text of the article was a masterpiece of precision and simplicity and his delegation supported it unreservedly.

13. The history of *jus cogens* and the controversy to which it had given rise had already been described to the Committee. He himself wished to sum up the principal legal propositions arising from article 50 and related articles and from the excellent commentary of the International Law Commission.

14. A treaty was void if it conflicted with a peremptory norm of general international law. The notion of a peremptory norm did not apply to every principle of general international law. It was the particular nature of the subject-matter with which a norm dealt that might give

it the character of *jus cogens*. States could not derogate from a peremptory norm, but that did not mean that any prohibitory provision of a treaty could be regarded as such. The notion of a peremptory norm admitted of some flexibility, since an existing peremptory norm could be modified by a new norm having the same character. If they conflicted, the latter would prevail, and, as stated in paragraph (4) of the commentary and implied in article 61, a treaty containing the new rule would not be caught by article 50.

15. The effects of existing or new peremptory norms were stated in article 67 and were not retroactive. In the first, the treaty was void *ab initio*; in the second, it became void and terminated with the emergence of the new norm. Article 50 laid down a substantive rule. The nullity of a treaty was not automatic, however; it had to be established, which excluded the arbitrary determination of nullity by a State. Consequently, there was no risk of the article causing confusion or instability. However it was ultimately worded, it could be invoked and applied like any other rule, in accordance with article 62.

16. A comparison between article 50 of the draft and Article 103 of the United Nations Charter showed that whereas the latter stipulated that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail, article 50 referred in the abstract to the fundamental principle that treaty obligations conflicting with a peremptory norm were void. It had been asserted that Article 103 of the Charter would prevail regardless of the contents of articles 49 and 50 of the draft convention. The Indian delegation disagreed. Article 103 of the Charter would operate to the same effect as the convention, and would in fact constitute a source of *jus cogens*.

17. The Commission had rightly refrained from giving examples of *jus cogens*. To have done so might have given the impression that any possible case not listed did not come within *jus cogens*, and therefore, further study would have been necessary.

18. The International Law Commission's purpose had clearly been to delimit the notion of *jus cogens* in articles 50 and 61 and to indicate its legal effects in article 67. His delegation unreservedly supported those articles as drafted by the International Law Commission. Not all the consequences of *jus cogens* were indicated in article 50, which emphasized only one: that in the absence of a world government, and despite the fact that States thereby enjoyed absolute sovereignty, their treaty-making capacity would nevertheless be limited in so far as any treaty conflicting with *jus cogens* was void. There was a similar and well-established principle in the internal law of most countries, and certainly in India, that any contract the object of which was unlawful or any law which was unconstitutional was void.

19. With regard to the amendments to article 50, his delegation regarded that submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) as a drafting amendment, and it should be referred to the Drafting Committee. It preferred the existing text of article 50, however. The idea embodied in the Mexican amendment (A/CONF.39/C.1/L.266) was already implied in the existing text of article 50 if the latter was read in conjunction with article 67. It could be left to the Drafting Committee to decide whether that idea should be made clearer.

20. The Indian delegation was not in favour of the Finnish amendment (A/CONF.39/C.1/L.293) on separability for the reasons given by the International Law Commission in paragraph (8) of its commentary to article 41.

21. With regard to the United States amendment (A/CONF.39/C.1/L.302), he was glad that the United States had accepted article 50 in principle. The drafting changes proposed in that amendment could be referred to the Drafting Committee, although the existing text of article 50 was preferable. However, if the amendment raised a point of substance, as the Polish representative had suggested, his delegation could not support it and would vote against it. Finally, it could not support either the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to the United States amendment or the amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

22. Mr. DE LA GUARDIA (Argentina) said that the existence of *jus cogens* was disputed by writers. Nevertheless, he was prepared to admit that a general international law from which States could not derogate did in fact exist; to recognize the existence of international norms of *jus cogens* was merely to acknowledge reality. The inclusion of the idea as it was set forth in article 50 of the draft convention was fully in accord with the progressive development of international law.

23. For that very reason, although the principle was indisputable, its formulation raised some difficulty, for it was by no means easy to define peremptory norms precisely. To enumerate them would be dangerous, since the *jus cogens* character of some types of rule was controversial. In that respect, his delegation viewed with interest the wording proposed by the United States (A/CONF.39/C.1/L.302) and Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

24. Another difficulty concerning article 50 was the time factor. The International Law Commission, in paragraph (6) of its commentary to the article, said that article 50 concerned cases where a treaty was void at the time of its conclusion and that there was no question of its having retroactive effects. The Argentine delegation therefore supported the insertion of the words " at the time of its conclusion " proposed by the United States, since they represented the views of the International Law Commission, but the idea was not reflected in the existing text of the article. Another point was that article 50 would also have retroactive effect if applied to situations which had arisen before the convention came into force, thus introducing legal uncertainty. For that reason the Argentine delegation supported the Mexican amendment (A/CONF.39/C.1/L.266), which specified that article 50 should not have retroactive effect. That did not mean however that his delegation accepted that other articles of the draft, in particular article 49, did have retroactive effect.

25. His delegation could not support the Finnish amendment (A/CONF.39/C.1/L.293), since the Argentine delegation had expressed its opposition to separability in connexion with article 41. It did not consider that the

amendment submitted by Romania and the Soviet Union (A/CONF.39/C.1/L.258 and Corr.1) made any real contribution to the definition of *jus cogens*.

26. Mr. DE BRESSON (France) observed that article 50 had the formidable reputation of being one of the most difficult provisions in the International Law Commission's draft. That was probably because the clause in question had often been represented as providing the setting for an inevitable confrontation between the upholders of different political, social or economic systems. But that attitude was mistaken and regrettable. The only problem with which the jurists participating in the Conference should have to cope was that of establishing in all objectivity and good faith rules which would contribute to the security and harmony of contemporary and future international society. Such a question should not be studied in the light of the situation obtaining at a time when nations had not enjoyed equality. What mattered now was to conceive, with the lucidity required by any future projection, principles that were calculated to ensure under the best conditions the permanency of the relations that had been established or would be established by States that were independent and equal at present, within the scope of their respective sovereignties and for the purpose of preserving their national interests. But where the preservation of their interests was concerned, all nations were at the same time in the position of petitioner and defender. Consequently, to remain balanced, any future juridical system should preserve States from the temptation to contract out of legitimate obligations and from the risk of being deprived of rights no less legitimate. The Conference's task was therefore to assess whether article 50 met that objective.

27. The problem was extremely important because article 50 was intended to deduce the consequences, in a system of positive law, from the existence of a supreme law which in no circumstances could be violated by the will of States. Accordingly, that provision would have the effect of limiting the principle according to which international organization proceeded from the autonomy of the will of the States, because treaties concluded by the latter, within the context of their sovereignty, might henceforth be declared null and void. His country could hardly formulate an objection to such an attempt, but it was a difficult undertaking.

28. The problem, which was on the ill-defined borderline between morality and law, was that of knowing which principles it was proposed to recognize as having such serious effects as to render international agreements void, irrespective of the will of the States which had concluded them. Such a choice was not easy, for although the idea that juridical principles existed which were distinct from treaty law had a very long history, it was another matter to determine which principle should acquire the character of *jus cogens*. The difficulty was still further aggravated by the fact that it was a question not only of referring to existing principles, but—and that was the stipulation laid down in article 61—of recognizing that future rules might be incorporated in *jus cogens*. In view of the wide scope of the question, it was essential that it should receive a clear and precise solution in the convention. It was unthinkable to admit the present and future existence of a supreme law and to attribute to it effects so serious as to lead to the nullity *ab initio* of international agreements, without defining the substance of that rule of positive law, the conditions of its development and the arrangements for its application. In the absence of such precautions, no one could foretell the extent of the confusion that might result in the international community, to the detriment of the weakest, for whom the law remained the best safeguard.

29. It must be stated that article 50 of the International Law Commission's draft did not meet those requirements. The Commission had given too simple a reply to a question of obvious complexity and in reality had evaded the problem facing it. The article as it stood gave no indication how a rule of law could be recognized as having the character of *jus cogens*, on the content of which divergent, even conflicting interpretations had been advanced during the discussion. Moreover—and that linked up with the remarks already made by his delegation in connexion with articles 48 and 49—considerable uncertainty existed concerning the conditions under which the nullity of a treaty alleged to be in conflict with a rule of *jus cogens* would be established. Also, no provision had been made for any jurisdictional control over the application of such a new and imprecise notion. Moreover, assuming that such a shortcoming could be overcome by recasting article 62, which was what his delegation would wish, that would by no means suffice to obviate the necessity of stating what constituted *jus cogens*, for the role of the international judge was to apply and explain the law and not to create it.

30. Finally, by retaining too general a wording, there was a danger that article 50 would create serious internal problems for many countries. At the constitutional level, States would ask themselves how far they could consent to a grave alienation of their sovereignty without any clear idea of the rules under which that limitation had been introduced. Further, where national jurisdictions were concerned, certain States like France, which incorporated treaty law directly into internal law, would have reason to fear that the fact that those jurisdictions would have to assess the validity of treaties in relation to a supreme, undefined law, would lead to the utmost confusion.

31. Accordingly, article 50 in its present form presented serious defects which should be remedied by inserting, if not a satisfactory definition of *jus cogens*, at least a method of defining that notion. Several delegations had made an effort in that direction, which showed that such a step was necessary and no doubt feasible.

32. His delegation considered that principles that were peculiar to a particular system adopted by States, or which related to the play of forces maintaining equilibrium in the world, should be excluded from *jus cogens*. Those principles were still too controversial. The substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person.

33. The amendment purporting to define *jus cogens* as " a peremptory rule of general international law which is recognized in common by the national and regional legal systems of the world " (A/CONF.39/C.1/L.302) deserved to be adopted, for it had the merit of determining the

objective criterion whereby such a rule was " recognized " as having the character of *jus cogens*.

34. His delegation thought that on those three points, which in its judgement were fundamental, namely the definition or method of definition, the development and the control of the application of *jus cogens*, the Conference might arrive at a satisfactory solution. But it must allow itself the time and necessary means—the time, by abstaining from taking premature decisions on *jus cogens* and the means by appointing a working group to study the problem in depth and work out solutions. He appealed urgently to the members of the Conference to believe that the serious concern expressed by his delegation to prevent the too hasty adoption of ideas which, though magnanimous in themselves, were liable to jeopardize the security of international relations, had not been prompted by any consideration of self-interest, but had been dictated solely by its regard for the interests of all. His delegation earnestly hoped that the Conference would apply itself to a task that, carried out with the necessary clarity and objectivity, would represent a contribution to the ideals of humanity which in the long run could be safeguarded solely by a universal, just and respected international law.

35. Mr. ROSENNE (Israel) said he wished to indicate his delegation's views on the relationship between the substantive articles dealing with the grounds for invalidity and for termination of a treaty and the procedure for their application. On that issue the position of the Israel delegation remained as stated at the 974th meeting of the Sixth Committee [2] and subsequently in its Government's comments (A/CONF.39/6). In its view, the International Law Commission had been right not to go beyond Article 33 of the Charter and to refrain from embarking on the question of the settlement of any disputes which might arise. It would be contrary to the settlement procedures established by the United Nations Charter to require the compulsory application of certain predetermined procedures for the settlement of disputes arising from the interpretation or application of provisions of the convention. The Israel delegation agreed with representatives who had said that the development of normative rules of modern international law was not contingent upon the simultaneous development of its procedural rules.

36. With regard to article 50, the Israel delegation considered that, as the International Law Commission had noted in its commentary, there were today certain rules from which States were not in any way competent to derogate by a treaty arrangement and which could be changed only by another rule of the same character. It should be noted that there was no amendment before the Conference to delete article 50 and that the doubts which had been expressed were limited to its proper formulation. It might be deduced from that that the very notion of *jus cogens* was an accepted element of contemporary positive international law.

37. In articles 41, 50, 61 and 67, the Commission had limited itself to indicating the major points of contact between the notion of *jus cogens* and the general law of treaties. It had not tried to determine what was meant by a rule of *jus cogens*, since that was not necessary in the present context. In the Israel delegation's opinion, the Commission had been right; furthermore, the delegation had taken note of Sir Humphrey Waldock's statement at the 969th meeting of the Sixth Committee of the General Assembly.[3] If the Conference considered that further examination of the notion of *jus cogens* at the intergovernmental level was necessary, it could draw the attention of the General Assembly to the matter by an appropriate resolution. The Israel delegation doubted, however, whether the International Law Commission should be asked to examine the matter further.

38. The invalidity of treaties with which article 50 dealt was different in kind from all the types of invalidity previously discussed. The consent there was real and the relations of the parties to the treaty *inter se* were not in issue. It was the object of the consent that was illegal. It was not a case of possible invalidation, but of a real invalidity. The invalidity was, therefore, objective and, leaving aside any question of State responsibility, it could be asserted by any State or any international organization aware of the invalid treaty. That seemed inherent in the very nature of *jus cogens*. The comment had been made that cases of the existence of treaties which were in conflict with *jus cogens* would very rarely be made public; thus it did not seem that article 50 and the related articles posed a serious threat to international treaty relationships. On the contrary, the inclusion of the article would be a step forward in strengthening the role of law as a means of ensuring international security, and its omission would rise give to misunderstanding.

39. In its amendments to article 50 (A/CONF.39/C.1/L.254) and to articles 41, 61 and 67 (A/CONF.39/C.1/L.253, L.255 and L.256) the Indian delegation had drawn attention to a very important point. The Drafting Committee should consider the possibility of grouping all the articles on *jus cogens* together in a single chapter. The Israel delegation could not support the Mexican amendment (A/CONF.39/C.1/L.266) for the reasons explained by the representatives of Uruguay and India. That proposal seemed to touch upon certain aspects of intertemporal law which could not be dealt with solely in connexion with article 50. The Finnish amendment (A/CONF.39/C.1/L.293) was also unacceptable. On that matter the Israel delegation accepted the view of the International Law Commission stated in paragraph (8) of its commentary to article 41.

40. The proposals in the amendments submitted by the United States (A/CONF.39/C.1/L.302) and by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) to clarify further the nature of the concept of *jus cogens* were worth further consideration, and the Israel delegation was prepared to support them in principle. A better wording should, however, be found. The expression " principal legal systems of the world " which was found in various constitutional texts of the United Nations, might, for instance, be used. The United States amendment seemed unduly restrictive since it could be interpreted as omitting the evolution of the rules of *jus cogens*. The terms of the United Kingdom's sub amendment (A/CONF.39/C.1/L.312) were too rigid and there might be some doubt whether it was really

[2] *Official Records of the General Assembly, Twenty-second session, Sixth Committee*, 974th meeting.

[3] *Ibid.*, 969th meeting.

necessary to lay down the modalities for the establishment of international law applicable only to the peremptory norms to which article 50 related or to specify the manner in which such norms came into being. The essential point was the universal degree of recognition, not the form in which the recognition was expressed. Since the question of revising article 50 had been raised, the Israel delegation hoped that, if that was done, the lapidary conciseness of the original text would be preserved.

41. Mr. MARESCA (Italy) said his delegation had given attention to the question raised in article 50 and considered whether the notion in the article had always existed in the international legal system and further whether it was merely a matter of codifying it or whether something new had been introduced by the International Law Commission. Some twenty years previously, several States had met at Geneva to draw up four Conventions on the protection of victims of war. Under those Conventions the human person was to be respected in all circumstances. No State could evade the responsibility it incurred by a serious breach of the rules in those Conventions. They were norms of international law of an absolutely peremptory character. In 1961, the Convention on Diplomatic Relations, drawn up at Vienna, stated rules derived from Roman law. In 1963, the rules of consular law had been drawn up and they too were of an absolute character. There was no doubt, therefore, that peremptory rules of international law did exist. That was confirmed by the rules of internal law. It had been said that the law could do anything. That was not true. In Italy, for example, the Constitutional Court very often rejected laws which conflicted with the principles of the Italian Constitution. There were bounds which the law itself could not transgress.

42. The evolution of international law was strictly bound up with a hierarchic conception of its sources and rules. In the early nineteen-thirties, the conception of international law had been purely conventional. The sole source of law had been agreement. Some jurists had held, however, that there was something beyond purely conventional rules, that there were also general rules and that there were sources of the first degree and of the second degree. Agreement was a source of the second degree, whereas custom was a source of the first degree. Agreement was limited by custom. The hierarchy of sources led to the hierarchy of content. Among the customary rules there were some which had a deeper juridical content, a content from which no derogation was possible. What rules had that absolute character? They were those which protected the human person and those which ensured the maintenance of peace and the existence and equality of States. That was an example of *jus naturalis*, that was to say, the law which had its first source in mankind's awareness of the law. The positivists had believed that they had driven a wide breach into natural law. The doctrine of positivism had, however, led to the terrible experiences of the two world wars. It was not surprising, therefore, that the conscience of mankind demanded something else. The International Law Commission should be congratulated on its courage in placing article 50 in the convention.

43. The rules in that article were peremptory rules; their source lay in custom, the first source of the rules from which no derogation was permissible. Accordingly, agreements which conflicted with those rules were void. The article could, of course, be improved. A more exact definition should be given in conformity with logic but also taking into account practical ideas. All requisite procedural safeguards should also be provided in order to obviate arbitrary action.

44. Amendments to that effect had been submitted. The idea expressed in the United States amendment (A/CONF.39/C.1/L.302), that the national and regional systems should be taken into consideration, was ingenious and valid. The amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) also deserved attention. The Drafting Committee should bear in mind the amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1). The Italian delegation was prepared to accept the Finnish amendment (A/CONF.39/C.1/L.293). The suggestion made in the Indian amendment (A/CONF.39/C.1/L.254) would arise when article 67 was examined. With regard to the Mexican amendment (A/CONF.39/C.1/L.266), it was difficult to understand how *jus cogens*, which had always existed, could not have a retroactive effect. The United Kingdom sub amendment (A/CONF.39/C.1/L.312) was interesting, since it was based on the idea that law was in constant evolution.

45. The Committee was called upon to solve a fundamental issue. It should not take an over-hasty decision. It would therefore be better, in the Italian delegation's opinion, not to vote on the amendments at that stage. If the Committee decided to set up a small working party to reconcile the different points of view, the Italian delegation would be prepared to take part in it.

46. Mrs. BOKOR-SZEGÖ (Hungary) said the Hungarian delegation fully supported article 50, which faithfully reflected the evolution of contemporary international law. The principle contained in the article was not based on the theory of natural law but on the reality of the relations between States. The source of rules having a peremptory character, like all the other rules of international law, lay in the will of States. They were a necessity dictated by the complexity of international relations and by the interdependence of the subjects of international law. That necessity, based upon the realities of inter-State life, decisively determined the will of the States which recognized those rules, for without them there would be no stability, not even relative stability, in their relations. The International Law Commission had therefore performed its task well in drafting article 50 and should be commended for it.

47. The Hungarian delegation could not support the United States amendment to article 50 (A/CONF.39/C.1/L.302), since it was not the internal or regional law of States but their co-ordinated will manifesting itself on the international plane that could become the source of a peremptory norm of international law. She was not in favour of the United Kingdom sub amendment (A/CONF.39/C.1/L.312) either, as she agreed with the International Law Commission that it was inappropriate to give a list, whether selective or not, of peremptory rules. The existence of peremptory rules did not depend on whether they were or were not listed in the convention or in additional protocols. Since there could be no doubt that peremptory norms of international law existed, the inevitable consequence was that any treaty conflicting

with those norms was void. Consequently, the validity of the rule stated in article 50 was not open to question. The Hungarian delegation could not support the Finnish amendment (A/CONF.39/C.1/L.293) either. As the International Law Commission had stressed in paragraph (6) of its commentary to article 50, when a treaty conflicted with a peremptory norm of general international law, it was wholly void and article 41 on the separability of treaties could not be invoked.

48. The Mexican amendment (A/CONF.39/C.1/L.266) was not a drafting amendment, since it affected the substance of article 50, and was so vaguely worded that it might jeopardize the efficacy of the article. The Hungarian delegation would therefore vote against it.

49. It could not support the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) since it did not make the International Law Commission's text any clearer. On the other hand, it supported the amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which gave a closer definition of the notion of *jus cogens* as set out in draft article 50.

50. Mr. SMALL (New Zealand) said that his delegation fully endorsed the principle that there were peremptory rules of international law which could prevail over treaties and render them void; but he agreed entirely with the view of those who had expressed concern over the risk of political misuse of article 50 in the future, and there was a question whether it was wise to keep the article. It was hazardous to give norms on whose content no agreement had been reached the possibility of attaching the sanction of absolute nullity to any treaty conflicting with them. A number of governments had made a wide range of questionable and uncertain statements in recent years about the content of *jus cogens*; and his delegation doubted whether those statements gave any adequate basis for assuming that the article would be used with moderation. It had been said that article 50 added nothing to the existing position. That might be true in logic, and might perhaps be true in law, but to put the matter in that way was to state only a part—and the lesser part—of the whole truth, for what article 50 was changing was the existing factual situation and the future political situation by giving States for the first time a handy capsule formula on the subject.

51. States would be tempted to invoke article 50 in justification of the termination of treaties that were detrimental to an important public interest, which could always be put plausibly in terms of some supposedly peremptory norm. He would prefer article 50 to be worded much less strongly. Further, if article 50 was taken together with article 61 and 67, the impression was that the unusual cases of treaties conflicting with *jus cogens* were a routine ground for the invalidation of treaties. But the case of a treaty conflicting with *jus cogens* was highly exceptional, and the content of *jus cogens* was still exceedingly speculative.

52. His delegation therefore considered that the article should make it quite clear that treaties conflicting with *jus cogens* were exceptional and should provide special safeguards for cases in which the article was invoked. If the article was retained as it stood, his delegation would support moves to clarify it and to make it explicit that the norms referred to in it were only those which were agreed upon by the generality of States as having a peremptory character. To vote on the article before the Committee knew whether an adequate procedure concerning its use would be provided later in the convention would be premature.

53. The vote on the article should be deferred so that the article could be viewed in the light of the later provisions in the convention.

54. The New Zealand delegation would then be prepared to support the United States amendment (A/CONF.39/C.1/L.302) but its position on the acceptability of articles 50 and 61 must remain reserved.

55. Mr. BOLINTINEANU (Romania) said that the notion of *jus cogens* reflected the manifest political and legal realities of the day. It could never be sufficiently emphasized that in the contemporary world, normal relations, based on confidence and mutual respect, could not develop between States without strict observance of the fundamental principles of international law. Those principles were intended to defend the values forming the common heritage of all peoples, for example peace and international security, for they represented the keystone of coexistence and co-operation between States. On that basis alone could a new system of relations between States develop. Moreover, those principles, which were also set forth in the United Nations Charter, were not only binding by virtue of their object and purpose but were also a part of *jus cogens* and ranked foremost among the peremptory rules of contemporary international law.

56. By prescribing in article 50 of its draft that any treaty conflicting with a peremptory norm of general international law was void, the International Law Commission had accepted the implications of the existence of *jus cogens* and made a valuable contribution to the progressive development of international law.

57. The Romanian delegation fully approved of the method followed by the International Law Commission in article 50. As the text was to be incorporated in a convention, the Commission had had to resort to general notions and not specific examples, for it would not be possible in the text of a convention to draw up a list of the peremptory norms of general international law. His delegation thought that it would be useless to adopt criteria other than those selected by the International Law Commission, since the formula it had used brought out the fundamental nature of the norms and indicated that the principles and rules in question were important for the stability and legal security of the international community.

58. In order to establish the peremptory character of a norm—for example, that of the principles to which reference had been made—one could take as a starting point the fact that the rule had been repeatedly affirmed in documents such as the United Nations Charter and other international documents which had stressed, sometimes explicitly, its fundamental importance. Consequently the Romanian delegation did not consider that there was any sound basis for the argument that it would be difficult to establish objectively the content of *jus cogens* and that there was a risk that that content would be determined arbitrarily by each State. Such arguments might ultimately lead to denial of its existence.

59. His delegation did not think that the method followed by the International Law Commission in demonstrating the existence of *jus cogens* could impair the stability of treaties by undermining the scope of the principle *pacta sunt servanda*, since the utility of the rule was not to be judged by reference to the possibility of a ground of invalidity being invoked in bad faith. He also thought that the relationship between the principle *pacta sunt servanda* and the norms of *jus cogens* was one of co-ordination and not opposition, since the application of the principle presupposed the existence of properly concluded treaties, namely treaties in conformity with *jus cogens*. *Jus cogens* and the performance of treaties in good faith thus merged in a logical and harmonious system.

60. A provision that a treaty conflicting with *jus cogens* was void seemed to have above all a preventive function. It warned States that any treaty they concluded must conform to the fundamental principles of international law and other peremptory rules of that law; and those principles were of fundamental significance for the legal security of the international community. The conclusion of treaties conforming with *jus cogens* could therefore ensure the effective and permanent stability of relations between States.

61. The contention that the adoption of article 50, the aim of which was to promote the rule of law in international affairs, would in practice facilitate all kinds of abuse seemed unfounded. The interdependence of the interests of States tended to strengthen good faith in their relations. That in itself was a safeguard against any arbitrary application of the rule stated in article 50. Such reasoning would throw doubt on any rule of international law, since the means of settling international disputes would be considered to be inadequate.

62. The Romanian delegation disagreed with those who wished to subordinate the adoption of article 50 to the establishment of a procedure for settling disputes concerning the operation of Part V of the draft articles.

63. It favoured the International Law Commission's wording, but wished to make the slight drafting change contained in the amendment it had submitted jointly with the USSR (A/CONF.39/C.1/L.258 and Corr.1), which introduced into the text an expression which would eliminate any possibility of interpreting the rule as signifying that there were peremptory norms from which derogation was permitted. The amendment was also designed to avoid any repetition in the text of article 50.

64. Mr. KOUTIKOV (Bulgaria) said he thought the participants had come to the Conference with very definite ideas on matters of principle, particularly on the topic dealt with in article 50, and one could hardly expect to be able to persuade them to change their minds. The Bulgarian delegation would therefore confine itself to explaining its Government's views on article 50.

65. In examining the article, the Bulgarian Government had proceeded on the assumption that every legal order that was to any degree developed presupposed the existence of a stable and coherent body of norms as its essential basis. Some of those elements were so important that any interference with them would seriously impair the operation of the associated legal system. If those rules were to be violated systematically, the whole body of norms would disintegrate and the legal order perhaps crumble away.

66. The Bulgarian Government had already identified without difficulty a series of principles and norms forming part of *jus cogens* and as the Bulgarian representative had told the Sixth Committee at the twenty-second session of the General Assembly: " Examples of generally recognized rules admitting of no derogation were to be found, first of all, embodied in the United Nations Charter as fundamental guiding principles of the Organization. Those principles were well known and were generally recognized as the basic tenets for the conduct of States in their international relations." [4]

67. The Bulgarian Government had never doubted the existence of those rules of *jus cogens*, since the realities of international life were there to prove it. It was not incumbent upon the Conference either to confirm or to invalidate that evidence expressly in the convention.

68. His delegation thought that it should be the task of the Conference to establish a text stating the legal consequences of the existence of *jus cogens* in the special field of treaty law. On that assumption, it was easy to discern all the merits of the wording of article 50, which simply reflected the general view that the fundamental rules of *jus cogens* were so important for the stability of the international legal order that a treaty was void if it violated them. The reasoning of the authors of the article seemed the only possible logical reasoning, because if it was assumed that a derogation from such a rule would upset the established legal order, how could a treaty be held valid if it contained a derogation that had given rise to a conflict between it and the peremptory rule? In such a case no sanction other than nullity *ab initio* could attach to the treaty.

69. Article 50 simply proclaimed a principle dictated by legal logic. The reaction of States to a derogation from any of the unchallengeable rules of *jus cogens* clearly proved that the principle laid down in article 50 was a reality of contemporary international life.

70. His delegation was surprised that other delegations had hesitated to accept the principle stated in article 50 purely because its scope could not yet be defined. No major principle governing international life had ever before had to wait until all its possible practical applications had been catalogued in detail before it was proclaimed a principle. One could formulate a principle having in mind only the outline of its application, pending definition of the concrete limits within which it could operate. In the case of article 50, the principle already existed in practice; it merely had to be incorporated in the text of the convention. That was exactly what the International Law Commission proposed. It had thus invited the Conference to take cognizance of the principle, and the Bulgarian delegation had decided to accept that invitation.

71. The wording of article 50 could nevertheless be improved; that was the aim of the amendment submitted by Romania and the Soviet Union (A/CONF.39/C.1/L.258 and Corr.1), which was designed to clarify the existing text of the article. The Bulgarian delegation was prepared to support that amendment. On the other hand, his delegation could not support the Mexican

[4] *Ibid.*, 979th meeting.

amendment (A/CONF.39/C.1/L.266), which was too rigid and did not specify from when onwards the provision contained in article 50 would not have retroactive effect. The difficulties that amendment might raise were, moreover, indicated in paragraph (6) of the commentary.

72. His delegation understood the desire for precision underlying the Finnish amendment (A/CONF.39/C.1/L.293), but it doubted whether in the case envisaged in that amendment specific provisions could be separated from the body of a treaty. Usually, when such provisions conflicted with norms as important as those of *jus cogens*, the whole treaty was vitiated, as a result of the homogeneity of the text of a convention, and was liable to the sanction of nullity.

73. He was opposed to the United States amendment (A/CONF.39/C.1/L.302), which presupposed that the world's national and regional legal systems were all well established and clearly defined. Nor could he support the joint amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), which, by inserting the words " recognized by the international community as a norm ", postulated the existence of a coherent and well-demarcated international community capable of giving a ruling as an organized entity.

74. The Bulgarian delegation could not support the United Kingdom sub-amendment (A/CONF.39/C.1/L.312), which introduced an innovation into the convention, namely the definition of peremptory norms of international law by protocols to the convention. It was not clear whether it was intended to create such norms by means of a protocol to the convention or merely to record existing norms. In the latter case, the norm to be recorded would already have appeared in the form of a concrete provision, which would no longer need definition as the amendment required. He would vote in favour of the text of the article, bearing in mind the drafting amendment submitted by Romania and the Soviet Union (A/CONF.39/C.1/L.258 and Corr.1).

75. Mr. KEBRETH (Ethiopia) said that in affirming that certain laws or principles partook of the character of *jus cogens*, care should be taken to avoid any proliferation of rules having the character of *jus cogens*, and not to erect any insuperable barriers to the recognition of new peremptory norms. Those two situations were undesirable, but the difficulties created by article 50 should not be taken as the basis for asserting that a provision on *jus cogens* should not be inserted in the convention; for without such a provision, the entire structure of the convention might collapse. So far, a large number of very different rules had been invoked as having the character of *jus cogens* and it was not for the Committee to indicate which rules had the character of *jus cogens*.

76. His delegation understood the reasons that had decided the International Law Commission not to give any examples in article 50 itself. Those examples presented certain drawbacks, in particular owing to the fact that each had its distinctive nuance which did not generally appear in the others. It was not the task of the International Law Commission to deal with those rules in detail in the context of the convention, nor was it for the Conference to do so. It was important, however, to elucidate certain aspects of those rules. Several representatives had stressed the need to establish, within the framework of article 50, in particular, a system for the settlement of disputes. The International Court of Justice had appeared to be the institution most suited to fulfil that role. Such a body would provide a safeguard against abuse by certain States which might be tempted to invoke article 50 wrongfully. But the word " abuse " had perhaps been used too often during the discussions. The existence of a feature inherent in the very nature of the rules of *jus cogens* seemed to have been ignored. A State that by concluding a treaty had derogated from a rule of *jus cogens*, would hesitate before invoking article 50 since it would experience difficulty in explaining to the international community its reasons for concluding the treaty. The question of retroactivity raised a different kind of problem, as did article 61, which moreover scarcely seemed to raise any difficulty owing to the fact that its effects and application had a less peremptory character. In his view, it would be preferable to keep articles 50 and 61 separate and to leave them in the place assigned to them by the Commission.

77. Further, the fear had been expressed that a third State might claim the right to intervene in a treaty derogating from a peremptory norm if, in the performance of the treaty, its interests had been materially affected, or if it considered that it could invoke that right as an injured member of the international community. It was interesting to recall in that connexion that Sir Hersch Lauterpacht's draft had provided for the invalidity of a treaty if its performance had been illegal. The case in question was that of a third State which accused other States of being parties to a treaty which, according to that State, derogated from a rule of *jus cogens*. In such a case, would the States parties to the treaty and the third State be willing to submit the question to the International Court of Justice or a similar institution? It was probable that those States would not follow that procedure in a matter that involved what they considered to be their vital interests. He thought that the procedure to be followed was the one laid down in article 62, which had his delegation's full support. In his view, the question of the intervention of a third State did not enter into the context of the convention on the law of treaties, but if that question assumed extremely grave proportions, Article 33 of the Charter and article 62, paragraph 3 of the draft convention should be applied.

78. His delegation agreed with the members of the International Law Commission that the questions of the development of law and the establishment of an organ for the settlement of disputes should be separate. That did not mean that one of those questions was more important than the other, but that with regard to the law of treaties, the Conference should concern itself primarily with the problem of the progressive development of international law.

79. He had not yet formed a definitive opinion on the amendments by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) and Mexico (A/CONF.39/C.1/L.266).

80. He thought that the United States amendment (A/CONF.39/C.1/L.302), the purpose of which, according to its sponsors, was to explain what was implied in the International Law Commission's text, was a useful attempt to indicate the source of *jus cogens*. If that

was the object of the amendment, he was not sure that the expression " recognized in common by the national and regional legal systems of the world " was complete. What place did multilateral conventions occupy, or the Charter of the United Nations and the resolutions and declarations of international organizations, which reflected the deep convictions of the international community and which sometimes had the character of peremptory norms?

81. Perhaps the United States amendment was more especially concerned with the emergence of new peremptory norms that was referred to in article 61 of the draft.

The meeting rose at 6.10 p.m.

FIFTY-FIFTH MEETING

Tuesday, 7 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) *(continued)* [1]

1. Mr. DE CASTRO (Spain) said that the existence of peremptory rules of international law might seem so obvious that even to mention them would be superfluous. But the International Law Commission had been right to include article 50 in the draft convention, in view of the insistence of a minority on either denying the existence of *jus cogens* altogether, or severely restricting its scope. During the present Conference, one distinguished speaker had been heard to express the view that the draft convention contained only one peremptory rule, which was that set out in article 23; according to that criterion, all the provisions of Part V had only a secondary value, and treaties concluded by force, fraud or corruption could conceivably be regarded as valid. It was because of the possibility of such an unacceptable conclusion, contrary to all moral law, that it was essential to include a provision stating the existence of norms which all States, large, medium and small, must fully respect.

2. With regard to the amendments before the Committee, his delegation could not support the Mexican amendment (A/CONF.39/C.1/L.266), because the result of the addition of the proposed second paragraph was by no means clear. The question of retroactivity was already dealt with satisfactorily in articles 24, 61 and 67. In view of its ambiguity, the amendment seemed unacceptable.

3. The amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) was intended to clarify the International Law Commission's text and could be referred to the Drafting Committee.

4. The United States amendment (A/CONF.39/C.1/L.302) had the merit of recognizing the existence of *jus cogens* and was a praiseworthy attempt to define the rule. But the delimitation it proposed was a temporal one, and might be construed as implying the deletion of article 61 and sub-paragraph 2(*b*) of article 67; that solution seemed to be inadmissible, for the reasons set out in the commentary to article 61. A more original element of the United States amendment was the attempt to reduce *jus cogens* to peremptory rules recognized in common by the national and regional legal systems of the world. The proposal seemed to be designed to bring the provision down from the nebulous realm of theory to the level of the man in the street, or more particularly, in the legal department of the Ministry of Foreign Affairs. But, if the United States amendment were adopted, it would mean that Ministry officials would need to be familiar with all the national and regional systems in the world in order to be able to decide whether a rule was recognized in common by all those systems, quite apart from needing to ascertain what national laws were to be regarded as constituting systems, and to decide what rules of national law were to be regarded as components of a system which might be described as international. That would impose a heavy burden on national legal advisers, if the problem were approached from the positive standpoint; but if it were approached from the negative standpoint, it would all be very simple, because it would be enough just to assert that a national system did not recognize the peremptory norm in order to be able to deny the existence of *jus cogens*.

5. In other words, the possibility of a veto by one national system would be introduced, and the United States amendment would represent a retrograde step in international law. Since the days of Francisco Suarez, it had been accepted that, although mankind was divided into peoples and nations, it nevertheless possessed an essential unity, which was the basis of the international community, and that the rules governing the community of all nations and peoples were those which really constituted international law. The effect of the United States amendment would be to revive the ultra-nationalist idea of what might be described as external State law, incompatible with the concept of real international law. His delegation could not, therefore, vote for that proposal.

6. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to the United States amendment also had the advantage of recognizing the existence of *jus cogens* and, in addition, was designed to remove one of the main objections to the Commission's text of article 50. Unfortunately, however, he was not convinced of the possibility of applying the machinery proposed by the United Kingdom, for two reasons. From the theoretical point of view, it was not clear how the existence of a rule of *jus cogens* could depend on any declaration by a group of States. The current Conference, for example, could establish binding rules which might be peremptory *inter se*, but not in respect of third States; *jus cogens*, however, was universal peremptory law, as recognized by the international community, binding by its very nature. From the practical point of view, moreover, it seemed unnecessary to await a definition of a *jus cogens* rule by means of protocols, for that implied that the conditions of the applicability of peremptory norms were subject to the convening of a conference and the drafting and entry into force of a protocol. The door would thus be opened to the possibility of indefinitely maintaining in force a clause which conflicted with a rule of *jus cogens*. The Spanish delegation therefore could not vote for the United Kingdom sub-amendment.

[1] For the list of the amendments submitted, see 52nd meeting, footnote 1.

7. His delegation had become a co-sponsor of the amendment by Greece and Finland (A/CONF.39/C.1/L.306 and Add.1 and 2) because it was designed to meet the objections of various delegations to the rather vague wording of article 50. The term " general international law " might, for instance, be held to refer only to geographical scope. The sponsors had therefore specified that the peremptory norms in question were the norms recognized by the international community as those from which no derogation was permitted. The Spanish delegation hoped that that wording would reconcile certain differences of opinion; if, however, the amendment were not accepted, it would vote for the International Law Commission's text.

8. Mr. SAMAD (Pakistan) said that the International Law Commission was to be congratulated on including in its draft convention articles 50 and 61 on *jus cogens*, which represented a substantial advance on Article 103 of the United Nations Charter.

9. The Pakistan delegation endorsed the underlying principle of article 50, that the will of the contracting parties was no longer the sole criterion for determining what could be lawfully contracted. The concept that legal force could be accorded only to treaties fully conforming with the basic principles of contemporary international law would, if properly applied, promote the rule of law in international relations. The Commission had rightly refrained from listing all the norms of international law which had the character of *jus cogens*, and had left the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals. The Pakistan delegation took the view that the application of articles 50 and 61 must be made subject to independent adjudication, along with certain other provisions of Part V of the draft convention. It supported the Commission's texts of both articles; since the rules were patently non-retroactive, no amendments to either article were necessary or desirable.

10. Mr. HARRY (Australia) said that the issue raised by the International Law Commission's text of article 50 was not, as some representatives had suggested, whether States participating in the Conference accepted *jus cogens* as an abstract doctrine or whether there were or should be certain peremptory norms of general international law which should prevail over any treaty provisions which conflicted with them. The Conference had been convened, not to speculate on the logical necessities of an ideal system of law in an ideal international society, but to draft in precise language the rules which might govern for decades the essential validity of written agreements between sovereign States. At that stage in its work, it had to decide on the precise circumstances in which a treaty might be or might become invalid, and must examine the Commission's draft from the point of view of States wishing to enter into agreements and to develop, through treaties, friendly relations with other States to their mutual interest. The courts which construed treaties, gave advisory opinions on them, or delivered judgements about them, needed sure criteria for the conditions under which a treaty should be regarded as void or invalid.

11. The preceding articles in Part V contained a number of grounds of invalidity, some of which seemed unnecessary and others of which had elements of obscurity; but all had at least the merit of relative clarity. Article 50 fell into a different category. It said " A treaty is void if it conflicts with a peremptory norm of general international law ", but left unanswered the question which norms possessed that peremptory character, and provided neither definition nor explanation of the term. The Romanian and USSR amendment (A/CONF.39/C.1/L.258 and Corr.1), that the norms were those from which no derogation was permitted, did not help at all.

12. In studying the International Law Commission's proceedings with regard to article 50, the Australian delegation had naturally gone beyond the deliberations of the Commission and of the Sixth Committee of the General Assembly, had studied the works of jurists and had sought for decisions of courts recognizing, applying or defining the alleged rule. It wished to emphasize the statement by Lauterpacht, in his 1953 report on the law of treaties, that " there are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object ". [2] As recently as 1961, Lord McNair had stated " no international tribunal has been directly compelled to pass upon the question of the effect of conflicts or incompatibility of these kinds upon the validity of a treaty ", [3] no cases had been heard of since, and none had been cited in the Committee. Lord McNair had gone on to suggest that it was " easier to illustrate these rules than to define them ". [4] Individual members of the Commission had referred to slavery, piracy, genocide and unlawful use of force and crimes under international law, but the Commission as a whole had decided not to include illustrative examples in the article, and had singled out in the commentary only the law of the Charter concerning the prohibition of the use of force; it had also recommended that it should be left to State practice to work out the full content of the rule.

13. In the absence of any comprehensive list or any clear definition, even by illustration, of what norms of general international law would have the character of *jus cogens*, the Australian Government concluded that it would be wrong to include the article in the present terms, in a convention on the law of treaties. It had not proposed the deletion of article 50, because it had hoped that the content of the article might become clearer during the deliberations of the Conference, and that amendments might be introduced which would add such necessary elements as a precise criterion for establishing whether a rule of international law had acquired a peremptory character.

14. The Australian Government had also expected that the Conference would attempt to develop in the draft convention an adequate system for the settlement of disputes arising in relation to treaties; such machinery would not, of course, be designed to establish new rules of international law, or even to attach the character of *jus cogens* to existing rules, but it would at least enable a court or arbitrator to give an objective decision on whether international law recognized a peremptory character as attaching to some already recognized rule of international law.

15. The results of the discussion had been disappointing and a clear definition of *jus cogens* was still lacking. No one knew by what process the doctrine came to apply to parti-

[2] *Yearbook of the International Law Commission, 1953*, vol. II, p. 155, para. 5 of comment on article 15.

[3] McNair, *The Law of Treaties*, p. 214.

[4] *Ibid.*, p. 215.

cular rules of general international law. There was no list of rules from which States could not derogate by treaty. It was a " dynamic field " and the International Law Commission had said that peremptory norms should not be regarded as immutable since they could be modified by a subsequent rule having the same character. One thing only was clear in article 50 and that was that conflict with a rule of *jus cogens* would render a treaty void *ab initio*.

16. Article 50 would be a development of international law. The international public order existed mainly by virtue of the Charter of the United Nations, and the primacy of the obligations of the Charter, so far as the great majority of nations was concerned, was established by Article 103. That key article had not been sufficiently recognized by the Commission. It meant that, even in the present convention, obligations inconsistent with the Charter could not be effectively accepted. The position of Article 103 was technically safeguarded in article 26 of the present articles, while articles 49 and 70 also referred to the Charter. Article 70 stressed the " super-cogens " character of the Charter. There were certain rules, like the prohibition of piracy, which should perhaps be given a peremptory character and, as the international community developed a more nearly perfect legal order, other norms of international law might be recognized as possessing a peremptory character, but the conditions for establishing that a rule fell within *jus cogens* should be defined.

17. The United States amendment (A/CONF.39/C.1/L.302) went some way towards providing a reasonable definition, not of the class of norms which should be regarded as imperative, but of essential conditions which would have to exist before it could be held by any court that an existing rule of international law had been recognized as having a peremptory character. It was not entirely clear what was meant by " regional legal systems " or what was envisaged in the recognition " in common " by national and regional systems. Perhaps one point from the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306) might be incorporated by the United States delegation in its amendment, which could be re-drafted to read " A treaty is void if, at the time of its conclusion, it conflicts with a peremptory rule of general international law which is recognized by all the principal legal systems of the world as a rule from which no derogation is permitted ". That would make it clear that a rule was a norm of *jus cogens* only if there was general agreement in the international community on the point. Absolute unanimity might not be necessary but the substantial concurrence of all the principal legal systems was necessary. As with customary rules, peremptory rules were not a matter of majority voting.

18. The United Kingdom amendment (A/CONF.39/C.1/L.312) would determine absolutely those rules of general international law which had been recognized by all the principal legal systems as rules from which no derogation was permitted. The amendment deserved careful consideration, even though it involved some difficulties. It was not a question of drafting new rules or codifying existing ones, because new rules could only be developed by the regular procedures laid down by international law itself. He understood the United Kingdom proposal to be to add, in protocols to the convention, a list of rules recognized by all the principal legal systems as possessing a peremptory character.

19. In view of the particular difficulties or article 50, time should be given for discussing it in a formal or informal working group, or to work on it between the present session of the Conference and the next.

20. Mr. AMADO (Brazil) said that at the stage of development now reached by international law, no one could deny the truth of Lord McNair's dictum " It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract. In every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements ".[5] Thus, when the question of including a provision on *jus cogens* had arisen in the International Law Commission, an extraordinary concordance of views had emerged among members of widely differing personality and legal background. The idea of including such a provision had first arisen when the Commission was considering preparing a code, rather than a convention, on the law of treaties; even at that early stage, however, the difficulty of ensuring the pre-eminence of certain principles had been recognized.

21. International law had developed rapidly in the past thirty or forty years, during which the practice first of the League of Nations and then of the United Nations had given it a degree of form and structure. Nevertheless, it was still at a stage open to development. Thus, in drafting article 50, the International Law Commission had for the first time proposed a rule in which no individual interest of two or more States was involved and which was concerned with the over-all interests of the international community. The individual and reciprocal rights and duties of contracting parties were subjected to the supreme and unanimously recognized interests of the international community.

22. It should be borne in mind, however, that all legal rules emerged from the practice of States. That was why his delegation had remained silent during the discussion of the nineteen-State amendment to article 49 (A/CONF.39/C.1/L.67/Rev.1 Corr.1), which went beyond the fundamental basis of State practice and the jurisprudence of international tribunals. International law was by definition formed by States, and no noble aspirations or sentiments, love of progress or anxiety for the well-being of the peoples of the world could be embodied in international instruments without the collective assent of the international community. Individuals could be swayed by sentiments, but States could not; in accusing a State of imperialism, it should be remembered that the first duty of any State was to protect its own interests and to solve the problems of its own population. Any contrary assertion was tantamount to interference in the domestic affairs of that State.

23. The world community was undoubtedly progressing towards the institutionalization of international law. The community was able to formulate rules, but in international law there were as yet no means of enforcement parallel to those of national law. The Committee was faced with a dilemma. Was it to adopt the pessimistic attitude of the Australian delegation, or the inflexible

[5] *Ibid.*, pp. 213 and 214.

approach of the United Kingdom delegation? Should it delete the noble and bold innovation proposed by the Commission in article 50 as a counterpart to the great principle *pacta sunt servanda*? In the opinion of the Brazilian delegation, that course was unthinkable. Some of the amendments before the Committee might introduce valuable elements into the Commission's draft, particularly those which gave greater force to the principle that the article was not retroactive, a principle which his delegation regarded as essential. An assembly of honest, cultured, patriotic yet internationally minded jurists, who must accept the principle of the predominance of the universal over the particular, should bend their collective efforts to ensure that the rule of *jus cogens* was not sacrificed. There could be no doubt that *jus cogens* was not just a principle or an aspiration, but a reality confronting all States in contemporary international law.

24. Mr. SMEJKAL (Czechoslovakia) said that article 50 contained one of the most important rules of international law. The disagreement over it centred on how *jus cogens* could be defined so as to protect the stability of contractual relations. His delegation would support a more precise formulation of article 50 if that could strengthen the international legal order but, after careful study of the Commission's documents and other sources, had come to the conclusion that a more precise formulation was not possible. It had not been attempted by the Commission on the grounds that it would be difficult to elaborate an exhaustive list of rules of *jus cogens*. The task of the Conference was to codify the law of treaties and not other rules of international law, some of which had the character of *jus cogens*. Those rules also governed non-contractual relations between States and belonged to an entirely different sphere to that being examined at the Conference.

25. The Commission had given in its commentary a number of examples of *jus cogens* which ought to be confirmed. Clearly a State could not conclude a valid treaty designed to exterminate a nation or ethnic group, or to destroy the territorial sovereignty and political independence of a State, or to promote the slave trade or piracy; nor could it conclude a treaty contrary to the principles in Articles 1 and 2 of the United Nations Charter or other rules of the Charter, or to rules outside the Charter from which, in the interests of the international community, States might not derogate. The content of *jus cogens* would be defined progressively by the practice of States and international jurisprudence. Rules of *jus cogens* were indispensable for the protection of public order, the community of States and the maintenance of the standards of public morality, and as the representative of Iraq had said, in order to acquire the character of *jus cogens*, a rule of international law must not only be accepted by a large number of States, it must also be regarded as indispensable for international life and be deeply rooted in the international conscience.

26. Unless *jus cogens* was respected the international legal order would be threatened, as would be the whole system of peaceful co-operation between States. It was therefore difficult to understand the negative position adopted by some States which frequently insisted on the need for a better organized system of international law. There was undoubtedly some risk of abuse with a general formula of *jus cogens*, but if treaties which conflicted with it were considered as valid and if the principle were not incorporated in the convention, an important safeguard would have been neglected.

27. His delegation was among those which had emphasized the importance of *jus cogens* for the international legal order, coexistence and peaceful co-operation between States. It paid tribute to the Commission's achievement in article 50 and was ready to vote in favour of constructive proposals, but could not support the amendments by Mexico (A/CONF.39/C.1/L.266), the United States of America (A/CONF.39/C.1/L.302) and the United Kingdom (A/CONF.39/C.1/L.312).

28. Mr. FUJISAKI (Japan) said that, as international intercourse increased, the need for peremptory norms became greater. His delegation believed that the idea of placing a peremptory norm of international law above ordinary treaties was a sound one. But the problem was how to define it. The International Law Commission had admitted that difficulty in its commentary.

29. It was particularly desirable in the case of article 50 to have a clear definition of the terms used and a precise delimitation of the scope of the article. From that point of view, he welcomed the United States amendment (A/CONF.39/C.1/L.302) and the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) as attempts to improve the wording.

30. But whatever the outcome of those attempts, his delegation was convinced that it was most important to provide for the adjudication of disputes arising under article 50 by the highest judicial organ, namely the International Court of Justice, for the question of conflicts between a treaty and a peremptory norm of international law was pre-eminently of a juridical nature, and it concerned the general interest of the whole community of nations. It could not properly be left to *ad hoc* procedures decided between the parties to a dispute. His delegation firmly believed that no State should be entitled to have recourse to article 50 without accepting the compulsory jurisdiction of the Court. It would therefore be difficult for his delegation to take a firm position on the article until a decision had been reached about procedures for resolving disputes. He would therefore suggest that the vote on article 50 should be deferred.

31. Mr. FLEISCHHAUER (Federal Republic of Germany) noted that only a few speakers had denied the existence of certain rules of *jus cogens* in international law and said that his delegation was equally of the opinion that such rules existed in international law. The growing interdependence of States had brought about an international public order which had led to the establishment of certain fundamental rules as peremptory norms from which no derogation was permitted. An example of such a rule was the prohibition of the use of force, laid down in Article 2 (4) of the Charter. The existence of an international *jus cogens* had been affirmed by a number of German scholars, and the Constitutional Court of the Federal Republic, in a recent decision concerning an international treaty, had declared that there were rules of international law from which even treaties could not derogate.

32. The question was whether the notion of peremptory norm used in article 50 needed some definition. Some speakers had considered that the International Law Commission's text, which contained no definition, should be retained but, since the notion was new and there was

no authoritative enumeration elsewhere of the rules of *jus cogens* and no agreement on their content, it was imperative in his delegation's view to have some definition; otherwise it would be like having a penal code which provided for the punishment of crimes without saying what acts constituted crimes. Unless some definition were provided, article 50 would be open to arbitrary interpretation and that could seriously impair the sanctity of treaties.

33. The method of casuistic enumeration of principles would be the clearest way to define *jus cogens* but would present the greatest technical difficulties. In any event, it was not for the Conference to seek a definition, which moreover would need revision from time to time. The United Kingdom amendment (A/CONF.39/C.1/L.312) was an interesting attempt to avoid the difficulty and arrive at a written enumeration of peremptory rules; it would make for clarity and deserved careful study. Another possible way of providing a definition would be to state in article 50 what requirements a norm had to meet in order to become a peremptory norm in international law. According to Article 38 of the Statute of the International Court of Justice, general international law comprised international custom as evidence of a general practice accepted as law and the general principles of law recognized by the community of nations. In order to become a peremptory norm of international law binding on all States, a rule required general recognition that went beyond the criteria developed by doctrine and practice. It must reflect international practice accepted as law and must also have uniform validity within the various legal systems.

34. Both the Greek amendment (A/CONF.39/C.1/L.306 and Add.1 and 2) co-sponsored by Finland and Spain and the United States amendment (A/CONF.39/C.1/L.302) went some way towards providing a definition of that kind but the former did not go far enough; it simply required that the rule should have the usual recognition of the international community; it did not require that it should be accepted by all legal systems. The United States amendment came closer to what his delegation had in mind, though its drafting needed improvement.

35. Another important question was how to secure the practical application of article 50 and how to prevent its being abused. He agreed with those delegations which considered it necessary to provide in article 62 for some kind of compulsory machinery, not necessarily limited to the International Court of Justice, with a mandatory conciliation procedure prior to the judicial stage leading at least to compulsory adjudication by an arbitral tribunal.

36. He could not support the proposal by the representative of Iraq to proceed with the material rule in article 50, irrespective of the outcome of the discussion on procedural guarantees. There was no reason why the provision of some kind of machinery should entail unduly complicated institutional arrangements. Certainly, without a procedural guarantee, the way would be open for misinterpretation and abuse which might threaten the principle of *pacta sunt servanda* and deprive the article of its protective function. Whatever definition was inserted in article 50, it could never be clear enough to forestall arbitrary interpretation by parties intending to release themselves from perfectly valid treaties. Without an adequate procedural guarantee, an economically or politically strong State might persuade a weaker partner to admit that in their bilateral relations certain principles of *jus cogens* should not apply. Even if no force was involved it seemed unthinkable that two States should be able to decide by agreement whether or not a norm of *jus cogens* was to apply between them. Thus compulsory guarantees were necessary if the notion of *jus cogens* was to be effectively implemented through article 50 and the legitimate rights and interests of States protected against possible abuse. He hoped, therefore, that the vote on article 50 could be postponed until the procedural question had been settled.

37. Mr. PINTO (Ceylon) said that, when commenting on article 39, he had expressed full support for the principle of *jus cogens* and had urged that it be written into an article of the convention which would then become a milestone in the progressive development of international law. Article 50 would give legal expression to a moral principle and for the first time States would recognize that there were certain rules of law of such importance that they could not be derogated from by agreement and would therefore accept voluntarily a fetter on their sovereignty in the external sphere.

38. But such a provision would only be a beginning and he had no illusions as to the actual utility of article 50 in its present form. For example, it would not prevent States from conspiring by treaty to achieve evil ends, for example, to promote the slave trade, decimate populations or commit aggression. To declare such treaties void would not greatly affect their performance and, if one of the parties wished to release itself from obligations, it would undoubtedly do so without claiming nullity on the ground of conflict with a peremptory norm. The provision might, however, encourage a successor government of a State party to an illicit agreement to refuse performance by such other legal means as were open to it and restore the *status quo*.

39. Article 50 was not likely to be applied often and recourse to conflict with *jus cogens* as a ground for nullity would be rare, so that international tribunals would not be flooded with claims of invalidity. Most treaties contained machinery for termination that was easier to apply and there were other better developed principles, such as *rebus sic stantibus* or the rules of succession to treaties, under which relief could be sought with a greater expectation of a reasonable solution. However, the likelihood of abuse did exist, so that some effort was needed to elaborate the article in such a way as to convey more explicitly the content of *jus cogens*. Perhaps article 50 should be studied further by the General Assembly or by the Commission. But as between postponing article 50 for further study—entailing long delay—and the adoption of the article in its present form while detailed study was proceeding, he would prefer the latter course. In any event it would be desirable to establish appropriate machinery for the prompt, objective and final determination of disputes that might arise over the interpretation or application of the article.

40. He was prepared to vote in favour of the Romanian and Soviet Union amendment (A/CONF.39/C.1/L.258 and Corr.1). The United States amendment had the drawback of failing to recognize the evolutionary aspect of *jus cogens*. He could not support the Finnish amendment (A/CONF.39/C.1/L.293) because, in his opinion, a treaty voided under article 50 should be totally void and

if the parties wished to salvage any part of it, they should be required to do so in an independent agreement. He could not support the Mexican amendment (A/CONF. 39/C.1/L.266) for the reasons given by the representatives of Uruguay and India.

41. Mr. GARCIA-ORTIZ (Ecuador) said that article 50 was undoubtedly the most progressive of the whole draft.

42. In paragraph (2) of its commentary to the article, the International Law Commission had stated that " there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* ". In paragraph (1), however, it had observed " that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens* ". So although no precise definition was possible or perhaps even desirable, the nature of the rules of *jus cogens* was well known and it was possible to give examples, as the Commission itself had done in the commentary.

43. Article 50 raised the problem whether an international legal order existed. The answer was undoubtedly in the affirmative. That order was based on the necessities of the life of the international society and perhaps on the concept of *jus communicationis* propounded by Vitoria. The international legal order did not proceed exclusively from the will of the States. Inter-State society had its own demands in the interests of its continued progress, independently of the will of the States which formed it. The subject-matter of the rules of *jus cogens* reflected the legal achievements of mankind which together formed a rational body of law, in a sense comparable to *jus naturalis*. There was, however, a fundamental difference between the two, in that *jus naturalis* was the point of departure, whereas the rational and universal rules of law were the point of arrival. Every legal order must respect those legal achievements of mankind, which placed certain negative limitations on its provisions. The limits which a positive legal order could thus not exceed rested on empirical bases derived from the prevailing conditions in the inter-State society; they were also evolutionary in character, in regard both to the rights conferred and to the grounds on which they were based.

44. His delegation therefore supported article 50, which specified two objective criteria for identifying a rule as having the character of *jus cogens*: first, the fact that no derogation was permitted; secondly, the fact that the rule could be modified only by a subsequent rule of *jus cogens*. The subsequent rule must always be progressive and not retrogressive; it would be readily recognizable because it would tend to foster and improve the international legal order. But at the same time, his delegation wished to suggest the insertion of an additional paragraph to read: " The norms of *jus cogens* contained in the Charter of the United Nations render void not only future but existing treaties which conflict with those norms, or which proceed from acts which conflict with those norms ". Since that suggestion merely incorporated a passage from the commentary to article 61, his delegation had not submitted it in the form of an amendment, but would ask that it be referred to the Drafting Committee and placed on record for the purpose of the interpretation of article 50.

45. His delegation could not support the amendments by Mexico (A/CONF.39/C.1/L.266), Finland (A/CONF.39/C.1/L.293) and Greece, Finland and Spain (A/CONF. 39/C.1/L.306 and Add.1 and 2). The amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which did not involve any change of substance, should be referred to the Drafting Committee. His delegation opposed the amendments by the United States (A/CONF.39/C.1/L.302) and the United Kingdom (A/CONF.39/C.1/L.312), which undermined the very character of the concept of *jus cogens* by placing it in a subordinate position. No rule of the convention or additional protocol thereto could take precedence over peremptory norms such as those embodied in the provisions of the United Nations Charter.

46. Mr. DEVADDER (Belgium) said that article 50 did not contain any criterion for identifying the rules of *jus cogens* but merely stated the consequences to be derived from the fact that a rule of general international law had that character. Since those consequences were serious, it was essential that it should be possible to determine the content of *jus cogens* on the basis of the text of the article.

47. There could be no question of trying to enumerate the rules of *jus cogens*, but article 50 should state certain objective criteria for determining which of the rules had the character of peremptory norms of general international law within the meaning of its provisions. The fact that a rule was recognized by the various legal systems of the world as being peremptory would constitute a valid criterion for deeming it to be a rule of *jus cogens*. Even if a criterion for determining the actual content of the concept of *jus cogens* were included in article 50, there would still remain the problem of determining in each specific case whether, and to what extent, a rule of *jus cogens* was applicable. For that purpose, it was essential that the issue should be decided by adjudication or arbitration, and the court or arbitral tribunal would need to find in the convention on the law of treaties objective elements on which to base its decisions. It was unthinkable that the law should be laid down by arbitrators and judges; their task was to apply the law and not to make it. States should not be left in doubt as to the content of *jus cogens* and have to wait years for a body of case-law to emerge. A State might have to decide its attitude to a proposed treaty which was liable to be affected by any change that might subsequently be acknowledged in the scope of the rules of *jus cogens*. The resulting uncertainty might well prevent the conclusion of an agreement which would be of benefit to all the States concerned but which governments would hesitate to ratify out of fear that the agreement might later be rendered void.

48. The United States amendment (A/CONF.39/C.1/L.302) could provide elements for determining the content of the *jus cogens* rule, subject to drafting improvements, such as the incorporation of the Australian suggestion.

49. Mr. YAPOBI (Ivory Coast) said that the provisions of article 50 raised the question whether *jus cogens* was a myth or a reality, but the statements by the representatives of Iraq and Lebanon had shown that the concept had been recognized from the earliest times. It had been acknowledged in a somewhat primitive form at first, but with the development of inter-State relations it had become more precise and had taken root in the conscience of mankind. Since the end of the Second World

War, the existence of rules of *jus cogens* had been undisputed.

50. There was no difficulty in identifying the source of *jus cogens* rules; they were a by-product of the evolution of the inter-State society. When the conduct of States was determined exclusively by considerations of self-interest, international relations had been governed by a sort of jungle law where the decisive factor was force, with its corollaries of duplicity and deceit. There was no room in that system for ethical rules. The increase in the number of independent States, the emergence of new powerful nations, the devastation of two world wars and the appearance and proliferation of nuclear weapons which endangered the very survival of mankind, had inspired a new solidarity of nations, based on the interdependence of States, international co-operation, peaceful co-existence, and assistance by the wealthier to the less-favoured nations. It was those developments which had led to the setting up of the United Nations and its family of organizations. The recognition of *jus cogens* by international law was only one result of that process, which was making international relations more human in character by basing them on the equality of men and that of States. The adoption of the *jus cogens* concept would constitute an international recognition of the inescapable necessity of introducing the element of morality into inter-State relations. For those reasons, his delegation commended the International Law Commission for its draft article 50.

51. The drafting amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) was logical and useful in that it stated more precisely the principle involved. He could not support the Mexican amendment (A/CONF.39/C.1/L.266), which appeared to repeat the contents of one of the provisions of article 67; in any event, he could not accept the idea that the immediate application of a new legal norm to a pre-existing situation constituted in any way a breach of the principle of non-retroactivity. He also could not accept the amendment by Finland (A/CONF.39/C.1/L.293), which made provision for separability. Since a treaty which came into conflict with a *jus cogens* rule was null and void, separability was out of the question; the whole of the treaty must disappear.

52. He opposed the remaining amendments, in particular the proposition that the determination of the rules of *jus cogens* in international law should depend on the internal law of States, as suggested in the United States amendment (A/CONF.39/C.1/L.302). He also rejected the United Kingdom amendment (A/CONF.39/C.1/L.312) for the enumeration of the rules of *jus cogens* in the convention on the law of treaties and protocols thereto. In view of their variable and evolutionary character, the rules of *jus cogens* should be determined by custom, State practice and court decisions.

53. He strongly supported the retention of the concept of *jus cogens*, as introducing into international law the essential concept of morality on which the fundamental principle of good faith was also based.

The meeting rose at 1 p.m.

FIFTY-SIXTH MEETING

Tuesday, 7 May 1968, at 3.25 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*) *(continued)* [1]

1. Mr. BISHOTA (United Republic of Tanzania) said his delegation fully supported the principle of *jus cogens* stated in article 50. The article was a simple and clear declaration, which meant that man was capable of feeling love, compassion and respect for his fellow men. It was a statement of fact, not merely a declaration of intent. The article was therefore useful, and indeed necessary, and the Conference should unanimously adopt the principle stated in it.

2. The text of the article, particularly the words " and which can be modified only by a subsequent norm of general international law having the same character ", was not, however, entirely satisfactory. In the first place, those words added nothing to the basic principle stated in the article and were therefore unnecessary. Besides, they might have serious consequences—a fear which seemed particularly well-founded in the light of the International Law Commission's explanation of the reasons why those words had been included in the text of article 50. In paragraph (4) of its commentary the Commission said that " it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments ". His delegation took the view that a rule of *jus cogens* could not be modified. New norms of *jus cogens* would, of course, emerge in the future, but they could only be added to the earlier norms and could never derogate from those already in existence. It was hard to see how " future developments " could modify the condemnation of the crime of genocide, the slave trade or the use of force. The Commission had explained that such modification would most probably be effected through a general multilateral treaty; thus, in order to escape the rigorous provisions of article 50, States would only need to call their treaties " general multilateral treaties ". Moreover, as the object of a treaty was generally to give formal recognition to State practice, what the Commission proposed as the means of modifying a rule of *jus cogens* was not only a " general multilateral treaty ", but also the practice of States. The words in question were therefore dangerous and should be deleted. The word " modified " had already been adversely criticized during the debate as providing a licence for breaching treaties; it was for that reason that article 38 had been deleted. If a vote was taken on article 50, the Tanzanian delegation would ask for a separate vote on the words in question.

3. The Tanzanian delegation supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which made the text more precise,

[1] For the list of the amendments submitted, see 52nd meeting, footnote 1.

and it was in favour of the addition of the words " at the time of its conclusion " proposed in the United States amendment (A/CONF.39/C.1/L.302). On the other hand, it could not accept the phrase " which is recognized in common by the national and regional legal systems of the world " in the United States amendment. The expression " regional legal systems " was being used for the first time and the United States delegation had not explained it. The effect of the expression " national legal systems " would be to wreck the principle of *jus cogens*, for it was well known that there were national systems whose basic principles were entirely contrary to what was believed to be the whole basis of *jus cogens*, namely, human dignity.

4. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) had nothing to do with the United States amendment to which it referred. It was really a request for the deletion of article 50, in that it sought to make the article a mere *pactum de contrahendo* whose content was to be defined in future protocols. That was particularly the case because the draft convention did not " set forth " any " peremptory rules ", contrary to what the United Kingdom sub-amendment suggested. In effect, therefore, the United Kingdom's proposal was contrary to what had been generally accepted, namely, that certain rules of modern international law had the character of *jus cogens*. The amendment would thus be a retrograde step and the Tanzanian delegation could not vote for it.

5. The United Kingdom representative had suggested that the Committee should refer article 50 back to the International Law Commission. The Tanzanian delegation could not support that suggestion, or suggestions that a vote on the article should be postponed so that negotiations could take place. There were not really any serious differences of opinion in the Committee and there was no reason why it should not vote at the end of the discussion.

6. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that article 50 reflected the historical development of international law. In the past, that law had had the character of *jus dispositivum*. Today it was assuming an increasingly peremptory character. In the report of the Sixth Committee to the General Assembly at its eighteenth session,[2] it was stated that the majority of representatives had agreed on the existence of rules of *jus cogens*, to which they attached great importance for the progressive development of international law. Among the peremptory norms were the universally recognized principles of international law prohibiting, *inter alia*, the use of force, unlawful war and colonialism.

7. It was with those considerations in mind that the Ukrainian delegation had examined the proposed amendments to article 50. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) improved the original text and could be considered by the Drafting Committee. The Mexican amendment (A/CONF.39/C.1/L.266) raised a complex problem—that of the retroactivity of rules of *jus cogens*—and solved it negatively; the original text of the article was preferable. The Finnish amendment (A/CONF.39/C.1/L.293) raised the question of the separability of the provisions of a treaty when only some of them were in conflict with a rule of *jus cogens*. The position taken on that question by the International Law Commission was the correct one: it had considered that the breach of a peremptory norm of international law was an act so serious that it made the whole treaty void.

8. The United States amendment (A/CONF.39/C.1/L.302) reduced the scope of *jus cogens*, since article 50 would not apply to treaties concluded in the past. It was well known, however, that the colonialists had often imposed treaties which conflicted with peremptory norms of international law. Further, the expression " recognized in common by the national and regional legal systems of the world " was contradictory, for if a norm was part of general international law, it had no need to be confirmed by national or regional systems. The Ukrainian delegation would therefore vote against that amendment.

9. Mr. MULIMBA (Zambia) said that in the debate on article 49, his delegation had spoken of the need to recognize the existence of peremptory norms in order to safeguard the interests of the international community as a whole. It would therefore support article 50, which met that need.

10. It would find difficulty, however, in supporting that part of the United States amendment (A/CONF.39/C.1/L.302) which would subject *jus cogens* to " the national and regional legal systems of the world ", because those terms were implicit in the text of the draft article and were therefore unnecessary. On the other hand, his delegation approved of the addition of the words " at the time of its conclusion " proposed in the same amendment, and would support the suggestion that they be incorporated in the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2). The Mexican amendment (A/CONF.39/C.1/L.266) would then become unnecessary.

11. The Finnish amendment (A/CONF.39/C.1/L.293), whose purpose was to apply the separability rule to treaties which article 50 stipulated to be void, was unacceptable. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) would clarify the wording of article 50.

12. A number of delegations had expressed the fear that article 50 would lead to abuses by leaving States free to ascribe or to deny the character of *jus cogens* to any rule of international law. The establishment of an impartial and independent system of settling disputes had been suggested as a means of strengthening article 62 and securing acceptance for articles 50 and 61. His delegation would consider any such proposal with interest.

13. In conclusion, he agreed with Professor Verdross that the criterion for rules of *jus cogens* was that they served the interests of the whole international community, not the needs of individual States.

14. Mr. MENDOZA (Philippines) said that to recognize the principle of *jus cogens* was to affirm that the community of nations could agree on the existence of certain basic rules from which no nation could derogate. That suggested that States were ready to surrender part of their traditional sovereign right to conclude whatever treaties they pleased.

15. The *jus cogens* principle would strengthen the expanding concept of international law; it represented a formula-

[2] *Official Records of the General Assembly, Eighteenth Session, Annexes*, agenda item 69, document A/5601.

tion of the positive concept of law in the international community.

16. Draft article 50 had met with some criticism. The Philippine delegation thought that it was satisfactory and that it stated a workable rule; for it required the norm to be peremptory, to be a norm not only on international law but also of general international law, and to be not only a peremptory norm of general international law, but also a norm from which no derogation was permitted. The word " general " was probably intended to emphasize the acceptance of the norm by the entire community of nations.

17. As expressed, the idea should not cause any fear of the emergence of too many norms having the status of *jus cogens*, for the rule itself recognized that there would still be general rules of international law which were not peremptory and from which derogation would be allowed. Owing to the diversity of norms, moral concepts and different nations' interests, it was obviously difficult to determine the objective content of the notion of *jus cogens*. It seemed, however, that the affirmation of the existence of *jus cogens* and its recognition provided a good basis for overcoming those difficulties.

18. It might be desirable to specify which rules partook of the nature of *jus cogens*, but the solution proposed in the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) did not seem satisfactory. The International Law Commission had rightly said in paragraph (3) of the commentary that the best course would be " to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals ".

19. His delegation understood why the United States, Romania and the USSR, and Finland had submitted amendments. It was not sure, however, that the reference to " national and regional legal systems " in the United States amendment (A/CONF.39/C.1/L.302) might not unduly limit the scope of the notion of *jus cogens*. Those amendments could nevertheless be considered by the Drafting Committee.

20. The debate had shown nearly unanimous acceptance of the concept of *jus cogens*. His delegation therefore disagreed with those who said it was as elusive as the " flying saucer ". There had, indeed, been very real and flagrant violations of *jus cogens*—piracy, slavery, the unlawful use of force, and genocide. He believed that the good faith and conscience of men and of nations would make it easier to determine eventually the objective content of *jus cogens*.

21. Mr. ROBERTSON (Canada) said that in the Sixth Committee of the General Assembly, at the twenty-second session, the Canadian representative had expressed his delegation's approval of the principle stated in articles 50 and 61, both of which dealt with *jus cogens*. He had also stated that in the absence of any provision for the adjudication of differences relating to the application of those articles in particular cases, the Conference would have either to attempt to define criteria for applying *jus cogens* or consider carefully the implications of failure to do so.[3] Those considerations were still valid.

22. Although his delegation believed that rules of *jus cogens* did exist in international law, it nevertheless shared the view of the International Law Commission that " there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* ". The concept was new in international law. It was true that aggressive wars, acts of genocide and violations of fundamental human rights appeared to be in conflict with the peremptory norms of general international law. But was it possible to go further? In that respect, the United States amendment (A/CONF.39/C.1/L.302) was a marked improvement on the Commission's text. If the article was not to be abused and if its application was to be reconciled with the principle *pacta sunt servanda*, two conditions must be met. First, in so far as that was possible in the text of the article, a standard must be established against which allegations of a departure from a norm of *jus cogens* could be measured. The United States amendment, by referring to the " national and regional legal systems of the world ", did at least suggest such a standard in broad terms. In that respect it was arguable whether the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) went any further than the Commission's text.

23. The second essential condition was that there should be a mechanism to determine the validity of an allegation that a treaty or a clause of a treaty was in conflict with a rule of *jus cogens*. It would be unacceptable for a party to a treaty or a third party to take such a decision itself. Consequently, it was essential to include somewhere in the draft articles, if not in article 50 itself, a provision for compulsory and impartial adjudication.

24. His delegation shared the view that if a treaty was in conflict with a norm of *jus cogens*, it should be void and not merely voidable. But since the application of article 50 would undoubtedly raise difficult problems, it would be in the general interest if, where the conflict was limited and separability was possible, only the offending clauses, and not the whole treaty, were to be declared void. The Canadian delegation therefore supported the Finnish amendment (A/CONF.39/C.1/L.293).

25. Mr. RUEGGER (Switzerland) said he was sorry that his delegation, although it had taken an active part in the work of the previous codifying conferences, had not been asked to give its views, even on a consultative basis, before the debate in the Sixth Committee of the General Assembly. He hoped that appropriate steps would be taken in due course to enable the Swiss delegation henceforth to submit its written comments to the Sixth Committee.

26. In his opinion, the meaning of the expression *jus cogens* and its introduction into international law called for more thorough study than it had so far been given, and the question should be treated with great caution. The expression " international public order ", the use of which had been advocated by the Lebanese representative, seemed preferable. It was close to the terms used by Lord McNair in his work on the law of treaties. Despite the diversity of doctrines, the conclusions reached on the essential points were very similar or even identical. The examples of the best settled rules

[3] *Official Records of the General Assembly, Twenty-second Session, Sixth Committee*, 976th meeting, para. 4.

of *jus cogens* given by the International Law Commission in paragraph (3) of its commentary were striking. The rules set out in the Geneva Conventions and the ILO Conventions might be added to them. Any infraction of those rules was in conflict with international law. Without there being any need to establish a hierarchy or to refer to *jus cogens*, any agreement in conflict with those main principles should, be considered unlawful, since it constituted an attack on the heritage of all mankind. Against such a violation, every member of the community could, and should protest. Obviously no arbitration body, or tribunal, could give its protection to a particular agreement that was immoral or in conflict with those principles, whether *jus cogens* was referred to or not. It seemed that during the discussion the members of the Committee had been more concerned with terms than with the substance of the problem.

27. It followed from what he had said that the Swiss delegation could not accept the International Law Commission's text. It much preferred the text proposed in the United States amendment (A/CONF.39/C.1/L.302) which, although not entirely satisfactory because it too stressed the idea of *jus cogens*, nevertheless had the merit of providing certain safeguards; above all it contained a discreet allusion to that basic instrument, the Statute of the International Court of Justice, and in particular to Articles 9 and 38 of that Statute. The United States amendment also did not beg the question to the same extent as the International Law Commission's text might be said to do.

28. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) was a praiseworthy attempt to improve the text, but it did not remedy the defects that made that text unacceptable to the Swiss delegation.

29. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) deserved very careful study. It had great advantages in regard to method and was designed to preserve the stability of law. If the Conference was to outline a sort of world constitution, it must at least apply the principles governing the enactment and revision of national constitutions. A bill could not be submitted to a parliament without stating its exact content. The United Kingdom sub-amendment proposed, for the establishment of rules of international law, a method which was clearly necessary; it consisted in applying to the only competent authority, namely, States. Meanwhile, the international community had nothing to lose because, once again, existing rules protected the human person and prohibited unilateral recourse to armed force, and they did not need to be confirmed by a new convention.

30. He could not agree with the view that a distinction must be made between the question of the normative law to be developed and that of the organ responsible for applying it. It was no use trusting blindly in the future and hoping for the subsequent emergence—which was possible, of course, but not certain—of the necessary institutions.

31. To sum up, the Swiss delegation thought it was absolutely essential to study the question further. One of the solutions proposed by the United Kingdom—to refer it back to the International Law Commission for study before the second session of the Conference—was possible, but would cause very great difficulties. Another solution would be to set up immediately, within the Conference, a special body which could continue its work after the end of the present session. It was important to make an effort to reach agreement, and it would be preferable not to vote on article 50 at that stage.

32. Mr. REY (Monaco) said that his country had a Mediterranean tradition imbued with respect for human values, which obliged it to concern itself with law, but also to be on its guard against the dangers of imprecision and arbitrariness. Monaco welcomed the introduction of *jus cogens* into positive international law, but was anxious about the use that might be made of it. The idea that there was a natural law, an international public order or *jus cogens*—whatever it might be called—had undoubtedly emerged from the debate; but when it came to giving a reasonably precise definition of the concept, opinions differed.

33. Article 50 admirably reflected those doubts and obscurities, but it had the fault of stating the consequences and imposing a sanction as serious as the nullity of a treaty, without indicating by whom, on what ground or by what process the peremptory norms were established by virtue of which a treaty would be voided. That was a gap in the law which ought to be filled. Although *jus cogens* was so universal and compelling, it should not be impossible to delimit it and give examples. Besides the gap in the law, there was also an absence of judicial authority, for article 62 did not say who would determine that a treaty was incompatible with *jus cogens*. It was not in the interest of any State, weak or strong, old or new, aligned or non-aligned, that international law should be threatened by such a retrograde step.

34. The representative of Iraq had probably been right in saying that the overriding principles should be included in the future convention. But article 50 jeopardized the very application of the principle it sought to establish. One way of avoiding the present uncertainty had been proposed; if it was not taken, Monaco would be unable to support article 50.

35. Mr. DONS (Norway) observed that international law was a set of rules established step by step, which were recognized by all as the prerequisite for friendly relations between nations and peoples. Those relations were based on mutual respect for the interests of the parties. On the other hand, it had been universally recognized that, provided the parties were in a position to make their decisions freely, they could include in a treaty any provisions they pleased, so long as they did not infringe the rights of other States. However, as a result of the progressive development of international law and the introduction of humanitarian principles into national and international relations, it had become necessary to limit the freedom of States to derogate from certain fundamental principles designed to safeguard the interests of all. It had become necessary to establish, as it were, a set of higher rules that could not be violated, even by a treaty freely entered into by both parties.

36. The first foundations of such an international constitutional edifice already existed, but they were not yet complete and hasty action must be avoided. In fact, although the International Law Commission had been bold enough to introduce the new concept of *jus cogens*

into the draft, article 50 suffered from defects which were mainly due to the fact that the Commission had tried to do too much too quickly.

37. The article gave no guidance on some important questions, namely, what were the existing rules of *jus cogens* and how did such rules come into being? The Commission's text stated the effects of those rules but did not define them, so that serious disputes might arise between States; and it provided no effective means of settling such disputes. Consequently, it would seriously impair the stability and security of international treaty relations.

38. His delegation was not opposed to the statement of a rule regarding the legal impossibility of performing a treaty which conflicted with a peremptory norm of general international law. But it considered that *jus cogens* should be defined.

39. The discussion on article 49 had shown the danger of leaving that concept undefined. Some delegations had proposed that the rule of *jus cogens* stated in the Charter regarding the threat or use of force, should be extended to cover economic or political pressure, simply by inserting a provision to that effect in the draft convention, by a two-thirds majority vote; but the Conference was not competent to interpret the Charter. If it was so easy to create or modify a rule of *jus cogens*, it was all the more important not to agree to the adoption of that concept in the draft without a proper definition. Some delegations had argued that since the concept of aggression had been recognized without being defined, it should also be possible to dispense with a definition of *jus cogens*; but it should be remembered that, as aggression was more a political than a legal concept, its interpretation was a matter for the Security Council, whereas the establishment of a similar body responsible for interpreting the legal concept of *jus cogens* had not even been planned.

40. Article 50 left open the question whether *jus cogens* could be invoked only by the parties to a treaty or also by other States, or even by private persons. His delegation did not think that either article 62 in its present form, or the United Nations Charter to which it referred, provided sufficient procedural safeguards to ensure the effective settlement of disputes arising out of the application of article 50. The only means of ensuring that that article would not be a source of serious discord was to provide for compulsory recourse to arbitration or judicial procedure when other means of settlement had proved ineffective.

41. As it stood, article 50 amounted to recognizing a party's right to denounce a treaty unilaterally at its own discretion, which was clearly unacceptable. It was very important that the text of the article should be acceptable to all, or nearly all, because it was intended to establish a new or at least hitherto little known rule. Consequently, his delegation agreed with those who thought that the Committee should not vote on the article at that stage, but should refer the text and amendments thereto, together with articles 61, 62 and possibly other articles, to a conciliation group or working party. If that group did not succeed in working out a text which was acceptable to the great majority, the success of the Conference's work and even the convention itself might be seriously endangered.

42. Mr. CHAROENCHAI (Thailand) said his delegation attached particular importance to Part V of the draft articles, which contained fundamental rules and made a substantial contribution to the development of positive international law. It warmly congratulated the International Law Commission on having included article 50 in the draft. Although they had emerged so late, the peremptory norms of general international law constituting *jus cogens* could not be disregarded by civilized States. It was right that a treaty violating those norms should be declared void, by virtue of a rule corresponding to that which already existed in private law. He reminded the Committee of the important passage in McNair's *The Law of Treaties* cited by the Brazilian representative at the previous meeting. [4]

43. The International Law Commission had been right not to give examples, for an enumeration might hinder the development of *jus cogens*. It was preferable to rely on the judgement of the International Court of Justice or any arbitral tribunal to which the matter might be referred.

44. His delegation also endorsed the opinion expressed in paragraph (6) of the commentary concerning the non-retroactive character of the nullity prescribed; if a new rule of *jus cogens* emerged, a previously concluded treaty conflicting with that rule would only become void when the new rule was established; it would not be void *ab initio*. That principle was laid down in article 61 of the draft.

45. With regard to the amendments, it seemed unnecessary to repeat the word " norm " as proposed by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1). The amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) was also unnecessary; the formula proposed by the International Law Commission ought not to raise too many difficulties in application. The same applied to the United States amendment (A/CONF.39/C.1/L.302).

46. As to the United Kingdom sub-amendment (A/CONF. 39/C.1/L.312), his delegation recognized the force of the arguments advanced by its author, but feared that negotiation of the protocols might be very difficult. An enumeration of peremptory norms, a solution also suggested by the United Kingdom representative, would be sure to give rise to interminable discussions in the Conference.

47. His delegation could not support the Mexican amendment (A/CONF.39/C.1/L.266), as it would prefer the question of non-retroactivity to be the subject of a separate article. Nor could it support the Finnish amendment (A/CONF.39/C.1/L.293), since it regarded the violation of a norm of *jus cogens* as sufficiently serious to render the whole treaty void.

48. Although it was not opposed to some of the amendments being considered by the Drafting Committee, the delegation of Thailand supported the text proposed by the International Law Commission and would prefer it not to be changed.

49. The CHAIRMAN announced that the Mexican amendment (A/CONF.39/C.1/L.266) was withdrawn.

50. Mr. ARIFF (Malaysia) said he thought it was safe to say that from the earliest times societies had been governed by some peremptory norms, at first as customs. As societies developed and formed States, their peremptory norms became public policy, depending on their

[4] Para. 20.

degree of organization and their community spirit; its function was to protect the community's essential interests. Transferred to the international sphere, public policy became what could be called *jus cogens*, which was indispensable for an increasingly organized international society in which relations tended to become multilateral rather than bilateral, and in which the interests of the international community as a whole consequently prevailed over the individual interests of each State.

51. At one time, States had been able to agree on almost anything, without restriction, by virtue of the rule of sovereignty, reinforced by the principle *pacta sunt servanda*. But once the use of force had been prohibited by instruments such as the League of Nations Covenant and the United Nations Charter, other limitations on sovereignty had become possible. That prohibition marked the appearance of *jus cogens*, a new development in international law having the same function as in early societies and later in societies of States. There was no denying the existence or the necessity of a body of rules of *jus cogens* to protect the interests of international society, even though opinions differed on the content and sources of those rules, and on the means of establishing them. Moreover, *jus cogens* evolved and new rules were added to the old; international jurisprudence, international conventions and diplomatic practice all contributed to that development. The notion of *jus cogens* was therefore difficult to define in contemporary practice, but it was none the less indispensable.

52. The International Law Commission had undoubtedly done a great service by including an article on *jus cogens* in its draft, but the proposed text was much too wide to be really useful in practice. It defined the norms of *jus cogens* by their effect, not by their content, and there were no criteria for recognizing them, except the few given in the commentary. No doubt the Commission had been right not to list examples; that might have taken it too far, as it pointed out in paragraph (3) of the commentary. However, it would hardly be practical for Ministries of Foreign Affairs to have to rely on a principle stated in such general terms when deciding whether a treaty derogated from a peremptory norm. Reference to practice and jurisprudence to define the content of the rule more precisely would result in divergent and therefore controversial answers, especially as *jus cogens* itself was not immutable.

53. The concluding words of article 50 provided a valuable safeguard, but the article did not say how it was to be determined whether the norms in question had the same character; that was a serious gap, which the Drafting Committee should endeavour to fill.

54. It remained to provide a means of determining the content of *jus cogens*. The amendment submitted by Greece, Finland and Spain, the United States amendment and the United Kingdom sub-amendment largely solved the problem and should therefore be given due consideration. His delegation favoured the three-State amendment (A/CONF.39/C.1/L.306 and Add.1 and 2), which stressed the universality of the norm of *jus cogens*. It proposed, however, that the words " recognized by the international community as a norm " should be replaced by the words " recognized as such by the international community and ", which would avoid repeating the word " norm ". The United States amendment (A/CONF.39/C.1/L.302) seemed to be based on the same considerations as the three-State amendment, since the words " of the world " undoubtedly suggested universality.

55. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) would considerably improve article 50. The proposed protocols would be very useful. But as the notion of *jus cogens* was elusive and dynamic, it would be extremely difficult, if not impossible, to work out a useful, satisfactory and practical definition, though the words " from time to time " in the amendment were calculated to facilitate the task. The first two sentences of paragraph (2) of the Commission's commentary emphasized the difficulties involved.

56. For those reasons, his delegation thought the best solution would be to adopt the text proposed by the International Law Commission, emphasizing the universal character of the norm, possibly by incorporating the three-State amendment (A/CONF.39/C.1/L.306 and Add.1 and 2), which his delegation unreservedly supported. But it would prefer the Committee to set up a conciliation group to seek a resolution acceptable to all rather than take a vote on the amendments and the article at that stage.

57. Mr. BADEN-SEMPER (Trinidad and Tobago) said that before the debate on article 50 his delegation had considered submitting a proposal to delete the article, as all the available evidence indicated that the principle of *jus cogens* could not be considered to be *lex lata*; and even though it was considered by some to be a desirable innovation, no one seemed quite certain of the juridical nature or content of norms having the character of *jus cogens*.

58. In view of the positions taken by States regarding the article, however, his delegation had refrained from proposing its deletion; for all the participants in the Conference except one had come out in favour of retaining the article.

59. The discussion had shown that the international legal system had arrived at a new stage in its development. The approach adopted in Article 103 of the United Nations Charter had been cautious and modest. Developments over the past two decades had permitted a more confident and positive approach. His delegation would therefore support the inclusion of article 50 in the draft convention.

60. As to the legal nature and effects of *jus cogens*, his delegation did not think that that notion was identical with public policy or *ordre public*. It was true that the latter notion did exist in positive international law and had frequently been in issue before the International Court of Justice and the European Commission on Human Rights. But the voidance of treaties that were incompatible with a peremptory norm was a different matter, which could not be assimilated to public policy. Nor could his delegation accept the proposition that all treaties encroaching on the rights of third States were contrary to *jus cogens*. It was difficult to accept that the international community at large had a legal interest in protecting the rights of non-parties to a treaty. In international law, the rights of third States were not absolutely inviolable; there were rules of customary international law which allowed third parties to protect their rights quite adequately.

61. The nature and extent of the conflict between a treaty and a peremptory norm of general international law from which no derogation was permitted deserved much closer attention. A useful comparison might be made between Article 103 of the Charter and the relevant provisions of the draft convention. Whereas Article 103 of the Charter referred to a conflict of " obligations ", the draft articles referred to conflict between a " treaty " and a " norm " or between a " situation " and a " norm " (article 67). The language of the draft articles was thus less precise, so that it led to difficulties of interpretation. Where a treaty could be considered severable, it was easy to determine under Article 103 of the Charter which provisions could continue to operate. The same was not true of article 61 of the draft convention. In that connexion, the International Law Commission's view that any incompatibility with a norm of *jus cogens* must necessarily be fundamental was unrealistic.

62. As to the amendments to article 50, the joint amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), though a drafting amendment, had considerable merit. The English text of the amendment, was not very elegant, however, and the same result might be achieved by deleting the word " peremptory " from the text of the article, but leaving it in the title.

63. His delegation had difficulty in understanding the United States amendment (A/CONF.39/C.1/L.302). It seemed to be based on the premise that *jus cogens* was a general principle of law recognized by civilized nations. His own delegation had a different conception of *jus cogens*, which it considered to be primarily a rule of customary international law manifested in the practice of States and in their conviction that such practice was legally binding on them. General multilateral treaties such as the United Nations Charter could also be a source of norms having the character of *jus cogens*.

64. As to general principles of law " recognized in common by the national and regional legal systems ", his delegation considered not only that that was a most unlikely source of rules of *jus cogens*, but that it would be dangerous to rely on analogies with municipal law in a matter of such fundamental importance.

65. The delegation of Trinidad and Tobago could not support the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to the United States amendment, since it would have the effect of destroying the basic principle stated in the draft article.

66. His delegation agreed that it was most undesirable to attach to article 50, or to any other article of the draft, a requirement of compulsory arbitration which would nullify the customary procedures for settling disputes between States. It could not agree with the United Kingdom representative that article 49 was a particular example of article 50. Article 49 operated in the context of consent to be bound by a treaty, whereas article 50 was concerned with the object of the treaty even when both parties freely consented to be bound by it.

67. Lastly, his delegation did not think that postponement of the vote on article 50 would serve any useful purpose.

68. Mr. MAIGA (Mali) said that *jus cogens* was a concept of positive international law which, though highly controversial, nevertheless reflected legal reality.

69. Public international law had undergone profound changes. International society, which had been egalitarian, consisting solely of juridically equal sovereign States, had evolved quickly since 1945 towards a hierarchic society in which an international power superior to States was gradually imposing its authority. International law was thus becoming, to an increasing extent, a community law. The notion of *jus cogens* faithfully reflected the political and sociological changes that had taken place in international society; hence it had its place in the draft convention.

70. The norms of *jus cogens* were of capital importance for the international community. As the International Law Commission had pointed out, for a norm to possess the character of *jus cogens* it must be peremptory, must partake of general law and must void any treaty which violated it. Such norms were the corner-stone of the progressive development of contemporary international law. Moreover, they were essential to the stability of international relations and constituted one of the most effective instruments for peaceful coexistence between States with different economic and social systems.

71. His delegation therefore fully supported the International Law Commission's draft article 50. It firmly rejected the artificial and subjective arguments put forward by some delegations with a view to preventing the inclusion of the *jus cogens* rule in the draft convention.

72. It had been argued that *jus cogens* restricted the freedom of the will of States and impaired their sovereignty. That allegation was unjustified. The *jus cogens* rule ensured the protection of a State, whether powerful or developing, against its own weakenesses; far from weakening the position of small States, it protected them against the superior force of their possible future partners, in other words, against inequalities in negotiating power. That showed how important *jus cogens* was to the international community as a whole.

73. The moral and spiritual values inherent in *jus cogens* could only assert themselves with the desired peremptory force if no geographical limits were placed on their applicability. Hence there could be no question of a regional *jus cogens*.

74. His delegation was convinced that the *jus cogens* rule would help to strengthen the legal conscience of the nations, today constantly disturbed by many political, economic and social factors that were endangering what was and should remain the essence of international law, namely the new relationships based on mutual respect for the personality of States.

75. His delegation was not in favour of setting up a working party to study article 50 and asked that the article be put to the vote.

76. It supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which made the International Law Commission's text clearer and more precise.

77. Sir Humphrey WALDOCK (Expert Consultant) explained that the International Law Commission had based its approach to the question of *jus cogens* on positive law much more than on natural law. It was because it had been convinced that there existed at the present time a number of principles of international law

which were of a peremptory character that it had undertaken the drafting of article 50.

78. The International Law Commission had always been faced with two problems: to define *jus cogens* and, if need be, to expand the article by enumerating the various cases of conflict with a rule of *jus cogens*. But, as it had explained in its commentary, it had not been able to go beyond the general formulation of the notion of *jus cogens* as an element of the law of treaties.

79. Some speakers had implied that it was much as though there was a provision in criminal law laying down penalties, but not the cases to which they were to apply. That comparison did not truly reflect the position, for in the " common law " systems, the notion of public policy and of illegality in the law of contract had been developed mainly from decisions of the courts; it was only in comparatively recent times that judges, increasingly aware of the relationships between them and the legislature in that sphere, had come to consider that the courts should not extend the categories of illegality any further by judicial decision. But those considerations did not apply in the same way to international law in the present state of its development and of the organization of the international community, and when the Commission had decided to set out the rule of *jus cogens* in article 50, its decision had been largely justified.

80. He had been glad to note that the majority of delegations had not contested the principle of the article, but only the adequacy of its formulation, or the possibility of giving it adequate expression.

81. He wished to emphasize that the text of article 50, if interpreted in good faith and in accordance with the natural meaning of the words, already contained implicitly many of the elements found in the various amendments. A general rule of international law necessarily implied general recognition by the international community. He recognized, however, that the wording could and should be improved in order to make explicit what at present was only implicit in the text: namely, the need for general recognition of the norm as a norm of *jus cogens*. The amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), for example, made the International Law Commission's text clearer on that point and deserved consideration.

82. The representative of Tanzania had expressed the view that the final words of article 50, " and which can be modified only by a subsequent norm of general international law having the same character ", weakened the article as a whole. He himself was of the opposite opinion. That provision strengthened the definition by specifying that the norm in question was of so peremptory a character that it could only be modified by another norm of the same character. *Jus cogens* could evolve; for example, the recent international definition of the crime of piracy given in the Convention on the High Seas [5] had modified the concept of piracy as expressed in the internal law of certain countries. Similarly, in view of the development of international organizations and the increasing delegation of powers to them, the notion of the sovereign equality of States was liable to change. The provision should not, therefore, be regarded as weakening the general principle stated in article 50 but as reinforcing the definition.

83. He shared the doubts expressed about the United States amendment (A/CONF.39/C.1/L.302). It was for the community of States as such to recognize the peremptory character of a norm. Moreover, the amendment might give rise to technical difficulties, because international law was often more advanced in certain spheres than national legal systems, for instance with regard to the coercion of a State and the rules regarding the use of force, and in many countries the constitution still laid down that in the event of a conflict between internal law and international law, internal law prevailed. Consequently, although he appreciated the United States' desire to place more emphasis on the fact that a peremptory norm must be recognized by the international community as a whole, he himself thought that the amendment approached the question from the wrong angle.

84. The CHAIRMAN announced that Finland had withdrawn its amendment (A/CONF.39/C.1/L.293) but reserved its position on article 41, relating to the separability of treaty provisions.

The meeting rose at 6 p.m.

[5] United Nations, *Treaty Series*, vol. 450, p. 11.

FIFTY-SEVENTH MEETING

Tuesday, 7 May 1968, at 8.40 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 49 (Coercion of a State by the threat or use of force) *(resumed from the 51st meeting)* [1]

1. The CHAIRMAN invited the Committee to resume its discussion of article 49 of the International Law Commission's draft and called upon the Netherlands representative to introduce the draft declaration proposed by his delegation (A/CONF.39/C.1/L.323), which read as follows:

" DRAFT DECLARATION ON THE PROHIBITION OF THE THREAT OR USE OF ECONOMIC OR POLITICAL COERCION IN CONCLUDING A TREATY

" *The United Nations Conference on the Law of Treaties*

" *Upholding* the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith;

" *Reaffirming* the principle of sovereign equality of States;

" *Convinced* that States must have complete freedom in performing any act relating to the conclusion of a treaty;

" *Mindful* of the fact that in the past instances have occurred where States have been forced to conclude

[1] For the list of the amendments submitted to article 49, see 48th meeting, footnote 2.

treaties under pressures in various forms exercised by other States;

" *Deprecating* the same;

" *Expressing its concern* at the exercise of such pressure and anxious to ensure that no such pressures in any form are exercised by any State whatever in the matter of conclusion of treaties;

" 1. *Solemnly condemns* the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent;

"2. *Decides* that the present declaration shall form part of the Final Act of the Conference on the Law of Treaties. "

2. Mr. RIPHAGEN (Netherlands) recalled that at the 51st meeting [2] he had moved that the various groups should hold informal consultations with a view to reaching agreement on the text of a resolution, the adoption of which by the Committee would make it possible to arrive at a generally acceptable solution in respect of article 49.

3. The text of the draft declaration was the outcome of those informal consultations. Although it was submitted in the name of the Netherlands, it was the result of the joint efforts of the representatives of the various groups of countries. Since no pride of authorship was involved on his part, he felt no embarrassment about recommending its adoption by the Committee of the Whole.

4. The CHAIRMAN said that he would take it that, in the absence of any objection, the Committee of the Whole approved the draft declaration.

It was so agreed.

5. The CHAIRMAN said that, as the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) did not wish to press their amendment to a vote, he would put the Chinese amendment (A/CONF.39/C.1/L.301) to the vote.

6. Mr. ALCIVAR-CASTILLO (Ecuador) requested that the Chinese amendment be put to the vote paragraph by paragraph.

Paragraph 1 of the Chinese amendment was rejected by 36 votes to 8, with 28 abstentions.

Paragraph 2 of the Chinese amendment was rejected by 44 votes to 2, with 29 abstentions.

7. The CHAIRMAN put to the vote the amendment by Japan and the Republic of Viet-Nam.

The amendment by Japan and the Republic of Viet-Nam (A/CONF.39/C.1/L.298 and Add.1) was rejected by 55 votes to 2, with 27 abstentions.

8. The CHAIRMAN put to the vote the amendment by Bulgaria, Ceylon, Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Ecuador, Finland, Greece, Guatemala, Kuwait, Mexico, Spain and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.289 and Add.1).

At the request of the representative of Cyprus, the vote was taken by roll-call.

The Netherlands, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Nigeria, Poland, Romania, Sierra Leone, Singapore, South Africa, Spain, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Ecuador, Ethiopia, Finland, Ghana, Greece, Guatemala, Guinea, Honduras, Hungary, India, Indonesia, Iraq, Israel, Kenya, Kuwait, Malaysia, Mali, Mexico, Mongolia, Morocco.

Against: New Zealand, Peru, Portugal, Republic of Korea, Republic of Viet-Nam, United Kingdom of Great Britain and Northern Ireland, Australia, Chile, China, Japan.

Abstaining: Netherlands, Norway, Pakistan, Philippines, San Marino, Saudi Arabia, Senegal, Sweden, Thailand, Trinidad and Tobago, Tunisia, Turkey, United States of America, Argentina, Austria, Belgium, Brazil, Canada, Central African Republic, Dahomey, Denmark, Federal Republic of Germany, France, Gabon, Holy See, Iran, Italy, Ivory Coast, Jamaica, Lebanon, Liberia, Liechtenstein, Monaco.

The amendment (A/CONF.39/C.1/L.289 and Add.1) was adopted by 49 votes to 10, with 33 abstentions.

9. Mr. DE BRESSON (France), explaining his delegation's vote, said that in abstaining from voting, his delegation had not intended to reserve its Government's position on a question which was perhaps of more particular concern to the Czechoslovak delegation. In fact, the French position had long been known.

10. The reason why his delegation had abstained from voting was that it had not had the time to assess fully the possible effects of that amendment on the territorial status of many States.

11. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had abstained from voting on the amendment because it was in favour of inserting the expression " international law ", but against the reference to the Charter of the United Nations. The expression " international law " included the principles and rules of the United Nations Charter.

12. Mr. NACHABE (Syria) said that his delegation had voted in favour of the amendment, subject to the reservation it had already made during the discussion on article 49, namely that the word " force " in that article should be understood in its widest meaning as set forth in the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

13. Mr. YAPOBI (Ivory Coast) said that the reason why his delegation had abstained from voting was not because it was opposed to the amendment, but because the head of his country's delegation had been unable to be present during the whole of the discussion and could not therefore come to a decision.

14. The CHAIRMAN put to the vote the Peruvian amendment (A/CONF.39/C.1/L.230).

The Peruvian amendment was rejected by 36 votes to 11, with 40 abstentions.

[2] Para. 63.

15. Mr. GON (Central African Republic) explained that his delegation had abstained in the votes because it preferred the present wording of article 49, in which it interpreted the word " force " in its widest meaning.

16. The CHAIRMAN said that the Australian amendment (A/CONF.39/C.1/L.296) related to a question of form and should therefore be referred to the Drafting Committee.

17. Mr. BISHOTA (United Republic of Tanzania) pointed out that there was a big difference between the words " invalid " and " void " and that the amendment should not be referred to the Drafting Committee.

18. Mr. TAYLHARDAT (Venezuela) said that it was difficult for his delegation and other Spanish-speaking delegations to express an opinion on the amendment, which referred solely to the English text. The words referred to in the Australian amendment appeared in English in the Spanish text.

19. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he was not sure that the Australian amendment did not relate rather to a question of substance. Accordingly, he proposed that the Chairman should put the amendment to the vote.

20. Mr. ALCIVAR-CASTILLO (Ecuador) thought that in Spanish the word "void " meant "*nulo*" and that the word " invalid " was translated by " *inválido* ". If there was any difference, as all the texts were equally authentic, it would be preferable to harmonize them in the different languages. For that reason, he supported the proposal by the representatives of the United Republic of Tanzania and the USSR.

21. Mr. DE CASTRO (Spain) said he also supported the proposal by the United Republic of Tanzania and the USSR.

22. Mr. VEROSTA (Austria) said he agreed with the Chairman's decision to refer the Australian amendment to the Drafting Committee. If the latter could not settle the question, it could submit it to the Committee of the Whole. He was not in a position to give an opinion on the text of the amendment in the different languages and would therefore abstain if the amendment was put to the vote.

23. Mr. HARRY (Australia) said that when his delegation's amendment was submitted he had clearly indicated that it concerned a question of form and that its purpose was to make the wording of article 49 clearer. The point of the amendment had been adequately discussed and he would agree to withdraw it. He was confident that the Drafting Committee would give it due consideration.

24. The CHAIRMAN said that article 49, as amended, would be referred to the Drafting Committee. [3]

Article 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) *(resumed from the previous meeting)*

25. The CHAIRMAN invited the Committee to resume its discussion of article 50. [4]

26. Mr. KEARNEY (United States of America) said certain delegations had expressed concern lest the reference to national legal systems might introduce the question of internal law into consideration of the content of *jus cogens*. Further, some representatives had considered that the reference to national and regional legal systems was too restrictive and might give rise to difficulties of interpretation. The purpose of the United States amendment was not to subject *jus cogens* to national law, but merely to clarify an aspect of *jus cogens* which was implicit both in its very nature and in the definition adopted by the International Law Commission. He wished to make it clear that a principle of general international law could become *jus cogens* only upon general acceptance as such throughout all the regions of the world.

27. The discussion of the United States amendment (A/CONF.39/C.1/L.302) had indicated that there was substantial support for the principle embodied in it, but concern for the manner in which that principle was expressed. Similar doubts had been expressed with regard to the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), which sought to clarify the same principle, but in language somewhat different from that used in the United States amendment.

28. He was much more concerned that the principle of *jus cogens* should be properly expressed than that the United States amendment should be adopted. The suggestion by the Australian delegation that the text of article 50 should refer to recognition by all the principal legal systems of the world deserved careful study.

29. He proposed that the vote on article 50 be deferred and that the article and the amendments thereto be referred to the Drafting Committee with a request to produce a revised text of article 50 capable of commanding the widest possible support.

30. Sir Francis VALLAT (United Kingdom) said he supported the United States proposal and was prepared to withdraw his own delegation's amendment (A/CONF.39/C.1/L.312) in order to assist in the move for conciliation implicit in the United States amendment (A/CONF.39/C.1/L.302). He must make it clear, however, that withdrawal of the amendment did not in the least mean that his delegation found the wording of article 50 satisfactory.

31. He must state categorically, with full recognition of the gravity of his words, that if article 50 was put to the vote at that time, the United Kingdom delegation would not vote for it and would very probably have to vote against the convention as a whole if that article was adopted.

32. Article 50 was a Pandora's box and might let loose a great many unforeseen difficulties when the convention came into force. The United Kingdom delegation believed that the text of the article must be changed and that a particular and objective criterion must be found to determine the nature and scope of the rule stated in it.

33. Mr. DADZIE (Ghana) said article 50 had been subjected to a detailed examination. The positions of most delegations were known and those in favour and those against deferring the vote on article 50 had been able to

[3] For the resumption of the discussion on article 49, see 78th meeting.

[4] For the list of the amendments submitted to article 50, see 52nd meeting, footnote 1. The amendments by India (A/CONF.39/C.1/L.254), Mexico (A/CONF.39/C.1/L.266) and Finland (A/CONF.39/C.1/L.293) had been withdrawn.

explain their reasons. The International Law Commission's text was clear so far as the meaning of the notion embodied in it was concerned. He would therefore ask that article 50 and the amendments thereto be put to the vote immediately in accordance with the rules of procedure.

34. Mr. JAGOTA (India) said he had listened attentively to the statements by the representatives of the United States and the United Kingdom. They had originally appeared to accept the principle of *jus cogens* and to be seeking only to make drafting amendments to the text of article 50, but they now seemed to wish to turn the Drafting Committee into a negotiating body to prepare a text which suited them better. They should therefore have asked for the establishment of a working party instead of tackling the substance of the article indirectly.

35. The question of *jus cogens* had been debated at length by jurists and governments as well as by the International Law Commission and also in the course of the present debate. All positions were known. The best course would therefore be to follow the normal procedure and vote on substantive amendments which had not been withdrawn and to refer the amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which was a drafting amendment, to the Drafting Committee. Accordingly, he was fully in favour of the Ghanaian procedural motion.

36. Mr. DE BRESSON (France) said he was perfectly well aware that a number of delegations wished to reach a decision on article 50 speedily as they rightly considered it important, but he would ask those delegations to acknowledge that that provision was no less important to other members of the Conference.

37. It was in the nature of a vote to interrupt the discussion and crystallize positions prematurely. That was not too serious in a case of legal technique, but it might be much more serious with clauses which, like those of article 50, had much more far-reaching implications.

38. His delegation had already stated on many occasions that, in its view, it was unthinkable that the codification of the law of treaties should not be based on the general agreement of the international community. Such agreement had not yet been reached on article 50, but the discussion had shown that there were reasonable chances of its being reached, provided that the subject matter was studied thoroughly. The inescapable conclusion was that the discussion should remain open.

39. It would be preferable, therefore, to request that article 50 should be referred immediately to the Drafting Committee, provided it was made clear that that body would, in that particular case, be given special terms of reference to enable it to discuss not merely the drafting amendments, but also proposals affecting the substance.

40. That suggestion did not in any way signify a dilatory attitude on the part of the French delegation. It was, on the contrary, clear evidence of its anxiety to find a method of work that would allow of a proper perspective and the requisite attention to enable solutions to be found calculated to lead to the success of the Conference's work.

41. Mr. MENDOZA (Philippines) said that, in view of the United States representative's explanation of his delegation's amendment, his own delegation supported the proposal to refer the amendments by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), the United States of America (A/CONF.39/C.1/L.302) and Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) to the Drafting Committee for consideration. The Committee must, however, take a decision on the principle in article 50 so that the Drafting Committee would be aware that the Committee of the Whole accepted the *jus cogens* rule.

42. The CHAIRMAN pointed out that if the Committee adopted the article, it would be unnecessary to refer the amendments to the Drafting Committee.

43. Mr. KHLESTOV (Union of Soviet Socialist Republics) observed that after the many statements the Committee had heard on article 50, the positions were perfectly clear. The USSR delegation did not accept the United States amendment (A/CONF.39/C.1/L.302) and accordingly it was against referring that amendment, which was a substantive amendment, to the Drafting Committee. His delegation requested that the amendment be put to the vote. The method proposed by the United States representative was not consistent with the Committee's established practice.

44. The CHAIRMAN pointed out that the Committee had before it two procedural motions, one by the United States, the other by Ghana. Under rule 42 of the rules of procedure, the Committee must take a decision on the motion submitted first, that was to say, on the United States procedural motion.

45. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) objected that rule 42 dealt only with proposals relating to the item under discussion and its purpose was only to determine which amendment was to be voted on first. In any event, the Committee must take a decision on substantive amendments.

46. Mr. TABIBI (Afghanistan) said the Committee must first take a decision on the United States procedural motion to postpone the vote on the article in order to enable consultations to be held. As to referring the amendments to the Drafting Committee, rule 48 of the rules of procedure must be followed.

47. Mr. BISHOTA (United Republic of Tanzania) said there were two parts to the United States procedural motion and they could be voted on separately. The first part was to defer the vote on article 50 and the amendments thereto, the second to refer the article and the amendments to the Drafting Committee.

48. Mr. MYSLIL (Czechoslovakia) requested, under rule 40, that the United States procedural motion be divided into two; the Committee should first take a decision on referring the United States amendment (A/CONF.39/C.1/L.302) to the Drafting Committee and then on referring the other amendments to the Drafting Committee.

49. Mr. MARESCA (Italy) moved the adjournment of the debate for thirty minutes under rule 25 of the rules of procedure.

50. Mr. DADZIE (Ghana) and Mr. KHLESTOV (Union of Soviet Socialist Republics) opposed the adjournment.

51. Mr. VARGAS (Chile) and Mr. AUGE (Gabon) said they were in favour of the adjournment.

The motion for the ajournment was rejected by 49 votes to 24, with 16 abstentions.

52. Sir Francis VALLAT (United Kingdom) moved that the United States procedural motion be put to the vote.

53. Mr. DADZIE (Ghana) supported that motion. If one of the motions was adopted, the other would be automatically rejected.

54. Mr. MWENDWA (Kenya) said that in his opinion, under rule 48, an amendment could not be referred to the Drafting Committee for advice unless the Committee took a decision to do so.

55. Mr. KHLESTOV (Union of Soviet Socialist Republics) moved that the Czechoslovak motion for division be put to the vote.

56. Sir Francis VALLAT (United Kingdom) said he opposed the request for division.

The Czechoslovak motion for division was carried by 45 votes to 28, with 15 abstentions.

57. The CHAIRMAN suggested that a vote should be taken on referring the United States amendment (A/CONF.39/C.1/L.302) to the Drafting Committee.

58. Mr. KEARNEY (United States of America) objected that the procedural motion fell into two parts, namely, to defer the vote on the amendments and to refer the amendments to the Drafting Committee. That was the only form of division compatible with the procedural motion.

59. Mr. HARRY (Australia) suggested that if the first part of the motion, relating to the deferment of the vote, were put first, it would simultaneously resolve the question raised by the representative of Ghana.

60. Mr. KHLESTOV (Union of Soviet Socialist Republics), supported by Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic), Mr. MYSLIL (Czechoslovakia), Mr. KELLOU (Algeria) and Mr. MOUDILENO (Congo, Brazzaville), said that, as the Czechoslovak motion for division had been adopted, the Committee must adhere to that decision and vote separately on referring the United States amendment to the Drafting Committee and on referring the other amendments to the Drafting Committee.

61. Mr. DADZIE (Ghana) requested priority for his procedural motion.

62. Mr. KEARNEY (United States of America) said that, in his opinion, the discussion of his procedural motion could not be interrupted, since a vote had already been taken.

63. The CHAIRMAN observed that the interpretations of the motion for division which had been adopted differed.

64. Mr. KEARNEY (United States of America) said that the only possible method of division was that which he had stated and asked that the Committee take a decision on that point.

65. Mr. MEGUID (United Arab Republic) suggested that it would be better to close the discussion.

66. Mr. BADEN-SEMPER (Trinidad and Tobago) said he was against the closure of the discussion.

67. Mr. ROBERTSON (Canada) said that he too was against the closure of the discussion. Further, the division moved by the Czechoslovak delegation related only to the second part of the United States procedural motion and did not affect the first part, namely the adjournment of the vote.

68. Mr. TABIBI (Afghanistan) said that he was afraid that the procedural discussion would never end. He suggested that the Czechoslovak representative should not press his motion for division. The Committee would then be able to take a decision on the Ghanaian delegation's motion for priority and, if it was adopted, the decision already taken on the motion for division would fall.

69. Mr. KEARNEY (United States of America) said the first part of his procedural motion was merely the Ghanaian motion put the other way round. Its rejection would settle the matter.

70. Mr. JAGOTA (India) summed up the procedural discussion and observed that there were now two procedural motions before the Committee, namely the motion for priority by the representative of Ghana and the United States motion interpreting the vote on the motion for division. As the Ghanaian motion had been put forward first, the Committee should vote on it first.

71. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that, in his view, the Committee had no choice in the matter. The United States representative had submitted a procedural motion to refer three amendments to the Drafting Committee. The Chairman had decided to put that motion to the vote. The Czechoslovak representative had then demanded that the motion should be divided into two parts, one to refer the United States amendment to the Drafting Committee and the other to refer the other amendments to the Drafting Committee. The United Kingdom representative had opposed the motion for division, and the Committee had then voted and had approved the division requested by the Czechoslovak representative. In accordance with that decision, the motion to refer the United States amendment to the Drafting Committee should now be put to the vote.

72. Mr. KELLOU (Algeria) said that he too thought that the Committee must stand by the Czechoslovak motion for division, unless it was withdrawn.

73. Mr. MYSLIL (Czechoslovakia) said he could hardly withdraw a motion which had been adopted by the Committee. The Committee should therefore now vote on the United States procedural motion as divided by the motion for division. A representative could, however, request priority for another motion, and the Committee was at liberty to grant that priority. If the Ghanaian representative requested priority for his procedural motion, the Czechoslovak delegation would support that request.

74. If the motion for division was followed, the vote should be taken on the proposal to refer the United States amendment to the Drafting Committee. The Ghanaian motion requested an immediate vote on the United States amendment. The two motions were not

therefore really far apart and the position was less confused than some seemed to think.

75. The CHAIRMAN said that the United States representative and the Ghanaian representative agreed that their respective motions with regard to the vote on article 50 and the two amendments thereto were two possible replies to the same question. Accordingly, the Committee could vote on the first part of the United States procedural amendment, namely that the voting on article 50 and the amendments thereto should be deferred.

76. He put the first part of the United States procedural motion to the vote.

At the request of the United States representative, the vote was taken by roll-call.

Morocco, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Netherlands, New Zealand, Nigeria, Norway, Peru, Portugal, Republic of Korea, Republic of Viet-Nam, Senegal, South Africa, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Costa Rica, Denmark, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Holy See, Honduras, Israel, Italy, Japan, Lebanon, Liberia, Liechtenstein, Malaysia, Mexico, Monaco.

Against: Morocco, Pakistan, Philippines, Poland, Romania, Sierra Leone, Spain, Syria, Trinidad and Tobago, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Dahomey, Ecuador, Ethiopia, Ghana, Guinea, Hungary, India, Indonesia, Iraq, Ivory Coast, Jamaica, Kenya, Kuwait, Mali, Mongolia.

Abstaining: Saudi Arabia, Singapore, Thailand, Tunisia, Uruguay, Central African Republic, Iran.

The first part of the United States procedural motion was rejected, 42 votes being cast in favour and 42 against, with 7 abstentions.

77. The CHAIRMAN invited the Committee to vote on the United States amendment (A/CONF.39/C.1/L.302).

78. Mr. VARGAS (Chile) pointed out that there were two parts to the amendment. First, it added the words " at the time of its conclusion " to the text. Secondly, it added the phrase " which is recognized in common by the national and regional legal systems of the world ". He requested a separate vote on the two parts of the amendment.

79. The CHAIRMAN put the first part of the United States amendment, namely the addition of the words " at the time of its conclusion ", to the vote.

The first part of the United States amendment (A/CONF. 39/C.1/L.302) was adopted by 43 votes to 27, with 12 abstentions.

80. The CHAIRMAN put the second part of the United States amendment, namely the expression " which is recognized in common by the national and regional legal systems of the world ", to the vote.

The second part of the United States amendment was rejected by 57 votes to 24, with 7 abstentions.

81. The CHAIRMAN said he thought that the substitution of the word " rule " for " norm ", also proposed in the United States amendment, might be regarded as a drafting amendment and left to the Drafting Committee.

It was so agreed.

82. Mr. JIMENEZ DE ARECHAGA (Uruguay) proposed that the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) and the amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) be referred to the Drafting Committee.

83. Mr. MIRAS (Turkey) requested that those amendments and article 50 be put to the vote and that the vote on article 50 be taken by roll-call.

84. Mr. JIMENEZ DE ARECHAGA (Uruguay) asked that the Committee should first vote on his motion to refer the two amendments to the Drafting Committee.

That motion was carried by 66 votes to 2, with 8 abstentions.

85. The CHAIRMAN said the amendment by Romania and the USSR (A/CONF.39/C.1/L.258/Corr.1) and the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) would be referred to the Drafting Committee, together with article 50.

86. Mr. GON (Central African Republic), explaining his delegation's votes, said that it considered *jus cogens* an important and necessary element of international law because of the moral element it would bring to it. It was in favour of any improvement of the text and so had voted for the amendments that had been adopted. On the other hand, it had voted against the second part of the United States amendment because it believed that the notion of *jus cogens* should not be subject to national legal systems and even less to regional systems.

87. Mr. DADZIE (Ghana) asked whether the decisions the Committee had taken meant that article 50 had been approved. If not, the Committee must also vote on article 50.

88. Mr. JIMENEZ DE ARECHAGA (Uruguay), speaking on a point of order and referring to the decision by which the Committee had just referred the amendments to the Drafting Committee, said that under the rules of procedure, the vote could not be taken on article 50 until the Drafting Committee had submitted its report.

89. Mr. VARGAS (Chile) said he supported the Uruguayan representative.

90. Mr. YAPOBI (Ivory Coast) said the Committee had approved article 50 by implication in referring the amendments which it considered to be drafting amendments to the Drafting Committee. Otherwise, the decision on the amendments would be meaningless.

91. Mr. JAGOTA (India), supported by Mr. BISHOTA (United Republic of Tanzania), Mr. MWENDWA (Kenya), Mr. MOUDILENO (Congo-Brazzaville),

Mr. JACOVIDES (Cyprus), and Mr. MAIGA (Mali), said he was in favour of the Ghanaian proposal, the sole purpose of which was to indicate clearly that the Committee had approved the principle embodied in article 50 and all the Drafting Committee had to do was to improve the drafting.

92. Mr. TABIBI (Afghanistan), supported by Mr. ARIFF (Malaysia), said the Committee would remember that the practice in the case of the other forty-nine articles had been that after the substantive amendments had been adopted or rejected, the Chairman had declared that the article under consideration had been approved and had been referred to the Drafting Committee together with the drafting amendments. If it was now held that the Committee must take an express decision on article 50, that might reopen the decisions taken on the other forty-nine articles. The reference of the article with the amendments to the Drafting Committee necessarily meant that the substance of the article had been approved.

93. Mr. RUEGGER (Switzerland) said he supported the Uruguayan representative's view. All that the Committee had decided had been to refer a number of amendments and the text of article 50 to the Drafting Committee. It was the first time that any delegation had pressed for a vote on the principle contained in an article under consideration. The amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), which had been referred to the Drafting Committee, appreciably modified the substance of article 50. If any delegation pressed for a vote on the present text of article 50, the Swiss delegation would have to vote against it, as it knew neither the present nor the future content of the article.

94. Sir Francis VALLAT (United Kingdom) asked what a vote on the principle of article 50 would mean. A number of delegations had said they were in favour of the principle of *jus cogens* but against the text of article 50, and if that article was put to the vote immediately, the United Kingdom delegation would have to vote against it. The Committee would do better to await the results of the Drafting Committee's work before taking a final decision.

95. Mr. JIMENEZ DE ARECHAGA (Uruguay) said he considered that the reference of the two remaining amendments to the Drafting Committee meant that, in the Committee's view, those amendments did not modify the substance of the text. The Drafting Committee's work would perhaps make it possible to reach broader agreement on the substance. To vote immediately on article 50 would be to deprive the Drafting Committee of any possibility of modifying it. He asked the Chairman to give a ruling on the subject under rule 22 of the rules of procedure.

96. The CHAIRMAN said that article 50 was being referred to the Drafting Committee on the clear understanding that the principle of *jus cogens* had been adopted and that the Drafting Committee was now being called upon, in view of the suggested changes, to have another look at the text and see whether it could be made clearer. That was the meaning of the decision and there was no question of debating the principle of *jus cogens* again when the text was reported back from the Drafting Committee.

97. Mr. JIMENEZ DE ARECHAGA (Uruguay), Mr. DADZIE (Ghana), and Mr. TABIBI (Afghanistan) said they accepted the Chairman's ruling.[5]

The meeting rose at 11.40 p.m.

[5] For the resumption of the discussion on article 50, see 80th meeting.

FIFTY-EIGHTH MEETING

Wednesday, 8 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 51 (Termination of or withdrawal from a treaty by consent of the parties)

1. The CHAIRMAN invited the Committee to consider article 51 of the International Law Commission's draft. [1]

2. Mr. PHAN-VAN-TRINH (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/C.1/L.222/Rev.1), said that the proposal was one of pure drafting. The International Law Commission's text was not entirely satisfactory, since its introductory sentence grouped together the two categories of cases in which a treaty might be terminated in conformity with a provision of the treaty or by consent of the parties. The underlying idea of the article would be better expressed by stating in paragraph 1 the case of the termination of a treaty through the application of its own provisions or by consent of all the parties, and in paragraph 2, that of the withdrawal of the parties from a treaty. Furthermore, the title of the article might lead to the assumption that the consent of the parties sufficed to enable them to terminate a treaty or to withdraw from it: it did not convey the idea that a treaty might be terminated or a party might withdraw from it in accordance with a provision of the treaty. His delegation therefore proposed that the title be amended accordingly.

3. Mr. ALVARADO (Peru), introducing his delegation's amendment (A/CONF.39/C.1/L.231), said that, as was indicated in the commentary to the article, there existed a great variety of treaty clauses on termination and withdrawal. In view of that fact, the language used in subparagraph (*a*) of article 51 was not appropriate. Subparagraph (*a*) referred to " a provision of the treaty ", in the singular. In practice, a treaty could contain two or more clauses relating to its termination: one clause would make provision for the right of denunciation or withdrawal, while one or more other clauses would specify in detail the conditions under which that right could be exercised. His delegation therefore proposed to replace sub-paragraph (*a*) by the wording: " In the manner and

[1] The following amendments had been submitted: Republic of Viet-Nam, A/CONF.39/C.1/L.222/Rev.1; Peru, A/CONF.39/C.1/L.231; Netherlands, A/CONF.39/C.1/L.313; Greece, A/CONF.39/C.1/L.314 and Rev.1.

under the conditions laid down in the treaty itself." Since that amendment did not affect the substance of the article but was merely intended to make the wording more precise, he suggested that it be referred to the Drafting Committee.

4. Mr. GEESTERANUS (Netherlands) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.313) because, under paragraph (*b*) of the International Law Commission's text, the States parties to a treaty could exercise the right to terminate the treaty by common consent without taking into account the interests of a State which had given its consent to be bound, but for which the treaty had not yet entered into force. Some treaties provided for quite a long period, sometimes up to twelve or eighteen months, after the date of ratification or accession before the treaty entered into force for the ratifying or acceding State. That period was provided as a matter of convenience to allow the State in question, and other States already parties to the treaty, time to prepare for the application of the provisions in their mutual relations. But an entirely different situation arose when the parties took up the matter of terminating a treaty.

5. First, termination under paragraph (*b*) was not a question of applying a provision of the treaty, but of applying a rule not provided for in the treaty. Secondly, there was no longer any question of mere convenience; indeed, it could be anything but convenient for an acceding State to have no say in the matter. Thirdly, a State which had given its consent to be bound should not be treated as a third State, for it had expressed a definitive wish to establish treaty relations with the other parties and in so doing had accepted an offer which was to be found in the treaty itself. The parties to the treaty should not therefore negotiate the termination of the treaty, that was to say the withdrawal of the offer, without allowing the participation in such negotiation of all the contracting States, including those States which, although not yet parties, had expressed their consent to be bound. The Netherlands amendment was in harmony with an earlier amendment to article 36 (A/CONF.39/C.1/L.232) which had already been referred to the Drafting Committee.

6. Mr. EVRIGENIS (Greece), introducing his delegation's amendment (A/CONF.39/C.1/L.314 and Rev.1), said that both the title and the text of article 51 had been couched in terms which covered only cases of termination and withdrawal by consent of the parties. Sub-paragraph (*a*) related to termination or withdrawal by one or more parties under a provision contained in the treaty itself. Sub-paragraph (*b*) dealt with termination or withdrawal with the consent of all the parties. In both cases, termination or withdrawal was based on the consent of the parties.

7. That language, however, did not cover cases where a treaty terminated by virtue of the expiry of the period set for its duration, or the case of the fulfilment of a condition or event which brought about the termination of the treaty. Since cases of that type were quite common in practice, his delegation had submitted its proposal (A/CONF.39/C.1/L.314 and Rev.1) to amend both the title and the text of article 51 so that they referred to termination or withdrawal by a party in virtue of the provisions of the treaty, and not only to termination or withdrawal by consent of the parties. At the same time, the amendment improved the drafting of sub-paragraph (*a*) by eliminating unnecessary repetitions in the French text and by replacing the singular " a provision " by the more appropriate plural " the provisions ".

8. Since the provisions of article 51 were supplemented by those of article 53 (Denunciation of a treaty containing no provision regarding termination), he would suggest that the order of articles 52 and 53 be reversed and that article 51 commence with the proviso " Subject to the provisions of article 53 ".

9. Mr. SOLHEIM (Norway) said he wished to mention a drafting point which also related to a number of other articles in part V. Article 51 spoke of " termination of " and " withdrawal from " a treaty, whereas the commentary to the article, after mentioning termination according to treaty provisions, discussed clauses providing for a right to " denounce " or " withdraw from " the treaty, although no reference to denunciation was to be found in the article itself. On the other hand, in the general provisions of section 1 of part V, the term "denunciation" was included between " termination " and " withdrawal " in articles 39, 40 and 41, paragraph 1, although it was omitted from article 41, paragraph 2, and from article 42. Similarly, in section 3, on termination and suspension, the term " denunciation " or " denounced " appeared in article 53, but was excluded from articles 51 and 59, and from article 62 on the procedure to be followed in cases of invalidity, termination and suspension. The term had also been omitted from article 63, but appeared in article 66.

10. His delegation was unable to understand by which system the Commission had omitted or included the term " denunciation ". One reason for its inclusion might have been that " denunciation " was meant to cover bilateral treaties, and "withdrawal from" was meant to cover multilateral treaties; but that theory was rendered inapplicable by article 66, paragraph 2, where both terms were used in relation to multilateral treaties only. It might therefore be concluded that the International Law Commission had made no distinction between the two terms; unless the Expert Consultant could throw light on the question, his delegation would suggest that the Drafting Committee look into the matter and decide on a uniform terminology. His delegation would prefer the term " denunciation " to be excluded altogether, since it only served to make the text more cumbersome.

11. Mr. HARRY (Australia) said that the remarks of the Norwegian representative were of great interest. His own impression had been that the International Law Commission had intended to use the term " termination " for cases where the treaty came to an end by virtue of some provision contained in the treaty, and the term "denunciation " for cases where the treaty came to an end otherwise than under its own provisions. There was however no consistency in that pattern. For example, the term " denunciation " was used in article 53 for termination provided for in the treaty. The Drafting Committee might consider the possibility of removing that inconsistency by replacing the word " denunciation " by the word "termination" in article 53, and using the same distinction between " denunciation " and " termination " elsewhere.

12. The CHAIRMAN said that the point would be considered in connexion with article 53. If there were no further comments on article 51, he would consider that the Committee agreed to refer that article to the Drafting Committee together with the various drafting amendments and suggestions.

It was so agreed. [2]

Article 52 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

13. The CHAIRMAN invited the Committee to consider article 52. [3]

14. Sir Francis VALLAT (United Kingdom), introducing his delegation's amendment to article 52 (A/CONF.39/C.1/L.310), said that it was of a purely drafting character. It proposed the deletion of the words " specified in the treaty as ". Sometimes, a treaty did not specify the number of parties necessary for its entry into force. In that case, under article 21, paragraph 2, the treaty entered into force as soon as consent to be bound had been established for all the negotiating States. The deletion of the words " specified in the treaty as " would have the effect of making article 52 cover all possible cases, including that mentioned in article 21, paragraph 2.

15. Mr. SECARIN (Romania) said that the rule in article 52 was necessary, because it provided an appropriate solution in certain situations were it was difficult to determine whether a treaty had been or had not been terminated. As a general rule, it was the will of the parties which determined the conditions of the termination of a multilateral treaty, either through the inclusion of special clauses on the matter or through manifestation of the consent of all the parties to terminate the treaty at any time, as provided in article 51. Thus, the conditions of the entry into force of a treaty could operate as conditions for its maintenance in force only if the treaty in question so provided.

16. Although his delegation was in favour of including a rule to cover situations where the treaty was silent on the matter, it considered that the International Law Commission's text could be improved, and therefore supported the United Kingdom amendment to replace the phrase " the number of the parties falls below the number specified in the treaty as necessary for its entry into force " by the phrase " the number of the parties falls below the number necessary for its entry into force ". The Commission's article 52 applied only to cases where the minimum number of parties was provided for in the treaty itself and did not cover all the possible situations; for instance, it did not take into account the provision in article 21 according to which the minimum number of parties to a treaty and the manner of its entry into force could be established not only by the provisions of the treaty, but also " as the negotiating States may agree ".

17. The CHAIRMAN suggested that article 52 and the United Kingdom amendment (A/CONF.39/C.1/L.310) be referred to the Drafting Committee.

It was so agreed. [4]

Article 53 (Denunciation of a treaty containing no provision regarding termination)

18. The CHAIRMAN invited the Committee to consider article 53. [5]

19. Mr. ALVAREZ TABIO (Cuba) said that before introducing his delegation's amendment to article 53 (A/CONF.39/C.1/L.160), he wished to state the Cuban position with regard to treaties of indefinite duration.

20. Any set of legal rules which claimed to make a positive contribution to the progressive development of international law must reject the abusive practice of perpetual treaties, which for long had helped the strong to dominate the weak. No one any longer seriously claimed that the law consisted of a set of rigid norms governing for all time social relations which were in constant evolution. A treaty containing no provision regarding termination was subject to the *rebus sic stantibus* clause, to the tacit condition that it would endure only so long as the circumstances remained unchanged. In practice, virtually no treaty could last indefinitely, since history showed how fundamentally circumstances could change in a comparatively short period of time. The famous 1793 Declaration during the French Revolution that a people never lost its right to amend its constitutional law, was equally valid in international law.

21. According to the commentary to article 53, the question whether a treaty was open to withdrawal must be decided in accordance with the circumstances of each particular case, especially by reference to the character of the treaty. Paragraph (2) of the commentary recalled the doctrinal controversy on the subject of that right of denunciation or withdrawal, and the conclusion reached was expressed in paragraph (4): " Some members of the Commission considered that in certain types of treaty ... a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there are indications of a contrary intention ".

22. Article 53, however, was based on the assumption that the intention of the parties was the sole factor to be taken into account in settling the problem. The article, it was true, made some allowance for the circumstances of the case, but in such obscure and equivocal terms that the whole provision was altogether unsatisfactory. As it stood, article 53 tended to make the perpetual character of treaties subject to the principle of the autonomy of the will of the parties, without allowing for exceptions of an objective character. It dealt with the problem of denunciation of a treaty containing no provision regarding termination exclusively on the basis of presumed intention. That approach was inconsistent with the recognition during the Commission's discussions that there were certain types of treaty for which a right of denunciation should be implied; those treaties were by their very nature temporary. In any event, neither the intention of the parties nor the *pacta sunt servanda* rule could affect the real position, which was that it was

[2] For resumption of the discussion on article 51, see 81st meeting.

[3] An amendment to this article had been submitted by the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/C.1/L.310).

[4] For resumption of the discussion on article 52, see 81st meeting.

[5] The following amendments had been submitted: Cuba, A/CONF.39/C.1/L.160; Peru, A/CONF.39/C.1/L.303; Spain, Colombia and Venezuela, A/CONF.39/C.1/L.307 and Add.1 and 2; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.311; Greece, A/CONF.39/C.1/L.315.

contrary to all reason to regard certain types of treaties as perpetual.

23. An obvious example was that of a lease. In private law, perpetual leases were excluded by all legal authorities because a lease without a termination date would debar the owner from ever recovering possession of his property. There were even stronger reasons for a similar conclusion in international law, since the problem affected sovereignty over the national territory and sovereignty was absolute, indivisible and inalienable. A lease of indefinite duration of a portion of a country's territory was clearly incompatible with the principle of sovereignty. He therefore asked that it be placed on record that his delegation did not accept as perpetual any treaty which affected or restricted the sovereignty or integrity of a State and rejected any practice in the matter that was incompatible with a sincere desire to contribute to the progressive development of international law.

24. The wording of article 53 was equivocal and unduly complex. Where a treaty was by its very nature temporary, the right of denunciation or withdrawal should be recognized on the basis of that objective fact, instead of being inferred from the presumed intention of the parties, as was done in the present text. Another defect of that text was that it did not specify the factual criteria for determining the presumed intention of the parties. Those criteria were left to be inferred from the vague and imprecise formula " unless it is established ". The presumption regarding the intention of the parties would thus be based on that inference but the conclusion was not expressed as a logical and necessary consequence of the presumption but as a mere possibility, in the concluding words of paragraph 1.

25. In the 1963 draft, article 39 (Treaties containing no provisions regarding their termination) [6]—the article corresponding to the present article 53—indicated clearly the various exceptions to the general rule, exceptions based on " the character of the treaty ", " the circumstances of its conclusion " and " the statements of the parties ". That enumeration listed the various subjective and objective elements which played a decisive part in conferring an implicit right of withdrawal or termination in the case of treaties containing no provisions regarding their termination. That approach was consistent with the prevailing view in the International Law Commission that the determination of the implied intention of the parties was essentially a question of fact, to be settled by reference not only to the character of the treaty but also to all the other circumstances of the case.

26. The purpose of the Cuban amendment (A/CONF.39/C.1/L.160) was to substitute an objective approach for the one adopted in article 53 as it now stood. His delegation did not insist on the wording of its amendment and would agree to a vote being taken solely on the principle of basing the right of withdrawal or denunciation on the character of certain types of treaty. If that were not agreeable to the Committee, he would request that the Cuban amendment be put to the vote.

27. Mr. ALVARADO (Peru), introducing his delegation's amendment (A/CONF.39/C.1/L.303), said that its purpose was to take account of the exceptions based on the nature of treaties mentioned in the commentary to article 53. The commentary stated that treaties of peace and treaties fixing a territorial boundary were by their nature excluded from the scope of article 53, because the very character of those treaties made it impossible for the contracting States to allow any one of the parties to denounce or withdraw from the treaty at will. Consequently, the Commission had laid down the non-applicability of paragraph 1 to normative or codifying treaties, on the basis of the system followed at the Geneva Conference on the Law of the Sea and the Vienna Conferences on Diplomatic and Consular Relations. It went on to say, however, that any temptation to generalize from those Conferences as to the intentions of the parties in regard to the denunciation of " law-making " treaties was discouraged by the fact that other conventions, such as the Genocide Convention and the Geneva Conventions of 1949 for the Protection of War Victims, expressly provided for a right of denunciation. It might therefore be concluded that law-making or codifying treaties which contained express provisions allowing for denunciation came under sub-paragraph (*a*) of article 51, but if they did not positively specify that right, they could not be denounced or withdrawn from unless that was permitted by the nature of the treaty and unless it was established beyond doubt that the parties had intended to admit the possibility of denunciation or withdrawal.

28. His delegation quite understood the reasons why the Commission had adopted a prudent attitude and had avoided any enumeration, since that risked being incomplete and might give rise to conflicting interpretations. Nevertheless, paragraph 1 of the article should contain a provision linking denunciation or withdrawal with the nature of the treaty, to which so many paragraphs of the commentary referred. Moreover, the reference to the intention of the parties in the last part of the paragraph was imprecise. The Peruvian delegation therefore proposed that the last part of the paragraph be amended to read " ... unless the nature of the treaty so permits and it is established beyond doubt that the parties intended to admit the possibility of denunciation or withdrawal ". In particular, the term " beyond doubt " would provide a safeguard if any question of interpretation arose concerning the intention of the parties.

29. Mr. MARTINEZ CARO (Spain) said that the purpose of the amendment submitted by his delegation and the delegations of Colombia and Venezuela to paragraph 1 of article 53 (A/CONF.39/C.1/L.307 and Add.1 and 2) was to express more clearly the residuary rule in the article and to make it conform more closely with the practical realities and needs of contemporary international society, with a view to maintaining a fair balance between the objective interests of justice and treaty stability and the subjective interests of States requiring special protection. It was inadmissible that weaker States should have to perform indefinitely treaty obligations which had been imposed on them unjustly.

30. Modern international practice showed that a large number of existing bilateral and multilateral treaties contained clauses on termination and withdrawal, with

[6] *Yearbook of the International Law Commission, 1963*, vol. II, p. 200.

the obvious exception of constituent instruments of international organizations and recent "law-making" treaties. The attitude of States to the question of the denunciation of treaties was now that, as a general rule, they did not wish to enter into or continue treaty relations of undefined duration, and that the concept of perpetual treaties, in a world characterized by continuous changes in circumstances, was repugnant.

31. The problem was how to formulate the residuary rule in article 53. In the opinion of the Spanish delegation, the starting-point should be recognition of the exigencies of modern State practice as an expression of the realities of international life, followed by protection of the interests of all States. International practice contained a number of examples of denunciation by notification to the other party where the treaty was silent on the matter, and there were far more treaties of that kind than was generally supposed. Many such treaties served only to maintain explosive political situations and to impose heavy burdens which were mere relics of the old colonial system.

32. It was consequently surprising that a large body of legal opinion still rejected the evidence of practice and dogmatically maintained that the principle of treaty stability must be upheld at all costs. That doctrine was based on the Declaration of London of 1871, which recognized as "an essential principle of the law of nations that no State might withdraw from a treaty obligation or modify the provisions of the treaty without the consent of the contracting parties".[7] A similar contention was made in the Harvard Research Draft, which stated that, unless the unanimous consent of all the parties were necessary, "the rule of *pacta sunt servanda* would have little or no meaning".[8] The majority of the International Law Commission seemed to have adopted that doctrinal view in 1963, although the Special Rapporteur's report on the then article 17 seemed to be more in keeping with the realities of State practice.

33. It should be remembered that, when adopting the Declaration of London, the great European Powers had been solving political problems in accordance with the doctrine of the balance of power, and had reaffirmed the principle of the unanimity of the great Powers in negotiating European treaties. In defining the unanimity rule, they had merely used a legal expedient to disguise their wish to prevent one Power from denouncing a clause of the 1856 peace treaty. Some modern jurists had closed their eyes to the political background of the precedent of 1871 and had based their conservative doctrines on the Declaration of London; the majority of the International Law Commission in turn seemed to have been swayed by that opinion. On the other hand, the Special Rapporteur had stated in his 1963 report that it was "doubtful how far it can be said today to be a general rule or presumption that a treaty which contains no provision on the matter is terminable only by mutual agreement of all the parties".[9]

34. In his delegation's opinion, the residuary rule should be a general presumption that a party could terminate or withdraw from a treaty which contained no provisions on the matter. That did not mean an unlimited power of denunciation, for three reasons.

35. First, the presumption was subject to conditions based on the nature of the treaty, the circumstances of its conclusion and its object and purpose. Those conditions provided every safeguard against arbitrary denunciation. It would be seen from article 17 of the Special Rapporteur's 1963 draft [10] that certain treaties, such as treaties of peace or those establishing frontiers, were by their nature exempt from withdrawal or denunciation. Nevertheless, the Spanish delegation considered that treaties in which certain territorial rights were granted to foreign States for an indefinite period might be included among those in which denunciation was permitted, particularly where such treaties were concluded after the granting of independence to new States. Commercial treaties and treaties of alliance by their very nature must be open to denunciation, although that was not made clear in article 53.

36. Secondly, it was clear that the presumption to which he had referred would not affect the *pacta sunt servanda* rule. Denunciation was a prior question, independent of the *pacta sunt servanda* rule because, if interpretation of the treaty led to the conclusion that denunciation or withdrawal was possible, the presumption not only did not contradict the *pacta sunt servanda* rule, but strengthened it. The intention of the parties was the basis of all treaties, and if that intention was proved to be an option for permitting denunciation, the *pacta sunt servanda* rule would only be strengthened. Of course, denunciation and withdrawal, like all other aspects of treaty-making, were governed by the principle of good faith.

37. Thirdly, where the possibility of withdrawal from a treaty was concerned, further safeguards would be provided by the rule in paragraph 2 of article 53, by the procedural requirements of article 62 and by any other procedural provisions that might be adopted.

38. The residuary rule in article 53 had the dual purpose of implicitly abandoning the concept of treaties in perpetuity and providing legal protection for the weaker parties in international relations. It had been rightly said that the omission of a denunciation or withdrawal clause from a treaty was usually the result of pressure on the part of a stronger State against the weaker party. Protection was particularly important for the new States because of their development needs.

39. The problem of denunciation was organically related to the institution of change of circumstance and to the process of peaceful revision of treaties. If the possibility of denunciation were admitted, under certain well-defined conditions, the scope of the rule *rebus sic stantibus* would be restricted. The statement of a well-regulated right of termination and withdrawal would have the salutary effect of removing a number of causes of political tension and threats to international peace and security. In that spirit, his delegation commended its amendment to the Committee, especially to the delegations of new States.

The meeting rose at 12 noon.

[7] *British and Foreign State Papers*, vol. 61, p. 1198.

[8] *Research in International Law* "III, Law of Treaties"; Supplement to the *American Journal of International Law*, vol. 29 (1935), p. 1173.

[9] *Yearbook of the International Law Commission, 1963*, vol. II, p. 67.

[10] *Ibid.*, p. 64.

FIFTY-NINTH MEETING

Wednesday, 8 May 1968, at 3.10 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 53 (Denunciation of a treaty containing no provision regarding termination) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 53 of the International Law Commission's draft.[1]

2. Sir Francis VALLAT (United Kingdom), introducing his delegation's amendment (A/CONF.39/C.1/L.311), said he thought article 53 could act as a safety-valve in the future convention, because it would permit the termination of or withdrawal from a treaty to take place smoothly and possibly as a matter of negotiation, without giving cause for controversy. By specifying a period of twelve months, paragraph 2 left sufficient time for discussion and negotiation before the notice took effect.

3. The task of the Conference was to strike a balance between the binding character of a treaty and the need to terminate it in certain circumstances. The stability of treaties had to be ensured in the interests of international peace and security, but provision also had to be made for parties to withdraw from treaties which, although of indefinite duration, were intrinsically temporary in character. The problem was to find the right formula for article 53. The Peruvian amendment (A/CONF.39/C.1/L.303) was too narrow and that submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) too general. The Cuban amendment (A/CONF.39/C.1/L.160), on the other hand, was very much in line with the purpose of the United Kingdom amendment (A/CONF.39/C.1/L.311), which was designed to introduce an additional ground for termination and stipulated that the right of denunciation or withdrawal might be implied from " the character of the treaty ". In view of the strong arguments advanced in favour of such a provision, especially by the Cuban representative, he thought it unnecessary to justify his delegation's amendment further.

4. Mr. EVRIGENIS (Greece) said that his delegation's amendment (A/CONF.39/C.1/L.315) was similar to and based on the same grounds as the amendments by Cuba (A/CONF.39/C.1/L.160), Peru (A/CONF.39/C.1/L.303) Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) and the United Kingdom (A/CONF.39/C.1/L.311).

5. It was a universally recognized principle of law that the implied intention of the parties should be sought and established in the light of the circumstances in which the agreement was made. That principle was clearly expressed by the International Law Commission in paragraph (5) of its commentary to article 53 in the statement that the right of denunciation or withdrawal would not be implied " unless it appears from the general circumstances of the case that the parties intended to allow the possibility or unilateral denunciation or withdrawal ". The Greek amendment simply inserted that proviso in the text of article 53. The wording of the Greek amendment was more flexible and more general than that of the other amendments to the same effect, so that it would cover all the objective circumstances which should be taken into account, where necessary, in determining the implied will of the parties, such as the nature of the treaty, the circumstances of its negotiation and conclusion and any other circumstance external or internal to the treaty which might enable the existence of an implied intention to be deduced in a particular case. It would be remembered that the expression " in the light of all the circumstances of the case " was commonly used in the same context in international private contracts. The principle that the implied intention of the parties regarding the law applicable to the contract should be sought " in the light of the circumstances of the case " had been unanimously confirmed both by legal theory and by judicial decisions in many countries; it would be useful to establish it also with respect to international treaties.

6. Mr. CASTRÉN (Finland) said that his delegation was entirely satisfied with the principle and formulation of article 53, which confirmed clearly and precisely the *pacta sunt servanda* principle. Accordingly, it could not support the five amendments submitted to that article; those amendments tended to substitute vague formulas for the International Law Commission's far more precise wording, which required that the intention of the parties to admit the possibility of denunciation or withdrawal from a treaty " is established ", namely in some way proved. The amendment by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) seemed particularly dangerous because it reversed the presumption of the stability of treaties in favour of that of the right of denunciation or withdrawal, a theory which had been rejected almost unanimously by the leading authorities.

7. Mr. SMALL (New Zealand) said that, from the drafting point of view, paragraph 1 of article 53 represented an incorrect generalization. In fact, provision was made in other articles of the draft for several obvious cases in which a party might terminate or denounce or withdraw from a treaty even if the treaty did not provide for termination, and even if the parties to the treaty had not contemplated the possibility of withdrawal. That applied, for example, to the situations covered by articles 49 and 59 if read in conjunction with article 62.

8. His delegation supposed that the International Law Commission had preferred to formulate article 53 in simple terms rather than associate it with extensive and perhaps over-complicated reservations. In other words, article 53 laid down a ground for termination independently of the other grounds of termination, denunciation or withdrawal provided for in the other articles of the draft and in particular in articles 49 and 59 interpreted in conjunction with article 62.

9. Accordingly, his delegation was willing to accept the wording of article 53 on the understanding that that text in no way affected the operation of the process of denunciation and withdrawal in the circumstances laid down in

[1] For the list of the amendments submitted, see 58th meeting, footnote 5.

other articles which did not satisfy the tests laid down in article 53. It would have been possible to specify that in article 53, but his delegation did not necessarily suggest that the Drafting Committee should consider doing so.

10. Mr. JACOVIDES (Cyprus) said that, in his delegation's view, it would be inappropriate to infer from the silence of the parties on the question that they had necessarily intended to exclude the possibility of denunciation or withdrawal, particularly since several weighty authorities had expressed the view that the right of denunciation or withdrawal might well be implied in certain types of treaty, such as treaties of alliance; in that case, the presumed intention of the parties must be that in the absence of express provisions to the contrary, the right of the parties to denounce or withdraw from the treaty after giving reasonable notice was implied in the treaty. That opinion was based upon the law as well as on sound sense as it was clear that a treaty for alliance, for example, could not remain indefinitely in force if the underlying basis of the treaty had ceased to exist. Consequently the text of article 53 should be amended accordingly.

11. The amendments by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2), Cuba (A/CONF.39/C.1/L.160), the United Kingdom (A/CONF.39/C.1/L.311) and Greece (A/CONF.39/C.1/L.315) served the desired purpose, in particular the United Kingdom amendment, as the character of the treaty was a primary consideration in that respect.

12. Mr. ROSENNE (Israel) said that although the International Law Commission had made a step forward in reconciling divergent views, his delegation thought that article 53 of the draft was too elliptical and that it could be improved along the lines of the amendments by Cuba (A/CONF.39/C.1/L.160), Peru (A/CONF.39/C.1/L.303), and the United Kingdom (A/CONF.39/C.1/L.311). If the principle of that modification was accepted, the actual wording could be left to the Drafting Committee. His delegation preferred the formula proposed by the United Kingdom. Also, that part of the amendment by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) referring to the circumstances of the conclusion of the treaty might be expressed in article 53 although that idea was actually contained in the text of the draft.

13. His delegation could not support the broad formula suggested by Greece (A/CONF.39/C.1/L.315), namely, "in the light of all the circumstances of the case". Although the International Law Commission had used that expression in its commentary, it did not seem appropriate for inclusion in a dispositive text.

14. His delegation noted that no mention had been made in article 53 of the possibility of suspending the application of a treaty in the hypothesis dealt with in that article. The Drafting Committee might consider including a provision to that effect.

15. Mr. ARMANDO ROJAS (Venezuela) said he had nothing to add to the Spanish representative's very sound arguments in favour of the amendment by Spain (A/CONF.39/C.1/L.307 and Add.1 and 2), of which his country was a sponsor. He merely wished to point out that article 53 raised one of the most complex problems in contemporary international law, namely the right of the parties to denounce a treaty that did not contain any provisions to the contrary, or which, by its nature, must be considered as permanent.

16. According to paragraph (5) of the commentary "the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal". In its present wording, article 53 deprived the parties to a treaty of their traditionally recognized right to denounce it, in the absence of a provision to the contrary; it was therefore unacceptable. On the other hand, the amendment by Spain, Colombia and Venezuela, by giving the principle an affirmative formulation, made it more coherent and more consistent with the right of denunciation that should be implicit in any treaty. Moreover, it took over an earlier suggestion made by the Special Rapporteur. [2] It laid down, as the only exceptions to the right of denunciation of or withdrawal from a treaty, the nature of the treaty and the circumstances of its conclusion.

17. With regard to paragraph 2, his delegation shared the opinion of those States which held that a twelve-months' time-limit was likely to be too long in certain cases and that it should be shortened. Perhaps that suggestion could be put to the Drafting Committee.

18. Mr. MARESCA (Italy) said that his delegation supported article 53 of the draft. To admit that, merely by the operation of its unilateral will, a party could at a given moment terminate a treaty to which it had itself subscribed, was to consider treaties as scraps of paper. If a party wished to reserve the right to terminate a treaty, it could always insert in the treaty a clause on denunciation. If it did not intend to reserve that right, it should keep silent.

19. Article 53 thus ensured the required legal certainty. The final provision in paragraph 1 of that article introduced an element of flexibility which should be accepted cautiously.

20. His delegation could not approve any of the amendments submitted to that article as they all had more or less the same effect of increasing the possibility of the unilateral denunciation of a treaty by one of the parties and of undermining the stability of international treaties.

21. Mr. SAMRUATRUAMPHOL (Thailand) said that in the opinion of his delegation, the essential point was to find the right balance between the requirements of the stability of treaties and the need to adapt treaty relations between States to the changing conditions of the modern world. That balance cuold only be achieved by taking into consideration the diversity of legal relationships, which demanded different solutions according to the circumstances.

22. His delegation therefore regarded the nature of a treaty and the circumstances of its conclusion as no less important than the intention of the parties in determining

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 28.

whether a treaty could be denounced. The Cuban amendment (A/CONF.39/C.1/L.160) fully met that view. The amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) and the United Kingdom amendment (A/CONF.39/C.1/L.311) also deserved consideration by the Drafting Committee. His delegation would therefore vote in favour of those amendments.

23. Mr. MIRAS (Turkey) said that in the case provided for in article 53, the normal procedure was for the parties concerned to agree to revise the treaty. The Turkish delegation therefore found the existing wording of article 53 unsatisfactory.

24. The application of article 53 necessitated legal safeguards, without which his delegation could not support the retention of the article.

25. The amendments to the article tended to enlarge its scope and the Turkish delegation could not support them. Since they concerned matters of substance, they should all be put to the vote, together with article 53 itself.

26. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation subscribed to the basic principle expressed in draft article 53. That principle was consonant with the rule *pacta sunt servanda*, and the Soviet delegation had repeatedly declared that one of its major concerns was that the future convention on the law of treaties should not contain provisions permitting derogation from that fundamental rule, not only of international law but also of all systems of relations between States. His delegation was dissatisfied, however, with the wording of article 53, and particularly the concluding sentence of paragraph 1. It was difficult to establish the real intention of the parties unless it was expressly indicated in the text of the treaty. The concluding sentence of paragraph 1 was therefore calculated to raise difficulties of interpretation, particularly if the parties wished to object to the withdrawal of one of their number.

27. Instead of the present wording, it would have been better to say in substance that denunciation was impossible unless the object and purpose of the treaty showed that it could be denounced, subject of course to the procedures prescribed in article 53, paragraph 2 and in article 62. Such a formula would show that peace and boundary treaties, for example, were not open to denunciation because that would conflict with the object and purpose of the treaty.

28. In any event, the Soviet delegation thought the opening portion of paragraph 1 clearly expressed the fundamental principle, and it had therefore submitted no amendment. It would support those amendments which helped to clarify the text. The Cuban amendment (A/CONF.39/C.1/L.160) came closest to the Soviet delegation's viewpoint. It would therefore vote in favour of it. The amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) went too far. The remaining amendments could be referred to the Drafting Committee.

29. Mr. VARGAS (Chile) said his delegation supported draft article 53, which clearly reaffirmed the rule *pacta sunt servanda*. Consequently, it could not accept those amendments which would facilitate denunciation or unilateral withdrawal where the treaty contained no provision on the matter. It could not therefore support the Cuban amendment (A/CONF.39/C.1/L.160), which left it to the discretion of one party to a treaty to decide whether or not it would continue to regard itself as bound by it. That would cause many difficulties it would be better to avoid. For the same reasons, his delegation could not support the amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2), which would reverse the general rule stated in article 53. It recognized, however, that the parties were entitled to denounce or withdraw from some treaties, but such cases should be an exception.

30. His delegation supported the Peruvian amendment (A/CONF.39/C.1/L.303), which emphasized even more clearly than the Commission's text the importance of the intention of the parties as an element determing the right of denunciation or withdrawal. On the other hand, it did not support the United Kingdom amendment (A/CONF.39/C.1/L.311), because the character of the treaty, however important, was not enough to determine the right of denunciation or withdrawal.

31. The Greek amendment (A/CONF.39/C.1L.315) deserved consideration by the Committee of the Whole, because it would introduce a useful element.

32. Mr. MAKAREWICZ (Poland) said he thought article 53 dealt with a particularly difficult matter. The possibility of denouncing a treaty should not be admitted too easily, since that would endanger the stability of treaties, but on the other hand, the possibility should be admitted if it was established that such was the intention of the parties. The International Law Commission had therefore rightly emphasized in its draft the importance of the intention of the parties. Many treaties contained no provision regarding their termination, in particular treaties in simplified form, which were quite common in contemporary practice; the subjects dealt with in treaties in simplified form were usually of such a nature that no one could claim that they were perpetual treaties. The right to denounce or withdraw from such treaties ought to depend on the general circumstances of the case, including the character of the treaty.

33. Several delegations which had submitted amendments had proposed the enumeration in article 53 of various objective circumstances from which the possibility of denunciation could be deduced, including the statements of the parties, the circumstances of the conclusion of the treaty and the nature of the treaty. In that respect, his delegation wished to draw attention to the Commission's commentary, which indicated the real meaning of the words " unless it is established that the parties intended to admit the possibility of denunciation or withdrawal". The Commission did not regard intention as a purely subjective element. The intention of the parties was to be inferred from " the general circumstances of the case ". The wording of paragraph 1 therefore seemed to cover all the relevant circumstances, including the statements of the parties, the circumstances of the conclusion of the treaty and, naturally, the character of the treaty. His delegation did not regard the nature of the treaty as a separate factor with respect to the intention

of the parties. It approved of the idea expressed in the second sentence of paragraph (5) of the commentary.

34. The Commission had rightly stressed that the very character of some treaties excluded the possibility that the contracting States intended them to be open to unilateral denunciation or withdrawal. Treaties of peace and treaties fixing territorial boundaries were cases in point.

35. Mr. MOUDILENO (Congo, Brazzaville) said he fully supported the Cuban representative's remarks and would vote for the Cuban amendment (A/CONF.39/C.1/L.160). The ceding of bases by small and weak States to other States was a very dangerous practice, as such a base often constituted a starting-point for a war of aggression against the country in whose territory it was situated or against a third State.

36. Mr. BISHOTA (United Republic of Tanzania) said that his delegation supported the original text of article 53. It might perhaps be useful to insert the word " unilateral " before the word " withdrawal ", so as to bring out clearly the distinction between articles 51 and 53.

37. Mr. KEARNEY (United States) thought that article 53 in its present form established a rule the application of which was simple and comprehensible. The amendments submitted created additional problems and did not provide any means for their solution. His delegation therefore supported the International Law Commission's text of article 53.

38. Mr. POP (Romania) pointed out that there were many treaties which did not contain any provision relating to their termination or denunciation and that the lack of such provisions had been a source of many difficulties in international relations. In certain cases, the denunciation of such a treaty had called forth protests, whereas in others it had been accepted without demur. In view of the differing practice of States in that respect, doctrine was also divided. Of the two possible solutions, namely the prohibition of denunciation or withdrawal and the possibility of denunciation and withdrawal in certain circumstances, his delegation considered that the second solution was preferable, because it was more in line with the new aspects of State practice.

39. Prohibition of the denunciation of treaties could be interpreted to mean that treaties were of unlimited duration and had a permanent character. That idea had been rejected by States. That did not mean, however that all treaties, without exception, could be denounced, despite the fact that they contained no express provision to that effect. In that case, it could be assumed that the parties, by not including any such clause in the treaty, had not admitted in principle the right of denunciation or withdrawal. But such a presumption might yield to clear proof of a contrary intention by the parties. For that reason, his delegation was in favour of the rule laid down in article 53 of the draft.

40. The question that the Committee had to decide was whether article 53 should confine itself to mentioning the intention of the parties or whether it should mention certain objective elements whereby the will of the parties could be determined. Those elements, such as the nature of the treaty, declarations by the parties or other circumstances might help in ascertaining the will of the parties. For that reason, the Cuban amendment (A/CONF.39/C.1/L.160 deserved consideration.

41. Mr. MYSLIL (Czechoslovakia) thought that the Commission should have tried to make a distinction between the different types of treaties for purposes of the application of article 53. For example, in the case of general multilateral treaties, stability might be the rule; they could be revised. In the case of bilateral agreements, they could be denounced, with the exception of peace treaties and treaties fixing territorial boundaries. The will of the parties might not be a decisive factor. The nature or type of treaty should also be taken into consideration. That was the idea behind the Cuban amendment (A/CONF.39/C.1/L.160), which his delegation would accordingly support. The amendment by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) went too far and was unacceptable.

42. Mr. ALCIVAR-CASTILLO (Ecuador) said that the nature of the treaty was not a contributory factor but a separate ground for terminating a treaty. Consequently, his delegation fully supported the Cuban amendment (A/CONF.39/C.1/L.160).

43. Mr. KEBRETH (Ethiopia) said that his delegation thought—and that attitude was justified by the International Law Commission's comments—that for certain categories of treaty, the nature of the treaty was the only controlling factor in determining the intention of the parties to admit the possibility of denunciation or withdrawal. The Commission had cited specific examples in that connexion. In those circumstances, his delegation approved the Commission's text.

44. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had been in favour of the stability of treaties save where a different intention of the parties could be inferred from certain factors. The formulation of that article, which was the opposite of that proposed by Spain, had been arrived at after very thorough study.

45. As to the phrase " unless it is established ", it should be remembered that, in the 1963 version of the article under consideration, the Commission had enumerated the factors from which to determine the intention of the parties. The article had provided: " unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties ".[3] The amendments submitted differed from that version in that they made the character of the treaty a separate element bearing no relation to the statements of the parties or to the circumstances surrounding the conclusion of the treaty. In its latest version the Commission had used the words " unless it is established ", which meant that certain evidence was needed; it had not mentioned the various elements available as grounds for denunciation or withdrawal. It had used a general form of words which covered by implication the character of the treaty, the circumstances of its conclusion and the statements of the parties, in other words all the elements mentioned in the amendments.

46. The New Zealand representative had raised a question of form which might also be a question of substance.

[3] *Yearbook of the International Law Commission, 1963*, vol. II, p. 200, article 39.

His observations regarding the Commission's intention were accurate. In that article the Commission had dealt with those cases in which the parties had the right of denunciation or withdrawal and were not required to furnish further grounds for such action. The ground here was the intention of the parties; it was entirely different from all other grounds for termination of a treaty. The Drafting Committee should take note of the New Zealand representative's observation and consider whether it would not be advisable to insert a safeguard clause.

47. Mr. ALVAREZ TABIO (Cuba) explained that his amendment related only to paragraph 1 of article 53. His delegation had no objection to paragraph 2.

48. Mr. RUIZ VARELA (Colombia) said that his delegation had joined in sponsoring the Spanish amendment (A/CONF.39/C.1/L.307 and Add.1 and 2); the text of that amendment was affirmative in form, well balanced and in keeping with legal theory and international practice. It stated a general rule on capacity to denounce a treaty which contained no provision regarding termination, and it provided a means of preserving the freedom of action of parties wishing to terminate a treaty. At the same time it provided for exceptions to that rule.

49. A further reason why his delegation supported the Spanish amendment was that it was in keeping with the provisions of the Convention on Treaties adopted by the Sixth International Conference of American States at Havana in 1928.[4]

50. Article 14 of that Convention specified, among the grounds for termination of a treaty, its " total or partial denunciation ". As to the conditions for denunciation, article 17 provided that, in the absence of a special clause, " a treaty may be denounced by any contracting State, which State shall notify the others of this decision, provided it has complied with all obligations covenanted therein "; the treaty terminated one year after the notification was made. That Convention was a useful contribution by the American countries to general international law; it was still the only instrument of positive law in existence on the subject, and was recognized by all specialists in international law as an excellent piece of codification. That provided his delegation with a further reason for vigorous support of the Spanish amendment (A/CONF.39/C.1/L.307 and Add.1 and 2).

51. Sir Francis VALLAT (United Kingdom) said that Sir Humphrey Waldock had raised a point which emerged from the International Law Commission's commentary: namely that, in order to have the right to denounce a treaty in virtue of article 53, it was necessary to rely on some element other than the character of the treaty. There was no doubt, however, that in certain cases the character of the treaty was the only guide. That was a practical consideration which the Convention should take into account. That idea was embodied in the Cuban amendment (A/CONF.39/C.1/L.160). Since that amendment affected only paragraph 1, his delegation was prepared to support it. He asked whether the word " statement " in that amendment ought not to be in the plural.

52. Mr. ALVAREZ TABIO (Cuba) confirmed that the amendment referred to the statements (in the plural) of the parties.

53. Sir Humphrey WALDOCK (Expert Consultant) said that the United Kingdom representative's comment was more applicable to the 1963 text, since in the new text the Commission had not listed separately the various elements from which to determine the intention of the parties but had used a very general form of words.

54. The CHAIRMAN put to the vote the amendments to article 53, beginning with the amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) as being the furthest removed from the original text.

The amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) was rejected by 55 votes to 10, with 21 abstentions.

The Cuban amendment (A/CONF.39/C.1/L.160) was rejected, 34 votes being cast in favour and 34 against, with 24 abstentions.

The United Kingdom amendment (A/CONF.39/C.1/L.311) was adopted by 26 votes to 25, with 37 abstentions.

The Peruvian amendment (A/CONF.39/C.1/L.303) was rejected by 41 votes to 5, with 43 abstentions.

55. Mr. EVRIGENIS (Greece) said that, in the light of the explanations given by the Expert Consultant, his delegation withdrew its amendment (A/CONF.39/C.1/L.315).

56. The CHAIRMAN suggested that draft article 53, together with the United Kingdom amendment (A/CONF.39/C.1/L.311), should be referred to the Drafting Committee.

It was so agreed[5]

Article 54 (Suspension of the operation of a treaty by consent of the parties)[6]

57. Mr. ALVARADO (Peru), introducing his delegation's amendment (A/CONF.39/C.1/L.304) to article 54, sub-paragraph (*a*), explained that it raised no problem of substance; its sole purpose was to make an explicit reference to the conditions laid down in the treaty itself with regard to the suspension of its operation.

58. His delegation had submitted an identical amendment (A/CONF.39/C.1/L.231) to article 51, concerning termination of or withdrawal from a treaty, and considered it desirable that sub-paragraph (*a*) of article 54, concerning the suspension of the operation of a treaty, should be drawn up in equally clear language. The wording which his delegation proposed would make the sub-paragraph more definite and at the same time widen its scope, for it provided that the operation of a treaty might be suspended in conformity with several provisions instead of only one. In other words, it presented in a general form what the International Law Commission had presented in a restricted from. Since it was a drafting amendment (A/CONF.39/C.1/L.316), which would enable mittee without being put to the vote.

59. Mr. EVRIGENIS (Greece) introduced the Greek amendment (A/CONF.39/C.1/L.316) which would enable

[4] *Sixth International Conference of American States: Final Act (motions, agreements, resolutions and Conventions)* (Havana, 1928), p. 135.

[5] For resumption of the discussion on article 53, see 81st meeting.

[6] The following amendments had been submitted: Peru, A/CONF.39/C.1/L.304; Greece, A/CONF.39/C.1/L.316.

the parties to suspend the operation merely of certain provisions of a treaty. The introduction of that element of flexibility would be in keeping with the principle laid down in article 41, paragraph 1, which, it would seem, met with the approval of the Committee of the Whole. The Greek amendment could equally well be examined when the discussion of article 41 was resumed.

60. Mr. GEESTERANUS (Netherlands) said that the words " all the parties ", used in paragraph (*b*), raised a problem. It might perhaps be desirable not to limit the rule exclusively to the parties, but to take into account the interests of other States which had expressed their consent to be bound by the treaty but for which the treaty had not yet entered into force. The Netherlands had already submitted amendments on those lines to articles 36 and 51 (A/CONF.39/C.1/L.232 and L.313), and those amendments had been referred to the Drafting Committee. If the Drafting Committee accepted those two amendments, it might perhaps consider making the same change in article 54.

61. Sir Humphrey WALDOCK (Expert Consultant), replying to a question put by Mr. LUKASHUK (Ukrainian Soviet Socialist Republic), said that the International Law Commission had not imagined that article 41 could apply to the cases covered by article 54. The parties were sovereign in the matter of separability and in that of suspension, but article 41 dealt with rights conferred on the parties individually, whereas article 54 was concerned with an agreement among the parties.

62. The idea expressed in the Greek amendment seemed self-evident: since the parties might agree to suspend the operation of the treaty as a whole, they could manifestly agree to suspend the operation of certain of its provisions.

63. The CHAIRMAN suggested that article 54, together with the amendments, should be referred to the Drafting Committee.

It was so agreed.[7]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

64. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 9, 9 *bis*, 10 and 10 *bis* adopted by that Committee.

65. Mr. YASSEEN, Chairman of the Drafting Committee, said that he proposed first of all to make a few general remarks concerning the procedure for the drafting of articles in the different working languages. Those members of the Drafting Committee whose language was Chinese, Spanish or Russian carefully studied the text of the International Law Commission's draft prepared in their language and submitted from time to time to the Drafting Committee corrections to the syntax or terminology. The Committee then referred such corrections to the Conference's language services so that the latter could ensure that they did not affect the versions in the other languages. All the corrections relating to their own particular language alone were incorporated in the text of that version submitted by the Committee to the Committee of the Whole. To avoid tiresome repetitions, he would abstain from enumerating those corrections when submitting to the Committee of the Whole the articles adopted by the Drafting Committee, but would merely draw attention to the changes made by the Committee itself at its meetings.

Article 9 (Authentication of the text)[8]

66. Mr. YASSEEN, Chairman of the Drafting Committee, said that article 9 had been approved by the Committee of the Whole at its fifteenth meeting. The Drafting Committee had not considered it necessary to make any changes.

Article 9 was approved.

(New article) *Article 9* bis[9]

67. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 9 *bis* adopted by the Drafting Committee read as follows:

"*Article 9* bis

" The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, approval, acceptance or accession, or by any other means if so agreed."

68. At its 18th meeting the Committee of the Whole had adopted the principle common to two amendments, namely, the amendment submitted by the United States and Poland (A/CONF.39/C.1/L.88 and Add.1) proposing a new article 9 *bis*, and that submitted by Belgium (A/CONF.39/C.1/L.111) proposing a new article 12 *bis*.

69. The Committee had noted that the legal effect of those two amendments was the same: both laid down a subsidiary rule which left it open to the parties to agree to another method of expressing consent to be bound by a treaty. Most members of the Committee had preferred the formula proposed by the United States and Poland, as an introduction to the articles relating to methods of expressing consent to be bound by a treaty. The Drafting Committee had made only one change in the text proposed in the United States and Polish amendment; it had added a comma after the word " accession ".

70. Mr. HARRY (Australia) pointed out that in article 2, paragraph 1(*b*), the different methods of expressing consent to be bound by a treaty had been enumerated in a slightly different order than in article 9 *bis*. When it came to consider article 2, the Drafting Committee might perhaps rearrange those terms so that they appeared in the same order as in article 9 *bis*.

71. The CHAIRMAN thought that that would be possible, as the content of article 9 *bis* would determine the final form of paragraph 1(*b*) of article 2.

Article 9 bis *was approved.*

Article 10 (Consent to be bound by a treaty expressed by signature)[10]

72. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 10 adopted by the Drafting Committee read as follows:

[7] For resumption of the discussion on article 54, see 81st meeting.

[8] For earlier discussion of article 9, see 15th meeting.

[9] For earlier discussion of the proposed new article 9 *bis*, see 15th and 18th meetings. The proposed new article 12 *bis* was discussed at the 18th meeting.

[10] For earlier discussion of article 10, see 17th meeting.

"*Article 10*

" 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

" (*a*) the treaty provides that signature shall have that effect;

" (*b*) it is otherwise established that the negotiating States were agreed that signature should have that effect;

" (*c*) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

" 2. For the purposes of paragraph 1:

" (*a*) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

" (*b*) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty."

73. The Drafting Committee had followed the suggestion made in a Spanish amendment (A/CONF.39/C.1/L.108) that the words " in question " after the word " State " in paragraph 1 (*c*) should be deleted. Those words added nothing to the meaning and created serious difficulties for the Spanish translation.

74. The Drafting Committee had not seen fit to accept any of the other amendments referred to it by the Committee of the Whole.

Article 10 was approved.

(New article) *Article 10* bis (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty) [11]

75. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for the new article 10 *bis* adopted by the Drafting Committee read as follows:

"*Article 10* bis

" The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

" (*a*) the instruments provide that their exchange shall have that effect;

" (*b*) it is otherwise established that those States were agreed that the exchange of instruments should have that effect."

76. He reminded the Committee of the Whole that, at its 18th meeting, it had adopted the Polish amendment (A/CONF.39/C.1/L.89) proposing a new article 10 *bis* on the expression of the consent of States to be bound by a treaty constituted by instruments exchanged between the parties. In practice, that type of treaty frequently took the form of an exchange of notes.

77. The Drafting Committee had based itself on the Polish amendment, but had redrafted it so as to take account of the Committee of the Whole's decisions on the other articles relating to the expression of consent; the Committee of the Whole had deemed it inappropriate to include a subsidiary rule in favour of a particular method of expressing that consent.[12] The wording of the Polish amendment might be construed to mean that it was stating a subsidiary rule establishing the presumption that an exchange of instruments constituted a treaty. That was the conclusion that had been arrived at by the majority of the members of the Drafting Committee.

78. Mr. ROSENNE (Israel) said that he saw no objection, in principle, to the adoption of article 10 *bis*. In his view, the two new articles 9 *bis* and 10 *bis* were useful additions.

79. Article 10 *bis*, however, contained the expression " The consent of States ", whereas in all the other articles relating to participation in a treaty the expression " The consent of a State " had been used. Perhaps the Drafting Committee might consider that point and decide whether the plural form should be retained in article 10 *bis*.

80. Mr. HARRY (Australia) said that his delegation had noticed the slight difference in drafting and had thought that it was deliberate; since article 10 *bis* concerned an exchange of instruments between at least two States, the plural seemed to be justified.

81. Mr. BLIX (Sweden) said that the Committee of the Whole had adopted the Polish amendment by 42 votes to 10, with 27 abstentions. The text of article 10 *bis* submitted by the Drafting Committee was completely different from the text proposed by Poland. His delegation had made reservations on that matter in the Drafting Committee. The Polish proposal had above all the merit of establishing a legal presumption, a residual rule—which was undisputed in his delegation's view—that when a treaty had been entered into by means of an exchange of notes, the expression of consent lay in that exchange, unless otherwise expressly agreed.

82. There was undoubtedly much controversy on the question whether treaties generally entered into force by signature or ratification. The Committee of the Whole had not settled that question. But his delegation did not think there was much doubt that agreements in the form of an exchange of notes, unless otherwise provided, became binding on the parties at the time of such exchange, without any need for subsequent approval. Attempts had already been made to establish a rule that agreements in so-called simplified form did not require ratification. His delegation had never believed in the possibility of finding a workable definition of such agreements. Nevertheless, it recognized that an exchange of notes did constitute a definable category of agreements. It would be regrettable therefore not to provide, at least for that kind of agreement, a rule to the effect that no subsequent approval was required after the exchange of instruments, unless otherwise agreed between the parties.

83. Unfortunately, the Drafting Committee had drawn up a text which, unlike the Polish amendment adopted by the Committee of the Whole, contained no residuary rule, but merely followed the pattern of other provisions relating to consent. There was a danger that the Drafting Committee's text would throw doubt on the existence of that rule and would therefore be a step backwards rather than forwards. In fact, it was purely descriptive.

[11] For earlier discussion of the proposed new article 10 *bis*, see 17th and 18th meetings.

[12] See 18th meeting.

84. His delegation realized the difficulty of finding a satisfactory formulation for the idea contained in the Polish amendment. However, the Drafting Committee might perhaps endeavour to render that idea more faithfully. He would suggest a wording such as: " The consent of States to be bound by a treaty constituted by instruments exchanged between them and embodying agreement between them is expressed by that exchange, unless the States have otherwise agreed ".

85. If the Drafting Committee's text was put to the vote, his delegation would be obliged to abstain.

86. Mr. ROSENNE (Israel) said that his comment was not merely that the word " State " should be put in the singular. He had wished to draw the Committee's attention to the fact that the expression " the consent of States " in article 10 *bis* was a new concept in the context of the articles on the conclusion of treaties, and while the intention of the Drafting Committee was clear, the text proposed could give rise to difficulties. He therefore thought that the Drafting Committee should re-examine the matter.

87. Subject to that, the Israel delegation would be prepared to vote for the article as a whole.

88. Mr. YASSEEN, Chairman of the Drafting Committee, said that the expression " The consent of States " was justified since it was stated in article 10 *bis* that consent was expressed by an exchange of instruments, and several States were therefore involved.

89. With regard to the Swedish representative's comments, he said that the majority of the members of the Drafting Committee had interpreted the decision of the majority of the Committee of the Whole on the Polish amendment as signifying that there was no need to lay down a residuary rule prescribing an exchange of instruments. The Drafting Committee had taken into account the attitude of the Committee of the Whole concerning other ways of expressing consent, in particular signature and ratification; and the Committee of the Whole had clearly decided not to accept any other method as a residuary rule to be applied when the treaty did not provide otherwise.

90. Mr. DE BRESSON (France) said he agreed with the remarks of the Chairman of the Drafting Committee.

91. Mr. MATINE-DAFTARY (Iran) said he thought the Drafting Committee's wording was a little too free. Treaties in simplified form were the exception. His delegation maintained the view it had already expressed in the Committee of the Whole, namely that ratification was the rule and that other cases should be the exception. Article 10 *bis* as proposed might give rise to abuse by States that desired to evade ratification.

92. He supported the proposal to refer the article to the Drafting Committee once again.

93. Mr. NAHLIK (Poland) said he agreed with the Chairman of the Drafting Committee about the comment of the Israel representative.

94. With regard to the wording of the article, he fully supported the Swedish representative. When an agreement had been concluded in the form of an exchange of notes, it only rarely required ratification.

95. Mr. JAGOTA (India) said he saw no difference in substance between the wording proposed in the Polish amendment and that of the Drafting Committee. The concluding words of the Polish amendment stated a residuary rule; that rule also existed in a more positive form in the wording proposed by the Drafting Committee, which explained in greater detail how to ascertain whether States had expressed their consent. Article 10 *bis* was worded consistently with article 10 and the other articles concerning consent. The new formula suggested by the Swedish representative was less satisfactory.

96. The plural form of the word " States " at the beginning of the article was justified since several States would have expressed their consent.

97. The proposed wording was acceptable and did not need to be referred back to the Drafting Committee.

98. Mr. WERSHOF (Canada) said it would be better to defer the vote on article 10 *bis*. To send it back to the Drafting Committee would not imply criticism. The Drafting Committee would simply be invited to re-examine the article, and might very well do no more than confirm its wording. The Committee of the Whole had, however, adopted the Polish amendment, and in view of what the Polish representative had just said, it could scarcely approve a new version which did not fully express the Polish delegation's intentions.

99. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had spent several meetings on formulating article 10 *bis*, which was a difficult article. The proposed wording expressed the opinion of the majority of the Drafting Committee, whose views could scarcely have changed. If the Committee of the Whole wished to send the text back to the Drafting Committee, it would also have to give it precise instructions. The Drafting Committee could not take upon itself to lay down a residuary rule about a means of expressing consent for which the International Law Commission had not even provided, particularly since the Committee of the Whole had decided not to stipulate a residuary rule in the articles concerning other means of expressing consent.

100. Mr. JIMENEZ DE ARECHAGA (Uruguay) said he agreed with the comments by the Chairman of the Drafting Committee. The Drafting Committee had considered not only the decision of the Committee of the Whole on the Polish amendment but also its decisions on all the other ways of expressing consent. The Czechoslovak delegation, which had proposed the statement of a residuary rule in the article on signature, had withdrawn its proposal on the ground that it had not secured sufficient support in the Committee of the Whole.[13] Neither had a proposal of a group of Latin American States to treat ratification as a residuary rule been accepted by the majority.[14] The Drafting Committee had therefore considered that the Committee of the Whole had confirmed the attitude taken by the International Law Commission and had not desired to establish a residuary rule but merely to indicate a procedure.

[13] See 18th meeting, paras. 7 and 8.

[14] *Ibid.*, para. 14.

101. Article 10 *bis* was entirely new, and Governments had had no opportunity of expressing their opinions. It would be paradoxical to introduce a residuary rule in that article when the Committee of the Whole had decided not to prescribe a residuary rule with regard to the traditional modes of expressing consent.

102. The Drafting Committee had realized the danger of introducing a presumption in virtue of which a State could become bound to another State by such a simple and common act as an exchange of notes.

103. It was for the Committee of the Whole to take the final decision.

104. Mr. BADEN-SEMPER (Trinidad and Tobago) asked for the drafting point concerning the plural form of the word " States " to be dealt with separately from the substantive question if a vote was taken. In article 9 *bis*, the word " State " was in the singular, although that article also dealt with the exchange of instruments. It was merely a question of drafting, however, which could be settled by the Drafting Committee without a vote by the Committee of the Whole.

105. The CHAIRMAN invited the Committee of the Whole to adopt article 10 *bis* and to leave it to the Drafting Committee to decide whether the word " States " in the phrase " The consent of States " at the beginning of the article should remain in the plural.

Article 10 bis *was approved by 69 votes to 1, with 18 abstentions, subject to the reservation stated by the Chairman.*

The meeting rose at 5.45 p.m.

SIXTIETH MEETING

Thursday, 9 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 55 (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only)

1. The CHAIRMAN invited the Committee to consider article 55 of the International Law Commission's draft.[1]

2. Mr. DE BRESSON (France) said that the French amendment (A/CONF.39/C.1/L.47) was in line with the other French amendments concerning restricted multilateral treaties. That category of treaties should at all times be applied entire by all the parties, and should therefore be excluded from the application of article 55. The amendment should be referred to the Drafting Committee.

3. Mr. ALVARADO (Peru) said that the Peruvian amendment (A/CONF.39/C.1/L.305) was in keeping with the International Law Commission's text. From a procedural point of view there was an obvious analogy between article 55 and article 37. The Commission had stated in paragraph (2) of its commentary to article 55 that, although it did not think that formal notice should be made a specific condition for temporary suspension of the operation of the treaty, its omission from the present article was not to be understood as implying that the parties in question might not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty. Notifying the other parties was a matter of international courtesy. His delegation's amendment should be referred to the Drafting Committee.

4. Mr. EVRIGENIS (Greece) said that the purpose of the Greek amendment (A/CONF.39/C.1/L.317) was to make article 55 more precise. It was the only provision in that part of the draft that used the expression " provisions of the treaty " instead of the expression " of the treaty ", and it was desirable even for reasons of uniformity in terminology to make clear that the suspension of the application of a multilateral treaty could apply to the whole treaty or to certain of its provisions only. That was the purpose of the amendment, which could be referred to the Drafting Committee.

5. Mr. ZEMANEK (Austria) said that the six-State joint amendment (A/CONF.39/C.1/L.321 and Add.1) had superseded the Austrian, Finnish and Polish amendment (A/CONF.39/C.1/L.6 and Add.1 and 2) and the Canadian amendment (A/CONF.39/C.1/L.286). Its aim was to harmonize article 55 and article 37. Given the similarity of the situations dealt with in those two articles, it was desirable that the wording of article 55 should follow as closely as possible that of article 37. It was in the interests of the security of treaties that the obligation to notify the other parties of an agreement to suspend *inter se* should be a specific and not merely a general obligation.

6. Mr. STANFORD (Canada), speaking as one of the sponsors of the six-State joint amendment, said that the purpose of the changes to article 55 that it proposed was to provide a similar formulation to that contained in article 37. The phrase " is not prohibited by the treaty " had also been incorporated.

7. The Commission's text of article 55 laid down three cumulative conditions for suspension by agreement between certain of the parties only. The first was that the treaty " contains no provision regarding the suspension of its operation "; the other two were given in sub-paragraphs (*a*) and (*b*). The sponsors of the six-State amendment proposed that the first condition be changed to read " if such suspension is not prohibited by the treaty ", which was the language used in article 37. The mere fact that the treaty contained some provision relating to suspension should not prevent two or more parties from agreeing on suspension as between themselves, unless the provision actually prohibited it. The text in the amendment retained the other two conditions

[1] The following amendments had been submitted: Austria, Finland and Poland, A/CONF.39/C.1/L.6 and Add.1 and 2; France, A/CONF.39/C.1/L.47; Canada, A/CONF.39/C.1/L.286; Peru, A/CONF.39/C.1/L.305; Greece, A/CONF.39/C.1/L.317; Austria, Canada, Finland, Poland, Romania and Yugoslavia, A/CONF.39/C.1/L.321 and Add.1; Australia, A/CONF.39/C.1/L.324.

in the Commission's draft, with slight changes. The words " as between the parties as a whole " had been deleted from sub-paragraph (*b*) of the Commission's draft and a reference added to " the object and purpose of the treaty as a whole ". That accorded with the wording of article 37. The reason for the deletion was that the situation contemplated by article 55 necessarily affected the position of those parties to the initial treaty who were also parties to the subsequent agreement. Sub-paragraphs (*a*) and (*b*) fully protected the rights of the other parties to the initial agreement.

8. The proposals in the six-State amendment were not mere drafting changes but at the same time were not controversial, and he hoped that they would find favour.

9. Mr. HARRY (Australia) said that, when the Committee had considered articles 16 and 17, concerning reservations, it had accepted the principle that there was a certain class of treaties the application of which in their entirety between all the parties was an essential condition of the consent of each party to be bound. The precise kind of treaty to be regarded as coming within that category was still to be decided. The Commission had concluded that, in such cases, reservations should not be permitted unless they were accepted by all the parties. If that rule applied to reservations, it should also apply to the situations dealt with in articles 37 and 55, which were analagous.

10. The tests laid down by the Commission in article 55 could give rise to disputes and call into question the efficacy of such restrictions. It was necessary, at least in the case of that class of treaty where its integrity was fundamental and its application in its entirety was essential, to have some more secure protection for the integrity of the treaty and the rights of the other parties. The Australian amendment (A/CONF.39/C.1/L.324) was designed to provide that protection by excluding from the application of article 55 the class of treaties referred to in article 17, paragraph 2; its effect would be to prevent *inter se* suspensions in the case of such treaties unless all the other parties gave their consent.

11. The amendment was one of substance and it would be undesirable to vote on it until the Committee had decided on the content of article 17, paragraph 2. Pending that decision, the amendment could be held in suspense by the Drafting Committee.

12. Mr. SEPULVEDA AMOR (Mexico) said he agreed with the Austrian and Canadian representatives. The suspension of a treaty must not affect the enjoyment of the rights or the purpose of the obligations of the other parties, or be incompatible with the execution of the object and purpose of the treaty. But a third requirement should also be mentioned. In stating the conditions governing *inter se* suspension, the article made no reference to the need to give the other parties prior notification in due form of the intended suspension. tI was not sufficient merely to say, as the commentary did, that the omission of that condition was not to be understood as implying that the parties in question might not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty; the obligation must be clearly stipulated in the text of the convention. Accordingly, although he was fnlly satisfied with the six-State amendment, he would suggest that the Drafting Committee consider adding a second paragraph drafted somewhat as follows: " Unless the treaty otherwise provides, the parties concerned shall notify the other parties of their intention to suspend the operation of provisions of the treaty temporarily and as between themselves alone".

13. As *inter se* suspension might affect the situation or the rights of other parties, for example in the case of a treaty establishing a free trade area or containing rules for the pacific settlement of disputes, the obligation to notify was essential for the purpose of the security of treaties. The requirement would be analogous to the one contained in article 37. But it would only be a question of providing for an obligation to notify; it was not the intention that such a notification would have any other effects than those produced by a further communication. If a situation arose in which those States which were not parties to the *inter se* suspension objected to it, the provisions of Part V, Section 4, on procedure, would apply.

14. Mr. MARESCA (Italy) said that an agreement to suspend *inter se* should be regarded as an absolute exception, only permissible when certain conditions were met. It must not be incompatible with the object of the treaty or in any way detract from the exercise of the rights of the other parties. A proper and rigid procedure must be laid down to prevent chaos. He supported the six-State amendment, which provided for a special procedure, and also viewed the Australian amendment with sympathy. As he was in favour of the principle of separability, he would have no objection to the Greek amendment (A/CONF.39/C.1/L.317). He also supported the French amendment.

15. Mr. SAULESCU (Romania) said that the purpose of the six-State amendment was to produce a clearer text. Article 55 dealt with the difficult problem of the conditions in which suspension *inter se* could be allowed. The conditions must be specified clearly and be accompanied by the necessary safeguards so as to protect the other parties. There was an obvious connexion between articles 55 and 37, and suspension under article 55 could only be permitted if the treaty did not prohibit such action. That was the first condition, as stated in the six-State amendment. The second was that suspension should not affect the rights and obligations of the other parties or be incompatible with the execution of the object and purpose of the treaty.

16. Paragraph 2 of the amendment was in conformity with the views expressed by the Commission in its commentary, and required notification to the other parties, as provided in article 37.

17. Mr. CHANG (China) said that he could accept the Commission's text in principle, but it would be improved by the six-State amendment, which brought article 55 into line with article 37 and laid down conditions in which two or more parties could suspend *inter se*. He supported the Australian amendment, as it would make the provision more explicit and contained the requirement that other parties should be notified of a decision to suspend *inter se*.

18. Mr. ROSENNE (Israel) said that article 55 dealt with an area of the law of treaties in which State practice

was scanty; indeed, none was referred to in the commentary to the article. It was therefore necessary to exercise caution, so as not to produce a text that was too rigid and might prove unworkable in practice. The fact that no up-to-date collection of modern final clauses was available made it difficult to study in depth the problems involved.

19. His delegation favoured the six-State amendment (A/CONF.39/C.1/L.321 and Add.1) subject to the following remarks. In general, it was desirable that the rule in article 55 should be framed as a residuary rule; but the requirement that the suspension should not be expressly prohibited might be too rigid. Paragraph 1 of the amendment expressed better than the International Law Commission's text the essential elements of *inter se* suspension. It might, however, be improved by the reintroduction, after the words " other parties " in paragraph 1(*a*), of the words " as a whole ".

20. With regard to paragraph 2, it was acknowledged in the concluding sentence of paragraph (2) of the commentary that the parties to an *inter se* suspension had " a certain general obligation to inform the other parties " to the treaty. That idea was rather vaguely expressed and should be clearly stated in the article, as was done in paragraph 2 of the amendment. He understood paragraph 2 of the amendment as referring to article 73 with respect to the manner in which the notification should be made, unless the treaty provided otherwise. The Drafting Committee could settle the precise wording. It was of course understood that the agreement for *inter se* suspension itself would subsequently be registered under Article 102 of the Charter.

21. The analogy with article 37 should not be carried too far; there was a point at which the similarities between articles 37 and 55 ended. It was essential to avoid *inter se* suspension and *inter se* modification developing into concealed reservations that would evade the provisions of the draft articles on reservations. What might be permissible in the cases envisaged in article 37 was not necessarily and automatically permissible or acceptable in the cases contemplated in article 55. The Drafting Committee should scrutinize very closely the nature of the relationship between the two sets of provisions.

22. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that his delegation had serious misgivings over article 55, which would encourage States to take the undesirable course of suspending the operation of a multilateral treaty between certain parties only. It was true that a number of safeguards had been introduced into the article, but they were not sufficient. To take an example, the provisions of article 55 would make possible an *inter se* suspension by two of the parties of the operation of the 1948 Pact of Bogotá, on the pacific settlement of disputes.[2] Such suspension might not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, but it would nonetheless affect the general interest; other American States were interested in the peaceful settlement of disputes arising between two American States. For those reasons, his delegation could not vote in favour of article 55.

23. He noted that no State practice had been adduced in the commentary in support of the idea of *inter se* suspension. Article 55 had been introduced as a matter of pure logic on the grounds that, since *inter se* modification had been provided for in article 37, it was logical to provide also for *inter se* suspension. But law was not simply a matter of logic; it was above all a matter of experience. Examples could be found of the situation envisaged in article 37, but none of the situation contemplated in article 55. Article 37 gave expression to a progressive practice which called for recognition. Article 55 did not rest on any practice and was of a regressive character. The late Professor Scelle had stressed the difference between the orthopaedic treatment of *inter se* modification and the paralysis of *inter se* suspension.

24. For those reasons, his delegation would support those amendments which introduced safeguards and limitations into the article, such as the Australian amendment (A/CONF.39/C.1/L.324) and the six-State amendment (A/CONF.39/C.1/L.321 and Add.1). The latter, however, used in the opening sentence of paragraph 1 the wording " if such suspension is not prohibited by the treaty ". He would urge the sponsors of the amendment to revert to the more restricted language used in the original text: " When a multilateral treaty contains no provisions regarding the suspension of its operation ". The need for that change was illustrated by the provisions of article 16, paragraph 3 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[3] Those provisions made it possible to suspend innocent passage of foreign ships through the territorial sea, but only on certain stringent conditions. The Convention thus did not prohibit the suspension of its provisions on innocent passage but it did make suspension subject to strict requirements. With the language proposed in the six-State amendment, it would be possible for two parties to the Convention to enter into an *inter se* agreement for the suspension of innocent passage. The original text of article 55 would preclude such *inter se* suspension.

25. Mr. CHEA DEN (Cambodia) said that article 55 reflected the International Law Commission's concern for the stability of treaties. Suspension, like invalidity, should be treated as an exception and therefore be regulated with caution. His delegation supported the six-State amendment (A/CONF.39/C.1/L.321 and Add.1), which was consistent with that preoccupation and introduced useful additions and improvements into the wording of the article.

26. He supported the suggestion that the French amendment (A/CONF.39/C.1/L.47) should be referred to the Drafting Committee, pending a decision on the question of restricted multilateral treaties.

27. Mr. DIOP (Senegal) said that he shared the International Law Commission's view that, in principle, the consent of all the parties was necessary for termination, but that such was not necessarily the case with the suspension of the operation of a treaty.

28. He supported the proposal in the six-State amendment to introduce the requirement of notification. That would strengthen the safeguards already contained in the article for the benefit of the other parties to the treaty. Notification would enable them to take appropriate measures to safeguard their rights.

[2] United Nations, *Treaty Series*, vol. 30, p. 84.

[3] United Nations, *Treaty Series*, vol. 516, p. 216.

29. He also supported the French amendment (A/CONF.39/C.1/L.47), which would exclude from the operation of article 55 multilateral treaties of a restricted character. Rigid application of the rule contained in article 55 could create insoluble problems for the performance of such treaties. A restricted multilateral treaty concerned only a few States for which the application of the treaty in its entirety between all the parties was an essential condition for successful performance. An obvious example was the case of a treaty for the improvement and economic development of a river basin. An *inter se* agreement between two of the parties to such a treaty for the suspension of its operation, even on a temporary basis, would undermine the operation of the treaty as a whole.

30. Mr. WERSHOF (Canada) said that the suggestion by the representative of Israel to insert after the words "other parties" in paragraph 1 (*a*) of the six-State amendment (A/CONF.39/C.1/L.321 and Add.1) the additional words "as a whole", was acceptable, and could perhaps be referred to the Drafting Committee.

31. With regard to the remarks of the Uruguayan representative, he said that the sponsors of the six-State amendment had used the wording "is not prohibited by the treaty" rather than "When a multilateral treaty contains no provision" because the mere existence in the treaty of a provision on suspension should not of itself rule out the possibility of *inter se* suspension, provided of course that the other conditions set forth in the article were fulfilled. Treaty provisions on the subject of suspension could be very varied and often related to the question of suspension by all the parties.

32. He suggested that a vote be taken on the principle in the six-State amendment. If the principle were approved, the Drafting Committee could then consider questions of wording.

33. It was his understanding that, although the French amendment (A/CONF.39/C.1/L.47) would be referred to the Drafting Committee, the Committee of the Whole would at some stage be called upon to take a decision on the substantive issue involved. The Australian amendment (A/CONF.39/C.1/L.324) should also be referred to the Drafting Committee on the same understanding since it dealt with the same problem in a different manner.

34. The Peruvian amendment (A/CONF.39/C.1/L.305) dealt with one of the points in the six-State amendment, namely, that of notification, in a slightly different way. He still preferred the method adopted in the six-State amendment, but would have no objection to the Peruvian amendment being referred to the Drafting Committee.

35. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that he understood from the explanations given by the Canadian representative that approval of the principle involved in the six-State amendment (A/CONF.39/C.1/L.321 and Add.1) would not prevent the Drafting Committee from adjusting the wording of paragraph 1 so as to make it clear that an agreement on *inter se* suspension would be subject to any restrictions placed on suspension by the treaty itself.

36. Sir Humphrey WALDOCK (Expert Consultant) said he supported those remarks on the question of treaty restrictions on suspension. It was quite common for a multilateral treaty to contemplate in advance the possibility of temporary suspension and to regulate it carefully.

37. The inclusion of the provisions of article 55 had to some extent been based on considerations of logic; but some members of the International Law Commission had also emphasized that those provisions dealt with a phenomenon which was common enough in State practice.

38. With regard to the question of notification, he said that the International Law Commission had regarded it as desirable. In his own original draft, *inter se* suspension had been made subject to the same notification requirements as *inter se* modification. That requirement had been dropped in the Commission's Drafting Committee, apparently because of a feeling that it would be too strict to require notification in all cases, in view of the temporary character of suspension. The introduction of such a requirement would not, however, run counter to the Commission's approach.

39. The CHAIRMAN said that the Peruvian amendment (A/CONF.39/C.1/L.305) would be referred to the Drafting Committee. The same applied to the French amendment (A/CONF.39/C.1/L.47) and the Australian amendment (A/CONF.39/C.1/L.324), on the understanding already expressed on previous occasions. He would put the Greek amendment (A/CONF.39/C.1/L.317) to the vote.

The Greek amendment was rejected by 25 votes to 13 with 49 abstentions.

40. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had abstained from voting on the Greek amendment (A/CONF.39/C.1/L.317) because it was clearly of a drafting character and should have been referred to the Drafting Committee, along with the other amendments of the same type. By virtue of the principle that the greater contained the less, the suspension of the whole treaty included the suspension of a part thereof. Accordingly, no question of substance was involved.

41. The CHAIRMAN invited the Committee to vote on the principle in the six-State amendment subject to the explanations given during the discussion.

The principle in the amendment by Austria, Canada, Finland, Poland, Romania and Yugoslavia (A/CONF.39/C.1/L.321 and Add.1) was approved by 82 votes to none, with 6 abstentions.

42. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 55, together with the principle in the six-State amendment and the various drafting amendments he had already mentioned, to the Drafting Committee.

It was so agreed.[4]

Article 56 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty)

[4] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to "restricted multilateral treaties" until the second session of the Conference. Further consideration of article 55 was therefore postponed.

43. The CHAIRMAN invited the Committee to consider article 56 and the amendments thereto.[5]

44. Mr. ZEMANEK (Austria), introducing his delegation's amendment (A/CONF.39/C.1/L.7), said that it did not involve any change of substance. Its purpose was merely to introduce expressly into the wording an idea which was already implicit in the existing text.

45. Paragraph 3 of article 26, on the application of successive treaties relating to the same subject-matter, specified that where " the earlier treaty is not terminated or suspended in operation under article 56 ", the earlier treaty applied " only to the extent that its provisions are compatible with those of the later treaty ". In order to make it possible to apply that provision, paragraph 1 (*b*) of article 56 should make it clear that it related to a case where the two treaties were not capable of being applied at the same time in their entirety. The Austrian amendment (A/CONF.39/C.1/L.7) would therefore replace the words " are not capable " in paragraph 1 (*b*) by the words " are in none of their provisions capable ".

46. Mr. STANFORD (Canada) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.285) was to provide that in the appropriate cases a subsequent treaty could have the effect of partially terminating or partially suspending an earlier treaty dealing with the same subject-matter. The present text of article 56 contemplated only the termination or suspension of the treaty as a whole. It was not clear whether article 41, on separability of treaty provisions, would meet the particular circumstances contemplated by article 56. The clause or clauses varied by the subsequent treaty could well have been " an essential basis of the consent of the other party " within the meaning of paragraph 3 (*b*) of article 41; nevertheless, it might be entirely appropriate for that portion of the earlier treaty which was not incompatible with the later treaty to remain in force. His delegation's amendment could be referred to the Drafting Committee.

47. Mr. AVAKOV (Byelorussian Soviet Socialist Republic), introducing his delegation's amendment (A/CONF.39/C.1/L.292), said he supported the idea contained in article 56.

48. The purpose of his amendment was to introduce in paragraph 1 (*b*) and also in paragraph 2 a reference to the instrument in which the intention of the parties had been expressed. That instrument could be either the treaty itself or some other instrument relating to the treaty. The point, although one of drafting, was an important one; the effects of termination or suspension were serious and it was necessary to state precisely in article 56 the manner in which the consent of the parties would be established.

49. Mr. VOICU (Romania), introducing his delegation's amendment (A/CONF.39/C.1/L.308), said that it was of a purely drafting character and related only to the French text. It should be referred to the Drafting Committee.

50. Mr. KIANG (China), introducing his delegation's amendment (A/CONF.39/C.1/L.327), said that the changes which it would introduce in the wording of the opening part of paragraph 1 and in paragraph 1 (*a*) would make the wording more precise. It would also delete as unnecessary the word " far " in paragraph 1 (*b*). The provisions of article 56 related to the case where the later treaty was at variance with the earlier one; the degree of variance was immaterial.

51. Mr. ROSENNE (Israel) said that his delegation was unable to support the inclusion of article 56 in the draft convention, because it regarded it as completely redundant and merely repetitious of other provisions of the draft; it seemed to duplicate article 51 and, to some extent, articles 35 and 36.

52. Under article 51, a treaty might be terminated at any time by the consent of all the parties, and under articles 35 and 36, a treaty could be amended at any time by the consent of all the parties. Obviously, the conclusion of a further treaty relating to the same subject-matter, according to paragraph 1 of article 56, meant that the parties had consented to something which might or might not result in the termination or modification of the earlier treaty. If the later treaty was clear, that was the end of the matter, and there was no room for article 56 to operate; if the later treaty was ambiguous, there seemed to be no reason why the normal processes of interpretation should not be applied. Those normal processes were, moreover, already incorporated in the opening phrase of paragraph 1 (*a*), and when they were applied to establish the intention of the parties, the normal consequences would follow: either the earlier treaty would be terminated or amended by consent, that being the intention of the parties, or the parties would agree that the two treaties could and should be applied simultaneously. Paragraph 2 of article 56 simply represented what was clearly stated in article 53.

53. The fact that those considerations had been recognized by the International Law Commission was clear from the last sentence of paragraph (1) of the commentary. His delegation did not consider it necessary or advisable to include what was in effect a special rule of interpretation in the form of an article of the convention. While it did not disagree with the conclusions to which article 56 led, it nevertheless thought that the inclusion of the article would add unnecessary confusion to an already complex draft convention. The Israel delegation would therefore abstain from voting on all the amendments before the Committee and reserved its right to vote against the article at the appropriate time.

54. Mr. HARRY (Australia) said that, although his delegation had originally doubted the need for including article 56, the debate had convinced it of the desirability of setting out such a provision. It hoped that the Drafting Committee would give careful attention to the drafting amendments that had been submitted: the terminology in the different languages of the convention should also be carefully scrutinized. For instance, the English text of the opening paragraph referred to " a further treaty ", whereas the purely temporal terms " earlier " and " later " were used in the subsequent paragraphs; that anomaly did not seem to apply to the French and Spanish texts, and might be studied by the Drafting Committee.

[5] The following amendments had been submitted: Austria, A/CONF.39/C.1/L.7; Canada, A/CONF.39/C.1/L.285; Byelorussian Soviet Socialist Republic, A/CONF.39/C.1/L.292; Romania, A/CONF.39/C.1/L.308; China, A/CONF.39/C.1/L.327. The Romanian amendment related only to the French text of the article.

55. Sir Humphrey WALDOCK (Expert Consultant) said that the Canadian amendment to sub-paragraph 1 (*b*) (A/CONF.39/C.1/L.285) seemed to go rather beyond the normal intention of the parties in the case at issue in providing that the incompatibility between the provisions of the later treaty and those of the earlier one should be such that not all of the provisions of the two treaties were capable of being applied at the same time. The International Law Commission had not considered that termination should be implied whenever the subsequent treaty had an impact on some of the provisions of the earlier treaty. The Canadian amendment was more far-reaching than it seemed at first sight, and would have the effect of altering the rule laid down by the Commission.

56. Mr. WERSHOF (Canada) said he agreed with the Expert Consultant concerning the scope of his delegation's amendment, and would withdraw that part of it which related to sub-paragraph 1 (*b*). He hoped that the Canadian amendment to the opening phrase of paragraph 1 would be considered by the Drafting Committee.

57. The CHAIRMAN suggested that article 56 and the amendments thereto be referred to the Drafting Committee.

It was so agreed.[6]

Article 57 (Termination or suspension of the operation of a treaty as a consequence of its breach)

58. The CHAIRMAN invited the Committee to consider article 57 and the amendments thereto.[7]

59. Mr. CASTRÉN (Finland), introducing his delegation's amendment (A/CONF.39/C.1/L.309), said that Finland accepted the principle expressed in paragraph 1 of the article and the machinery laid down in paragraph 2. Nevertheless, it might be wise, in order to bring them into conformity with sub-paragraph 2 (*b*) and paragraph 1, to supplement sub-paragraphs (*a*) and (*c*) of paragraph 2 by stating expressly that a material breach of a multilateral treaty by one of the parties entitled the other parties to suspend the operation of the treaty in whole or in part.

60. His delegation also considered that the sanctions provided for in paragraph 2, particularly that of the termination of the treaty as between all the parties, seemed unduly rigorous in the case of treaties of general interest, such as those for the protection of human rights. Sir Gerald Fitzmaurice, an earlier Special Rapporteur on the law of treaties, had mentioned other treaties which should be maintained in force even if they were violated materially by a party to the treaty.[8] On the other hand, it was very difficult to agree on all the categories of treaties which should be placed on the same footing as treaties on human rights, and the Finnish delegation had decided not to prepare a list of exceptions or to propose a new wording for paragraph 2; it would only appeal to the parties to the convention in their wisdom to apply the sanctions in paragraph 2 with moderation, and to apply the most severe measures only in extreme cases.

61. His delegation had submitted its amendment to paragraph 3 in the belief that the definition of a material breach of a treaty entitling the innocent parties to the rights set out in the preceding paragraph could be improved. The provision that such a breach consisted in the violation of a provision essential to the accomplishment of the object or purpose of the treaty seemed insufficient: it was equally important to take into account the nature or degree of the violation itself. Even if a violation did not make it difficult or impossible to accomplish the object or purpose of a treaty, it might prejudice important rights of the innocent parties if it continued for a long time; similarly, if one of the parties violated several secondary provisions of the treaty, simultaneously or successively, that attitude might be described as a serious violation and should entitle the other parties to resort to the measures set out in paragraph 2. The purpose of the addition proposed by his delegation was to take such situations into account. It might be argued that the term " of a serious character " was not very precise; perhaps the Drafting Committee could find more satisfactory wording.

62. Mr. CARMONA (Venezuela) said that the question of breach of treaties was one of the most difficult before the Conference. The International Law Commission had considered the problem since 1963, and the Special Rapporteur's introductory work on it had shown a reaction against the theory of excessive rigidity which had hitherto prevailed and had resulted in an uncompromising insistence on the principle of the stability of treaties. The discussions in the International Law Commission had shown that those eminent jurists considered the principle of good faith to be the essential basis of an article on situations arising from a breach of a treaty.

63. The late Professor de Luna had clearly stated his views on the subject when he had said that " the principle that ' a material breach of a treaty by one party entitles the other party or parties to denounce or withdraw from the treaty or to suspend, in whole or in part, its operation ' was not an exception to the rule *pacta sunt servanda*, but rather a corollary of the principle of the sanctity of treaties. In the application of its provisions, a treaty should not conflict with the principle of good faith, without which the rule *pacta sunt servanda* was meaningless. That explained the maxim of the Roman jurists: '*frangenti fidem, fides non est servanda*'." He had then gone on to quote such international precedents as the *Polish Nationals in Danzig*,[9] the *Serbian* and *Brazilian Loans*[10] and the *North Atlantic Coast Fisheries*[11] cases, in all of which the Permanent Court of International Justice and the Permanent Court of Arbitration had stressed the element of good faith. Moreover, under Article 2, paragraph 2 of the United Nations Charter, Members were bound " to fulfil in good faith the obligations assumed by them." A further, highly important, point made by Professor de Luna was that if the party

[6] For resumption of discussion, see 81st meeting.

[7] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.309; Venezuela, A/CONF.39/C.1/L.318; United States of America, A/CONF.39/C.1/L.325; Spain, A/CONF.39/C.1/L.326.

[8] See *Yearbook of the International Law Commission, 1957*, vol. II, p. 31, article 19, and para. 125 of Sir Gerald Fitzmaurice's commentary (p. 54).

[9] *P.C.I.J.*, Series A/B (1932), No. 44.

[10] *P.C.I.J.*, Series A (1929), Nos. 20 and 21.

[11] *Reports of International Arbitral Awards*, vol. XI, p. 167.

injured by a breach continued to be bound by the treaty without having the right to denounce it, there would be a violation of the principle of reciprocity, which itself was merely an expression of the principle, embodied in Article 2, paragraph 1, of the Charter, of the sovereign equality of all States.[12]

64. That was the fundamental principle governing the whole matter: to try to draw a contrary conclusion by contending that States might abuse the principle in bad faith and invoke pretexts to evade their obligations would simply have the effect of punishing States acting in good faith for the bad faith of defaulting States. A balance must be struck between the principle which entitled States to free themselves of obligations they had contracted in good faith when those obligations had been violated by others, and abuses of that principle which might jeopardize the stability of treaties; but in no case should the principle of reciprocity be undermined by, so to speak, awarding the prize to the defaulting State to the detriment of the innocent party.

65. The Venezuelan amendment to article 57 (A/CONF.39/C.1/L.318) was largely based on the texts prepared by the International Law Commission during its fifteenth and seventeenth sessions. The main change it sought to introduce related to the effect of the article on bilateral and on multilateral treaties: his delegation did not believe that the differentiation between the two types of treaties in the Commission's text was entirely justified. Although it was true that, in the case of a bilateral treaty, only one State would be the injured party, it was perfectly possible that violation of a multilateral treaty might affect all the parties, if they were equally interested in maintaining the treaty; every State must be free to choose whether to suspend the operation of the treaty or whether to terminate it, even if the other parties chose to continue to be bound by their obligations. The Venezuelan delegation therefore considered that the requirement of the consent of all the parties, laid down in sub-paragraph 2 (*a*) (ii) of the Commission's text, was tantamount to imposing an inadmissible right of veto.

66. Attention had been drawn in the International Law Commission to the danger that a State wishing to evade its obligations under a treaty might cause a third State to provoke a violation which would entitle the former State to withdraw from the treaty. But the Commission seemed to have overlooked the inverse possibility that the defaulting State might by influencing another party prevent unanimous consent to the suspension or termination of obligations contracted by the injured State, thus compelling it to fulfil those obligations without reciprocity and infringing its sovereign rights by subterfuge. Perhaps the Drafting Committee could find a compromise text which would avoid both those undesirable situations.

67. A crucial aspect of the article was the definition of the nature of the breach of a treaty. The use of such words as " essential ", " material " or simply " serious " had been suggested; but the difficulty lay in establishing what a " serious " violation really was. Such an important matter clearly could not be left to arbitrary appraisal according to circumstances, and yet the Commission's text of paragraph 3 seemed to be unduly rigid, especially in providing that material breach consisted in a repudiation of the treaty not sanctioned by the convention; the Venezuelan delegation had therefore returned to the 1963 text and had proposed that sub-paragraph 3 (*a*) should read " The unjustified repudiation of the treaty ".

68. Finally, it was obvious that the right to suspend or terminate a bilateral or multilateral treaty was subject to the provisions that would ultimately be adopted on procedure, so that the crucial questions dealt with in article 57 would not be subject to the whims or bad faith of one party.

69. The amendment submitted by the Spanish delegation (A/CONF.39/C.1/L.326) was similar in intent to the Venezuelan amendment, and might be considered together with it. Perhaps the Drafting Committee might be asked to consider the whole article in the light of the debates in the International Law Commission and the comments in the Committee.

The meeting rose at 1 p.m.

[12] *Yearbook of the International Law Commission, 1963*, vol. I, 693rd meeting, paras. 3-5.

SIXTY-FIRST MEETING

Thursday, 9 May 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 57 (Termination or suspension of the operation of a treaty as a consequence of its breach) *(continued)* [1]

1. Mr. DE CASTRO (Spain), introducing his delegation's amendment (A/CONF.39/C.1/L.326), said that article 57 dealt with one of the most important points in the draft. It was based on the idea that in certain circumstances the performance of a treaty could upset the balance which should normally exist between the obligations of the contracting States.

2. His delegation hoped that the Drafting Committee would find a more satisfactory term than " *recusación* ", used in paragraph 3 (*a*) of the Spanish text of the article.

3. The Spanish amendment related to paragraph 3 (*b*). The rule stated in that sub-paragraph was reasonable; his delegation fully supported it, but feared that it was expressed in a manner open to an unduly narrow interpretation. For a treaty might contain provisions which, although not essential to the accomplishment of its object or purpose, were essential for one or more parties in respect of the obligations contracted. If that sub-paragraph was interpreted according to the rules laid down in article 27 of the draft, a breach of such provisions might not be invokable as constituting a material breach of the treaty. Instead of referring to the " provisions " of the treaty, it would be preferable to look to its tenor, in other words the obligations, rights and

[1] For the list of the amendments submitted, see 60th meeting, footnote 7.

faculties it had created. The Spanish amendment therefore proposed a return to the traditional principle *inadimplenti non est adimplendum*. The amendment was intended to exclude minor, incidental or purely negligent infringements from the grounds which could be invoked under article 57.

4. The amendment divided sub-paragraph (*b*) into two separate sub-paragraphs: a new sub-paragraph (*b*) referring to obligations and a sub-paragraph (*c*) referring to rights and faculties. Sub-paragraph (*c*) contained an idea which might arouse some misgivings; but the Spanish delegation thought it essential to transfer to the international plane the idea of abuse of rights. That idea was inseparable from the notion of good faith, which had already prevented so many abuses in internal law. The *Tacna-Arica Arbitration* [2] exemplified the view reproduced in paragraph (4) of the commentary that the abuse of a right created a situation which frustrated the operation of the treaty.

5. The Spanish amendment took account of the fact that one of the purposes of treaties was to help maintain international peace; if an abuse of a right created by a treaty was so serious as to justify its being held unlawful, it must be regarded as a material breach of the treaty. For example, the performance of a trade or assistance treaty might be a pretext for economic subjection or political interference. The amendment would therefore safeguard the principle of the independence and equality of States.

6. The ideas he had outlined might already be embodied in the International Law Commission's wording, but the Spanish delegation was proposing a formula which would prevent any misunderstanding and make it necessary to interpret a treaty in terms of good faith.

7. Mr. WOZENCRAFT (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.325), explained that it was intended to reconcile the principles stated in article 57 with the practical problem of ascertaining the consequences of a material breach.

8. The International Law Commission had drafted the article with great care. The text and commentary served the cause of the stability of treaty relations by providing that a material breach could be invoked by a party to terminate a treaty or suspend its operation, but did not produce that effect in itself. Article 57 did not, however, indicate whether a material breach could be invoked to terminate or suspend the entire treaty or only part of it. According to the commentary, the injured party could choose either possibility. The United States delegation thought it would be helpful to introduce into the article itself a rule that the injured party had no right to make a response disproportionate to the nature of the breach. For example, delay in payment for goods supplied under a treaty could be a material breach, yet it might be disproportionate and unfair to invoke it to terminate the treaty where there were circumstances excusing the delay.

9. The United States amendment was based on a principle which the Committee had already discussed [3] in connexion with the amendments to article 41 submitted by Hungary (A/CONF.39/C.1/L.246) and the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1), which applied the provisions of article 41, paragraph 3, to the injured party's choice under article 57. The Expert Consultant had pointed out various difficulties raised by those amendments,[4] which several delegations had supported. The United States amendment to article 57 would achieve the same purpose—that the response must be proportionate to the breach—without disturbing the balance established by article 57 or changing its relationship to article 41.

10. The United States amendment emphasized two factors relevant in determining a just proportion between the breach and the response to it. The words "considering the nature and extent of the breach" provided criteria for testing the seriousness of the breach. The words "the extent to which the treaty obligations have been performed" were intended to permit evaluation of the breach in the context of past and future operation of the treaty. His delegation was not especially attached to the precise wording it had proposed; if it involved difficulties, he would have no objection to its being revised by the Drafting Committee.

11. His delegation was not seeking to condone or encourage any kind of breach, but it thought the interests of all nations would be served by introducing an element of fairness into an article on which the maintenance of all treaty relations depended.

12. Mr. BINDSCHEDLER (Switzerland) said he thought article 57 was extremely well drafted. The Swiss delegation was prepared to support the article, but wished to propose an oral amendment which it regretted that it had been unable to submit in writing within the prescribed time. For humanitarian reasons, it was anxious that the rule stated in article 57 should not disturb a whole series of conventions relating to protection of the human person. The Geneva Conventions for the protection of war victims [5] prohibited reprisals against the protected persons and were virtually universal, but they were still the subject of some doubts and reservations. Encouragement was given to the conclusion of bilateral or partial agreements or the registration with a neutral intermediary of concordant declarations by States which were not parties to the Conventions, but expressed the wish to observe some of their principles or essential provisions. Such agreements should not be exposed to termination or suspension that would endanger human life. In addition, there were conventions of equal importance concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general; even a material breach of those conventions by a party should not be allowed to injure innocent people. That idea, to which the Swiss delegation attached particular importance, could be expressed in a paragraph 5 added to article 57, which might read:

> "The foregoing rules do not apply to humanitarian conventions concluded with or between States not bound by multilateral conventions for the protection

[2] *Reports of International Arbitral Awards*, vol. II, p. 921.

[3] See 41st and 42nd meetings.

[4] See 42nd meeting, para. 40.

[5] United Nations, *Treaty Series*, vol. 75, p. 2.

of the human person which prohibit reprisals against individuals. Agreements of this kind must be observed in all circumstances."

13. He hoped the Drafting Committee would take that suggestion into consideration.

14. Mr. MENDOZA (Philippines) reminded the Committee that at the 42nd meeting,[6] in his statement on article 41, he had emphasized that the specific mention of article 57 in article 41, paragraph 2, implied that the requirements of separability laid down in article 41, paragraph 3, need not be complied with when a treaty was terminated in part, or its operation was suspended in part, under article 57. The Expert Consultant had confirmed at the time that that was indeed the International Law Commission's intention in explicitly mentioning article 57 in article 41, paragraph 2.

15. On the basis of that interpretation, under article 57 the innocent State would have an unqualified right not only to terminate the treaty or suspend its operation in part, but freely to choose which part of the treaty it wished to terminate or suspend. His delegation had great difficulty in recognizing the correctness of that rule. Although the guilty State under article 57 should probably suffer some onerous consequences for its action, it would be neither reasonable nor practical, if the innocent State elected to terminate the treaty or suspend its operation only in part, to allow it to choose for termination or suspension of operation clauses which were not separable from the rest of the treaty.

16. Consequently he could not accept article 57 unless the right to terminate or suspend the operation of part of a treaty only was made subject to the conditions laid down in article 41, paragraph 3. That was the purpose of the Hungarian amendment (A/CONF.39/C.1/L.246) and the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) to article 41, which his delegation could support.

17. His delegation would be able to support the United States amendment (A/CONF.39/C.1/L.325) to the extent that it was intended to apply article 41, paragraph 3, to the partial termination or suspension of operation of a treaty. But the text of that amendment would seem to have the effect of giving the innocent party only a limited choice between total termination or suspension and partial termination or suspension of the treaty. It followed from the definition of a " material breach " in article 57, paragraph 3, however, that the " nature and extent " of the breach would always be so serious as to entitle the innocent party to terminate or suspend the operation of the entire treaty if it so desired. The United States amendment appeared to suggest the possibility of a " material breach " not serious enough to constitute a material breach as defined in the article itself. His delegation doubted whether that was compatible with paragraph 3 of the draft article.

18. The Spanish amendment (A/CONF.39/C.1/L.326) and, in particular, the sub-paragraph (*c*) it proposed to add to paragraph 3, might make the concept of a material breach too wide. If the abuse of the rights and faculties granted by the treaty was grave and continuous, it would amount to the violation of a provision essential to the accomplishment of the object and purpose of the treaty. If the acts performed were in obvious abuse of the rights and faculties granted by the treaty, and amounted to the performance of acts not contemplated by the treaty, then the situation might well fall within the scope of paragraph 3.

19. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that article 57 expressed a well-known notion: a party had the right to terminate a treaty or to suspend its operation in the event of a material breach of the treaty by another party. That rule applied particularly to bilateral treaties, but it also held good for multilateral treaties. If a multilateral treaty suffered a material breach or was ignored for so long that it no longer operated, the other parties could consider themselves released from their obligations. Certain multilateral treaties, however, for reasons connected with their particular nature, contained clauses prohibiting the parties from refusing to apply the treaty even in the event of its breach by another party. For example, the Geneva Conventions of 1949 contained an article providing that no party might absolve itself from its liabilities as a result of a breach of the preceding articles. Since the very purpose of those Conventions was to render war more humane, their operation could not be left at the mercy of a breach by one party.

20. In the case of bilateral treaties, the right to terminate a treaty or to suspend its operation existed only when the treaty had been violated gravely, maliciously and deliberately. Breach by inadvertence afforded no grounds.

21. The text of article 57 proposed by the International Law Commission was acceptable and he supported it.

22. His delegation understood the intentions of the Venezuelan amendment (A/CONF.39/C.1/L.318) but could not support it, because it went too far. Nor could it support the United States amendment (A/CONF.39/C.1/L.325) or the Spanish amendment (A/CONF.39/C.1/L.326).

23. The amendment just proposed orally by the Swiss representative seemed unnecessary. Many treaties prohibited denunciation even in the event of a breach. Furthermore, article 57, paragraph 4, reserved the rights of the parties under any provision in the treaty applicable in the event of a breach.

24. His delegation would support the Finnish amendment (A/CONF.39/C.1/L.309), which improved the text.

25. Mr. PHOBA (Democratic Republic of the Congo) said that the text of article 57 proposed by the International Law Commission was concise, clear and accurate; it stated the problem well and should be supported.

26. In paragraphs 1 and 2 it would be advisable to replace the word " entitles " by the words " may entitle ", so as to make the right conferred on the parties less than absolute. That expression would be in keeping with the ideas expressed in paragraph (1) of the commentary, which used the words " may give rise ". The Drafting Committee might consider making that change.

27. In paragraph 4 it would be better to reverse the clauses so as to make " any provision in the treaty applicable in the event of a breach " the subject of the sentence.

[6] Para. 12.

28. His delegation supported neither the Finnish amendment nor the Venezuelan amendment; both adversely affected the meaning and spirit of the article.

29. In the event of a vote, it would support the text proposed by the International Law Commission.

30. Mr. ALVAREZ TABIO (Cuba) said he thought article 57, which was very important, was beyond reproach in substance, but open to improvement in wording.

31. His delegation supported the Spanish amendment (A/CONF.39/C.1/L.326), which made the text more satisfactory as to terminology and legal technique. The doctrine of the abuse of a right was universally accepted. Sub-paragraph 3 (*c*) in that amendment was a necessary confirmation of sub-paragraph 3 (*b*). The obligations created by the treaty must be fulfilled in good faith in accordance with the object and purpose of the treaty, and, similarly, the rights and faculties granted by the treaty must be exercised in a manner which was not contrary to the object and purpose of the treaty.

32. The United States amendment (A/CONF.39/C.1/L.325) contained some new elements which his delegation did not find acceptable. In the first place it stated characteristics of a material breach in paragraph 1, whereas such a breach was defined in paragraph 3, and the idea that the nature and extent of the breach must be considered was already implicit in paragraph 3 (*b*). Furthermore, the extent to which the treaty obligations had been performed was a criterion which must be taken into account, not in order to determine the existence of a breach, but in order to determine its legal consequences —a matter dealt with in article 66.

33. For the reasons already given, the Finnish amendment was less comprehensive than the Spanish amendment.

34. The word "*recusación*", in the Spanish text of paragraph 3 (*a*), did not seem ill-chosen, but it could be replaced by the word "*rechazo*", which was used in the Venezuelan amendment.

35. Mr. JACOVIDES (Cyprus) said he approved of the principle underlying article 57. His delegation agreed with the International Law Commission that, to justify denunciation of a treaty, the breach should be of a serious character. His delegation accepted the expression "material breach", but thought the notion would be better defined if the Finnish amendment (A/CONF.39/C.1/L.309) was adopted.

36. The Spanish amendment (A/CONF.39/C.1/L.326) expressly added an important and pertinent element which, in his delegation's opinion, was already implicit in the text; that would serve to remove any doubts which might remain, and his delegation therefore supported the amendment.

37. Mr. JIMENEZ DE ARECHAGA (Uruguay), said that he approved of article 57, but it raised two difficulties, to which some of the amendments drew attention.

38. One of those difficulties arose in paragraph 1: it concerned the relationship between article 57 and article 62. A party which invoked a ground for the application of article 57 must do so by the procedure laid down in article 62. His delegation acknowledged the need for that procedure: there must be agreement between the parties that a ground existed for terminating the treaty or suspending its operation. But it was difficult to accept the procedure laid down in article 62 with regard to the application of article 57. A State which alleged a breach of a treaty by other States would normally do so in good faith; it would really be the victim of a breach of the treaty by another party. It could not, however, immediately cease to apply the treaty; it would have to initiate the procedure laid down in article 62 and await the result before being relieved of its obligations. That arrangement was not satisfactory, for it disregarded the principle *inadimplenti non est adimplendum*. The Venezuelan amendment (A/CONF.39/C.1/L.318) was designed to solve that problem, but it was too drastic. Both the possible cases must be taken into account: that in which the allegation of a breach was made in good faith, and that in which it was disingenuous. Perhaps the Committee would be able to settle that point when it took up article 62.

39. The second difficulty related to paragraph 3 (*b*): the rule laid down was unduly restrictive. For example, where a treaty contained an arbitration clause, if one party ceased to apply that clause, the other party would be unable to invoke a violation of "a provision essential to the accomplishment of the object or purpose of the treaty"; yet it was a grave breach which ought to come under the rule in article 57. The Spanish amendment (A/CONF.39/C.1/L.326) and the Finnish amendment (A/CONF.39/C.1/L.309) were designed to remedy that defect.

40. His delegation approved of the text proposed by the International Law Commission, but hoped that the Conference would endeavour to overcome those two difficulties, perhaps on the basis of the amendments submitted.

41. Mr. RATTRAY (Jamaica) said he shared the view of the International Law Commission that a material breach was a ground that could properly be invoked for terminating a treaty or suspending its operation. He also thought the Commission had been right to deal with bilateral treaties and multilateral treaties separately.

42. With regard to bilateral treaties, however, his delegation considered that a material breach according to the definition contained in paragraph 3 of the article was predicated upon circumstances which could only have the effect of giving the right to wholesale termination or suspension of the treaty. According to the régime provided for in article 41, however, separability was denied when the essential basis of the treaty was affected. How then according to article 57 could an injured party consistently be given the right to terminate or suspend the treaty in part only when the material breach affected a provision "essential to the accomplishment of the object and purpose of the treaty"?

43. If those provisions of the convention were to be consistent, the definition of a material breach should at least be freed from the words "essential to the accomplishment of the object or purpose of the treaty". His delegation would welcome an explanation from the Expert Consultant as to how the Commission had harmonized the notion of invoking a material breach of a bilateral treaty as a ground for terminating a part only of the treaty, in the light of the definition of material breach contained in article 57 of the convention.

44. In its vote on the amendments, his delegation would be guided by the explanations given during the debate.

45. Sir Francis VALLAT (United Kingdom) said he thought that article 57 would be difficult to improve. The doctrine of termination or suspension of operation of a treaty as a consequence of a material breach was based on the practice of States and customary international law; thus article 57 codified existing law. His delegation could not accept the amendments that tended to weaken that article. In particular, it could not support the amendments submitted by Finland (A/CONF.39/C.1/L.309) and Spain (A/CONF.39/C.1/L.326), which added new grounds for termination or suspension of the operation of a treaty.

46. He did not know why, in paragraph 2 (*b*) of the article, the Commission had used the expression "A party specially affected by the breach ", whereas in paragraph 2 (*c*) it had referred to a breach which " radically changes the position of every party ". The latter formula seemed more specific and clearer, and on the whole, preferable. That point could be brought to the attention of the Drafting Committee.

47. Another point was that separability was provided for in paragraph 1 and in paragraph 2 (*b*), whereas it was not provided for in paragraph 2 (*a*). As it had already said in connexion with article 41, his delegation saw no reason why the conditions set out in article 41, paragraph 3 should not also apply to article 57, and thought that the reference to article 57 in article 41, paragraph 2, was inappropriate.[7] Those points, together with the United States amendment (A/CONF.39/C.1/L.325), should be studied in conjunction with the questions raised concerning article 41 which had not yet been settled. His delegation would therefore prefer that the amendments to article 57 should not be put to the vote at that stage.

48. He stressed the importance of article 57, paragraph 4, but pointed out that the article could easily lead to abuses. Hence its application, like that of other articles in the draft, particularly those in Part V, called for appropriate safeguards. That point could be considered in connexion with article 62 on procedure.

49. The United Kingdom delegation supported article 57 as a whole, as drafted by the International Law Commission, with certain reservations regarding procedure.

50. Mr. MAKAREWICZ (Poland) said that the rule stated in article 57 was generally recognized, but it raised two questions: first, the extent of the rights of innocent parties and the conditions for the exercise of those rights, and second, the nature of the breach entitling innocent parties to act.

51. With regard to the first question, his delegation approved of the International Law Commission's rejection of the idea that a breach, however serious, could *ipso facto* put an end to a treaty. The commentary to the article gave convincing reasons for not recognizing the right to terminate a treaty arbitrarily. Consequently, his delegation could not support the Venezuelan amendment (A/CONF.39/C.1/L.318), which followed the opposite course. Among other arguments against that amendment, it could be said that the innocent party might not be interested in terminating the treaty, but in securing its proper performance.

52. As to the second question, the International Law Commission had rightly taken the view that it was only material breach that entitled innocent parties to invoke the breach as a ground for terminating or suspending the treaty. His delegation thought that the Commission had given a satisfactory definition of a " material breach of a treaty ".

53. The Spanish amendment (A/CONF.39/C.1/L.326) did not seem to add anything to the definition. The other amendments appeared to deal mainly with points of drafting and could therefore be referred to the Drafting Committee.

54. His delegation had listened with interest to the Swiss representative's suggestion concerning treaties of a humanitarian character: it deserved careful consideration.

55. Mr. KEARNEY (United States of America) said it had been asked whether a material breach of a treaty should not always give the injured party the choice between total termination or suspension of the treaty and partial termination or suspension. His delegation thought that the question should be settled according to each individual case and that it was practically impossible to lay down a strict rule which would allow complete freedom of choice. That was why the United States delegation had submitted its amendment (A/CONF.39/C.1/L.325). In its opinion, a decision should be taken in each case that was fair to both parties to the treaty

56. With regard to the suggestion made by the United Kingdom representative, his delegation recognized that its amendment was linked with the question of separability and had no objection to its being considered in connexion with article 41 if the Committee of the Whole so desired.

57. Mr. WERSHOF (Canada) said he could not support the Venezuelan amendment (A/CONF.39/C.1/L.318).

58. He was aware of the distinction made in article 57 between the right of all the parties, if in unanimous agreement, and the right of a party specially affected by the breach, but he thought there were good reasons for giving the former greater rights, namely, the choice of either terminating the treaty or suspending its operation.

59. The Venezuelan amendment proposed several changes liable to weaken the *pacta sunt servanda* rule. Instead of the right to invoke a breach as a ground for terminating a treaty, which clearly brought in the procedure prescribed in article 62, it seemed to grant the innocent party an absolute right to terminate or suspend the treaty. Moreover, the replacement of the word "radically" by the word " substantially " in paragraph 2 (*c*) wrongly relaxed the conditions for the application of that subparagraph.

60. On the other hand, his delegation was in favour of the United States amendment (A/CONF.39/C.1/L.325), which, by introducing the idea of proportionality of the response to a breach, could strengthen respect for treaty relationships. Otherwise, his delegation supported the International Law Commission's text.

61. Mr. MARESCA (Italy) said that the International Law Commission deserved great credit for having given suitable form to the very old principle that a party to

[7] See 41st meeting, para. 13.

a treaty was not bound to apply it with respect to another party which did not do so itself. That principle had been recognized in State practice and international law; but, naturally, it could not be applied automatically and radically, and the Commission had rightly specified that there must be a material breach. The notion of a material breach needed clarification, which was provided by some of the proposed amendments to article 57. The Finnish amendment (A/CONF.39/C.1/L.309), for example, would add the idea that the breach must be " of a serious character "; a similar expression was used in the Geneva Conventions. The formula proposed in the United States amendment (A/CONF.39/C.1/L.325) might also be worth adopting. The Venezuelan amendment (A/CONF.39/C.1/L.318) made the text of the article more systematic; in paragraph 2 (*a*) it deleted the clause which was tantamount to granting a right of veto inadmissible in multilateral treaties, and in paragraph 3 (*a*) it replaced the words " repudiation of the treaty not sanctioned by the present articles " by the words " unjustified repudiation of the treaty ", which was an improvement. Those amendments should be taken into consideration by the Drafting Committee.

62. His delegation was in favour of the Spanish amendment (A/CONF.39/C.1/L.326); the two criteria it introduced would make a useful contribution towards a better definition of the complex notion of a material breach of an international agreement. The amendment which deserved the most careful attention and came closest to the Italian delegation's viewpoint was that submitted orally by the Swiss representative. There were conventions to which the general principle he had mentioned at the beginning of his remarks could not be applied, and they must be observed by the parties even if another party failed to observe them. The Geneva Conventions and the 1961 Vienna Convention on Diplomatic Relations [8] were examples. He hoped therefore that the oral amendment proposed by Switzerland could be taken into consideration.

63. Mr. HARRY (Australia) said his delegation approved of article 57 on the whole and preferred the International Law Commission's wording to the proposed amendments.

64. He would like some clarification on one point. Paragraph 2 was confined to a material breach by one of the parties. As it explained in paragraph (7) of the commentary to article 57, the International Law Commission had " considered it necessary to distinguish between the right of the other parties to react jointly to the breach and the right of an individual party specially affected by the breach to react alone ". That implied that it was always possible to distinguish clearly between the " other parties " whose unanimous agreement was required under paragraph 2 (*a*), and the party which had committed the material breach; but in fact several parties might be guilty of a material breach of a treaty at the same time and there might be some collusion in the material breach of a multilateral treaty. His delegation would like to know whether the Commission had considered that possibility. Perhaps the point should be taken up in connexion with article 62.

65. Mr. DE CASTRO (Spain), replying to the point raised by the Philippine representative concerning sub-paragraph (*c*) of the Spanish amendment (A/CONF.39/C.1/L.326), said that the purpose of the amendment was to reaffirm the principle of good faith and specify the conditions under which a contracting party could seek the termination of a treaty on the ground of its breach by another party. His delegation considered that the breach must be material, unlawful and have the effect of upsetting the balance between the obligations established by the treaty, either because one party had not fulfilled the obligations assumed or because it had exercised the facilities conferred on it by the treaty in a manner contrary to the letter and spirit of the treaty.

66. The Spanish amendment was not intended to destroy the principle stated in article 57, but simply to give it the desired scope. The aim should be that the treaty could not be used as a pretext for interfering with the freedom and independence of a contracting party. The Spanish delegation believed that a party committed a material breach not only when it ceased to apply the provisions of a treaty, but also when it applied them unjustifiably.

67. Mrs. ADAMSEN (Denmark) said her delegation fully supported the oral amendment proposed by the Swiss representative, which would add to article 57 a new paragraph 5 concerning humanitarian conventions. Some speakers had maintained that the inclusion of such a provision was not absolutely necessary from the legal point of view. But even if that was so, the Danish delegation believed that the principle was of such fundamental importance that it should be stated in article 57 in any case.

68. With regard to the other amendments, the Danish delegation preferred article 57 as it stood.

69. Mr. DE BRESSON (France) said his delegation was in favour of article 57 as drafted by the International Law Commission. Consequently, it had difficulty in supporting the amendments submitted by Finland (A/CONF.39/C.1/L.309), Spain (A/CONF.39/C.1/L.326) and Venezuela (A/CONF.39/C.1/L.318), which would detract from the precision with which the criteria for determining a material breach of a treaty were defined, and would thus impair the stability of treaty undertakings. With regard to the United States amendment (A/CONF.39/C.1/L.325), the French delegation was not opposed to it in so far as it sought to define more clearly the notion of proportionality between the breach and the response of the injured party; but there must be an assurance that the principle would operate only in the event of a material breach and would not replace the limitation very wisely prescribed by the Commission. Perhaps that was a question of drafting.

70. Sir Humphrey WALDOCK (Expert Consultant) said that the definition of a material breach was one of the fundamental elements determining the acceptability of article 57. As he had already explained, the International Law Commission had had to strike a balance between the need to preserve the stability of treaties and the need to ensure reasonable protection of the innocent victim of a breach. It had tried to define a material breach fairly strictly.

71. The first element of the proposed definition was the repudiation of the treaty specified in paragraph 3 (*a*). One delegation apparently regarded that element as completely pointless on the supposition that the treaty would already be at an end. But if a treaty was repudiated

[8] United Nations, *Treaty Series*, vol. 500, p. 95.

the injured party had the choice of two courses: it could invoke the breach to terminate the treaty or try to assert its right to the performance of the treaty. That point was particularly important if there was a possibility of recourse to an international tribunal; the convention should therefore safeguard the right of the injured party to treat the repudiation simply as a breach.

72. The more general, and hence more important, provision was in paragraph 3 (*b*). It had been proposed during the discussion that new elements should be added to the notion of a material breach; it had also been proposed that the drafting should be improved. The Commission did not claim to have found the perfect formula and would welcome any improvement in the text.

73. With regard to the amendments intended to improve the definition of a material breach, his own feeling was that in so far as those amendments were really acceptable —that was to say, where they did not widen the notion of a material breach excessively—the ideas they expressed were already embodied in the wording of paragraph 3.

74. For example, if sub-paragraph (*c*) of the Spanish amendment was applied to the Vienna Convention on Diplomatic Relations, the results might be too far-reaching. Would the slightest abuse of the facilities, privileges and immunities provided for in that Convention create a right to invoke a material breach? The notion of a material breach must be limited by a reference to the essential purposes of the treaty.

75. Similarly, it was doubtful whether the Finnish amendment (A/CONF.39/C.1/L.309) could be of much assistance, since the " serious character " of the breach would have to be judged in relation to some criterion and that criterion would naturally seem to be the essential object and purpose of the treaty.

76. Every delegation must sympathize with the proposal made by the Swiss representative during the discussion for a new paragraph excluding certain categories of humanitarian conventions from the application of article 57. He was bound, however, to draw attention to certain difficulties in connexion with that proposal. Many of the humanitarian conventions in question, and notably the Geneva Conventions, contained clauses permitting their denunciation merely by giving notice without stating any reason; it might therefore seem strange to exclude any possibility of suspension or termination as a reaction to a material breach. The question of breaches of humanitarian conventions of that kind raised very delicate moral and legal issues. He doubted whether those issues could easily be resolved in the context of the rules regarding the rights arising from breach. The Commission had sought to cover problems of that kind rather in article 40, under which the termination or suspension of a treaty did not in any way impair the duty of any State to fulfil any obligation in the treaty to which it was subject under any other rule of international law. Rules in the treaty which were also obligatory under customary international law and which were rules of *jus cogens* would thus continue to be binding even in the event of a treaty termination on breach.

77. The CHAIRMAN said he would put the proposed amendments to article 57 to the vote, beginning with that part of the Venezuelan amendment (A/CONF.39/C.1/L.318) which related to paragraph 1.

78. Sir Francis VALLAT (United Kingdom) said that the Venezuelan amendment was unacceptable to his delegation. He would therefore vote against each paragraph of it successively.

79. Mr. RATTRAY (Jamaica) said his delegation had some doubts about the exact meaning of the term " material breach ". It would therefore abstain from voting.

The Venezuelan amendment to paragraph 1 was rejected by 52 votes to 4, with 34 abstentions.

The Venezuelan amendment to paragraph 2 was rejected by 51 votes to 3, with 38 abstentions.

The Venezuelan amendment to paragraph 3 was rejected by 48 votes to 5, with 35 abstentions.

The Finnish amendment (A/CONF.39/C.1/L.309) was rejected by 33 votes to 14, with 41 abstentions.

The Spanish amendment (A/CONF.39/C.1/L.326) to *paragraph 3* (b) *was rejected by 56 votes to 10, with 27 abstentions.*

The Spanish amendment (A/CONF.39/C.1/L.326) adding a new sub-paragraph (c) *to paragraph 3, was rejected by 63 votes to 6, with 20 abstentions.*

80. The CHAIRMAN said that the United States amendment (A/CONF.39/C.1/L.325) would be examined in connexion with article 41. The Swiss proposal had not been introduced in writing as required by the rules of procedure, and he asked the Committee what action it wished to take on the matter.

81. Mr. VEROSTA (Austria) said that, despite the difficulties to which the Expert Consultant had referred, his delegation was in favour of adopting the Swiss proposal. The Drafting Committee could perhaps be asked to insert a provision giving effect to it in article 57.

82. Mr. WERSHOF (Canada) said he thought the Committee of the Whole could not take a decision on such an important amendment until it had been submitted in writing. The Committee might perhaps authorize the Swiss delegation to submit its amendment in the proper form, in which case it could be considered at a subsequent meeting.

83. Sir Francis VALLAT (United Kingdom) said he thought most of the members of the Committee were in favour of the Swiss delegation's proposal. It seemed very difficult, however, to find a satisfactory definition of the type of treaty concerned. It would be easy to use the word " humanitarian ", of course, but to what treaties would that description properly apply? Instead of an amendment to article 57, the Swiss delegation might perhaps consider submitting a resolution on the subject in plenary.

84. Mr. RUEGGER (Switzerland) asked whether it might not be possible to instruct the Drafting Committee to examine the question. An alternative would be to authorize the Swiss delegation to submit a draft of a new article, which could be discussed after all the other articles whose consideration had been deferred. The idea was not easy to express, but it would be desirable for it to appear in the convention. The Swiss delegation could also accept the suggestion made by the United Kingdom representative.

85. Mr. FATTAL (Lebanon) said that so far only humanitarian conventions had been mentioned, but he

wondered what the position would be with regard to general multilateral treaties containing principles of *jus cogens*.

86. The CHAIRMAN suggested that article 57 should be referred to the Drafting Committee.

It was so agreed.[9]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

87. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 11, 13, 14 and 15 as adopted by the Drafting Committee.

Article 11 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) [10]

88. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 11 had been adopted by the Drafting Committee:

" Article 11

" 1. The consent of a State to be bound by a treaty is expressed by ratification when:

" (*a*) the treaty provides for such consent to be expressed by means of ratification;

" (*b*) it is otherwise established that the negotiating States were agreed that ratification should be required;

" (*c*) the representative of the State has signed the treaty subject to ratification; or

" (*d*) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

" 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification."

89. No important changes had been made in the article by the Drafting Committee. As in article 10, and for the same reasons, it had deleted the words " in question " after the word " State " in sub-paragraphs (*c*) and (*d*) of paragraph 1. It had found that that change did not alter the substance of the article and removed certain translation difficulties.

90. The Drafting Committee had been unable to accept the amendments submitted by Finland (A/CONF.39/C.1/L.60) and Spain (A/CONF.39/C.1/L.109). The Finnish amendment proposed an order which had been judged less logical than that adopted by the International Law Commission. With regard to the Spanish amendment, the Drafting Committee had thought that ratification, which was a very important means of expressing a State's consent to be bound, should be the subject of a separate sub-paragraph.

91. Mr. BARROS (Chile) criticized the use of the verb " *constar* " in the Spanish text of articles 11-13 because in his opinion it did not have the same meaning as the French word " *établir* " or the English word " establish ". In view of the comments of the Expert Consultant on the meaning of the words " unless it is established " in article 53,[11] not merely a drafting point but a question of substance might be involved.

92. The CHAIRMAN said that the question raised by the Chilean representative would be examined by the Drafting Committee. He invited the Committee of the Whole to approve the text of article 11 submitted by the Drafting Committee.

Article 11 was approved.

Article 12 (Consent to be bound by a treaty expressed by accession)

93. The CHAIRMAN announced that the Committee of the Whole would not discuss article 12 at that meeting, as it was one of the articles whose consideration had been deferred.[12]

94. Mr. BARROS (Chile) said that in sub-paragraph (*c*) of article 12, the Spanish words " *hayan acordado* " and the English words " have agreed " had been duly translated by the words " *sont convenues* ", which was the normal translation, whereas in sub-paragraph (*b*) they had been translated by the words " *entendaient accepter* ". It would be interesting to know whether there was any reason for using the latter expression, which was not to be found anywhere else.

Article 13 (Exchange or deposit of instruments of ratification, acceptance, approval or accession) [13]

95. Mr. YASSEEN, Chairman of the Drafting Committee, said the Drafting Committee had made no change in the International Law Commission's text of article 13. It had rejected the Polish amendment (A/CONF.39/C.1/L.93/Rev.1), which would have introduced provisions making the same stipulations about consent expressed by signature and by exchange of instruments as were made in articles 10 and 10 *bis* respectively. The Drafting Committee thought those provisions were superfluous and would complicate the drafting of article 13 unnecessarily. Although there was some doubt about the time when consent expressed by one of the complicated procedures referred to in article 13 was established, that was not true of consent expressed by signature or exchange of instruments.

96. The Drafting Committee had not thought it appropriate to add the words " or instrument " after the word " treaty " as proposed in the Canadian amendment (A/CONF.39/C.1/L.110).

97. The CHAIRMAN invited the Committee of the Whole to approve the text of article 13 submitted by the Drafting Committee.

Article 13 was approved.

Article 14 (Consent relating to a part of a treaty and choice of differing provisions)

98. Mr. YASSEEN, Chairman of the Drafting Committee, said that, at the 18th meeting, the Committee of the Whole had approved the text of article 14 and had referred it to the Drafting Committee. In view of the opening phrase of the article, referring to the provisions on reservations, the Drafting Committee had decided

[9] For resumption of discussion, see 81st meeting.

[10] For earlier discussion of article 11, see 16th, 17th and 18th meetings.

[11] See 59th meeting, para. 45.

[12] See 18th meeting, paras. 28-32.

[13] For earlier discussion of article 13, see 18th meeting.

not to consider it until it had examined articles 16 and 17. After examining those articles, it had decided that the text of article 14 required no change.

99. The CHAIRMAN invited the Committee of the Whole to confirm its approval of article 14.

Article 14 was approved.

Article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force) [14]

100. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 15 adopted by the Drafting Committee read as follows:

"*Article 15*

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

"(*a*) it has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

"(*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

101. The Drafting Committee had made several drafting changes in article 15, all in the introductory part of the article. The Committee of the Whole had decided to delete sub-paragraph (*a*) and in view of that decision the Drafting Committee had thought fit to delete the word "proposed" before the word "treaty", since without sub-paragraph (*a*) only signed or ratified treaties would be involved. In the French text, the Drafting Committee had replaced the words "*est obligé*" by the word "*doit*" and in the Spanish text it had used the word "*deberá*"; the English words "is obliged" had not been changed. The Drafting Committee had replaced the words "acts tending to frustrate the object of a treaty" by the words "acts which would defeat the object and purpose of a treaty". It wished to emphasize that that was a purely drafting change, made in the interests of clarity. It had added the word "purpose" to the word "object" because the expression "object and purpose of the treaty" was frequently used in the convention. The absence of the word "purpose" in the introductory phrase of article 15 might lead to difficulties in interpretation. The change in no way affected the substance of the provision and did not widen the obligation imposed on States by article 15.

102. Mr. EVRIGENIS (Greece) said he thought that in the French text it would be advisable, from the drafting point of view, to place the word "*lorsque*" at the end of the introductory phrase, so as to avoid having to repeat it in sub-paragraphs (*a*) and (*b*). That also applied to article 12.

103. Mr. SINCLAIR (United Kingdom) said that his delegation had proposed the deletion of article 15 because it had had some difficulty in accepting sub-paragraph (*a*) and the introductory phrase. Since the Committee of the Whole had deleted sub-paragraph (*a*) and the Drafting Committee had amended the introductory phrase by deleting, *inter alia*, the words "tending to frustrate", the United Kingdom delegation could now support the article.

[14] For earlier discussion of article 15, see 19th and 20th meetings.

104. Mr. BARROS (Chile) said he regretted that the term "*malograr*" was still used in the Spanish text. It was not employed in its normal sense and corresponded neither to the English word "defeat" nor to the French word "*priver*". It would be preferable to use the word "*privar*" or "*frustrar*".

105. The CHAIRMAN invited the Committee of the Whole to approve the text of article 15 submitted by the Drafting Committee, subject to those comments.

Article 15 was approved.

106. Mr. BISHOTA (United Republic of Tanzania) observed that the articles submitted by the Drafting Committee had no titles.

107. The CHAIRMAN said that the Drafting Committee had deferred consideration of the titles of all the articles.[15]

The meeting rose at 6.15 p.m.

[15] See 28th meeting, para. 2.

SIXTY-SECOND MEETING

Thursday, 9 May 1968, at 8.40 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 58 (Supervening impossibility of performance)

1. The CHAIRMAN invited the Committee to consider article 58 of the International Law Commission's draft.[1]

2. Mr. SUAREZ (Mexico), introducing his amendment (A/CONF.39/C.1/L.330), said that in article 58 the International Law Commission had dealt with a particular case of *force majeure*, that of the disappearance or destruction of an object indispensable for the execution of the treaty. The very wide definition of a treaty given in article 2 covered a great variety of treaties, including those of a commercial or financial character, the performance of which might come up against many other cases of *force majeure*. He was thinking, in particular, of the impossibility to deliver an article by a given date owing to a strike, the closing of a port or a war, or of the possibility that a rich and powerful State, faced with temporary difficulties, might be obliged to suspend its payments. In such cases, the law should establish the rights of the parties and not rely on their mutual good will.

3. *Force majeure* was a well-defined notion in law: the principle that "no person is required to do the impossible" was both a universal rule of international law and a question of common sense. Its application had not caused courts any special difficulties and it was

[1] The following amendments had been submitted: Mexico, A/CONF.39/C.1/L.330; Netherlands, A/CONF.39/C.1/L.331; Ecuador, A/CONF.39/C.1/L.332/Rev.1.

unnecessary to draw up a list of the situations covered by that rule.

4. According to paragraph (3) of the International Law Commission's commentary to the article, such cases might be regarded simply as cases in which *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But not to incur responsibility for an act or its omission was to have the right of performance or non-performance of an act. If in the case of *force majeure* a State did not incur any responsibility, that was because so long as *force majeure* lasted, the treaty must be considered suspended.

5. If the notion of *force majeure* belonged not to the law of treaties but to the doctrine of responsibility, article 58 would not have a place in the draft convention. His delegation was of the opinion that a principle so important as that of *force majeure* should be included in the draft and should not be reduced to a particular case of which the practice of States furnished few examples.

6. Mr. GEESTERANUS (Netherlands) said that his delegation's amendment (A/CONF.39/C.1/L.331) proposed two changes in article 58. The first concerned the replacement, in the second line, of the words " for terminating it if " by the words " for terminating or withdrawing from the treaty if ", the wording used in article 59. That was a purely drafting change.

7. The second change was more important and its purpose was to state an exception to the rule laid down in the article. That exception derived from the general principle of law that a party could not take advantage of its own wrong. Article 59 expressly stated that exception, and there was no reason to proceed differently in article 58 when, according to paragraph (1) of the commentary to the article " Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into ".

8. Mr. GARCIA-ORTIZ (Ecuador) said that his amendment (A/CONF.39/C.1/L.332/Rev.1) was of a drafting nature. In his delegation's view, cases of the disappearance or destruction of an object of the treaty were not infrequent and should moreover be covered by a separate article, as they referred to situations different from those dealt with in article 59.

9. Nevertheless, impossibility of performance might also result from the non-existence of the object that was thought to exist at the time the treaty was entered into. The Ecuadorian amendment took account of that possibility.

10. Mr. ARIFF (Malaysia) said that a glance at article 58 showed that the rule embodied in it was based on the theory of frustration in the English law of contract. The International Law Commission had been right to provide for the termination of a treaty in the event of the permanent disappearance or destruction of the object of the treaty, but if the disappearance of the object was temporary, then the operation of the treaty was merely suspended. The Commission had also been right to reject the idea that the treaty would be terminated automatically and to provide instead that the impossibility of performance of a treaty could only be invoked as a ground for its termination. The reasons given in paragraph (5) of the commentary fully justified that solution.

11. Nevertheless, his delegation was in favour of adding a special clause to cover cases where the treaty had been partly performed before its termination. Although it appreciated the problems of equitable adjustment that might then arise, the Commission had explained in paragraph (7) of its commentary that it " doubted the advisability of trying to regulate them by a general provision in articles 58 and 59 ". That explanation was not satisfactory; the Expert Consultant might perhaps throw more light on it. If the Committee agreed to the principle of adding a new special provision, the Drafting Committee could be requested to draw up a second paragraph suitably worded.

12. Apart from that omission, his delegation supported the substance of article 58. It had not had time to submit a formal amendment to the wording of the article, but it hoped that the Drafting Committee would consider the possibility of making the following changes in the first sentence of that article: replace the expression " performing a treaty " by " performance " and replace the word " it " by " a treaty " after " for terminating " in the English text; add the words " and total " after the word " permanent "; insert the words " of the foundation " between the word " disappearance " and the word " or "; lastly, substitute the word " the " for the word " an " before the word " object ". The amended text would then read:

> " A party may invoke an impossibility of performance as a ground for terminating a treaty if the impossibility results from the permanent and total disappearance of the foundation or from the destruction of an object indispensable for the execution of the treaty."

13. With respect to the propos amendments, he agreeded with the substance of the Mexican amendment (A/CONF. 39/C.1/L.330), but was not in favour of changing the text as the idea was already implicit in it. Moreover, the proposed formulation seemed to narrow the scope of the draft. Nor did he favour the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1), since he did not see how the parties could have agreed in the first place with respect to a thing that did not exist at the time the treaty was concluded.

14. Lastly, his delegation supported the proposals in the Netherlands amendment (A/CONF.39/C.1/L.331), for which he considered there was good reason.

15. Mr. BRIGGS (United States of America) said he fully supported the principle set forth in article 58. He agreed with the International Law Commission that a supervening impossibility of performance and a fundamental change of circumstances were distinct grounds for invoking release from treaty obligations. The second case referred less to impossibility of performance than to unwillingness to perform. He also thought that the International Law Commission had been right to decide that that ground should be invoked, which implicitly brought in the procedure laid down in article 62. While it did not propose to submit a formal amendment, his delegation wished to draw attention to an inconsistency in the draft. Although the first sentence referred to an impossibility of performance resulting from permanent

disappearance or destruction, the second sentence appeared to imply that the so-called permanent disappearance or destruction might be only temporary. Accordingly, he suggested that the second sentence of the article should be redrafted to read: " If the object can be replaced or the treaty can be performed using an alternate means, the disappearance or destruction of its object may be invoked only as a ground for suspending the operation of the treaty ".

16. The expression " *force majeure* " which the Mexican amendment (A/CONF.39/C.1/L.330) proposed to introduce in article 58 lacked precision. The expression " impossibility of performance " amply covered that notion. His delegation supported the change proposed in the first part of the Netherlands amendment (A/CONF. 39/C.1/L.331). With regard to the second part of that amendment, the question was perhaps more one of responsibility. However, he had no objection to the addition of that paragraph. Lastly, in the light of the explanations given by the representative of Ecuador, the non-existence of the object would seem to be covered by a possible error.

17. Mr. KOUTIKOV (Bulgaria) said he regarded article 58 as bordering on the institutions of internal civil law. It seemed to be a striking example of the interpenetration of the principles and institutions of two very distinct disciplines: internal civil law and international law. In international law, the rule expressed in article 58 had a limited scope. Its subject was the impossibility of carrying out a treaty as a result of the final disappearance or destruction of an object indispensable for its execution. As in internal civil law, the rule applied to a corporeal object or objects, otherwise there could scarcely be either disappearance or destruction. His delegation therefore was in favour of the substance of article 58, but suggested that the Drafting Committee should consider the possibility of replacing the adjective " permanent " by " final ", because the disappearance or destruction of corporeal objects could not be temporary. Moreover, the French text of paragraph (1) of the commentary to the article used the adjective " *définitive* ".

18. His delegation did not support the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1), because if the non-existence of the object had been overlooked in good faith, the case was one of error, and if on the other hand the non-existence had been known but concealed, the case was one of fraud.

19. Nor did it support the Netherlands amendment (A/CONF.39/C.1/L.331), particularly the second part. The case envisaged was the disappearance or destruction of the object as objective events beyond the control of the party which was required to perform the action connected with the object. The new paragraph 2 proposed in the Netherlands amendment, however, introduced a purely subjective factor.

20. Lastly, the Mexican amendment (A/CONF.39/C.1/L.330) should be referred to the Drafting Committee, even if only to allow it to express an opinion on the necessity or advisability of expressly introducing the notion of *force majeure*. Article 58 confined itself and should confine itself to circumstances of *force majeure*, but solely within the limits prescribed by the text of the draft article.

21. Mr. MOUDILENO (Congo, Brazzaville) said he thought the amendments submitted by Mexico (A/CONF. 39/C.1/L.330) and Ecuador (A/CONF.39/C.1/L.332/ Rev.1) proposed sensible drafting changes. The Netherlands amendment (A/CONF.39/C.1/L.331) reflected the ideas which his own delegation would have expressed had it had time to introduce an amendment; it rightly included in article 58 the important point of the cause of the disappearance or destruction of the object, because there were some causes connected with a party's behaviour which should not entitle it to make use of the disappearance as a pretext for evading its obligations.

22. His delegation would have preferred article 58 to read:

> " 1. A party may, to terminate a treaty, invoke the impossibility of performing it as a result of the disappearance or final destruction of an element indispensable for the performance of the treaty.
>
> " 2. If the impossibility referred to in the foregoing paragraph is merely temporary, it may be invoked only with a view to suspending the operation of the treaty.
>
> " 3. The foregoing paragraphs shall not apply when the supervening impossibility of performance results from a breach by the party invoking them either of the treaty or of a different international obligation owed to the other parties to the treaty."

Such a formulation, which expressed the views he had outlined, would also, in his delegation's opinion, have the advantage of giving greater weight to article 58, which at present was so brief that it was somewhat overshadowed by the important articles 57 and 59. That oral proposal could be referred to the Drafting Committee.

23. Mr. ALVAREZ TABIO (Cuba) said he thought article 58 should cover the case of the non-existence of the object of a treaty. He therefore supported the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1).

24. He favoured the Mexican amendment (A/CONF.39/ C.1/L.330), but thought it necessary to take account of the specific case mentioned in article 58, namely, that the object in question must be one that was indispensable for the execution of the treaty and one whose absence, when established, would have immediate effect on the validity of the treaty.

25. He supported the first part of the Netherlands amendment (A/CONF.39/C.1/L.331), but thought that the second part was perhaps not essential, in view of the fact that the case covered by article 58 arose from an exceptional situation independent of the will of the parties. Moreover, he had been unable to understand the precise meaning of the paragraph in Spanish. If the object of the second part was to include a paragraph similar to paragraph 2 (*b*) of article 59, that might perhaps help to improve the wording of article 58.

26. Mr. DE BRESSON (France) said that his delegation approved of the existing wording of article 58, subject to drafting improvements, and had no objection to the change in paragraph 1 of the article proposed in the

Netherlands amendment (A/CONF.39/C.1/L.331). It had doubts, however, about the proposed new paragraph 2, which might be out of place in article 58.

27. He thought that the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1) dealt with an issue different from that covered by article 58 and referred rather to a case of error or fraud. The Mexican amendment (A/CONF.39/C.1/L.330) seemed to raise a more delicate problem. Article 58 dealt with a specific case of *force majeure*: one in which the disappearance or destruction of an object indispensable for the execution of a treaty could be objectively ascertained. The Mexican amendment, on the other hand, proposed that all cases of *force majeure* should be covered. The notion of *force majeure* was well known in internal law because many years of judicial practice had helped to define it and make it clear. His delegation was not convinced that the notion was equally clear in international law, and feared that its inclusion in article 58 would broaden the scope of the article and make its application more difficult. He thought it preferable therefore to confine the idea of *force majeure* to the case covered by article 58.

28. Mr. MAKAREWICZ (Poland) said he thought the Mexican amendment (A/CONF.39/C.1/L.330) did not seem necessary since articles 58 and 59 were complementary and seemed to leave no gaps. Further, the notion of *force majeure* would introduce an element of internal law hitherto foreign to international law, and he thought the wording of the article should continue to be based on objective factors.

29. The Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1) was of a drafting nature and should be referred to the Drafting Committee.

30. The first part of the Netherlands amendment (A/CONF.39/C.1/L.331) was a drafting change and should also be referred to the Drafting Committee.

31. The second part of that amendment was based on a perfectly sound principle, but too close a parallel should not be drawn between articles 58 and 59, because article 58 dealt solely with the case in which the object of a treaty had disappeared or had been destroyed permanently, and it was difficult to see how a treaty could be performed if its object no longer existed.

32. The justifiable concern of the Netherlands delegation might be taken into account in the context of State responsibility. Under article 69, however, the question of State responsibility had been excluded from the scope of the convention on the law of treaties.

33. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the aim of article 58 might to a certain extent and in some cases coincide with that of article 59, since the impossibility of performing a treaty could result from an alteration in a situation just as much as from a fundamental change of circumstances. The International Law Commission had rightly considered the need for a separate article dealing with the impossibility of performing a treaty owing to the permanent disappearance or destruction of its object. The distinction between articles 58 and 59 was sufficiently clear in a whole range of cases, particularly where the physical destruction or permanent disappearance of an actual object was in question. Article 58 could therefore be kept separate from article 59 in the draft convention. There was, however, a certain analogy between the two articles; the provision in paragraph 2 (*b*) of article 59 could apply if a party deliberately destroyed the object of the treaty, since the aim of that paragraph was to prevent a contracting party, acting in breach of the treaty or its international obligations, from contributing to the permanent disappearance or destruction of the object of the treaty and invoking that as a ground for demanding the invalidity of the treaty. He was therefore in favour of the Netherlands amendment (A/CONF.39/C.1/L.331) supported by the representative of the Congo (Brazzaville), which could help to improve the text of article 58 and should therefore be referred to the Drafting Committee. It should be pointed out that the question of State responsibility might of course arise as a result of unlawful acts by a party to a treaty with a view to the destruction of its object. That was a separate problem, however.

34. With regard to the Mexican amendment (A/CONF.39/C.1/L.330), he agreed with the Polish, French and United States representatives that the notion of *force majeure* as understood in the internal law of certain States had not been clearly defined and had no precise meaning in international law. Recourse to analogies taken from internal law should be avoided, particularly in international law. His delegation was therefore opposed to the Mexican amendment.

35. Mr. CHAO (Singapore) said he was not certain whether article 58 could prohibit a contracting party from invoking an impossibility of performing a treaty as a ground for terminating it, if that impossibility resulted from acts it had deliberately committed. Neither the commentary to article 58 nor the second part of the Netherlands amendment (A/CONF.39/C.1/L.331) specifically mentioned the point. The act of self-inducing an impossibility did not necessarily in every case entail a breach of the treaty or an international obligation. In those exceptional cases, that only occurred if the guilty party later attempted to use the self-induced impossibility to terminate the treaty. He supported the principle embodied in the Netherlands amendment, but said he would be grateful if the Expert Consultant would clarify that point.

36. Mr. GEESTERANUS (Netherlands) expressed his gratitude to the Cuban representative for drawing attention to the Spanish translation of the second part of the Netherlands amendment and explained that the purpose of the amendment was to introduce the same exception into article 58 as was provided in paragraph 2 (*b*) of article 59. The wording of the two clauses in both the articles should be the same. The correctness of the Spanish text could be examined by the Drafting Committee.

37. Mr. ALCIVAR-CASTILLO (Ecuador) said he did not regard the non-existence of an object as constituting a case of error or fraud, since the notion of error had a specific place in the general theory of law, particularly in that of civil law. Error referred to facts or situations for which special provision was made under article 45. The non-existence of an object came under the notion of the impossibility of performing the object, a notion quite distinct from error.

38. The contention of some delegations that his amendment was out of place in article 58 was justified; he agreed that the question involved in his amendment had a consequence quite distinct from that of the termination of a treaty as provided in article 58. The impossibility of performing the object entailed the non-existence of the treaty, since it rendered the treaty void *ab initio*.

39. In its written observations (A/CONF.39/6), his Government had requested the inclusion of an article providing that a treaty was void if its performance was impossible by reason of the non-existence of something provided for at the time of the conclusion of the treaty and essential for its execution. He would not insist on his amendment being put to the vote, although he reserved the right to submit to the appropriate organ, on a suitable occasion, a new article concerning the impossibility of performing the object of a treaty.

40. Mr. BADEN-SEMPER (Trinidad and Tobago) said he would confine himself to commenting briefly on the second part of the Netherlands amendment (A/CONF.39/C.1/L.331). His delegation wondered whether it was really necessary to insert such a provision in the article. That also applied to article 59.

41. The second part of the amendment stated a general principle of law recognized by all civilized nations, which was summed up in the maxim *ex turpi causa non oritur actio*. That was a procedural rule which was not peculiar to the law of treaties. Further, treaties could only be interpreted in the light of good faith, which implied that the party invoking the grounds laid down in article 58 could not do so lawfully unless it had no cause for self-reproach. Accordingly, his delegation was not in favour of the second part of the Netherlands amendment.

42. Sir Humphrey WALDOCK (Expert Consultant) said that the question of equitable adjustment in the case of a treaty which had been partly performed had been examined by the International Law Commission as a result of the written comments by Governments. He himself had submitted a draft on the matter, but the Commission after thorough consideration had preferred not to formulate a special rule in the present article. After discussion, it had come to the conclusion that the question of the law governing the parties after the termination of a treaty was much wider than the case of a fundamental change of circumstances and should be considered on a general basis. The Commission had therefore inserted in article 66 provisions concerning the consequences of the termination of a treaty, but in preparing that article it had decided that it could not enter very far into the equities of the situation after a treaty had terminated and the only conclusion that it had been able to reach on that extremely thorny subject was stated in paragraph (4) of the commentary to article 66, which referred to the application of the rule of good faith.

43. The question raised in paragraph 2 of the Netherlands amendment (A/CONF.39/C.1/L.331) had been examined by the International Law Commission at the second part of its seventeenth session, held in Monaco. A proposal to insert in article 58 a provision similar to that in article 59, paragraph 2 (*b*), had been submitted at that time.[2] The Commission had considered that the subject concerned the application of a general principle of law and was closely connected with the question of State responsibility. He had pointed out at the time that there were two sides to the question, that of the direct operation of State responsibility and that of the application of the principle as a means of defence against failure to perform a treaty.[3] The Commission had eventually decided to place the provision only in article 59, although it had recognized that the same considerations applied to a great extent to both articles. It had thought that the problem of a fundamental change of circumstances brought about by the acts of one of the parties would be more likely to be significant and that there was a special case for mentioning the principle in article 59.

44. Mr. SUAREZ (Mexico) said that after hearing the Expert Consultant's explanations, he would not ask that his amendment be put to the vote.

45. The CHAIRMAN invited the Committee to vote on the second part of the Netherlands amendment. The first part of the amendment was a drafting matter.

The second part of the Netherlands amendment (A/CONF.39/C.1/L.331) was adopted by 30 votes to 10, with 40 abstentions.

46. The CHAIRMAN said that article 58, as amended, and the first part of the Netherlands amendment, to replace the words "for terminating it" by the words "for terminating or withdrawing from the treaty", would be referred to the Drafting Committee.[4]

The meeting rose at 10.10 p.m.

[2] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 832nd meeting, para. 28.

[3] *Ibid.*, 833rd meeting, para. 28.

[4] For resumption of discussion, see 81st meeting.

SIXTY-THIRD MEETING

Friday, 10 May 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 59 (Fundamental change of circumstances)

1. The CHAIRMAN invited the Committee to consider article 59 of the International Law Commission's draft.[1]

2. Mr. PHAN-VAN-THINH (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/C.1/L.299), said that, in a world of continual change, the application of the rule *rebus sic stantibus* to treaties was obviously essential. But unless that application was subject to strict regulations, arbitrary invocation and interpretation of the rule might seriously prejudice the

[1] The following amendments had been submitted: Republic of Viet-Nam, A/CONF.39/C.1/L.299; Venezuela, A/CONF.39/C.1/L.319; Canada, A/CONF.39/C.1/L.320; Finland, A/CONF.39/C.1/L.333; United States of America, A/CONF.39/C.1/L.335; Japan, A/CONF.39/C.1/L.336.

basic rule, *pacta sunt servanda*. The risk of tension was all the more real since the international community had not yet established a system of compulsory jurisdiction. The International Law Commission had shown itself alive to the dangers by excluding from the application of article 59 treaties establishing boundaries, for if a single party invoked the rule in such cases, dangerous friction was bound to arise.

3. It was his delegation's view that the rule *pacta sunt servanda* should be understood *rebus sic stantibus*, being based on the idea of justice and of the observance of a balance between the obligations incumbent on the parties to a treaty, in the light of the factual circumstances existing at the time of negotiation. If that balance was subsequently disrupted to the detriment of one of the parties as a result of circumstances not provoked by that party, the injured party must be entitled to redress the balance to some extent. It was therefore not entirely just to exclude a treaty establishing boundaries from the benefits of article 59, since those were the political and perpetual treaties in which the condition *rebus sic stantibus* was particularly essential.

4. Nevertheless, his delegation had not proposed the deletion of paragraph 2, but merely an amendment which might provide an escape clause, or a general procedure whereby a State invoking fundamental change of circumstances should first try to communicate with the other party in an attempt to obtain its consent to modify the treaty or to denounce it. Treaties establishing a boundary were not the only ones where unilateral denunciation was likely to lead to dangerous tension: others were treaties which provided for the peaceful settlement of armed conflict or established a definite political status for a certain country. The party invoking a change of circumstances as grounds for withdrawal from a treaty was sometimes the very State which had deliberately provoked or organized the change, or had committed a breach of its treaty obligations. If such practices were to be perpetuated under article 59, there would be no more morality or security in international relations; that was why his delegation had submitted its amendments to sub-paragraphs 2 (*a*) and 2 (*b*) of article 59.

5. Mr. CARMONA (Venezuela) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.319) was to give positive form to a provision which the International Law Commission had drafted in the form of an exception. The Commission's text seemed to emphasize a limitation in which the balance between the *status quo* essential for treaty stability and the need to take changing situations into account was disrupted, essentially altering the meaning and scope of the obligations deriving from the treaty. At the present stage of the development of international law, it could not be claimed that the *status quo* should be maintained without taking into account the development of international relations, since if it were, international law would become so petrified that there would be a risk of serious explosions, with disastrous consequences for the integrity of the treaty. Article 59 provided an escape clause for maintaining the balance between the two principal factors involved.

6. It was clear from the commentary that a change of circumstances had its own autonomous existence, and must not be regarded *a priori* as a derogation from the *pacta sunt servanda* rule. It was therefore logical to state the principle *rebus sic stantibus* in positive form. The Venezuelan amendment to sub-paragraph 1 (*b*) restated the proposal that the Special Rapporteur had submitted in his fifth report to the Commission, [2] which seemed to correspond more closely than did the existing text to the purposes of the article.

7. Mr. WERSHOF (Canada) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.320), to include the word " suspending " before the word " terminating " in paragraph 1, despite the International Law Commission's decision not to include suspension as a possible consequence of the invocation of a change of circumstance, and despite the Expert Consultant's view that mere suspension could not be a consequence of the application of the doctrine expressed in the article.

8. In his delegation's opinion, the possibility of suspension could be excluded from the article only if it were considered that " fundamental change " was synonymous with irreversible, permanent or unalterable change. Few representatives would be likely to accept any of those terms as a substitute for "fundamental change". His delegation's view found support in the opinion of Professor Oliver Lissitzyn, in his commentary on the Commission's draft article 59 [3] where he stated that the termination of a treaty obligation was not the only possible and proper effect of invocation of a change of circumstances; depending on the expectations of the parties and the nature of the change, the proper effect might be suspension or limitation of performance, as the case might be.

9. In view of the divergent and conflicting views on the application of the rule in article 59 and of the paucity of judicial decisions and State practice in the matter, it would be unwise to exclude completely the possibility of suspension as a consequence of a fundamental change of circumstance.

10. Mr. CASTRÉN (Finland) said that his delegation had submitted its amendment to the introductory sentence of paragraph 1 (A/CONF.39/C.1/L.333) in order to render it more flexible and to restrict the effects of its application on treaty stability. First, it was designed to make it clear that the principle of separability of treaties also operated in the cases governed by article 59; in introducing his delegation's amendment (A/CONF.39/C.1/L.144) to article 41, on separability of treaty provisions, he had tried to give the reasons for and against its application in connexion with the *rebus sic stantibus* doctrine. [4] Secondly, since it was preferable to abandon part of a treaty rather than terminate it entirely, the Finnish delegation considered that the parties might resort to less stringent measures than the termination of a treaty or of some of its provisions, and had proposed the inclusion of the words " or suspending the operation " in paragraph 1, as was provided in paragraph 1 of article 57, on termination or suspension as a consequence of a breach of the treaty. There was one more method of dealing with situations where fundamental changes of circumstances

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 44.

[3] *American Journal of International Law*, vol. 61, p. 895.

[4] See 41st meeting, para. 1.

occurred, and that was to revise the treaty, but that possibility seemed to be implicit in article 62, on procedure.

11. Mr. KEARNEY (United States of America) said that the purpose of the United States amendment (A/CONF. 39/C.1/L.335) was to clarify the principle expressed in sub-paragraph 2 (*a*). The United States considered that if the doctrine *rebus sic stantibus* was to be incorporated in the convention, there must be safeguards against its misuse. The international community as a whole benefited from any rule which would have the effect of reducing the possibilities of reopening territorial questions settled by treaty, and the wording of sub-paragraph 2 (*a*) must not exclude any treaties intended to settle territorial disputes.

12. The term " a treaty establishing a boundary " was unduly restricted. Oppenheim defined boundaries of State territory as " the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the open sea ".[5] Paragraph (11) of the commentary clearly indicated that the expression in sub-paragraph 2 (*a*) " would embrace treaties of cession as well as delimitation treaties ". Although the International Law Commission had discarded the phrase " fixing a boundary " in favour of " establishing a boundary ", the sub-paragraph still failed to cover several important groups of treaties, which, while not establishing boundaries, established territorial status or settled territorial disputes.

13. Examples of such treaties were condominium agreements, such as the agreement between the United States and the United Kingdom establishing condominium status for Canton and Enderbury Islands, [6] which settled a long-standing dispute and in respect of which neither party should be in a position to invoke *rebus sic stantibus*. Another common type of treaty used to settle territorial disputes was one in which neither party renounced its existing claims, but the parties agreed not to press their claims, in the light of mutual concessions relating to such matters as treatment of minority groups, customs concessions, or joint development of resources. Such treaties recognized a *status quo* or created a régime which took the place of establishing a boundary. An example of that kind of arrangement was the Antarctic Treaty; [7] that treaty, however, had special features which precluded the application of the *rebus sic stantibus* doctrine. Another problem was the settlement of disputes concerning islands: when a party withdrew its claim to an island by a treaty, no boundary was established, and unless that point was covered, a State might conceivably claim that *rebus sic stantibus* applied to such a territorial settlement.

14. There was another type of treaty, which did not itself establish boundaries but was designed to ensure that boundary disputes were settled in a spirit of co-operation and friendship. The United States had treaties of that kind with Canada and Mexico. On both its borders, joint commissions had jurisdiction over a wide range of territorial problems and had operated most successfully. To be successful, however, such joint operations must be set up for a long period, in order to allow ample time for establishing procedures for preventing disputes in both countries; if the *rebus sic stantibus* doctrine were to be applied the object and purpose of the treaties would be defeated.

15. The United States delegation did not claim that its proposed wording for sub-paragraph 2 (*a*) was ideal, but it did believe that it was an improvement on the Commission's text. Its hope was that the proposal would be accepted by the Committee as a further attempt to reduce the frequency and severity of territorial disputes by covering a particular range of treaties, which it was highly important to maintain.

16. Mr. FUJISAKI (Japan), introducing the Japanese amendment (A/CONF.39/C.1/L.336), said that the doctrine of *rebus sic stantibus* was founded on the notion of equity and could be invoked if a fundamental change of circumstances created a situation in which the balance of obligations was radically altered so that the burden fell heavily upon one of the parties. He thought the phrase " radically to transform the scope of obligations " in the International Law Commission's draft meant the same as what his delegation was proposing, and he hoped his amendment would be referred to the Drafting Committee.

17. He supported the United States amendment (A/CONF.39/C.1/L.335). The cases mentioned in the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.299) appeared to be already covered in the Commission's draft of the article.

18. Mr. STUYT (Netherlands) said it was sometimes claimed that the *rebus sic stantibus* clause was the counterpart of the *pacta sunt servanda* rule, and the Commission had referred to that problem in paragraph (7) of its commentary; but in fact, the two notions were entirely different. Once a treaty came into existence, it had to be executed in good faith; otherwise it remained a dead letter. But whether or not the treaty remained binding, despite a fundamental change of circumstances, was an entirely different matter. It was a practical problem and could not be solved merely by referring to the logical principle of good faith.

19. Some maintained that the *rebus sic stantibus* clause was necessary and at the same time dangerous. It was quite clear from the Commission's commentary that it was necessary, and that view was supported by the 1950 opinion of the United Nations Secretary-General in connexion with treaty régimes for the protection of minorities after the First World War. It was also maintained that it was going too far to make no provision for a change of policy or to exclude treaties fixing boundaries.

20. His delegation was in favour of combining articles 59 and 62. Article 59, however, was the only article in the draft which contained a number of ambiguous terms. It was impossible, for example, to know with certainty what was meant by such terms as " fundamental ", " with regard to ", " foreseen ", " essential basis ", " radically ", or " the scope of obligations ", and it would be dangerous to employ such expressions in a legislative text. The article also raised a problem of placing, and some would consider that it ought to be transferred to the provisions concerning the application and interpretation of treaties.

21. He would reserve his delegation's final position until the full scope of Part V had been elucidated. In any event,

[5] Oppenheim, *International Law*, 8th edition, vol. I, p. 531.

[6] League of Nations, *Treaty Series*, vol. CXCVI, p. 344.

[7] United Nations, *Treaty Series*, vol. 402, p. 71.

it could not vote for article 59, unless it were made subject to an objective procedure for determining when it would be applied and not left to the free choice of a party wishing to invoke the doctrine *rebus sic stantibus*.

22. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that the doctrine of *rebus sic stantibus* was one of the most controversial in the history of international law. Its essence was that if the circumstances existing at the time of the conclusion of the treaty changed so fundamentally that performance became impossible or meaningless, then any party might denounce the treaty. Many eminent jurists considered that the doctrine existed, including even the theologian Thomas Aquinas, but there was still some doubt as to whether it had acquired the character of a rule of law. Practice was extremely cautious and Governments avoided recognizing the doctrine and creating precedents, realizing the danger that it might have for the security of treaties and the principle of *pacta sunt servanda*. It was a matter of great responsibility to decide whether such a rule existed. Generally recognized norms of international law were created by agreement between States representing the main socio-political and legal systems of the world.

23. The theory and practice of western countries recognized the doctrine in principle. In support of that view many eminent jurists of western Europe could be cited, among them McNair, Jessup, McDougall and Friedmann. But the comments of some western Governments on the draft articles had been reserved. The representatives of African and Asian Governments had adopted a favourable attitude in the Sixth Committee and had claimed that it was a rule of positive international law. Among them had been Mr. Yasseen. A similar standpoint had been taken by the Latin American countries. The socialist countries did not reject the existence of the doctrine but considered that it should be applied only in very exceptional cases and with the greatest possible caution.

24. On the whole the Commission's draft was acceptable, and rightly contained certain specific limitations. The reasons for the inclusion of paragraph 2 (*a*) had been convincingly expounded in the commentary. The restriction in paragraph 2 (*b*) was very important, because the violation of an obligation could not release a government from its treaty obligations, even if there had been a fundamental change of circumstances.

25. He could not support the United States amendment (A/CONF.39/C.1/L.335), which raised doubts about the limitations and would dilute the force of the article; it was also far less precise than the original, which was broad enough to cover such matters as islands. The Japanese amendment was not precise enough and he would not vote for it. Although he was in favour of the Commission's text, he hoped that the Drafting Committee could render it more precise and paragraph 1 (*b*) more stringent. Account should be taken of the Finnish and Canadian amendments, which would certainly improve the text.

26. Mr. BINDSCHEDLER (Switzerland) said that his delegation agreed that the rule relating to fundamental change of circumstances formed part of contemporary general international law. When formulating that rule, however, it was essential to make it as restrictive as possible in order to provide safeguards against abuse. The text of article 59 was satisfactory in that respect; in particular, the negative presentation served to stress that the case envisaged in the article was an exception to the higher principle of *pacta sunt servanda*. Unfortunately, however, the text did not make it clear that the *rebus sic stantibus* doctrine could not be invoked unilaterally by the party adversely affected by the change of circumstances, if it wished to avoid its obligations under a treaty. The majority of scholars agreed that a fundamental change of circumstances only authorized the affected party to demand negotiations for the purpose of terminating or revising the treaty. In the event of a dispute, that party was entitled to bring the case to an international court.

27. In paragraph (4) of the commentary, the International Law Commission had indicated that State practice showed " a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground ". No single case could be cited of a unilateral application of the *rebus sic stantibus* doctrine. The denunciation by Russia in 1870 of the clauses of the Treaty of Paris of 1856, dealing with the status of the Black Sea, had been strongly resisted by the other European Powers; the dispute had been settled by the London Conference of 1871, which had replaced that status by a new agreed régime. In that same paragraph (4) of the commentary, it was recalled that " In the *Free Zones* case [8] the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that the principle does not allow unilateral denunciation of a treaty claimed to be out of date ". To its credit, that Government, although its interests would have been served by a unilateralist approach, argued that the *rebus sic stantibus* doctrine would cause a treaty to lapse only where the change of circumstances had received legal recognition, either by agreement of the parties or by international adjudication.

28. The lack of clarity of article 59 on that question left the matter open. The matter would not be grave if article 62 were adopted in a form which ruled out the possibility of grounds of invalidation being invoked unilaterally. The Swiss delegation, therefore, could not give its approval to article 59 until it knew the final form which article 62 was to take. He accordingly reserved his delegation's position on article 59.

29. With regard to the amendments, he thought the amendment by the Republic of Viet-Nam to paragraph 2 (*a*) (A/CONF.39/C.1/L.299) went too far in proposing to exclude " a negotiated political settlement " from the operation of article 59. In point of fact, political settlements, such as treaties of alliance, lent themselves to the application of the *rebus sic stantibus* doctrine.

30. As for the amendment by the Republic of Viet-Nam to paragraph 2 (*b*), the Swiss delegation would have no objection to the inclusion of an express reference to the case where the change had been deliberately provoked

[8] *P.C.I.J.*, Series A/B (1932), No. 46.

by the party invoking it, or was the result of a breach of the treaty by that party. However, such an amendment seemed hardly necessary; a change of that type would represent a violation of the treaty and the principle of good faith would debar the party concerned from invoking it as a ground for seeking to invalidate the treaty.

31. He also had doubts regarding the proposals by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333) for the inclusion of a provision on suspension. Where a change of circumstances was so fundamental as to bring into operation article 59, the only conclusion would seem to be that the treaty must be terminated or revised; there would be no room for mere suspension. However, his delegation would not oppose those amendments, since there might conceivably be cases in which it would be sufficient to suspend the operation of the treaty; should that be so, it was undesirable to go any further.

32. He supported the United States amendment (A/CONF.39/C.1/L.335) to insert in paragraph 2 (*a*) a reference to treaties " establishing territorial status ". A provision of that kind would be very helpful to a country like Switzerland which had concluded many treaties with neighbouring States on the joint utilization of rivers forming boundaries. A treaty which provided the basis for hydro-electric installations must be of an enduring character and could not be exposed to the risk of termination on the grounds of *rebus sic stantibus*. The same was true of treaties relating to freedom of navigation on certain rivers, or to right of passage through certain territories. Switzerland, for example, had very complicated frontiers, many of them in mountainous and difficult terrain. In such frontier areas, a place in the territory of one country was often accessible only by passing through the territory of another. Clearly all those treaties, which affected territorial status, must be excluded from the operation of article 59.

33. He appreciated the idea contained in the Japanese amendment (A/CONF.39/C.1/L.336) but it did not seem necessary to specify that the rule in article 59 would be invoked by the State which was placed at a disadvantage by the change of circumstances. One could hardly imagine the rule being invoked by the State which benefited from that change. Article 59 was one of the most important articles of the whole draft and must be formulated with the utmost care in order to safeguard the *pacta sunt servanda* rule.

34. Sir Francis VALLAT (United Kingdom) said that the doctrine of *rebus sic stantibus* had provoked a great deal of controversy among scholars, while attempts to apply it in State practice had constantly given rise to international disputes. The reason was simply that any misapplication of that principle struck at the security and stability of treaty relations. It was therefore important to maintain in article 59 the proper balance between stability and change.

35. It was his Government's view that the doctrine of *rebus sic stantibus* did not give an automatic right to repudiate a treaty. The party adversely affected by a fundamental change of circumstances should first request the other parties to release it from its obligations. It was only if the other parties refused to accede to that request that the doctrine could be invoked. He stressed the word " invoked " because, in the circumstances envisaged, there would clearly be a dispute between the parties, which would in all probability turn on whether the change of circumstances was fundamental enough to justify the doctrine being invoked. It was difficult to reach a conclusion on article 59 without knowing what procedural safeguards in the way of machinery for the settlement of disputes would be included in article 62, which in its present form was inadequate, and his delegation therefore reserved its final position on the substance of article 59 until the content of article 62 had been decided.

36. He wished, however, to raise three points at that stage. The first was his delegation's understanding of the effect of article 59, in the sense that no State was entitled to invoke its own acts or omissions as amounting to a fundamental change of circumstances giving rise to the operation of article 59.

37. The preponderant opinion in the International Law Commission had rightly been that the doctrine of *rebus sic stantibus* could only be invoked by a State acting in good faith. It had also been generally agreed that the test as to whether a fundamental change of circumstances had occurred must be an objective one and should not rest on implied terms or ascertainment of intentions.

38. The second point was indicated in paragraph (10) of the commentary, where it said: " Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty ". His delegation believed that it would have been preferable to include an express provision on the point, but noted with satisfaction that there had been no dissent in the Commission on that question. Also in paragraph (10) of the commentary, reference had been made to the view of some members of the Commission that a treaty of alliance was " a possible case where a radical change of political alignment by the Government of a country might make it unacceptable, *from the point of view of both parties*, to continue with the treaty ". He did not dispute that general proposition, but doubted whether the case should be discussed under the heading *rebus sic stantibus*. The United Kingdom amendment to article 53 (A/CONF.39/C.1/L.311), which had been adopted by the Committee at the 59th meeting, had been intended to deal with that type of case by indicating that the particular character of the treaty could be such that a right of termination on reasonable notice might be implied.

39. The third point was mentioned in paragraph (8) of the commentary where it was stated: " The Commission also recognized that jurists have in the past often limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination ". In that paragraph, the Commission gave its reasons for not limiting the *rebus sic stantibus* principle to treaties which contained no provision regarding their termination. The Commission was clearly aware that its proposals were *de lege ferenda* in so far as they were not limited to perpetual treaties. However

cogent the Commission's argument might be for adopting that course, it must be recognized that the absence of such a limitation made even more necessary an objective machinery for the settlement of disputes arising out of the application of article 59.

40. In general, his delegation approved the manner in which the International Law Commission had sought to delimit the scope of the doctrine of *rebus sic stantibus* by casting it as a " right to invoke " rather than as an absolute rule and by setting out the provisions in negative terms, subject only to limited and narrowly defined exceptions.

41. With regard to the amendments, he would not be able to support the proposal by Venezuela (A/CONF.39/C.1/L.319) since its effect would be to change the emphasis of the article by transforming it from a negative rule accompanied by exceptions, to a positive rule subject to the fulfilment of certain conditions.

42. He viewed with sympathy the amendments by Canada (A/CONF.39/C.1/L.320), Finland (A/CONF.39/C.1/L.333) and the United States (A/CONF.39/C.1/L.335) but thought that it would be preferable to deal with the Finnish amendments in the context of article 41, on separability of treaty provisions.

43. Mr. KEMPFF MERCADO (Bolivia) said that he wished to have it placed on record that Bolivia had consistently maintained that the observance of treaties did not exclude the possibility of modification. There could be no question of proclaiming the absolute sanctity of a treaty establishing a boundary where such a treaty had resulted from conquest and violence and had created a manifestly unjust international situation. No treaty could endure for all time and be immune to the action of new circumstances. It would be unnatural and bordering on the absurd to consider the inviolability of international agreements as implying that they were in principle perpetual and unalterable.

44. During the past fifty years, writers on international law had been unanimous in stressing the need to lay down practical rules for facilitating treaty revision. Article 19 of the Covenant of the League of Nations provided that the Assembly of the League should " from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable ". That provision of the Covenant constituted a recognition of the *rebus sic stantibus* doctrine, which did not basically conflict with the *pacta sunt servanda* principle; it was a reasonable and fair interpretation of the latter principle that it refused to admit the perpetuity of treaties.

45. Bolivia considered it an essential condition for the continuity of treaties that the possibility of peaceful modification should not be excluded; that rule must apply both to treaties establishing boundaries and to peace treaties which were manifestly unjust, and which belonged to a period when war was considered legal.

46. Consequently his delegation totally disagreed with the provisions of paragraph 2 (*a*) of article 59, which were not based on valid legal grounds.

The meeting rose at 12.30 p.m.

SIXTY-FOURTH MEETING

Friday, 10 May 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 59 (Fundamental change of circumstances) *(continued)* [1]

1. Mr. JACOVIDES (Cyprus) said his delegation, like the International Law Commission, considered that the *rebus sic stantibus* principle should have its place in the modern law of treaties, provided that its application was properly delimited and regulated. The doctrine was a safety-valve of the utmost importance. If the only way open to the parties to terminate or modify a treaty was to conclude a new agreement, and if one of the parties objected, without a valid reason, to the conclusion of a new agreement, that would impose an undue burden on the party wishing to terminate the treaty, for it would be placed in a situation in which law was inconsistent with equity. It was true that that kind of situation would not often occur, but the doctrine had a certain value as a residuary rule, and the International Law Commission had done well to devote article 59 to it.

2. The International Law Commission had endeavoured to delimit the application of the *rebus sic stantibus* doctrine by listing the conditions that appeared in article 59. His delegation agreed in general with the conditions laid down, but it understood the position of those members of the Committee who had expressed a preference for less restrictive rules.

3. With regard to the question discussed in paragraph (11) of the commentary, his delegation considered that the principle of self-determination was an independent principle based upon the Charter, an essential element of the sovereign equality of States and, as such, a peremptory norm of general international law from which no derogation was permitted. The procedural safeguards for the application of that doctrine might be examined in the context of article 62.

4. The text submitted by the International Law Commission was well balanced and satisfactory in substance; apart from the Venezuelan amendment (A/CONF.39/C.1/L.319), which his delegation would not oppose, his delegation would support the existing text.

5. Mr. ALVAREZ TABIO (Cuba) said that he did not think there could be any objection to the recognition in international law of the principle stated in article 59. There was no doubt that the *pacta sunt servanda* principle obliged States to abide by the rules they had established by agreement. However, agreements once concluded could be denounced as a result of a fundamental change of circumstances. It was then that the *rebus sic stantibus* rule applied. That rule was a very ancient one, but since the First World War it had been firmly established, and it was upheld by a number of eminent jurists. There was evidence of the existence of the principle in customary

[1] For the list of the amendments submitted, see 63rd meeting, footnote 1.

law and, as the International Law Commission had said in its commentary, it had often been invoked in State practice. The Commission had concluded that the principle should find a place in the law of treaties, provided that its application was carefully delimited and regulated.

6. The principle, based on grounds of equity and justice, was presented in an objective form in the draft article. The text was acceptable to the Cuban delegation.

7. The United States amendment (A/CONF.39/C.1/L.335), which was designed to remove from the application of the *rebus sic stantibus* rule treaties establishing territorial status, was incompatible with the principle of self-determination and contrary to resolutions of the United Nations General Assembly which strongly condemned all manifestations of colonialism. The amendment also ran counter to the principles stated in the draft convention, and in particular to that embodied in article 50, which the Committee had recently approved.

8. The Venezuelan amendment (A/CONF.39/C.1/L.319) improved the text of the draft article because it stated the principle in a positive form and because the Spanish text was better worded.

9. Mr. DE CASTRO (Spain) said that his delegation was satisfied with the International Law Commission's text because it established the exact scope of the *rebus sic stantibus* rule and laid down strict conditions for its application. The Commission had succeeded in striking an acceptable balance between, on the one hand, the principles of equity and justice enabling a party to invoke the right to terminate or withdraw from a treaty in the event of a fundamental and unforeseen change of circumstances and, on the other, the limits of application of the rule. By adopting that article, the Conference would establish an essential rule which would have the effect of ensuring harmony between the dynamism inherent in an international community and the continuous evolution of international law. The *rebus sic stantibus* rule did not conflict with the *pacta sunt servanda* rule.

10. The Canadian and Finnish amendments (A/CONF.39/C.1/L.320 and L.333) provided for the possibility of suspending a treaty in the event of a fundamental change of circumstances, but in that event there would seem to be no justification for keeping the treaty in force. The addition of the phrase " confirming a negotiated political settlement " proposed in the amendment submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.299) seemed liable to lead to all manner of misunderstandings; moreover the phrase was superfluous, since any treaty could be said to be a negotiated political settlement between the parties. The Japanese amendment (A/CONF.39/C.1/L.336) also seemed superfluous, for the very purpose of the *rebus sic stantibus* rule was to eliminate a situation that placed an undue burden on the parties. Furthermore the word " serious " introduced an element that was difficult to define.

11. The United States amendment (A/CONF.39/C.1/L.335), to add the words " or otherwise establishing territorial status ", also narrowed the scope of article 59 and was based on a vague notion that might give rise to controversy. In the Special Rapporteur's first draft of the article,[2] there had been a reference to the grant of territorial rights; but it was significant that during the International Law Commission's debates, out of the sixteen members present, more than twelve had opposed the inclusion of those words, on the grounds that the notion presented serious theoretical problems and unduly limited the scope of the rule. The United States amendment was therefore unacceptable to the Spanish delegation.

12. The text submitted by the International Law Commission might be revised by the Drafting Committee. Paragraph 1 referred to a change " which was not foreseen by the parties ". Perhaps it would be better to say " which could not reasonably be foreseen by the parties ". In paragraph 1, sub-paragraph (*a*), it might be possible to say " an essential basis of what was agreed between the parties ", in order to make it clear that it was not a matter of what one or other party wanted. In sub-paragraph (*b*) it would be desirable to mention not only obligations, but also rights. Lastly, in the Spanish text, it would be advisable to replace the words " *poner término* " by the words " *dar por terminado* ".

13. Mr. OSIECKI (Poland) said that his delegation had always regarded the *pacta sunt servanda* principle as a fundamental guarantee of the stability of international relations; treaties in force must be performed in good faith. Article 59 provided for the possibility of terminating or withdrawing from a treaty in the event of a fundamental change of circumstances. His delegation realized that, once such a possibility was admitted, it was open to serious abuse; Poland fully shared the views expressed by the representative of the Ukrainian SSR. The International Law Commission had placed the emphasis on the conditions which were to govern that possibility: namely, that the existence of the circumstances in question constituted an essential basis of the consent of the parties, and that the effect of the change was radically to transform the scope of the essential obligations imposed by the treaty. In his delegation's view that could happen only in extremely unusual circumstances which drastically upset the balance in the legal situation of the parties. That fact would have to be taken into account in drawing up the final text of article 59.

14. Stress should also be laid on another aspect of the problem, which affected the entire international community, namely, the need to guarantee international peace and security. It was obvious that peace and security would be constantly threatened if the boundaries between States were not scrupulously respected. That idea was expressed in the Charter of the United Nations, and the International Law Commission had also been guided by it in paragraph 2 (*a*). Moreover the Commission had acknowledged in paragraph (11) of its commentary that treaties establishing a boundary should be recognized to be an exception to the rule. Lastly the International Court of Justice, in the *Case concerning the Temple of Preah Vihear*, had expressed the opinion that one of the primary objects of any treaty establishing a frontier between States was to achieve " stability and finality ".[3] Hence his delegation fully endorsed the

[2] *Yearbook of the International Law Commission, 1963*, vol. II, p. 80, article 22, para. 5.

[3] *I.C.J. Reports, 1962*, p. 34.

position adopted in the matter by the International Law Commission in paragraph 2 (*a*), which would obviate the kind of interpretations which could be given to the vague and ambiguous wording of Article 19 of the Covenant of the League of Nations.

15. His delegation also approved of the clause embodied in paragraph 2 (*b*), which was a very pertinent application of the old Latin maxim *nemo commodum capere potest ex injuria sua propria.*

16. His delegation could not accept the Venezuelan amendment (A/CONF.39/C.1/L.319); it altered the scope of article 59, whose essential characteristic was to establish an exception to the *pacta sunt servanda* principle and which made it clear that the situations in which that exception might be invoked must be regarded as entirely exceptional.

17. The amendments submitted by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333) seemed open to misunderstanding. On the one hand, they might imply that where there were no grounds for termination, there were *a fortiori* no grounds for suspension. On the other hand, they might imply that suspension was possible in cases where, in view of the radical nature of the changes, only the termination of a treaty ought to enter into consideration. With regard to the second part of the Finnish amendment, on the subject of separability of treaty provisions, the case seemed to be adequately dealt with in article 41.

18. The amendment in document A/CONF.39/C.1/L.299 would change the draft article too drastically; the exception laid down in paragraph 2 (*a*) must be formulated precisely and not in vague words which would increase the difficulties of interpreting the entire article.

19. In view of the difficult questions it dealt with, article 59 must be drafted with the utmost precision. In that respect the United States amendment (A/CONF.39/C.1/L.335), which removed from the application of the *rebus sic stantibus* rule any settlement of territorial questions, might give rise to misunderstanding. The notion of " territorial status " and the word " otherwise " did not seem sufficiently clear; moreover, the replacement of the expression " establishing a boundary " by the expression " drawing a boundary " did nothing to improve the text; the latter expression was open to unduly restrictive interpretations. The present wording therefore seemed preferable.

20. The Japanese amendment (A/CONF.39/C.1/L.336) did not improve the text either. In short, his delegation was in favour of retaining article 59 as submitted by the International Law Commission.

21. Mr. HARRY (Australia) said that in appraising article 59 his delegation had been guided by three main considerations. First, where there was a fundamental change of the circumstances which had constituted an essential basis of the consent of the parties to be bound by the treaty, it was reasonable to seek a review of the treaty. Secondly, there was justification for maintaining that international law recognized a doctrine of *rebus sic stantibus*, but the precise conditions under which that doctrine applied could not be regarded as settled; the most that could be said was that—as the International Law Commission put it in paragraph (6) of the commentary—" the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties ". Thirdly, as a ground for terminating treaties, a fundamental change of circumstances was particularly open to abuse, thus prejudicing the security of treaties; the Commission itself had recognized that. The fact was that circumstances were always changing, and the doctrine in question, if formulated too loosely, was a standing temptation to States to seek release from the obligations of treaties which had become inconvenient or more onerous than they had contemplated.

22. The International Law Commission had been aware of the danger and had endeavoured to state as objectively as possible the limited circumstances in which the doctrine could be invoked as a ground for terminating a treaty. His delegation would have preferred the Commission to have drafted an article inviting the parties to negotiate in good faith a review of the treaty, and providing that the question of termination of the treaty could arise only if the negotiations failed.

23. As formulated, paragraph 1 of the article laid down fairly clear conditions, but it remained to be seen whether a general change of circumstances quite outside the treaty, for example a change in government policy, could be a ground for terminating a treaty. As indicated in paragraph (10) of the commentary, the Commission had been divided on that point; his delegation, for its part, found it difficult to agree with those members of the Commission who had maintained that a treaty of alliance was a possible case where a radical change of political alignment by the government of a country might make it unacceptable, *from the point of view of both parties*, to continue with the treaty. If a change of political attitude made the treaty unacceptable to both parties, they should obviously agree to terminate it. His delegation was firmly of the opinion that a change in government policy should in no event be invoked as a ground for unilaterally terminating a treaty.

24. With regard to paragraph 2 (*a*), which concerned treaties establishing a boundary, he pointed out that the Australian Government, in its written observations in 1965 on an earlier version of the article, had expressed the view that the provision should cover not only treaties establishing a boundary but also treaties relating to other kinds of territorial determinations. [4] That was still its view. His delegation therefore supported the United States amendment (A/CONF.39/C.1/L.335). As the United States representative had indicated, there were many arrangements of a territorial character which could not be described as treaties " establishing a boundary ", but to which the exception specified in paragraph 2 (*a*) should apply. However, the Antarctic Treaty, which the United States representative had cited as an example, was *sui generis*. It did not, strictly speaking, establish territorial status. What it did was to provide a special régime for a defined area. The parties had not agreed not to press claims, but that acts or activities while the Treaty was in force did not affect claims. It was a very important treaty setting up a unique and very promising system of scientific co-operation and demilitarization, including denuclearization, and the Australian Government did not consider that any party had the right to terminate it in any conceivable circumstance except as provided by the

[4] *Yearbook of the International Law Commission, 1966*, vol. II, p. 280, comment on article 44.

Treaty itself. It could be described as a treaty designed to maintain the *status quo* for the duration of its operation. Consequently, the Drafting Committee might slightly modify the formula proposed by the United States and say, for example, "treaty relating to the status of territory".

25. It was common practice to include in treaties intended to operate for long periods a provision for consultation or review at regular intervals or at the request of either party. In practice, those provisions greatly facilitated relations between the States concerned. It would have been helpful if their existence had been noted in the article itself. Perhaps an indirect allusion to them could be seen in the statement in paragraph 1 that the fundamental change of circumstances invoked must be one which had not been foreseen by the parties at the time of the conclusion of the treaty. In any event, it was highly desirable that article 59 should not prejudice the operation of the provisions for consultation and review which many treaties contained.

26. In the light of those considerations, his delegation would not take a final position on article 59 until the wording of article 62, concerning the settlement of disputes, had been decided. In the meantime it would abstain if article 59 were put to the vote.

27. Mr. TABIBI (Afghanistan) observed that the principle of *rebus sic stantibus* had long been accepted as a ground for the termination of treaties and it was desirable that the future convention should include a rule on the subject. The inclusion of article 59 strengthened the *pacta sunt servanda* rule; it was a safety-valve which operated when a treaty became too onerous to apply and when the continuance of the obligations created by it placed a strain on relations between the parties.

28. The International Law Commission had stated the rule very well in paragraph 1. But that paragraph by itself was enough. The exceptions stated in paragraph 2 greatly weakened the doctrine by excepting boundary treaties from the general rule, in the name of the stability of treaties but to the detriment of the interests of nations and individuals. He agreed with the Swiss representative that certain treaties establishing a legal régime should not be capable of being voided, but it was wrong to claim that boundary treaties and treaties establishing territorial status, of which the United States representative had spoken, should be excepted from the application of the rule. It would be useful if the Expert Consultant would explain what the relationship would be between paragraph 2 (*a*), if it were adopted, and the right of self-determination, which was recognized in the Charter and from which no derogation was permitted. The provision was also incompatible with the principle of peaceful relations among States, since undue rigidity was a source of disputes. A boundary line was not a geometric line, but determined the fate of millions of human beings. In the *Free Zones* case,[5] the Permanent Court of International Justice had not held that the *rebus sic stantibus* doctrine was not applicable to that kind of treaty. A treaty imposed during the colonial era for colonial or military reasons should not be exempted from the rule. Paragraph 2 (*a*) should therefore be deleted. If a majority imposed that exception for political reasons, he hoped that the Conference would find some way to save the future convention and protect States against any abusive application of the provision.

29. He would therefore vote against all amendments calculated to protect colonial and "iniquitous" treaties which, as such, conflicted with several provisions in the draft. Like the representative of the Ukrainian SSR and the Swiss representative, he believed that the Committee should make the rule as effective as possible.

30. Mr. RAJU (India) said the Indian delegation accepted article 59. A fundamental change of circumstances should be recognized as a ground for terminating a treaty, whether perpetual or not. The rule should be stated in such a way as to preclude the arbitrary denunciation of a treaty. The Indian delegation was in favour of the negative form in which paragraph 1 was couched; it also accepted the fundamental conditions stated in that paragraph and was in favour of the two exceptions set out in paragraph 2.

31. Accordingly, it could not support the amendment by the Republic of Viet-Nam to paragraph 2 (*a*) (A/CONF. 39/C.1/L.299), the effect of which would be to restrict unduly the application of the principle stated in paragraph 1, since almost all treaties confirmed a negotiated political settlement. Nor could it accept the broader scope which the amendment would give to paragraph 2 (*b*).

32. With regard to the United States amendment (A/CONF.39/C.1/L.335), the Indian delegation considered that it would be unwise to substitute the term "drawing" for "establishing", for the reason stated in the last sentence of paragraph (11) of the commentary. As to the remainder of the United States amendment, the words "or otherwise establishing territorial status" were somewhat obscure and the examples given by the United States representative had not thrown any light on the meaning. The term "territorial status" might easily connote political status. But treaties determining the political status of a territory were often cited as illustrations of the application of the *rebus sic stantibus* principle and not as exceptions to that principle. As it did not know exactly what was the scope of the proposed change, the Indian delegation would abstain on that amendment.

33. It was inclined to support the Canadian amendment (A/CONF.39/C.1/L.320) and the first part of the Finnish amendment (A/CONF.39/C.1/L.333), but would like the Expert Consultant to explain why the International Law Commission had decided not to refer to suspension in the opening paragraph of paragraph 1.

34. The second part of the Finnish amendment, relating to the question of separability, was already implied in the present text, taken together with article 41, paragraph 3.

35. The Indian delegation would support the Japanese amendment (A/CONF.39/C.1/L.336), but could not support the Venezuelan amendment (A/CONF.39/C.1/L.319) as it preferred the negative phrasing of the principle.

36. Mr. STREZOV (Bulgaria) said that the International Law Commission had shown an enlightened caution in article 59. It had sought to be realistic and had admitted the possibility of invoking a fundamental change of circumstances for terminating or withdrawing from a treaty; yet, in view of the risk of abuse, it had made that

[5] *P.C.I.J.*, Series A/B (1932), No. 46.

possibility conditional upon a number of circumstances which would have to be considered in deciding whether the attitude of the State invoking the article was justified.

37. His delegation approved of the text proposed by the International Law Commission, but would like the conditions under which the principle *rebus sic stantibus* would operate to be stated with greater clarity and precision. In particular, in paragraph 1 (*b*), it was necessary to know the precise meaning of the words " radically to transform the scope of obligations still to be performed under the treaty ". When the necessary alterations had been made, the article would reflect a judicious balance between the demands of international life and the no less important needs of the stability of treaties.

38. His delegation could not accept the United States amendment, which would unduly extend the scope of paragraph 2 (*a*).

39. The Finnish and Canadian amendments might be referred to the Drafting Committee.

40. Mr. COLE (Sierra Leone) said that article 59 provided a reasonable compromise between the need for the stability of treaties and the traditional principle *rebus sic stantibus*.

41. His delegation supported in substance the article proposed by the International Law Commission and also those amendments which improved the text.

42. It sincerely hoped that article 59 would be interpreted and applied so as to protect the interests of all States, in particular small States. However perfect international legislation might be, it would always rest with nations to put it into effect. The great problem did not therefore reside in the imperfection of the text but in the difficulty of persuading nations to resort to peaceful means of settling their disputes. Those considerations would determine his delegation's attitude to the substantive amendments to article 59.

43. Mr. KOVALEV (Union of Soviet Socialist Republics) congratulated the International Law Commission on having settled endless controversies as to whether the principle of fundamental change of circumstances was a recognized norm of international law. For a long time, government attitudes had varied from country to country, and opinions on the subject had often been divided even within States. It had taken time for the doctrine to crystallize. In the opinion of Sir Hersch Lauterpacht some years back, the *rebus sic stantibus* rule was " almost " a principle of international law. The International Law Commission had rendered great service to the international community by dispelling the last glimmer of doubt represented by the word " almost ".

44. His delegation welcomed that evolution. The profound transformations brought about by a genuine social revolution or by decolonization meant that there was a fundamental change from the circumstances which had existed at the moment of the conclusion of a treaty before the revolution. In such circumstances of fundamental change, it would be a violation of the people's sovereignty to impose the application of the treaty. At the same time, a mere change in a country's internal policy or government was not a fundamental change of circumstances; in that respect, the Soviet Union delegation supported the statement in the last sentence of paragaph (10) of the commentary.

45. The purpose of the rule stated in article 59 was to facilitate the elimination of a *status quo* which society had rejected and the retention of which could prejudice international relations. The norm operated when circumstances had so changed that the treaty had lost all meaning, would be detrimental to peace, and contrary to the principle of the equality and mutual advantage of the parties.

46. Recourse to the rule could only be exceptional and a very delicate matter. The occasions on which it had been applied in the practice of the Soviet State were extremely rare. One example was the annulment of the Treaty of Brest-Litovsk by the Soviet Union on 13 November 1918. There had however been another ground for terminating that treaty, because some of its provisions had been violated by the other party. Since the annulment had subsequently been recognized by the new German Government, it was also an example of the modification of a treaty by mutual agreement between the parties.

47. Article 59 fulfilled essential needs, and the negative formulation of its introductory paragraph emphasized the exceptional nature of the cases to which the rule applied. The Soviet delegation was therefore unable to support the Venezuelan amendment (A/CONF.39/C.1/L.319), which would state the rule positively.

48. It would support the amendments submitted by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333), which would add a reference to suspension in the opening portion of paragraph 1. That accorded with practice and the laws of logic.

49. The exceptions stipulated in paragraph 2 were justified. However far-reaching the change of circumstances, the interests of peace required that the rule could not be invoked with respect to a boundary treaty.

50. His delegation had doubts about the United States amendment (A/CONF.39/C.1/L.335), which had not been dispelled by the sponsor's explanations. First, the word "establishing" had the advantage of being a legal term, whereas the word " drawing " was purely technical and tended to weaken the rule. The reference to a treaty " otherwise establishing territorial status " was very vague. The Soviet delegation would add to the criticisms made by several representatives that it irresistibly evoked the idea of a cease-fire or armistice line. The United States amendment was therefore unacceptable.

51. Paragraph 2 (*b*) might not be absolutely clear, but the proposed amendments, far from improving it, made it even more obscure, and the Soviet Union delegation would vote against them.

52. The observation by the Swiss representative on the impossibility of terminating a treaty unilaterally on the ground of fundamental change of circumstances was confirmed by neither practice nor history. A party could at all times request the revision of a treaty, but a change of circumstances would be invoked only when the parties disagreed. In that connexion, the Soviet delegation agreed with the United Kingdom representative that the problem could be solved by applying article 62, but unlike him it regarded the machinery provided in article 62 as satisfactory and adequate.

53. Finally, "*iniquitous*" agreements and colonial treaties, to which the Afghan representative had referred, were void *ab initio* in virtue of article 50 as conflicting with a norm of *jus cogens*. Article 59, on the other hand, was concerned with legitimate treaties which had to be terminated on the ground of a fundamental change of circumstances.

54. Mr. QUINTEROS (Chile) said that his delegation attached special importance to the problems raised by the doctrine of *rebus sic stantibus*. It was well that the convention should recognize the fundamental aspects of that doctrine. The formula proposed by the International Law Commission amply met the need to recognize the dynamic nature of international society. Under the conditions laid down in article 59, a fundamental change of circumstances constituted a legitimate ground for terminating or withdrawing from a treaty. Formulated in that manner, the *rebus sic stantibus* rule did not violate the principle of the non-revision of treaties; it was founded on justice and was designed to maintain inter-State relations in the realm of law.

55. The rule stated in article 59 usefully complemented the rule *pacta sunt servanda*, the rigid application of which was liable, in certain circumstances, to introduce an element of injustice into contractual relations between States. Article 59 had been formulated in a sufficiently objective and restrictive manner to prevent abuse. The exceptions provided for in paragraph 2 offered adequate safeguards.

56. Despite the almost universal recognition of the doctrine of *rebus sic stantibus* and despite international and judicial practice, views differed concerning certain aspects of the application of that doctrine. In his delegation's opinion, it would be too rigid to limit the application of that principle to so-called perpetual treaties, to the exclusion of treaties of long duration.

57. Further, the Commission's formulation of article 59 might be taken to mean that, despite a fundamental change of circumstances under the conditions laid down, a party injured by a unilateral act of denunciation of a treaty was not authorized to terminate or withdraw from the treaty. His delegation considered that in such a case recourse must be had to an international tribunal, and that the procedure to be followed under article 62 represented an important safeguard.

58. The problem of the separability of treaties should also be considered in connexion with the application of the *rebus sic stantibus* principle; article 41 provided a solution to that problem.

59. With regard to the amendments to article 59, that by the Republic of Viet-Nam (A/CONF.39/C.1/L.299) was unsuitable because it introduced into paragraph 2 new elements designed to limit the scope of the article. The expression "confirming a negotiated political settlement" called for an assessment that would necessarily be extra-judicial. Similarly, the expression "was deliberately provoked" would be open to an essentially subjective interpretation. Consequently, his delegation could not support the amendment.

60. As to the Venezuelan amendment (A/CONF.39/C.1/L.319) according to which article 59 would be expressed affirmatively, his delegation thought that the negative formulation proposed by the International Law Commission reflected more faithfully the very limited character of the cases that constituted an exception to the general principle that a change of circumstances could not be invoked as a ground for terminating a treaty. It would therefore be unable to support that amendment.

61. On the other hand, it was in favour of the Canadian amendment (A/CONF.39/C.1/L.320), which usefully added that the *rebus sic stantibus* principle might not be invoked as a ground for suspending a treaty. For the same reason, his delegation also supported the Finnish amendment (A/CONF.39/C.1/L.333).

62. The United States amendment (A/CONF.39/C.1/L.335) substituted the words "drawing a boundary" for the words "establishing a boundary" in paragraph 2 (*a*). But the International Law Commission had explained in paragraph (11) of its commentary to article 59 that it had deliberately replaced the expression "treaty fixing a boundary" by the words "treaty establishing a boundary", as being a broader expression which did not merely embrace delimitation treaties. The amendment also proposed to include, in addition to boundary treaties, treaties "otherwise establishing territorial status"; that would unduly broaden the scope of a rule which had the character of an exception and as such ought to remain as precise and specific as possible. For that reason the Chilean delegation was not in favour of the amendment.

63. Lastly, his delegation could not support the Japanese amendment (A/CONF.39/C.1/L.336), as the new element it proposed to insert—the phrase "to a serious disadvantage of the party invoking it"—necessarily called for a subjective interpretation.

64. Mr. ALCIVAR-CASTILLO (Ecuador) said that although his delegation welcomed the inclusion in the convention of the *rebus sic stantibus* principle, it had certain objections to raise concerning the formulation of that principle in the draft.

65. The principle had always been the subject of much controversy. The traditional view that the *rebus sic stantibus* principle not only constituted an exception to the *pacta sunt servanda* rule, but was even its antithesis, was no longer admitted at the present time. Henceforth, both rules were general norms of international law. Nevertheless, the International Law Commission had been obliged to take into account to some extent the misgivings that the *rebus sic stantibus* principle had aroused among those who continued to affirm that the *pacta sunt servanda* rule was sacrosanct, an attitude that had no sound foundation in law but on the contrary reflected power politics. His own delegation took the view that the *pacta sunt servanda* rule should be considered as a norm of general international law, the effects of which were limited by other equally important or more important norms. The *rebus sic stantibus* principle, which was limited to the termination of a treaty, was of more limited scope than other principles entailing the nullity *ab initio* of a treaty. For that reason, his delegation did not approve of the negative terms in which the International Law Commission had framed article 59, as that implied that the intention was to continue to regard the *rebus sic stantibus* principle as an exception to the *pacta sunt servanda* rule. Such a theory was indefensible at the present stage of the evolution of international

law. The positive formulation proposed in the Venezuelan amendment (A/CONF.39/C.1/L.319) would be an improvement.

66. On the other hand, his delegation found it less easy to understand the provision in paragraph 2 (*a*) which excluded treaties establishing a boundary from the scope of the *rebus sic stantibus* principle. The United States amendment (A/CONF.39/C.1/L.335) still further aggravated the situation by proposing to exclude, in addition, treaties " otherwise establishing territorial status ". Whereas in the draft the sole purpose of paragraph 2 (*a*) was to protect " peace " treaties, the vague expression proposed by the United States tended to perpetuate existing colonial systems and territorial régimes established by force.

67. In his view it was clear that the United Nations General Assembly could, in virtue of Article 14 of the Charter, recommend the revision of international treaties. The fact that it had not yet made use of that right in no way detracted from the value of that principle. In an article published in 1948,[6] Blaine Sloan had expressed the opinion that a General Assembly recommendation concerning the revision of a treaty was tantamount to the express recognition of a fundamental change of circumstances as compared with those that had existed at the time the treaty was entered into, and that that fact could not fail to influence the arbitral or judicial body that had to decide the dispute.

68. His delegation realized that it would be difficult to modify article 59 at the present stage and had refrained from submitting an amendment. Nevertheless, it hoped that the necessary changes could be made in the near future.

69. Mr. AL-RAWI (Iraq) said that his delegation was in favour of the principle laid down in article 59 and of the way in which it had been drafted by the International Law Commission.

70. The principle was accepted by most authors. It had existed in international State practice for centuries and was recognized by the internal law of most countries. Sometimes, States invoked a change of circumstances without expressly mentioning the *rebus sic stantibus* rule or referring to a general principle. In other cases—and there were many—the *rebus sic stantibus* principle had been explicitly invoked.

71. His delegation was firmly convinced that if the application of a treaty in a given situation was not in conformity with the objectives of the parties, because the circumstances differed greatly from those existing at the time the treaty was entered into, the treaty should no longer be applied.

72. His delegation could not accept any of the amendments submitted to article 59, as it considered that the text of that article was clear, satisfactory and in accordance with State practice. The Commission had been wise not to include the words " *rebus sic stantibus* " either in the text or in the title of the article, so as to avoid the theoretical implications of that expression. His delegation supported article 59 as it stood.

73. Mr. MIRAS (Turkey) said that at the present stage of international law, a party that was no longer satisfied with a treaty as the result of a fundamental change of circumstances could request the other party to open negotiations with a view, where necessary, to modifying the treaty so as to adapt it to the new conditions. If the parties failed to reach agreement, they could have recourse to judicial settlement or arbitration, as the assessment of the effects of a fundamental change of circumstances could be entrusted only to an impartial third party. The unilateral and irregular denunciation of a treaty was devoid of all legal effect.

74. When commenting on the first draft, his Government had suggested[7] that article 59 should be modified so as to stipulate that the interested parties should first enter into negotiations *inter se* and only bring the dispute before an international tribunal if they were unable to reach agreement. Judicial safeguards were essential for the article; without them, article 59 would be unacceptable to his delegation. As it also considered that the wording could be improved, its attitude towards the article would depend on the final drafting and on the drafting of article 62. The same applied to the relevant amendments.

75. Mr. MEGUID (United Arab Republic) said he approved of the principle in draft article 59.

76. The principle had been stated in Article 19 of the League of Nations Covenant and it was regrettable that that Article had not been given its counterpart in the United Nations Charter. Article 59 of the International Law Commission's draft had the great merit of filling that gap in international law.

77. No doubt it was true that the majority of modern treaties were expressed to be of short duration, or were entered into for recurrent terms of years with a right of denunciation at the end of each term, or else they were expressly or implicitly terminable after notification. But, as the International Law Commission observed in paragraph (6) of its commentary, there might remain " a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party ".

78. That was what the Egyptian Government had tried to do when it had wished to terminate the treaty of alliance with the United Kingdom of 1936,[8] article 16 of which incorporated the principle of the perpetuity of the alliance. But when negotiations had proved abortive, and after a vain appeal to the Security Council, a law had been promulgated in 1951 terminating the treaty by the application of the *rebus sic stantibus* clause.

79. His delegation supported the retention of article 59 and was prepared to accept any improvement in the drafting.

80. Mr. SAMAD (Pakistan) said he was in favour of the *rebus sic stantibus* principle stated in draft article 59. The existence of the principle in international law had been recognized by jurists, but most of them had held

[6] " The binding force of a recommendation of the General Assembly of the United Nations " in *British Yearbook of International Law, 1948*, p. 29.

[7] *Yearbook of the International Law Commission, 1966*, vol. II, pp. 341 and 342.

[8] League of Nations, *Treaty Series*, vol. CLXXIII, p. 402.

that certain limits should be placed upon its scope of application and that the conditions under which it might be invoked should be regulated. Without such limitations, and in the absence of any system of compulsory jurisdiction, there was a risk that the principle might impair the stability of treaties.

81. The International Law Commission had therefore done well to attach restrictions to the right to invoke the principle, in order to prevent abuse. His delegation was accordingly in favour both of paragraph 2 (*a*) and of paragraph 2 (*b*), which was based on the rule that a party ought not to benefit from its own wrong doing.

82. With regard to the form of article 59, the Pakistan delegation would not strongly oppose the positive wording proposed in the Venezuelan amendment (A/CONF.39/C.1/L.319), but preferred the negative form in which the International Law Commission had couched the article. His delegation was not in favour of the other amendments to article 59, for they did not improve the text.

83. It was to be hoped that the application of article 59 would be made subject to independent and impartial adjudication.

84. Mr. OUTRATA (Czechoslovakia) said the International Law Commission had done excellent work in drafting article 59 and had succeeded in devising the right balance between the need to include in the convention a clause without which it would not truly reflect contemporary positive international law and the need to stress the exceptional character of that clause and to set limits to its application. The Czechoslovak delegation was therefore prepared to support article 59 as it stood.

85. Most of the amendments improved neither the substance nor the form of the text. The Venezuelan proposal (A/CONF.39/C.1/L.319) that the principle should be stated positively would not alter the legal meaning, but would go against the wish expressed by most delegations that the exceptional character of the application of the *rebus sic stantibus* clause should be stressed as strongly as possible. His delegation could not endorse the reference to the suspension of a treaty proposed by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333). The Japanese amendment (A/CONF.39/C.1/L.336) was superfluous and had the disadvantage of introducing a subjective element.

86. The Czechoslovak delegation was prepared to accept the general idea in the United States amendment (A/CONF.39/C.1/L.335) that some territorial régimes established by treaties, and in particular by multilateral treaties, should be protected against unilateral denunciation, as should treaties establishing boundaries. But that did not apply to all such territorial régimes. There might well be situations in which a party would be completely justified in invoking the clause with respect to a territorial status established by agreement, if resort to the clause was the only way to terminate a treaty which had become a liability to international peace and friendly relations among nations. The present wording of the United States amendment, however, was not precise enough and might lead to unjustified interpretations. The Czechoslovak delegation would therefore be unable to support it, but as the amendment was to be referred to the Drafting Committee, it would reserve its position until the Drafting Committee submitted a revised text to the Committee of the Whole.

87. Mr. DE BRESSON (France) said his delegation was prepared to recognize the existence of the principle of a fundamental change of circumstances as a rule of positive law. Generally, therefore, it favoured article 59 as proposed by the International Law Commission, although it did not interpret it as in itself enabling a State to avoid its undertakings unilaterally. His delegation considered nevertheless that it would be advisable to study the wording of article 59 with great care and to make it more precise where necessary.

88. The United States amendment (A/CONF.39/C.1/L.335) had the merit of showing that the wording used to describe the cases mentioned in paragraph 2 (*a*) of the draft article was perhaps not wholly satisfactory, although it might be asked whether the wording suggested by the United States was not too broad and too imprecise. Although his delegation did not accept the formula proposed in that amendment, it considered that the idea it contained could be submitted to the Drafting Committee.

89. The Venezuelan amendment (A/CONF.39/C.1/L.319) had the disadvantage of reversing the principle laid down in article 59 and of turning the exception into the rule. It thus considerably enlarged the scope of a provision which should in all cases be applied only with the greatest caution.

90. His delegation doubted whether the Japanese amendment (A/CONF.39/C.1/L.336) was really essential and thought that the idea it expressed might be implicit in the existing text of article 59.

91. The remaining amendments were more of a drafting nature. His delegation had no objection to them in principle.

92. Whatever its attitude might be to article 59 as such, the French delegation reserved its position generally until the questions concerning the settlement of differences arising from the application of Part V of the draft articles had been discussed in the context of article 62.

93. Mr. MUTUALE (Democratic Republic of Congo) said his delegation approved of the principle expressed in article 59 of the draft. As formulated by the International Law Commission, that principle was based on justice and equity. It was also a useful principle which helped to promote the stability of treaty relations, prevented their violent rupture and provided a remedy for the desperate plight of a State which found itself unable to meet burdensome obligations because the circumstances which had induced it to accept those obligations had ceased to exist, without such an eventuality having been contemplated in the treaty. The principle should however be watered down because its application by States entailed certain risks; it should therefore be made subject to conditions such as the International Law Commission had very wisely provided.

94. With regard to the amendments to article 59, that submitted by Japan (A/CONF.39/C.1/L.336) was unacceptable, because it was sufficient that a fundamental change of circumstance should radically transform the scope of obligations still to be performed under the

treaty for it to be invoked as a ground for terminating or withdrawing from the treaty.

95. The Venezuelan amendment (A/CONF.39/C.1/L.319) was also unacceptable, because it ran counter to the cautious and sensible attitude adopted by the International Law Commission concerning the application of the *rebus sic stantibus* principle.

96. The amendments submitted by Finland (A/CONF.39/C.1/L.333) and Canada (A/CONF.39/C.1/L.320) raised difficulties to which the sponsors themselves had drawn attention. How, for instance, could a fundamental change of the circumstances which had constituted an essential basis of the consent of the parties entail only the suspension of the treaty? The Finnish amendment, however, contained a provision regarding separability which his delegation could accept.

97. He could not support the United States amendment (A/CONF.39/C.1/L.335) because it introduced an insufficiently precise notion: the words " territorial status " might also cover a cession of territory, a proposition which his delegation could not accept.

The meeting rose at 6.10 p.m.

SIXTY-FIFTH MEETING

Saturday, 11 May 1968, at 9.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 59 (Fundamental change of circumstances) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 59 of the International Law Commission's draft. [1]

2. Mr. EVRIGENIS (Greece) said that some delegations had expressed doubts about the wisdom of including the rule in article 59 in the draft convention. His delegation, while appreciating their arguments, was nevertheless in favour of including at least the principle, although it was not blind to the difficulty of formulating a substantive rule on the matter and of establishing the conditions under which it would be applied by an adjudicating body. But the difficulties were not such as to make it necessary to omit the principle from the convention. The rule that a fundamental or unforeseeable change of circumstances affected the performance of a treaty was now firmly established in the legal conscience everywhere, although it might not be easy to frame it in a comprehensive and satisfactory manner. The rule would operate in any case, whether it was included in the convention or not. It was inconceivable that, after displaying a progressive attitude on so may other questions, the Conference should leave entirely aside a concept which owed its existence to the continuous evolution and transformation of international life.

[1] For the list of the amendments submitted, see 63rd meeting, footnote 1.

3. The International Law Commission had worked out an admirable definition, in view of the complexity of the subject. It was a well-balanced combination of the French doctrine of "*imprévision*" and the German theory of " *geschäftsgrundlage* " and it could provide, through the medium of suitable tribunals, an equitable solution without endangering the stability of international treaty relations. His delegation would support the International Law Commission's text in principle, though it would reserve its position until the official form of article 62 was known. It would also support the Canadian amendment (A/CONF.39/C.1/L.320) and the Finnish amendment (A/CONF.39/C.1/L.333) because they introduced a desirable element of flexibility with regard to the legal effects of a fundamental change of circumstances.

4. A few small drafting changes needed to be made to the Commission's text. The words " as a ground for terminating or withdrawing from " in paragraph 2 (*a*) would be better placed at the end of the introductory sentence; otherwise, sub-paragraph (*b*) would appear to be left in the air as a legal rule, without any sanction attached to it. It might be better to substitute the word " another " for the words " a different " in paragraph 2 (*b*), since the word " different " might give the impression that it meant an obligation having a different object and not, as should be the case, a legally different obligation. That change would bring the text into line with the Netherlands amendment (A/CONF.39/C.1/L.331) to article 58 which had already been adopted.

5. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that though the title of article 59 was " Fundamental change of circumstances ", the subject of the article was in reality *rebus sic stantibus*. It dealt, therefore, with a very ancient principle which, however, had some new aspects. The article made provision for new grounds for terminating or withdrawing from a treaty and, accordingly, dealt with a very radical principle of law, particularly of international law. It had been argued that the principle that, if a fundamental change of circumstances occurred, a party might unilaterally terminate a treaty, was implicit in all treaties. The principle had not yet, however, been confirmed in the law of treaties nor had it been finally introduced into international law. It was not a general principle of international law, because it was not yet universal. The International Law Commission was therefore to be commended for the excellent text in which it had embodied the *rebus sic stantibus* principle. His delegation supported the Commission's text, despite a few weak points which had already been noted.

6. The principle had often been interpreted broadly to imply that any change in circumstances enabled a State to terminate a treaty. The article would therefore have to be worded very strictly, since unduly elastic interpretation was undesirable. At the same time, it must be brought into line with the progress of modern international law and accepted only if the changes were objective and if its application was designed to preserve friendly relations between States.

7. The prime object was to prevent the perpetuation of situations which had become obsolete. In concluding a treaty the parties should, where possible, not only have regard to the circumstances at the time of its conclusion but should also make a scientific attempt to assess future

conditions. The prime difficulty was the reasonable application of the principle of *rebus sic stantibus* in the context of contemporary life. It should be applied with discretion, since exaggerated use of it would be fatal to the stability of treaties. The Drafting Committee should therefore attempt to make paragraphs 1 (*a*) and 1 (*b*) more flexible, perhaps by strengthening the definition of the term "fundamental". The provision should apply only when a State found it completely impossible to perform a treaty, or where a treaty conflicted with its most vital interests.

8. At the 64th meeting, the representative of Afghanistan had expressed doubts about paragraph 2 (*a*). He appreciated the Afghan representative's concern, but it should not be forgotten that the article dealt only with legal treaties. Illegal and unequal treaties should be void not only under the terms of article 59, but also where they conflicted with a rule of *jus cogens*. Newly emergent States had the right to state their attitude towards treaties previously concluded by the metropolitan Power, but that was not relevant to article 59. What was in issue was a change in the whole system, not merely in so far as it affected treaties. The *rebus sic stantibus* principle affected only certain treaties, and that was why the International Law Commission's text was commendable in that it destroyed the notion of the immutability of previous circumstances. Some had seen a contradiction between *rebus sic stantibus* and *pacta sunt servanda*, but only the latter was immutable.

9. He could not accept the United States amendment (A/CONF.39/C.1/L.335), because it made the article less precise, nor the Venezuelan amendment (A/CONF.39/C.1/L.319), because it stated the rule positively. Nor could he support the Canadian (A/CONF.39/C.1/L.320) and Finnish (A/CONF.39/C.1/L.333) amendments.

10. Mr. ENGEL (Denmark) said the Danish delegation shared the view that fundamental changes of circumstances might be invoked as a ground for terminating or withdrawing from a treaty under the conditions and within the limits specified in article 59. That principle should find a place in the modern law of treaties.

11. Since, however, the contracting parties were likely to assess circumstances differently and to draw different legal conclusions from the facts, it was essential to ensure that a State should not be entitled to withdraw from a treaty under article 59 unless it was prepared to submit any dispute on the point to the decision of an arbitral or judicial body. The dangers to the security of treaties presented by the adoption of the principle of *rebus sic stantibus* in the absence of any rule to that effect were obvious. The Danish delegation's position would consequently depend on what safeguards were provided in article 62 against the arbitrary application of article 59, and it must reserve its final position on article 59 until the shape of article 62 was known.

12. Mr. HARASZTI (Hungary) said the International Law Commission was to be commended on its clear formulation in draft article 59 of the controversial principle of *rebus sic stantibus* and his delegation would accept the text as it stood, though it was quite prepared to examine carefully the various amendments submitted.

13. He had noted with satisfaction that the idea underlying article 59 had met with wide acceptance even by those delegations which had been reluctant to accept the principle in the Sixth Committee. Without going further into the substance, he would merely say that he agreed with the view that the principle of *rebus sic stantibus* was not incompatible with the *pacta sunt servanda* rule but was a necessary corollary of it.

14. The Hungarian delegation could accept the idea in the Canadian (A/CONF.39/C.1/L.320) and Finnish (A/CONF.39/C.1/L.333) amendments, enabling States to suspend a treaty in the case of a fundamental change of circumstances, since that was consistent with State practice; an example was the well-known case of the International Load Line Convention which had been suspended by the United States of America with express reference to the *rebus sic stantibus* clause. His delegation could also accept the second idea in the Finnish amendment (A/CONF.39/C.1/L.333), concerning the separability of treaties with respect to termination, since that too was consistent with State practice, but it was not convinced of the necessity of that amendment, since in its opinion article 41 would also be applicable in the case of a fundamental change of circumstances.

15. His delegation could not support the United States amendment (A/CONF.39/C.1/L.335) because it was ambiguous and might give rise to unnecessary disputes. Further, it might prevent the application of article 59 with regard to a number of treaties containing provisions dating from the colonial era. Nor could his delegation support the Japanese amendment (A/CONF.39/C.1/L.336), which was not truly a drafting amendment, as the Japanese representative had claimed, but affected the substance. The additional condition embodied in the Japanese amendment would seriously limit the application of the rule laid down in article 59. The International Law Commission's negative formulation was preferable to the positive formulation in the Venezuelan amendment (A/CONF.39/C.1/L.319), because the negative formulation stressed the exceptional character of the *rebus sic stantibus* rule as compared with *pacta sunt servanda*.

16. Mr. KABBAJ (Morocco) said that article 59 should certainly be included in the draft convention on the law of treaties because a strict statement of the *rebus sic stantibus* rule would contribute to the stability of treaty relations. Paragraph 2 (*a*) was, however, open to objection. The case of the treaties dealt with in that sub-paragraph, especially with the broad interpretation given by the Commission, had never been completely accepted in legal theory, in case-law or in State practice. There were changes of circumstances so fundamental that it would be both inequitable and legally wrong to regard the treaties affected by them as immutable, especially where the origin was illegal. In the opinion of many jurists and in accordance with State practice, even so-called perpetual treaties might be revised as a result of a fundamental change of circumstances. Although the Permanent Court of International Justice had made no decision on the application of the *rebus sic stantibus* principle to treaties relating to territorial problems in the *Free Zones* case, [2] it had not thereby intended to contest the existence of the principle nor to set aside the possibility of applying it to that kind of treaty.

[2] *P.C.I.J.*, Series A/B (1932), No. 46.

17. His delegation was perturbed at the statement in paragraph (11) of the Commission's commentary that the expression "treaty establishing a boundary" embraced treaties of cession as well as delimitation treaties. A large number of treaties of cession had been concluded in unjust and illegal circumstances and therefore belonged to the past, now that the circumstances had been affected by profound changes in the notions of international relations; they could not, therefore, be perpetuated indefinitely. That consideration applied to the amendments by the Republic of Viet-Nam, Venezuela and the United States (A/CONF.39/C.1/L.299, L.319 and L.335) whose effect was either to maintain the exception in its broader sense, or to extend its scope.

18. Mr. FERNANDO (Philippines) said that article 59 as drafted by the International Law Commission was designed to remove any remaining doubts about the general principle of *rebus sic stantibus*, even though its invocation under particular circumstances might sometimes be considered dubious. The *pacta sunt servanda* rule was basic, but it was only realistic to assert that rigid adherence to it at all times and in all conditions, notwithstanding a radical change of circumstances, could lead to disputes. Article 59 supplied a necessary corrective. Since it was worded in a negative form, there was no danger that the provision would be regarded as an exception to the *pacta sunt servanda* rule. It was flexible and the field of interpretation was not unduly narrowed. When the rule was expressed in very general terms, the importance of environmental facts and conditions became clearer. In view of the circumstances in which treaties between colonial powers and developing countries had been concluded and of the fact that modification of such treaties was accepted in modern international life, some such provisions as those in article 59 were highly desirable. The International Law Commission's text might perhaps be improved, but the principle embodied in it was commendable.

19. Mr. MATINE-DAFTARY (Iran) said that he would like to give a specific illustration from the history of his own country of how the *rebus sic stantibus* principle had provoked controversy in the past. The Government of Iran had invoked the *rebus sic stantibus* principle in order to rid itself of the baneful Capitulations régime. That régime, which had made increasingly serious encroachments on Iranian sovereignty for nearly a century, had been imposed on Iran by Czarist Russia in 1828, following a military defeat. It had been abolished on the morrow of the October Revolution and its abolition had been confirmed by the treaty between Iran and the Soviet Union, signed at Moscow in February 1921. The western Powers, however, had persisted in exercising consular jurisdiction in Iran, partly by virtue of conventions imposed during the course of the nineteenth century on the Russian model, and partly by virtue of the most-favoured-nation clause. Despite the far-reaching judicial and administrative reforms after 1921 following the establishment of the modern Iranian Army, representing a fundamental change of circumstances in Iran, the States parties to the conventions had opposed the Iranian claim and contested the very existence of the *rebus sic stantibus* principle in international law. Only after lengthy negotiations and after receiving assurances as to the guarantees provided by the Iranian courts had the western Powers finally yielded and the capitulations been abolished in April 1927.

20. He had given that illustration in order to show that the very natural and logical principle of *rebus sic stantibus* had been the subject of controversy. The principle underlay Article 19 of the League of Nations Covenant and Article 14 of the United Nations Charter. The International Law Commission was therefore to be commended on having brought the controversy to an end with article 59 of its draft.

21. The criticisms of the Commission made in the course of the debate seemed hardly constructive. The Commission had been accused of using vague terms, but the amendments put forward did not suggest any changes that would improve the text. They could be referred to the Drafting Committee.

22. Mr. MARESCA (Italy) said that article 59 was one of the most successful articles drafted by the International Law Commission, and was remarkably well-balanced. It kept the most-favoured-nation treatment as an exception and linked a traditional notion with a new idea, namely, that it was not only a change of circumstances but also a radical transformation in obligations that enabled a State to invoke grounds for the termination of a treaty.

23. Article 59 was closely bound up with article 62. It was hard to see how the *rebus sic stantibus* clause could operate, especially with regard to the termination of a treaty, without the agreement of the parties, but it could not depend solely upon the will of another party.

24. The advantage of the Finnish amendment (A/CONF.39/C.1/L.333) was that it brought back the idea of the suspension of a treaty or, in other words, helped to preserve the treaty by admitting the possibility of separability. The Canadian amendment (A/CONF.39/C.1/L.320) had a similar effect. His delegation had considerable sympathy for the United States amendment (A/CONF.39/C.1/L.335), since it made clearer the notion of territorial status as an absolute exception to the *rebus sic stantibus* rule.

25. Mr. MWENDWA (Kenya) said that the existence and importance of the *rebus sic stantibus* principle had not been questioned during the debate. His delegation agreed with many others that the convention on the law of treaties would be incomplete if it failed to include a provision on fundamental change of circumstances as a ground for terminating a treaty. The International Law Commission's draft was entirely satisfactory; if any changes apart from drafting changes were made to it, they would upset the delicate balance achieved by the Commission between the need to preserve the stability of treaty relations, on the one hand, and the demands of change, on the other. The negative form in which draft article 59 had been couched was an essential part of that balance. His delegation could not support the Venezuelan amendment (A/CONF.39/C.1/L.319) because it sought to put the article in positive form.

26. The exceptions to the rule, particularly the provision in paragraph 2 (*a*), were of special importance. Some delegations had been understandably reluctant to admit that exception in view of the arbitrary way in which some

boundaries, including many former colonial territorial boundaries, had been established. Nevertheless, territorial boundaries were so inextricably interwoven with the sovereignty and integrity of a State that the Commission had been wholly justified in excluding treaties establishing boundaries from the ambit of *rebus sic stantibus*. The merit of the International Law Commission's formulation of the exception was that it not only kept the balance but was stated clearly and unequivocally. Any attempt to rewrite the exception was likely either to broaden its scope or make the text ambiguous. His delegation would therefore vote against the United States amendment (A/CONF.39/C.1/L.335) and against the first part of the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.299); the second part introduced a new and highly controversial element of a non-juridical nature. Similarly his delegation would vote against the Japanese amendment (A/CONF.39/C.1/L.336), since it introduced a subjective element where an objective criterion was required. The Canadian and the Finnish amendments (A/CONF.39/C.1/L.320 and L.333) were less objectionable, but his delegation would prefer the retention of the article as it stood.

27. Sir Humphrey WALDOCK (Expert Consultant) said that the Netherlands representative had asked him to explain the notions embodied in such terms as "fundamental", "radically" and "scope of obligations" used in stating the conditions necessary for the application of the principle. He interpreted the question as indicating some uneasiness as to whether the conditions had been tightly enough drawn in draft article 59. As an English judge had said in connexion with an analogous situation in English law, it was almost impossible by any nice combination of words to state a rule in advance of any possible controversy; all that could be done was to state as strictly as possible circumstances in which the rule might apply. Strictness was particularly needed in article 59 since a change in circumstances, unlike a supervening impossibility of performance, was hard to state in concrete terms. The Commission had felt that it had had to be specially careful in formulating the article from the point of view of the stability of treaties. It had examined many combinations of words before it had arrived at the present text; but if the Conference could improve the text by making it stricter and more objective, so much the better.

28. The Commission had considered the negative statement of the rule specially important. He himself, as Special Rapporteur, had originally worded the draft article slightly differently, stating it in terms of "only if", but the Commission had insisted that the notion should be expressly stated in the negative. The Venezuelan amendment (A/CONF.39/C.1/L.319) therefore ran completely counter to the International Law Commission's opinion.

29. There had been some support for the Canadian and Finnish amendments to add the notion of suspension. The Commission had considered the point and had found it difficult to reach a clear conclusion. The Commission's view had been that article 59, which dealt with a fundamental change of circumstances, might conflict with the idea of mere suspension. It was true that the Commission had provided for temporary impossibility in article 58, but that was a sharper case and made it easier to conceive of a situation where suspension might be appropriate. There were also other articles dealing with the suspension of a treaty by the agreement of the parties, so that if there was a case where that was desirable, there would always be that outlet. The real relevance of the point was to a situation where one party wished to terminate a treaty and the other resisted. In the case of fundamental change, the notion of suspension might not be very practicable. More important, however, was the feeling that, if the possibility of suspension were added, that might weaken the strict philosophy of the whole article. To allow suspension might give the impression that the change of circumstances might not be quite fundamental. That reasoning had induced the Commission not to include a provision for suspension.

30. With regard to the question of separability, other speakers had pointed out that the principle was stated in article 41. The Commission's intention had been that article 59 should clearly be subject to the provisions of article 41, and so it had omitted the expression "in whole or in part".

31. The reasons for including paragraph 2 (*a*) were given in the commentary. The Afghan representative had asked what was the relation between that provision, and self-determination, and illegal and unequal colonial boundary treaties. The answer had to be found in the present convention itself. The question of illegality was dealt with in the two articles treating of *jus cogens*. The question of self-determination was also covered in the commentary. In the Commission's view, self-determination was an independent principle which belonged to another branch of international law and which had its own conditions and problems. The Commission had not intended in paragraph 2 (*a*) to give the impression that boundaries were immutable, but article 59 was not a basis for seeking the termination of a boundary treaty.

32. He had some sympathy for the United States proposal (A/CONF.39/C.1/L.335) for rewording paragraph 2 (*a*). He himself had raised the question in the International Law Commission in the form of a possible enlargement of the article to cover territorial régimes. The Commission, however, had considered that it would be too hard to find a form of words which would not unduly enlarge the exceptions and had come down firmly for the present provision.

33. With regard to paragraph 2 (*b*) and cases of provocation or inducement by the act of the party concerned, the Commission had considered the matter, but had thought it undesirable to state it as an element separate from breach. The rule contained in the article concerned treaties of a certain duration, and even acts done *bona fide* in application of the treaty might tend to bring about a change of circumstances. The Commission had therefore confined the provision to breach, and where acts provoking or inducing a change were not *bona fide* acts, the case would fall within paragraph 2 (*b*), since they would constitute breaches of the treaty.

34. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the Expert Consultant's remarks on subparagraph 2 (*a*) had allayed some of his delegation's doubts. Clearly, the principle of self-determination was covered by other articles of the draft, and article 59,

like all the other articles in Section 3 of Part V, referred to legally concluded treaties; illegal and unequal treaties were dealt with in Section 2. Sub-paragraph 2 (*a*) of article 59 was of the greatest importance to all States, as was proved by the decisions of various organizations, including African organizations, which had stressed the need for the observance of treaties establishing boundaries.

35. Mr. CASTRÉN (Finland) said that he would not ask for a vote to be taken on the second part of his delegation's amendment (A/CONF.39/C.1/L.333), which related to the question of the separability of treaty provisions. That point could be decided when the Committee gave further consideration to article 41. Indeed, the Expert Consultant seemed to have agreed with the Finnish suggestion in connexion with that article.

36. Mr. ARMANDO ROJAS (Venezuela) said he would withdraw his delegation's amendment (A/CONF.39/C.1/L.319), on the understanding that the Drafting Committee might be able to make use of some of the elements it contained.

37. The CHAIRMAN said he would invite the Committee to vote first on the principle contained in the amendments proposed by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333), to include in paragraph 1 a reference to suspension of a treaty.

The principle was approved by 31 votes to 26, with 28 abstentions.

38. The CHAIRMAN said he would now invite the Committee to vote on the Japanese, Republic of Viet-Nam and United States amendments, in that order.

The Japanese amendment (A/CONF.39/C.1/L.336) was rejected by 41 votes to 6, with 35 abstentions.

*The amendment by the Republic of Viet-Nam to sub-paragraph 2 (*a*) (A/CONF.39/C.1/L.299) was rejected by 64 votes to 1, with 13 abstentions.*

*The amendment by the Republic of Viet-Nam to sub-paragraph 2 (*b*) (A/CONF.39/C.1/L.299) was rejected by 50 votes to 2, with 24 abstentions.*

The words "or otherwise establishing territorial status" in the United States amendment (A/CONF.39/C.1/L.335) were rejected by 43 votes to 14, with 28 abstentions.

39. The CHAIRMAN suggested that article 59, as amended in principle, be referred to the Drafting Committee, together with the first part of the United States amendment.

It was so agreed.[3]

40. Mr. WERSHOF (Canada) said that his delegation's abstention in the vote on the United States amendment (A/CONF.39/C.1/L.335) did not mean that it was opposed to the principle of that proposal. It was merely that the amendment had been circulated so recently that the Canadian Government had not had time to consider the potentially important implications of the text.

41. Mr. MEGUID (United Arab Republic) said that his delegation's approval of paragraph 2 of article 59 was contingent on the understanding that unjust, unequal and wrongfully imposed treaties were excluded from the scope of that clause.

[3] For resumption of discussion, see 81st meeting.

42. Mr. TABIBI (Afghanistan) said that his delegation also understood sub-paragraph 2 (*a*) as not covering unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination.

Article 60 (Severance of diplomatic relations)

43. The CHAIRMAN invited the Committee to consider article 60 and the amendments thereto.[4]

44. Mr. MARESCA (Italy), introducing the amendment submitted jointly by the Italian and Swiss delegations (A/CONF.39/C.1/L.322), said that, although the International Law Commission's wish to make the texts of the articles as brief as possible was commendable, in the case of article 60, that brevity had led to some obscurity. Severance of diplomatic relations could in fact affect legal relations established by two categories of treaties. First, there were many treaties in which diplomatic relations were the only technical means of execution, through the essential communications that they established in such matters as consultation, extradition and so forth. Secondly, diplomatic relations were the direct and exclusive subject of some treaties, such as, for example, the 1961 Vienna Convention on Diplomatic Relations. In the event of severance of diplomatic relations, legal effects would be produced in both cases. The execution of treaties in the first category would necessarily be interrupted in the absence of normal channels: the good offices of a third State might be sought, but such a State could not be called upon to carry out all the work of a diplomatic mission. In the case of treaties directly concerned with diplomatic relations, the effects were much more serious, for such instruments would in effect be terminated or suspended, and the non-operation of their provisions might cause breaches of international law. The omission of any exception to the rule in article 60 could have the dangerous effect of giving the impression that diplomatic relations could be severed without serious consequences.

45. Mr. BENYI (Hungary), introducing his delegation's amendment (A/CONF.39/C.1/L.334), said that Hungary fully supported the basic principle of the International Law Commission's text of article 60. Nevertheless, his delegation had felt obliged to fill an important gap in that text. Although diplomatic relations usually included consular relations, the latter might come into being without the former: States were free to establish consular relations even in the absence of diplomatic relations, and consular relations were frequently the only formal links between countries. Moreover, economic and commercial ties sometimes preceded formal inter-State relations.

46. When diplomatic relations had been severed in the past, it had nearly always been agreed that consular relations should continue; there were many examples of that throughout the world. Accordingly, it should be specified that the severance of consular relations did not affect the treaty obligations existing between the countries concerned; otherwise, it might be assumed that

[4] The following amendments had been submitted: Italy and Switzerland, A/CONF.39/C.1/L.322; Hungary, A/CONF.39/C.1/L.334; Japan, A/CONF.39/C.1/L.337; Chile, A/CONF.39/C.1/L.341.

treaties concluded between States which were linked only by consular relations depended solely on the continuance of those relations, and a State in such a position might invoke article 60 as an escape clause for ridding itself of its obligations under a treaty it did not wish to perform. The Hungarian delegation had therefore proposed the inclusion of the words " and consular " after the word " diplomatic " in the title and first line of the article, in the belief that that amendment would strengthen the *pacta sunt servanda* principle.

47. His delegation fully supported the principle of the Italian and Swiss amendment (A/CONF.39/C.1/L.322), but considered that the words " and consular " should be inserted in the appropriate place in that text, and also that the word " normal " was unnecessary, because it did not appear either in the title or in the article and, moreover, introduced an element of ambiguity. It should be stated clearly with regard to the proposed exception that the treaty would be suspended, not terminated, if the severance of diplomatic and consular relations made it impossible to comply with the obligations of the treaty.

48. Mr. OWADA (Japan) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.337) was merely to reverse the order of articles 60 and 61. The present article 60 was not concerned with a real case of termination or suspension, but was rather a proviso inserted *ex abundanti cautela*, and would more appropriately be placed at the end of Section 3, of Part V. That minor point could be referred to the Drafting Committee.

49. Mr. VARGAS (Chile) said that his delegation's amendment (A/CONF.39/C.1/L.341) comprised two separate ideas which were, however, closely interrelated. The first sentence of the proposed new paragraph 2 was based on the international practice whereby multilateral and bilateral treaties were concluded between States which had severed diplomatic relations. Although it might be considered unnecessary to state such a self-evident fact, it should be borne in mind that one of the tasks of the Conference was to codify existing international law and practice. Moreover, the absence of such a provision might lead to the assumption that States could not conclude treaties among themselves if diplomatic relations had been severed.

50. The second sentence was a necessary complement to the first: whereas the conclusion of treaties was a legal act binding two or more States, severance of diplomatic relations had a political significance and affected relations between Governments. It therefore seemed advisable to state that the conclusion of a treaty in those circumstances did not affect the situation between the two States in regard to diplomatic relations. The problem was connected with that of recognition, for the conclusion of a treaty might be held to imply tacit recognition.

51. The Chilean delegation hoped that the principle of its amendment would be approved by the Committee. It would not press for the inclusion of the provision as paragraph 2 of article 60; if the principle were approved, the Drafting Committee might prefer to place the clause elsewhere in the convention.

52. Mr. LADOR (Israel) said that his delegation also appreciated the brevity of the International Law Commission's text, but recognized that the price of that brevity was that some of the provisions had to be read in conjunction with others. Thus, article 60 derived directly from the principle *pacta sunt servanda* which the Committee had approved in article 23, but it could not be regarded as a full statement of the rule governing severance of diplomatic relations. His delegation therefore supported the Italian and Swiss amendment (A/CONF.39/C.1/L.322).

53. He stressed that there was yet another consequence of the rule, namely, that of the applicability of those conventions which presupposed the absence of normal diplomatic relations and therefore often went so far as to suggest recourse to other means of communication for the full performance of the obligations incumbent on the parties to the treaty. Classical examples of such treaties were what were known as the humanitarian conventions. Such recourse was within the spirit of the draft convention, since the term " performed " in article 23 was more precisely specified in article 27, paragraph 1, as an obligation of good faith.

54. The Hungarian amendment (A/CONF.39/C.1/L.334) also conformed with those ideas, although from another point of view. There were, indeed, cases where the severance of diplomatic relations was accompanied by continuance of consular relations, since the consular function was that of the protection of individual interests. It was therefore questionable whether a parallel should be established between the severance of diplomatic and of consular relations without mentioning the subsidiary methods of consular protection as an element in the maintenance of the treaties in force.

55. His delegation could support the Chilean amendment (A/CONF.39/C.1/L.337), particularly if the second sentence were deleted and the words " or absence " were inserted after the word " severance ". Such a general provision might then be included in Part I of the draft convention.

56. Incidentally, his delegation considered that the word " postulate " in the English version of the Italian and Swiss amendment (A/CONF.39/C.1/L.322) was an unsatisfactory translation of the French " *présupposent* ", and that the word " require " would be preferable.

57. Mr. ARIFF (Malaysia) said that the principle that treaty obligations between parties to a treaty should continue despite the severance of diplomatic relations between them was rooted in practice. Some treaties might be so fundamental to the very existence of States that they simply could not be dispensed with, whatever political differences might arise. For example, the new island State of Singapore was dependent on Malaysia for its water supply; the treaty under which Malaysia had to supply a certain quantity of water daily to Singapore could not be terminated or suspended between the two States for any political reason. Another kind of treaty whose continuance might be fundamental to the existence of a State was one concluded between a land-locked country and a neighbouring maritime State: a treaty providing the former State with an outlet to the sea essential to its economic survival must continue to exist despite the severance of diplomatic relations.

58. The Malaysian delegation was therefore in favour of the principle of article 60, but did not consider the

wording entirely appropriate, since it failed to take into account the political sentiment of States. It was not always true in State practice that the severance of diplomatic relations left the legal relations of the parties unaffected. The Italian and Swiss amendment (A/CONF.39/C.1/L.322) went a long way towards remedying that shortcoming of the Commission's text, and the Malaysian delegation could support it. Perhaps, however, the sponsors would agree to the insertion of the word " continued " before the word " existence ", in order to strengthen the proviso by specifying that normal diplomatic relations must continue to exist.

59. His delegation recognized that cases might arise in which severance of diplomatic relations would not preclude the conclusion of treaties and the establishment of legal relations which were essential for the economic survival of States. It could therefore support the Chilean amendment (A/CONF.39/C.1/L.341) in principle, although it considered the wording rather too loose in its presumption that States would wish to enter into treaties while there was diplomatic friction between them. In practice, States would more often than not refrain from concluding treaties when relations between them were strained. On the other hand, the option to conclude treaties in such circumstances should be stated, and the Chilean delegation might consider accepting the following wording for paragraph 2: " The severance of diplomatic relations between two or more States is no ground for preventing the conclusion of treaties which are fundamental to the existence of these States ". His delegation considered that the second sentence of the Chilean amendment was already implicit in the first sentence and should therefore be deleted.

60. Mr. MOUDILENO (Congo, Brazzaville) said that his delegation agreed in principle with the Commission's text of article 60, but considered that the wording had some shortcomings. First, the term " between parties to a treaty " was rather vague, and it would be advisable to specify diplomatic relations between parties to a treaty " in force "; the term " parties to a treaty " was used even in the articles on the initial stages of the conclusion of treaties, and it seemed advisable to make it clear that the parties in question were bound by the treaty obligations referred to in article 60. Secondly, the expression " in itself " seemed superfluous. Thirdly, it might be advisable to change the position of the adjective " legal ", so that the article would read " The severance of diplomatic relations between parties to a treaty in force does not legally affect the relations established between them by the treaty ".

61. The Commission's wording, moreover, failed to take into account the psychological climate of international relations. It was inaccurate to state categorically that the severance of diplomatic relations had no legal effect on the relations established by the treaty. The Italian and Swiss amendment (A/CONF.39/C.1/L.322) indeed filled a gap, and his delegation could support that proposal in principle; nevertheless, the amendment lacked an essential element, in that it did not make clear whether the effect of the exception would be covered by article 58, on supervening impossibility of performance, or by article 59, on fundamental change of circumstances. In any case, his delegation hoped that the amendment would be adopted by the Committee.

62. Mr. CUENDET (Switzerland) said he was glad to see that the joint Italian and Swiss amendment (A/CONF.39/C.1/L.322) had gained a wide measure of support. Although it might indeed be asked whether article 60 was absolutely indispensable, his delegation supported it because it met certain political necessities. The rule it contained must, however, be set out as precisely as possible; treaties directly affecting diplomatic missions were nullified by the severance of diplomatic relations and were often replaced by others concluded, not with the sending State, but with the protecting power. That was the reason for the amendment by Italy and Switzerland.

63. He supported the Hungarian amendment (A/CONF.39/C.1/L.334), which would make for greater precision, but would involve some drafting modification of the joint amendment. The Japanese amendment (A/CONF.39/C.1/L.337) should be examined by the Drafting Committee. The Chilean amendment (A/CONF.39/C.1/L.341) should perhaps appear in another part of the draft; the second idea expressed in that amendment seemed to belong rather to the law of diplomatic relations.

64. Mr. CALLE Y CALLE (Peru) said he supported the principle laid down in article 60, which was in line with modern doctrine. The joint amendment was justified and made the article more complete. He also supported the Hungarian amendment, as well as the Chilean amendment which stipulated that new treaties could be concluded even if diplomatic relations had been severed between the States concerned. Important agreements would be frustrated if severance were to be a barrier to the conclusion of treaties.

65. Mr. BOLINTINEANU (Romania) said that he was concerned with the practical aspects of the severance of diplomatic relations. As the Commission had indicated in its commentary, the severance of diplomatic relations might make the performance of some political treaties impossible. There were other treaties whose performance required the existence of diplomatic relations; the point was dealt with in article 25 of the Harvard Draft. Thus some categories of treaties could be affected by severance and provision should be made for allowing an exception in their case, so as to attenuate the rigidity of article 60. For those reasons his delegation supported the joint amendment by Italy and Switzerland (A/CONF.39/C.1/L.322); the Drafting Committee could make any drafting improvements to it that might prove necessary.

66. Mr. CHAO (Singapore) said he had noted with satisfaction that the representative of Malaysia had said that even the severance of diplomatic relations, which he hoped would never occur, would not affect the water agreement between Singapore and Malaysia.

67. He agreed with the rule stated in article 60, but there were certain treaties, as recognized in paragraph (4) of the Commission's commentary, which by their very nature contemplated the continuance of diplomatic relations. He therefore supported the joint amendment by Italy and Switzerland (A/CONF.39/C.1/L.322), which was an improvement on the Commission's text and stated unequivocally what was implicit in the text. The word " normal ", however should be deleted because it might create uncertainty.

68. He doubted whether article 60 was the right place for the Chilean amendment (A/CONF.39/C.1/L.341), which he supported. Article 60 dealt with the termination of treaties and not with their conclusion. Favourable consideration should be given to the Japanese amendment (A/CONF.39/C.1/L.337) by the Drafting Committee.

69. Mrs. THAKORE (India) said that the Commission's commentary indicated what were the general exceptions to the rules governing invalidity, termination and suspension. At one time the Commission had considered that severance of diplomatic relations might constitute a ground for termination if it resulted in the disappearance of the means for performing the treaty, but later the view was taken that it should not *per se* affect the validity of the treaty because it might be invoked as a new ground for termination. She supported the Commission's present view and would consequently be unable to support the amendment by Italy and Switzerland (A/CONF.39/C.1/L.322).

70. She supported the Hungarian amendment (A/CONF.39/C.1/L.334) because some States might have consular without having diplomatic relations. For example, a treaty of friendship, commerce and navigation might provide for the establishment of diplomatic or consular relations, or both, between the parties and also provide for the protection of the rights of nationals in the territory of the other party in connexion with trade, shipping and other matters. It stood to reason, in such a case, that if either diplomatic or consular relations, or both, were severed, that should not affect the observance of other obligations arising under such a treaty.

71. The Chilean amendment (A/CONF.39/C.1/L.341) was already implicit in the article but it could be examined by the Drafting Committee.

72. Mr. DEVADDER (Belgium) said he supported article 60 in principle and also the joint amendment by Italy and Switzerland (A/CONF.39/C.1/L.322), but they should be made more precise and the effects of a treaty falling to the ground or of rights and obligations being suspended should be elucidated.

73. Mr. MAKAREWICZ (Poland) said that there was wide support for the proposition contained in article 60, but it was desirable to mention consular relations also because States not infrequently maintained consular relations without maintaining diplomatic relations. He therefore supported the Hungarian amendment (A/CONF.39/C.1/L.334). He also supported the Italian and Swiss amendment (A/CONF.39/C.1/L.322) because the impact of severance of diplomatic and consular relations on a treaty might depend on the nature of the treaty. Some treaties would not be affected whereas others, such as those that established joint organs of which diplomatic agents were members, would be affected because the means of application would disappear. He was also in favour of the Chilean amendment (A/CONF.39/C.1/L.341).

74. He would emphasize that, in the case of the severance of diplomatic or consular relations, the conclusion of a treaty might effectively contribute to lessening the tension between the States concerned.

75. Mr. KEARNEY (United States of America) said he favoured the joint amendment by Italy and Switzerland and the Hungarian amendment since they would serve to elucidate the meaning of article 60 as formulated by the Commission.

76. Mr. KEMPFF MERCADO (Bolivia) said he supported the rule in article 60 together with the joint Italian and Swiss amendment, which would render it more complete. He could not agree that the Chilean amendment was already covered by article 60, since it dealt with the possibility of treaties being concluded in the future when diplomatic relations had been severed. It was unnecessary to specify, as suggested by the representative of Congo (Brazzaville), that the treaties in question must be of fundamental importance. He was in favour of the Chilean amendment but its placing should be left to the Drafting Committee.

77. Mr. BISHOTA (United Republic of Tanzania) said that the principle in article 60 was not in dispute and should apply to any future treaty. He favoured the Chilean amendment, though he was not entirely satisfied with its wording. Nor was he certain that it deserved a separate paragraph. Its content could be conveniently covered if it were formulated in the following terms: " The severance of diplomatic and consular relations between States does not in itself affect treaty relations between them ".

78. He could also accept the Hungarian amendment. On the other hand, he was uncertain whether the joint amendment by Italy and Switzerland was necessary, since it seemed to be fully covered by the words " in itself " in the original text.

79. Mr. WERSHOF (Canada) said he supported the joint Italian and Swiss amendment. The Drafting Committee should, however, redraft it in clearer terms and also advise on the best place for the Chilean amendment.

80. Mr. RUIZ VARELA (Colombia) said that article 60 reflected international doctrine and practice. He favoured the Hungarian amendment as well as the Chilean amendment, both of which would fill gaps in the Commission's draft. His Government was of the opinion that all States should be free to negotiate with each other, whether or not they maintained diplomatic relations, and that was the policy it followed itself.

81. Mr. EUSTATHIADES (Greece) said that although he agreed with the idea in the joint amendment, it was already reflected in article 60. If, however, it were felt desirable to insert it *ex abundanti cautela,* he would have no objection, but hoped that the Drafting Committee would manage to produce a more precise wording. A number of treaties presupposed the existence of diplomatic relations for their application and if the wording were not precise enough, their existence might be endangered. The Hungarian amendment was acceptable but would be clearer if it read " diplomatic or consular ". The Chilean amendment was correct but should be given another place in the draft: that was a matter that the Drafting Committee could deal with.

82. The CHAIRMAN said he would now put the various amendments to the vote, beginning with the Hungarian amendment.

The Hungarian amendment (A/CONF.39/C.1/L.334) was adopted by 79 votes to none, with 11 abstentions.

83. The CHAIRMAN put to the vote the principle of the joint Italian and Swiss amendment, the exact wording of which would be left to the Drafting Committee.

The principle of the joint Italian and Swiss amendment (A/CONF.39/C.1/L.322) was adopted by 62 votes to none, with 25 abstentions.

84. Mr. ROSENNE (Israel) asked for separate votes to be taken on the two sentences in the Chilean amendment (A/CONF.39/C.1/L.341).

85. Mr. VARGAS (Chile) said that his delegation accepted the Israel suggestion to insert the words " or absence " after the words " the severance " in the first sentence of the Chilean amendment. The placing of the paragraph could be left to the Drafting Committee.

86. The CHAIRMAN put to the vote successively the principles of the first and second sentences of the Chilean amendment (A/CONF.39/C.1/L.341).

The principle of the first sentence, as amended, was adopted by 56 votes to 2, with 30 abstentions.

The principle of the second sentence was adopted by 43 votes to none, with 44 abstentions.

87. Mr. CASTRÉN (Finland) said that he had abstained from voting on all the amendments because the joint amendment was already covered in article 60 and the others were unnecessary.

88. The CHAIRMAN said that article 60 would be referred to the Drafting Committee, together with the Japanese amendment (A/CONF.39/C.1/L.337).

The meeting rose at 1.15 p.m.

SIXTY-SIXTH MEETING

Monday, 13 May 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 61 (Emergence of a new peremptory norm of general international law)

1. The CHAIRMAN invited the Committee to consider article 61 of the International Law Commission's draft.[1]

2. Mr. CASTRÉN (Finland) said that, according to paragraph (3) of the Commission's commentary to article 61, the principle of separability of the provisions of a treaty was applicable under article 61, unlike the case dealt with in article 50, where the treaty was void *ab initio* if it conflicted with a rule of *jus cogens* existing at the time when it was concluded. But the text of article 61 did not reflect that proposition and the purpose of the Finnish amendment (A/CONF.39/C.1/L.294) was to clarify the text in that regard. Otherwise it would give rise to doubts about the scope of the principle of separability. As the amendment was a drafting one, it could be sent to the Drafting Committee. The point might be covered in article 41.

3. Mr. BARROS (Chile) said that his delegation's attitude to the articles on *jus cogens* had been misunderstood. It certainly accepted the notion of *jus cogens* as a superior rule to all others. The wording of article 50 was imprecise and would have to be clarified and a better definition of the rule given. He had some apprehensions about the effect of article 61, similar to those he had expressed in connexion with article 50,[2] since it was difficult to foresee how the rules of *jus cogens* would operate in the future and what effect that would have on parliaments having to ratify the treaties in question. If the Committee decided to maintain article 61, he would support the Finnish amendment.

4. Sir Francis VALLAT (United Kingdom) said that article 61 was closely linked with article 50. The fundamental principle of *jus cogens* was recognized by the vast majority of States represented at the Conference and should be confirmed in the convention, but there were difficulties over its content and application which, with good will, should be solved; otherwise, the most unhappy consequences would ensue. The question was, how the future of international law was to be determined. Some criterion for identifying peremptory norms for the purpose of articles 50 and 61 would have to be found. Ideally, it would be most satisfactory to have express agreement on them from time to time, since it would be sowing the seeds of future conflict if it were impossible to agree now on the content of the peremptory norms, even for the purpose of article 50. The United States amendment to article 50 (A/CONF.39/C.1/L.302) pointed in the right direction, and it was a matter of deep regret to his delegation that the Committee was denied the opportunity of conciliation owing to a tied vote,[3] but perhaps moderation would prevail and a formula would be found that provided some safeguard on the question of content, without in any way undermining the basic principle of *jus cogens*.

5. The question of separability in relation to article 61 would be covered by the Finnish amendment (A/CONF. 39/C.1/L.294) or by article 41. In proper cases the principle was absolutely sound and it would be absurd and disruptive of good international relations in many cases if the whole of a treaty were to be rendered void merely because, on one interpretation, one of its provisions happened to conflict with a peremptory rule or norm of international law. Treaties of a broad character such as commercial treaties, treaties of extradition, or treaties settling complicated disputes, might conflict only in a minor respect with a peremptory norm of existing or future international law. It would be better and wiser, bearing in mind the principle in Article 103 of the Charter, to permit separability rather than to regard the whole treaty as void and invalid. He was, of course, speaking of cases where only a separable provision conflicted with a peremptory norm and not the whole treaty. Satisfactory procedures for deciding the method of application of *jus cogens* were essential, in the interests of the international community as a whole.

[1] Amendments had been submitted by India (A/CONF.39/C.1/L.255) and Finland (A/CONF.39/C.1/L.294).

[2] See 52nd meeting, paras. 53-62.

[3] 57th meeting, para. 76.

6. If the problems he had mentioned could be solved, his Government would reconsider its position as it had been stated in connexion with article 50.[4]

7. Mr. JACOVIDES (Cyprus) said that article 61 was a corollary of article 50 and declared that a new peremptory rule established by a law-making treaty or custom had primacy over other rules of law. His delegation would vote for the Commission's text.

8. Mr. FERNANDO (Philippines) said that his delegation fully accepted and respected peremptory norms dictated by the overriding interests of the world community, to which national interests must yield. Such norms circumscribed the autonomy of individual States. International law was a progressive science capable of modification and growth and the needs of the future were beyond prediction. There was a real need for rules of a mandatory character applicable to all, but if they were to acquire peremptory status they must have been accorded more or less universal acceptance, either express or tacit, by the whole international community.

9. Technically the Commission had been correct in asserting that the provisions of article 61 lacked the element of retroactivity, since a treaty only became void and terminated on the peremptory norm being established. Until such a time, it was valid unless vitiated by some other defect. But a peremptory norm, in so far as it superseded existing treaty relations, had an *ex post facto* element.

10. The Finnish amendment would make for clarity and his delegation supported it.

11. Mr. ALVAREZ TABIO (Cuba) said that the rule formulated in article 61 was the logical corollary of the rule stated in article 50. If the rule was that there were norms of international law from which States could not derogate, the necessary consequence was that the establishment of a new peremptory norm of general international law voided any treaty which conflicted with it. General recognition of the illegitimacy of certain types of treaty had an immediate effect on them, not only for formal reasons, based on the principle of the hierarchy of norms, but on substantive grounds deriving from the principle of justice inherent in any norm of *jus cogens*, which was the expression of the conscience of the international community at any given moment. Thus, a treaty in force which conflicted with a new norm of *jus cogens* was not only illegal but illegitimate; in other words, it not only conflicted with a subsequent higher ranking norm but became illicit and immoral.

12. That moral view was particularly important in determining the temporal scope of the new norm of *jus cogens*. Obviously, rules of law could not have retroactive effect; the problem was to establish the meaning and extent of non-retroactivity. There could be no doubt that laws became effective as soon as they entered into force, and ceased to be effective as soon as they were abrogated; the difficulty arose in the case of successive treaties which were subject to the consequences of successive norms of international law. If a treaty had come into effect under a given legal order, but the effects of the treaty had not ceased when a new peremptory norm emerged which substantially changed that legal order, the dispute about the non-applicability of the new norm would not be about non-retroactivity, but about the continuing operation of the original legal order. In other words, norms which had given way to a subsequent norm of the same character would continue to apply.

13. If the new norm of *jus cogens* was applied to a perpetual contract, the principle of non-retroactivity would not be violated, even if it was a treaty which had previously come into force. The reason was not only a matter of pure logic, but also because the conflict arose with norms which affected the actual legitimacy of a treaty, in other words, norms embodying a principle of justice radically contrary to the norm which had suffered derogation. It might be argued that, where the situation entered the territory of the illicit, the universally accepted principle of *nullum crimen, nulla poena sine lege* should be invoked. Undoubtedly that maxim was fully applicable to an act where performance and result had been exhausted before the norm defining them as illicit came into existence. But with a continuing or permanent activity whose effects had not been exhausted, even when the new norm declaring it illicit had come into force, there was no question that the resulting situation could be impeached on the basis of the new law. The Conference could hardly hold that unequal or unjust treaties still in force, no matter when concluded, could remain immutable in the face of the new international order which had carried them into the ambit of the illegal and the illegitimate. The argument that a new norm of *jus cogens* did not have retroactive effect meant that a treaty became void from the time when the new norm was established; but the principle in applying that norm to a treaty in force, even though it might have come into force at a prior date, could never be violated.

14. Mr. MIRAS (Turkey) said that article 61 was a logical corollary of article 50 and what his delegation had said about the latter held good for article 61. He would have voted against article 50 had it been put to the vote and would vote against article 61.

15. Mr. HARRY (Australia) said that his delegation had the same difficulties with article 61 as with article 50 and he could perhaps illustrate those difficulties by recounting an imaginary conversation between a legal adviser and his government. The government asked what kind of treaties it had the capacity to enter into in the relations it sought with other States, and the answer was that the capacity of sovereign States was unlimited, except where it was excluded by peremptory norms of international law which were neither listed nor defined. The legal adviser would point out that incapacity and the invalidity ensuing therefrom only applied in the case of rules of *jus cogens* existing at the time of the conclusion of the treaty. But even if a treaty were within the capacity of the State at the time of its conclusion, it might subsequently become invalid because it conflicted with a new rule of *jus cogens* which had just emerged. The legal adviser would then add that unfortunately no guidance was provided in article 61 about the conditions under which an established rule of law could be transformed into a rule having peremptory status.

[4] *Ibid.*, para. 31.

16. The Conference had to draw up a working code on the law of treaties for decades to come. All participating States had an interest in upholding treaties rather than in multiplying the grounds on which treaties could be brought down. As in the case of article 50, his delegation was ready to help in defining the conditions under which it could be established when particular rules had been invested with the extraordinary status involved in the concept of *jus cogens*. Rules could only be regarded as having that status if there was general agreement on the part of the international community as a whole, to use the words employed by the Expert Consultant in connexion with article 50. Absolute unanimity might not be required, but the substantial concurrence of States belonging to all the principal legal systems was required. If there were disagreement by a significant group of States, recognition of a rule as a norm of *jus cogens* would have to be deferred. As in the case of the development of ordinary rules of customary international law, the development of peremptory rules was not a matter of majority voting.

17. He hoped agreement would be reached on a precise draft for that very fundamental article. So long as the category of peremptory norms was not adequately defined, whether in article 61, article 50, or elsewhere, his delegation could not accept either article.

18. Mr. DE BRESSON (France) said that article 61 was closely linked with article 50 and consequently the French delegation had no need to repeat the arguments it had developed at some length at the 54th meeting about the problems involved in the voidance of treaties allegedly conflicting with *jus cogens*. The French delegation had expounded its view, but apparently not cogently enough, that a definition or method of recognition of *jus cogens*—which it accepted—was all the more essential because the object was not only to incorporate in a system of positive law principles already more or less precisely formulated, but also to lay down that treaties which had been lawful at the time of their conclusion could subsequently become void owing to the emergence of new rules. Unfortunately, in view of the decision taken by the Committee on article 50, the French delegation had found it impossible to accept the text of that article and, in consequence, it could not accept the text of article 61 either. A satisfactory solution for article 50 might, however, eventually be found and, if it were, the French delegation would be able to modify its position on article 61.

19. With regard to the text of article 61, the word " rule " should be substituted for " norm ", since " rule " better expressed the binding nature of a notion whose effects had to be recognized for the purpose of positive law. The expression " of the kind referred to in article 50 " was imprecise and linguistically unsatisfactory, and should be replaced by something more appropriate. To say that the new rule was " established " gave the impression that there existed, or could exist, some judicial or other authority or some machinery which could create a rule of *jus cogens*. The whole debate had shown that *jus cogens* could not, by its very nature, arise from such sources. The only terms suitable for article 61 would therefore be " recognized " or " identified ".

20. The notion of invalidity should be dropped, since it did not seem justified in the context and its effects were not clearly specified. It was hard to see how, if a treaty was lawful at the time it was concluded, it lost that quality merely because a rule was established after its entry into force and thereby voided it. All that need be stated was that such a treaty terminated or ceased to produce its effects. That was the conclusion to be drawn from the United States amendment to article 50 (A/CONF.39/C.1/L.302), adopted by the Committee of the Whole, by which a treaty which could be considered void owing to conflict with a rule of *jus cogens* should be void from the time of its conclusion. The notion of invalidity would clearly have to be omitted if articles 50 and 61 were to be brought into line, so that article 61 became the logical corollary of the revised article 50.

21. There remained the question whether the termination of such a treaty need necessarily affect it in its entirety or whether it could apply only to those of its provisions which conflicted with the new rule of *jus cogens*. The Finnish amendment (A/CONF.39/C.1/L.294) proposed a reasonable solution.

22. As things stood, however, the French delegation must express very strong reservations about the actual principle of draft article 61.

23. Mr. EUSTATHIADES (Greece) said the problems of *jus cogens* involved in article 61 were rather different from those in article 50. In all probability, the emergence of rules of *jus cogens* formed *a posteriori* would not occur until some years after a treaty had been concluded and, even then, only rarely, since few norms were likely to emerge, given the long and gradual evolution of international law. Disproportionate importance should not therefore be attached to the situation dealt with in article 61. But that did not mean that the few cases which did occur would not affect very important interests. It was the importance, not the frequency, that should be the deciding factor.

24. The Finnish amendment (A/CONF.39/C.1/L.294) reproduced the idea expressed by the International Law Commission in paragraph (3) of its commentary to article 61. A valid treaty affected by the subsequent emergence of a new peremptory norm of general international law clearly should not become void in its entirety, since not all of its provisions would necessarily be affected. The Drafting Committee might therefore consider making provision for separability in article 61. He supported the French delegation's suggestions with regard to other drafting changes to the article.

25. A treaty became void only *ex nunc*. It was difficult enough to date the formation of a rule of customary law, and even more difficult to know when a subsequently emergent peremptory norm had been established. With existing norms of *jus cogens*, treaties enjoyed a certain amount of security, since the norms existed before the treaty was concluded and represented an idea recognized by the international community. If, as the United Kingdom delegation had suggested, peremptory rules should be established by a certain procedure in connexion with article 50, that procedure was the more necessary in connexion with article 61. Some methods for ascertaining whether a norm had been generally recognized by the international community had been

suggested in some of the amendments to article 62. If some delegations considered that reference to that procedure should be adapted to article 50, that was even more necessary in the case of article 61.

26. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 61 to the Drafting Committee as approved in principle, together with the Finnish amendment (A/CONF.39/C.1/L.294) thereto.

It was so agreed.[5]

Article 41 (Separability of treaty provisions) *(resumed from the 42nd meeting)*

27. The CHAIRMAN invited the Committee to resume its consideration of article 41 of the International Law Commission's draft.[6]

28. Mr. KEARNEY (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.350), said that, as was explained in the footnote, it had first been proposed as an amendment to article 57 (A/CONF.39/C.1/L.325) but, pursuant to the decision taken at the 61st meeting,[7] it was now submitted in conjunction with article 41. That meant that there were two United States amendments to article 41, namely the amendment in question and the amendment to add a new paragraph 3 (*c*) (A/CONF.39/C.1/L.260). Both turned on the principle of proportionality and were an attempt to combine the idea of justice and fairness with that of separability.

29. Mr. CASTRÉN (Finland) said that the conclusion to be drawn from the Committee's earlier debates, and especially from the explanations given by the Expert Consultant at the end of the discussion on article 59, was that the principle of the separability of treaty provisions was applicable in cases governed by article 59. His delegation was therefore withdrawing the first part of its amendment (A/CONF.39/C.1/L.144). On the other hand, it was maintaining the second part, dealing with paragraph 5. That amendment had already been twice presented in substance, once during the earlier debate on article 41[8] and again (as document A/CONF.39/C.1/L.293) at the 52nd meeting, during the discussion of article 50. He would now therefore merely refer the Committee to the arguments his delegation had put forward on those two occasions.

30. Mr. CHANG (China) said that his delegation was not submitting any amendment to article 41 but had examined other delegations' amendments to it with great care. At first sight, the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) seemed to be a complete redraft, but it was not in fact so sweeping. Its substantive changes amounted to the deletion of the reference to article 57 in paragraph 2; that had some merit, but the International Law Commission's text was clearer. The addition of a reference to article 57 in paragraph 4 was, however, an improvement. His delegation could not support the proposed deletion of paragraph 5.

31. His delegation could vote for both United States amendments (A/CONF.39/C.1/L.260 and L.350), but not for the amendment by Argentina (A/CONF.39/C.1/L.244) to delete paragraphs 3, 4 and 5, because that would leave too many gaps. The remainder of the Argentine amendment might be referred to the Drafting Committee.

32. Sir Francis VALLAT (United Kingdom) said he could not agree with the Chinese representative about the purport of the United Kingdom amendment. It had been intended to improve the drafting of the original article and to raise certain technical points relating to article 57. The drafting points might be left to the Drafting Committee. The points raised concerning article 57, although of substance, were mainly technical and they too might be referred to the Drafting Committee. The Committee of the Whole could take its final decision on the basis of the Drafting Committee's text.

33. He wished to withdraw his proposal for the deletion of paragraph 5 in favour of the Finnish amendment (A/CONF.39/C.1/L.144), which proposed the deletion of the reference to article 50. Separability should apply in article 50, where only a minor provision conflicted with an existing peremptory norm. With regard to the inclusion of the reference to articles 48 and 49 in paragraph 5, his delegation had been convinced that the reference to article 49 should be retained because such cases concerned a treaty as a whole, but it had no strong views about the retention of the reference to article 48.

34. Mr. DELPECH (Argentina) said that he wished to withdraw that part of the Argentine amendment (A/CONF.39/C.1/L.244) which referred to the point of substance and to request that the part dealing with paragraphs 3, 4 and 5 should be referred to the Drafting Committee.

35. The CHAIRMAN suggested that, in line with the Committee's decision on draft article 61, the second part of the Finnish amendment (A/CONF.39/C.1/L.144) be referred to the Drafting Committee.

It was so agreed.

36. Mr. HARASZTI (Hungary) said that his delegation's amendment (A/CONF.39/C.1/L.246) should be referred to the Drafting Committee, since it overlapped with the drafting amendment by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1).

It was so agreed.

37. The CHAIRMAN put to the vote the United States amendment to insert a new sub-paragraph 3 (*c*).

The United States amendment (A.CONF.39/C.1/L.260) was adopted by 27 votes to 14, with 45 abstentions.

38. The CHAIRMAN put to the vote the first part of the United States proposal, to amend paragraph 2.

The first part of the United States amendment (A/CONF.39/C.1/L.350) was rejected by 22 votes to 18, with 50 abstentions.

39. The CHAIRMAN put to the vote the second part of the United States proposal, to add a new paragraph 6.

The second part of the United States amendment (A/CONF.39/C.1/L.350) was rejected by 35 votes to 21, with 33 abstentions.

[5] For resumption of discussion, see 83rd meeting.

[6] For the list of the amendments submitted, see 41st meeting, footnote 1. The Indian amendment (A/CONF.39/C.1/L.253) had been withdrawn (see 52nd meeting, para. 2). A second amendment (A/CONF.39/C.1/L.350) was subsequently submitted by the United States of America.

[7] Paragraph 80.

[8] See 41st meeting, para. 2.

40. Mr. ARMANDO ROJAS (Venezuela) said he would not press his request for a separate vote on paragraph 4 of the International Law Commission's text.

41. The CHAIRMAN said that if there were no objection, he would consider that the Committee agreed to refer article 41, together with the drafting amendments thereto, to the Drafting Committee.

It was so agreed.

42. Mr. WERSHOF (Canada) asked whether he was right in thinking that the remaining part of the Finnish amendment (A/CONF.39/C.1/L.144), for the deletion of the reference to article 50, would be considered by the Drafting Committee and that any delegation, including his own, would be able to request a vote on whatever text the Drafting Committee produced concerning it.

43. The CHAIRMAN replied that any delegation could ask for a separate vote on any part of any draft submitted by the Drafting Committee.

Article 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) *(resumed from the 43rd meeting)*

44. The CHAIRMAN invited the Committee to consider article 42, the discussion of which had been postponed [9] until Sections 2 and 3 of Part V had been examined.[10]

45. Mr. CASTRÉN (Finland), introducing the amendment by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1), said that, if the execution of a treaty became impossible as the result of a new situation, or, as was more clearly stated in article 58, owing to " the permanent disappearance or destruction of an object indispensable for the execution of the treaty", nothing further could be done while that situation prevailed. The parties to the treaty were obliged to recognize the fact, even if the situation resulted from an act or omission on the part of one of them. The question of responsibility was naturally reserved. The sponsors of the amendment considered that it was unnecessary to refer to article 58 in article 42. They would not object if their proposal were referred to the Drafting Committee.

46. Mr. ARMANDO ROJAS (Venezuela), introducing the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) said that article 42, first submitted in the Special Rapporteur's second report to the International Law Commission,[11] introduced a new element into the law of treaties which was undeniably important but which was also extremely dangerous in its interpretation and application. The Special Rapporteur had based the article on the principle of preclusion or estoppel, applied by the International Court of Justice in its decisions of 1960 in the case of the *Arbitral Award made by the King of Spain*,[12] and of 1962 in the *Temple of Preah Vihear* case; [13] but those decisions were far from providing incontrovertible guidance and firm precedents of general application, since several members of the Court had delivered dissenting opinions and a number of international jurists had commented adversely on them.

47. Basdevant had defined estoppel as a procedural term borrowed from English law to describe a peremptory objection which precluded a party to a dispute from taking up a position in contradiction either with what it had previously admitted, expressly or tacitly, or with what it was averring before the same court.[14] In fact, estoppel was a common law doctrine whereby an individual could not subsequently deny what he had previously accepted or recognized; in statutory law, the doctrine corresponded to the Roman *stipulatio*, equivalent to a manifestation of consent which must be explicit to have legal force. The doctrine of *forclusion* in French law and *actos propios* in Spanish law were analogous and had a limited application in international law; but the dangers of unrestricted application of the principle were evident in both municipal and international law. Indeed, it was stated in paragraph (4) of the commentary to article 42 that certain technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law, and that the Commission had therefore preferred to avoid the use of such municipal law terms as " estoppel ".

48. Clearly, a State which had expressly accepted, acquiesced in or recognized a treaty, an arbitral award or a given situation could not subsequently disown its own consent thus expressly manifested, unless that consent had been invalid from the outset, but the position was quite different where tacit consent was concerned. There were obviously many ways of interpreting the acts of States which had not expressly manifested their consent to be bound, and such interpretation presented grave dangers to States which were not fully sovereign or were not entirely free to express their sovereign will.

49. Thus, the article submitted by the Special Rapporteur in 1963 had encountered considerable opposition in the International Law Commission. One member had asserted that the rule applied only to valid treaties being avoided or denounced on supervening grounds but not to treaties which were void *ab initio* and had therefore never existed,[15] while another had expressed the view that the principle could not apply if there was coercion, if the treaty was void or non-existent, or if the *rebus sic stantibus* rule was invoked.[16] The majority of the Commission had upheld that view, and much of the potential danger of the article had thus been removed, but the Special Rapporteur had nevertheless submitted in his fifth report a draft article containing an even stronger formulation of implicit consent.[17] In introducing that

[9] See 42nd meeting, para. 54.

[10] The following amendments had been submitted: Finland and Czechoslovakia, A/CONF.39/C.1/L.247 and Add.1; Bolivia, Byelorussian Soviet Socialist Republic, Colombia, Congo (Brazzaville), Dominican Republic, Guatemala, Union of Soviet Socialist Republics and Venezuela, A/CONF.39/C.1/L.251 and Add.1-3; United States of America and Guyana, A/CONF.39/C.1/L.267 and Add.1; Guyana, A/CONF.39/C.1/L.268; Spain, A/CONF.39/C.1/L.272; Cambodia, A/CONF.39/C.1/L.273; Switzerland, A/CONF.39/C.1/L.340; Australia, A/CONF.39/C.1/L.354.

[11] *Yearbook of the International Law Commission, 1963*, vol. II, pp. 39 and 40.

[12] *I.C.J. Reports, 1960*, p. 192.

[13] *I.C.J. Reports, 1962*, p. 6.

[14] *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), p. 263.

[15] *Yearbook of the International Law Commission, 1963*, vol. I, 701st meeting, para. 5.

[16] *Ibid.*, para. 15.

[17] *Yearbook of the International Law Commission, 1966*, vol. II, p. 7.

report, he had stated that he regarded the 1963 text as an unsatisfactory compromise, and had replaced it by a "more affirmative" proposal.[18] The Commission had not accepted that text, and had confined the provision of tacit consent to conduct denoting acquiescence in the validity or maintenance in force or in operation of the treaty; but it had retained in the opening paragraph the references to the grounds for invalidity set out in articles 43 to 47 and 57 to 59, apparently without taking into account the fact that many of those cases could give grounds for invalidity *ab initio*, on an equal footing with those set out in articles 48 to 50, on coercion and *jus cogens*.

50. The Commission's decision to include a reference to articles 46 and 47 had a positive meaning only in the sense that a State might invoke fraud or coercion as grounds for invalidating consent in accordance with the formal provisions of the convention; it did not lay down the nature or consequence of that invalidity. States were free to confirm expressly what instruments were or were not invalid *ab initio*; it could not be claimed that an unjust *status quo* could be perpetuated tacitly by interpretation.

51. The sponsors of the amendment also considered it unnecessary to include references to articles 57 to 59, but the Venezuelan delegation had an open mind on that point, and was prepared to consider arguments in favour of retaining those references.

52. The sponsors were convinced that the principle set out in article 42 must apply only to express agreement that the treaty was valid or remained in force, and not to cases where the treaty was void *ab initio*; they also considered that the principle could never be invoked in respect of any conduct interpreted as simple acquiescence. If the Commission's text were adopted, States ratifying the convention would be placed in a highly dangerous situation; that would be the case particularly with new States which in the past had suffered from the pressure of the metropolitan Powers and, to a lesser extent, to those which had borne the consequences of the legal domination of powerful States in the nineteenth century. Under the present article 42, the former would be bound indefinitely by instruments in which they had supposedly acquiesced before attaining their independence, and the latter by unjust situations resulting from obligations which had been imposed on them. His delegation therefore urged the Committee to accept the eight State amendment.

53. Mr. KEARNEY (United States of America) said that the amendment by his delegation and the delegation of Guyana (A/CONF.39/C.1/L.267 and Add.1), was a corollary of the basic principle set out in article 42. The proposed new paragraph 2 was designed to limit the invocation of a ground of invalidity under articles 43 to 47, when a State which had excercised rights or obtained the performance of obligations under the treaty had failed to raise such a ground for a period of ten years. Most municipal legal systems contained statutes on limitation which extinguished unasserted private rights after a given period, and the purpose of the amendment was to establish a similar rule on the international level.

54. The familiar principle that a claim must be acted on within a reasonable period, after which the claim was no longer enforceable, varied in different legal systems on such matters as whether the expiry of the time-limit extinguished the claim or merely barred its enforcement, and as to the length of the time-limit applicable to different categories of claims; but there was unanimity on the point that the claim must be put forward without unreasonable delay, for otherwise the stability of contractual relations would be endangered, and the economy and the judicial system of a State could not function in an orderly manner. That universally accepted requirement in national law obviously called for acceptance of the principle in international law, for it might be argued that the need for stability in international contracts was much more pressing than the same requirement in contracts between individuals.

55. In studying the comments of Governments on the draft convention and the comments by representatives in the Sixth Committee of the General Assembly, the United States had been impressed by the general support for the principle set out in article 42, and hoped that the same support would be extended to the proposed addition. Although it was true that the introduction of a general time-limit for raising objections to the validity of a treaty had some novel characteristics, that novelty must be considered in the light of the fact that the Conference was engaged in the novel enterprise of laying down basic rules to govern a highly important sector of international relations. In proposing grounds for testing the validity of treaties, the International Law Commission had not hesitated to consider principles of private law when there was a paucity of international precedent: that was illustrated by the discussions in the Commission on articles 45, on error and 46, on fraud.

56. It was perfectly reasonable to provide that, in the early years after the conclusion of a treaty, a State which found that the treaty had been concluded in violation of provisions of internal law, or as a result of error or fraud, might invoke those facts to impeach the validity of the treaty. With the passage of time, however, as the parties exercised rights or obtained benefits under the treaty, their pre-treaty positions would have been changed by reliance on the binding nature of the treaty, and there should be a point of time when States could be certain that the treaty relationships into which they had entered and on which they had relied would not be disturbed. In the absence of a rule establishing a time-limit, there was a risk, as the Commission had stated in paragraph (2) of the commentary, that a State might put forward claims of invalidity on grounds of restrictions on the authority of its representative, or on a claim of error, as a subterfuge to end its obligations under the treaty. Cases of that kind had occurred in the history of international relations, and adoption of the rule proposed by his delegation would substantially reduce the number of such claims, which sometimes even tended to develop into situations leading to a breach of the peace.

57. It might be argued that a State could not discover the ground for invalidity within a specific time-limit, but in fact failure to put forward a claim of invalidity within ten years would be due, in nearly every case, not to ignorance, but to the State's unwillingness to recognize the facts or to advance a claim. To cover the extremely rare cases in which there might be an actual lack of knowledge, his delegation would have no objection to

[18] Op. cit., 1966, vol. I, part I, 836th meeting, para. 22.

adding a safety clause, such as " unless the State could not with reasonable diligence have discovered the ground prior to the expiry of the time-limit ".

58. A further practical reason for adopting the new rule was that it became more difficult, with the passage of time, for a State seeking to preserve the validity of a treaty to adduce evidence in support of its position. Witnesses might die and documents might be destroyed or lost; the longer the period that elapsed between the conclusion of the treaty and the invocation of invalidity, the less likely it would be that a reliable judgment could be made on the claim. Indeed, after ten years had passed, the State with the largest number of archivists was the most likely to prevail in any dispute; the difficulties involved were illustrated in a number of cases decided by the International Court of Justice.

59. His delegation did not insist that the time-limit should be fixed at ten years, although that seemed a reasonable time. It considered that its proposal was substantive, and should be voted on, but it would suggest that the vote be taken on the principle, and that if the principle were approved, the amendment be referred to an appropriate group for consideration of the proper time-limit and of the question of including a safety clause.

60. In view of the widespread support for the proposal in article 42, the United States had been surprised by the introduction of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) the adoption of which, for all practical purposes, would have the same effect as the deletion of the article. The amendment seemed to be designed to introduce special rules in order to cover specific long-standing disputes: but revision of the Commission's draft for such purposes would open the door to a flood of amendments, seeking to incorporate in the convention the principles designed to support stale claims of invalidity, instead of legal rules applicable to all treaties. The United States was convinced that the only realistic way of achieving a codification of the law applicable to treaties concluded by existing and future States was to deal with the future, not with the past. On the other hand, it fully understood the desire of States facing current problems not to have their legal positions undermined by any of the provisions of the convention, and would have no objection to a proposal that the convention should apply only to future treaties.

The meeting rose at 1.5 p.m.

SIXTY-SEVENTH MEETING

Monday, 13 May 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 42 of the International Law Commission's draft.[1]

2. Sir Lionel LUCKHOO (Guyana) said that in article 42 the International Law Commission had clearly been seeking to codify existing principles, while at the same time incorporating new principles deriving from developments in the international community. Article 42 as formulated by the Commission contained those elements of continuity and certainty without which law ceased to reflect the moral awareness of a society and degenerated into congeries of arbitrary imperatives. Sub-paragraph (*a*) of the article was consistent with the generally accepted principles of international law regarding consent and the sovereign independence of States, according to which a State must be considered competent to decide whether it wished to continue to enjoy rights and assume obligations under a treaty concluded in the circumstances described in articles 44 to 47.

3. Sub-paragraph (*b*) involved somewhat different considerations. The great importance in international law of the doctrines of sovereignty and consent had helped to determine the content of the jural postulate according to which the consent of States was not to be lightly presumed. Recognition of the need to inject some functional elements into the body of norms which governed conduct at the level of inter-State relations had led to the formulation of the principle that consent might be inferred from conduct. Equity and good faith required that a State which, by its conduct, had induced another State to believe that certain facts existed, should be precluded from denying their existence if, by so doing, it prejudiced the interests of that other State which had acted in good faith.

4. His delegation therefore supported article 42 as it stood, but thought that the substitution of the word " shall " for the word " may " in the first line would strengthen the element of certainty already present in the Commission's draft. That was the purpose of his delegation's amendment (A/CONF.39/C.1/L.268), which could be examined by the Drafting Committee.

5. For the reasons he had stated, his delegation could not accept the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). In introducing that amendment, the Venezuelan representative had said that the principle that a party could not be permitted to benefit from its own inconsistencies could not be invoked when the treaty was void *ab initio*. It should be noted, however, that the circumstances contemplated in articles 43 to 47 did not render a treaty void *ab initio*; the aggrieved State was merely given the right, subject to the provisions of article 62, to invoke circumstances as grounds for invalidating the treaty. If the amendment was accepted, the consequent deletion of the reference to articles 46 and 47 would mean that fraud, and the corruption of a State's representative, could be invoked to terminate a treaty although the parties, as sovereign independent entities, had expressly agreed to ignore a defect in the consent to be bound, or although the invoking State had acquiesced in the continuing validity of the treaty

[1] For the list of the amendments submitted, see 66th meeting, footnote 10.

by its conduct. The amendment went even further: it proposed the deletion of sub-paragraph (*b*), so that a State which had acquiesced in the fraud and accepted the benefits of the treaty could seek at a later date to invalidate it when political expediency dictated such a course of action. The amendment, if accepted, would thus destroy the very foundation of principles enunciated and accepted by every civilized community for years.

6. In its commentary, the International Law Commission had referred to the *Temple of Preah Vihear* case and the separate opinion of the Vice-President of the Court, Judge Alfaro, who had said: "This principle, as I understand it, is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation ... a State must not be permitted to benefit by its own inconsistency to the prejudice of another State. ... Silence by a State in the presence of facts contrary or prejudicial to rights later on claimed by it ... can only be interpreted as tacit recognition given prior to the litigation".[2]

7. Today, there were large nations and small nations. Some could assert their rights by force, others lacked the means to do so. On attaining independence, some colonial territories had succeeded to treaties establishing boundaries. If the amendment was accepted, a State which was party to a boundary treaty with a former colonial power could attempt to impeach the validity of the treaty and advance unreasonable claims to the territory of the newly-independent State. That might be considered a monstrous suggestion, but means of encouraging any such act should not be provided. To accept the amendment would be to introduce elements of instability and uncertainty into the generally accepted norms of international law. Principles hallowed by time and judicial decisions—principles which provided an element of harmony indispensable in treaty relations—must not be undermined. Organizations such as the United Nations should proclaim equitable principles intended to protect the weak.

8. Mr. DE CASTRO (Spain) stressed the importance of article 42, which set conditions and limitations for the future application of several articles already adopted by the Committee. If it was established that a State invoking grounds for invalidating or terminating a treaty had confirmed by its conduct, expressly or impliedly, that the treaty was valid, in force or in operation, the scope of the articles establishing those grounds for invalidity would automatically be limited.

9. All the rules whose effect was to restrict the scope of Part V of the convention by limiting the scope of the grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty should therefore be drafted with the utmost precision so as to ensure stability and justice in the law of treaties. They must not impair the other essential provisions in the draft articles.

10. In the desire to further that aim, the Spanish delegation had submitted amendments (A/CONF.39/C.1/L.272) to the introductory sentence of the article and to sub-paragraph (*b*). It accepted, in principle, the idea of article 42, for the rule it stated, which was based on good faith and equity, would help to improve international morality in the future by barring wrongful and arbitrary claims relating to the invalidity or termination of treaties. To specify carefully the content and scope of article 42 would thus be equivalent to specifying and defining an element of good faith in international relations.

11. It was difficult to achieve the necessary precision, however, and the text of article 42 presented some danger of confusion and uncertainty. The danger was particularly serious in sub-paragraph (*b*) of the article, where the idea of acquiescence appeared. That might be why the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) called for the deletion of the sub-paragraph. The Spanish delegation believed that its proposal would make it possible to retain sub-paragraph (*b*) by specifying the conditions for its application and eliminating the dangers of the present text.

12. The first problem raised by the text related to the time factor. Some delegations had proposed setting a time-limit, but that was a procedural matter, and article 42 raised more serious problems. The proviso "after becoming aware of the facts" in the introductory sentence seemed inadequate. For if the ground for invalidating or terminating a treaty still existed at the time when it was invoked, article 42 should not be applicable. The Spanish amendment therefore specified that a State "being aware of the ground, and the ground having ceased to exist" could not invoke that ground for invalidation or termination.

13. The second problem related to the conduct of a State which might be considered to have acquiesced in the validity of a treaty. What were the factors on which a final judgment of its conduct could be based? Silence could mean approval, disapproval or indifference. What value should be attached to the protest of the State injured by the invalidity of the treaty? It should not be forgotten that some writers who defended the imperialist *status quo* and situations established by coercion or force had tried to restrict the effect of the objections and to extend the effect of acquiescence unduly. Another factor to be considered might be the persistence of a State's conduct for some length of time. It would then be necessary to specify whether a single act was sufficient for confirmation or whether such acts must continue over a period. For confirmation to be established, there must be no possible doubt about the State's conduct. That was what the Spanish amendment proposed. Merely to consider that a State had acquiesced, as article 42 put it, would open the door to all sorts of uncertainties which might lead to arbitrary action and consolidate unlawfully established situations.

14. The notion of acquiescence had been introduced by a member of the International Law Commission to avoid the undesirable use of municipal law terms such as "preclusion" or "estoppel" in article 42. It was true that that notion was much in favour at present, especially since the judgments of the International Court of Justice in the cases of the *Temple of Preah Vihear* and the *Arbitral Award of the King of Spain*. The concept was not precise enough, however, and its scope was not sufficiently well-defined for it to be used in article 42.

[2] *I.C.J. Reports 1962*, pp. 39 and 40.

In paragraph (4) of its commentary, the International Law Commission had explained the difficulty of introducing municipal law terms into international law, but uncertainties could not be avoided merely by eliminating terms. It might therefore be asked whether the notion of acquiescence, which served solely to cover principles of municipal law, might not cause great confusion. In the opinion of the International Law Commission, if the notion of acquiescence was to be acceptable, it must reflect the technical features of the international order. But it did not. For instance, the principle *allegans contraria non audiendus est*, on which the Commission's reasoning was based, provided no real basis for the idea of confirmation by acquiescence in the validity of a treaty that was void. In municipal law the principle was a sanction against bad faith, directly linked with conduct considered to be unlawful. It operated in the sphere of responsibility, not as confirmation of grounds for nullity of a contract *ab initio*.

15. The Spanish delegation therefore considered that the notion of acquiescence should be removed from article 42. Confirmation was possible only where a State's conduct clearly showed that it wished to renounce the right to invoke the ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. If the freely expressed will of a State was the foundation of the law of treaties, that will should be given the importance it warranted, whether it was manifested expressly or tacitly. Acquiescence called for a very delicate evaluation, in which arbitrary interpretation and error were only too easy. The will of States, on the other hand, corresponded more closely to the technical features of the international order, for in principle, no limitation on the sovereignty of the State could be presumed in that order.

16. Article 42 should be drafted in terms that did not conflict with the *pacta sunt servanda* principle. A treaty which was not valid, to which a State had not freely consented while fully aware of the facts, could not be imposed on it. To render valid what was invalid required something other than passive conduct. The Spanish delegation accordingly believed that the conditions for and effect of confirmation should be clearly stated.

17. The eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) called for the deletion of sub-paragraph (*b*) of article 42, which would remove the danger involved in introducing the word "acquiesced". The Spanish proposal was certainly more finely shaded, however, and took account of the International Law Commission's wish to introduce into the convention the principle *venire contra factum proprium non valet*, or estoppel. The Spanish delegation would have little difficulty in accepting the first part of the eight-State amendment, since the same rule could be applied to treaties concluded in the circumstances specified in articles 46 and 47 as the Commission had laid down for treaties concluded through coercion of the representative of a State.

18. Mr. SARIN CHHAK (Cambodia), introducing his delegation's amendment (A/CONF.39/C.1/L.273), said that the text of article 42 was well balanced and calculated to ensure the stability of treaties. In his opinion, the growth of international co-operation presupposed the stability of concluded treaties, achieved through their performance in good faith. His delegation accordingly considered that once concluded, a treaty was intended to last and that, *a priori*, all treaties were valid; nullity should be a rare exception.

19. So great was the importance the International Law Commission attached to the security of treaties that even in Part V it had provided, in article 42, final measures to safeguard their existence—measures which, as it were, counterbalanced the provisions that followed.

20. Sub-paragraph (*b*) of article 42 provided that certain defects could not be invoked as a ground for invalidating a treaty if the invoking State must be considered as having acquiesced in the validity of the treaty. In such cases there was a contradiction between the conduct of the State in question and the claim of invalidity. Good faith, equity and logic demanded that the conduct, not the complaint, should be taken into consideration. The conduct of the State was the clear manifestation of its acquiescence and its real will, whereas the complaint was made only for the requirements of the case.

21. Since article 45 had been adopted by the Committee by a large majority in the form proposed by the International Law Commission, it would be logical to retain article 42 as it stood, but a few drafting amendments should be made.

22. His delegation thought that article 42 could not cover certain abuses, because it contained no mention of articles 48 and 49, which dealt with coercion and the threat or use of force—means which had often been used in the past to procure the consent of a State. The defects referred to in article 42 were more permanent and might vitiate treaties concluded between States which were on an equal footing.

23. To eliminate all possibility of recourse to article 42 to cover past abuses, however, his delegation was proposing an amendment which would clarify the terms of sub-paragraph (*b*). The word "freely" had been added to show that the conduct referred to was the manifestation of a real will free from all coercion, which was the source of the obligations and rights constituting the basis of the treaty.

24. He could not support the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) because its content was too far removed from that of the articles already adopted by the Committee of the Whole.

25. Mr. BINDSCHEDLER (Switzerland) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.340) was not merely to ensure the stability of the law and treaty regulations. The terms "coercion" and "force" might be given very different interpretations. In some cases the application of article 42 would meet with difficulties. In his opinion, it was not sufficient to declare that a treaty vitiated by an element of coercion was void; it was also necessary to establish an effective procedure for obliterating the wrongful effect of the coercion and for restoring the situation as it had been originally. As experience with the Stimson doctrine had shown, that would unfortunately not always be the case. Account must be taken of that deficiency in the present structure of the international community and provision made for the consequences. From that point of view there was

no difference between the cases referred to in articles 43 to 47 and those dealt with in articles 48 and 49.

26. With regard to sub-paragraph (*a*) of article 42, he did not see how a State which had expressly agreed to conclude a treaty to which an element of coercion attached could be entitled to claim that the treaty was void if the element of coercion had disappeared. Furthermore, he did not understand on what grounds a State which appeared, by reason of its conduct, to have acquiesced in the validity of a treaty concluded under coercion, could claim that the treaty was void if it had been applied over a very long period. The omission of a reference to article 49 in article 42 might disturb the whole international legal system and endanger peace treaties and armistice agreements.

27. He thought that the relative time-limit prescribed in the Australian amendment (A/CONF.39/C.1/L.354) should be linked with the absolute time-limit of the amendment by the United States and Guyana (A/CONF. 39/C.1/L.267 and Add.1), so as to establish a complete system which would promote the stability of the law. Lastly, he supported the Cambodian amendment (A/CONF.39/C.1/L.273), which clarified the principle stated in sub-paragraph (*b*).

28. Mr. BRAZIL (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.354), said that Australia had already submitted amendments to articles 43 to 48 which likewise set a twelve-months' time-limit for a State wishing to invoke a ground for invalidity. At the time, certain representatives had considered that the matter raised by those amendments properly belonged to article 42, in particular sub-paragraph (*b*) ; the Australian delegation had deferred to that view in submitting its amendment to article 42. The proposal applied only to articles 43 to 47, all of which dealt with a situation in which the expression of a State's consent to be bound by a treaty had a defect that could be invoked as a ground for invalidating the treaty. The most important feature of the amendment was that the time-limit only began to run when the State concerned had become aware of the ground of invalidity; that was the main difference between the Australian amendment and the amendment by the United States and Guyana (A/CONF. 39/C.1/L.267 and Add.1). He thought that in practice it would always be possible to establish that a State had been aware of the ground of invalidity at a certain point in time. If not, the Australian amendment would not apply. The twelve months' period specified was only a suggestion and he would ask the Committee to pronounce only on the principle of the amendment.

29. He reminded the Committee that in paragraph (3) of its commentary to article 59, the International Law Commission had pointed out that some municipal courts had held that the doctrine of *rebus sic stantibus* must be invoked " within a reasonable time after the change in the circumstances was first perceived ".

30. The purpose of the Australian amendment was to ensure good faith and stability in treaty relations.

31. Mr. GARCIA-ORTIZ (Ecuador) said he regarded article 42 as an attempt to establish a legal principle connected with good faith and fair dealing, namely, that a party was not permitted to benefit from its own inconsistencies. A certain analogy between the situation referred to in article 42 and that covered by the English doctrine of estoppel might suggest that article 42 merely applied that common law notion to international law. He did not think that the cases covered by article 42 were really cases of estoppel; in that connexion, Mr. de Luna had told the International Law Commission that " The common law doctrine of estoppel had resulted from a long history of judicial decisions " and that " On the continent, the subject was governed by rules which had their origin in the Roman law maxims *nemo contra factum suum proprium venire potest* and *allegans contraria non audiendus est* ".[3] In his (Mr. Garcia's) view, it was unnecessary to have recourse to the doctrine of estoppel in the cases referred to in article 42, for the *factum proprium* maxim seemed to be sufficient.

32. The rule stated in article 42 had a basis of justice and good faith, but it should only be applied with the utmost caution in the international sphere. The International Law Commission had excluded articles 48 to 50 from the application of the rule expressed in article 42, because they dealt with cases of absolute nullity of treaties. In that connexion, it was well to remember the opinion expressed by Mr. Paredes in the International Law Commission, that treaties which were void *ab initio* " could not be affirmed or adjusted by any means except the conclusion of a new treaty without the defects of the former one." [4] Other articles, however, for example articles 46 and 47, specified circumstances which could result in a treaty being void *ab initio* without it being necessary to apply " estoppel ".

33. His delegation was opposed to the view that the presumed or supposed acquiescence by a State in the validity of a treaty could validate that treaty if it was void *ab initio*.

34. The Ecuadorian delegation supported the amendment submitted by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1), but was opposed to those submitted by Australia (A/CONF.39/C.1/L.354) and by the United States and Guyana (A/CONF.39/C.1/ L.267 and Add.1).

35. Mr. KHASHBAT (Mongolia) stressed the great importance of article 42 for the stability of treaty relations between States. The conditions under which a State could no longer invoke a ground for invalidating a treaty were not, however, formulated sufficiently clearly in the text.

36. The Mongolian delegation was opposed to the amendment by the United States and Guyana (A/CONF. 39/C.1/L.267 and Add.1), as it seemed neither desirable nor justified to consider a State as having acquiesced in the validity of a treaty after ten years of performance, even if the treaty was vitiated as to substance or had been unlawfully concluded.

37. The eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) clarified the International Law Commission's text and made it unambiguous. It deleted sub-paragraph (*b*) because it was not always possible to judge a State's conduct; it might dispute the presumption

[3] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 837th meeting, para. 93.

[4] *Yearbook of the International Law Commission, 1963*, vol. I, 701st meeting, para. 5.

that it had renounced its right to invoke grounds for invalidity, even though that presumption seemed obvious to other States. It was quite right that the principle of article 42 should not apply to articles 46 and 47, which concerned the will of a State to be bound by a treaty and therefore rendered the treaty void *ab initio*. On the other hand, his delegation had doubts about the deletion of the reference to articles 57 to 59, especially article 57. For in the event of a breach by one of the contracting parties, another party to the treaty might protest against the breach, but the treaty could remain in force between them; whereas if the reference to article 57 was deleted, the operation of the treaty would be suspended, which would greatly endanger its future. He therefore asked the sponsors of the eight-State amendment to consider carefully the possible consequences of deleting the reference to article 57.

38. He could not support the Swiss amendment (A/CONF.39/C.1/L.340), because the rule stated in article 42 should not apply to articles 48 and 49, which rendered a treaty void *ab initio*.

39. The amendment submitted by Guyana (A/CONF.39/C.1/L.268) was concerned with a matter of drafting and should be referred to the Drafting Committee, though he thought the word " may " seemed more flexible and more suitable than the word " shall ".

40. Mr. ALVAREZ TABIO (Cuba) said that article 42 embodied the theory *nemo contra factum suum proprium venire potest*. That theory was universally recognized, but its practical application gave rise to difficulties; article 42 was a case in point.

41. The Cuban delegation considered, first of all, that as defined in the opening sentence of the article, the field of application of the principle was not consistent with the régime of invalidity established by the draft, under which the effect of the grounds for invalidity in Part V was to invalidate a treaty *ipso jure*, with a very few exceptions. That being so, it was hard to see how the confirmation of a treaty vitiated by an initial defect could be logically accepted.

42. The theory of the *factum proprium* should only be applied to the régime of invalidity provided for in the draft in the case of treaties which became void by reason of subsequent facts. Those treaties were based on valid consent, the effect of which could be invalidated on the initiative of the injured party. It was therefore logical that the injured party should be able to renounce its right to claim invalidity, since such a treaty was not void *ipso jure*. The treaty was presumed to be valid unless there was evidence to the contrary.

43. The same did not apply, however, to a treaty that was void *ab initio*. If a party had been guilty of fraud or corruption, it was not justified in relying on the theory of the *factum proprium*, and article 65 denied it the right to take advantage of the legality of acts performed in bad faith before the invalidity was invoked.

44. For the application of the principle on which article 42 was based, two cases must be distinguished: that in which the treaty was invalidated after the parties had acted in good faith for some time, and that in which consent was the result of reprehensible conduct by one of the parties. Hence, it seemed illogical for article 42 to place on an equal footing cases in which a treaty was void *ab initio* and cases in which consent could be invalidated only on the application of the injured party.

45. Article 42, sub-paragraph (*b*) was not acceptable to the Cuban delegation, because it applied the principle of the *factum proprium* on the basis of tacit consent manifested by the silence of the injured party. The provision should be rejected on two grounds. First, the presumption of consent derived from conduct which was not defined precisely enough not to leave a dangerous margin of discretion liable to impair the stability of international relations. The problem became even more serious where treaties had not been freely consented to, for the provision authorized, on the basis of ill-defined conduct, confirmation of a treaty which had not even come into existence. Secondly, the rule in sub-paragraph (*b*) carried the theory of estoppel to extremes by placing the onus of action on the victim of fraud or corruption.

46. If article 42 was taken to read: " A State may no longer invoke a ground for invalidating... a treaty... if, after becoming aware of the facts... it must by reason of its conduct be considered as having acquiesced... in the validity of the treaty ", the wording permitted an interpretation bordering on the absurd, namely that, as could be inferred from that wording, silence was the conduct from which acquiescence was deduced; in other words, silence gave consent. Moreover, no provision was made for the possibility that such conduct might be the consequence of a situation that allowed no freedom of choice. Thus mere abstention or silence, in whatever circumstances, was always taken as tacit consent.

47. Consequently, in view of the unrestricted application of the principle of the *factum proprium* and the ambiguous form in which it was stated, the Cuban delegation found article 42, sub-paragraph (*b*) unacceptable.

48. It would therefore vote for the solution proposed in the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). For the reasons he had already given it could not accept the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) or the Australian amendment (A/CONF.39/C.1/L.354).

49. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) stressed the importance of article 42 in the draft convention. The article could not be accepted in its entirety, however, and the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) seemed to be a definite improvement.

50. His delegation thought the article should be drafted with the utmost precision, so as to rule out the possibility of its being applied to cases in which a State, after becoming aware of the ground for invalidity, had been unable freely to exercise its right to contest the validity of the treaty.

51. He also thought it preferable not to refer to articles 46 and 47, and he fully endorsed the arguments advanced by the Mongolian representative regarding articles 57-59.

52. He was opposed to the amendments submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and by Australia (A/CONF.39/C.1/L.354), and to the Swiss amendment (A/CONF.39/C.1/L.340), which widened the scope of article 42.

53. Mr. KEMPFF MERCADO (Bolivia) said he had little to add to the Venezuelan representative's very comprehensive introduction of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). He merely wished to point out that the notion of implied acquiescence in the validity of a treaty expressed in sub-paragraph (*b*) of article 42 could be a source of disputes; it might also be unfair to States which had been unable to exercise their full sovereignty in the conclusion of a treaty and had subsequently been subjected to pressure to prevent them from terminating or withdrawing from the treaty. Such situations were unacceptable in the modern world and the deletion of sub-paragraph (*b*) would prevent their occurrence. Consequently, his delegation could not accept the amendments relating to that sub-paragraph.

54. Mr. SOLHEIM (Norway) said that the aim of article 42 was to contribute to the stability of treaties by making it an obligation of the parties to make their position clear when they became aware that something was wrong with a treaty. As the International Law Commission had pointed out in paragraph (1) of its commentary, the foundation of the article was essentially good faith and fair dealing.

55. His delegation fully agreed with the principle on which the article was based, but wished to make a few comments on the enumeration of the articles in respect of which that principle was applicable.

56. First of all, his delegation doubted whether the reference to articles 46 and 47 was really justified. The fate of article 42 would ultimately depend on what would happen to those articles at the plenary session of the Conference in 1969. The Committee's vote on article 47 suggested indeed that that article would finally be deleted. However, the fraud and corruption which, according to the existing wording of articles 46 and 47, invalidated a State's consent to be bound by a treaty, must be attributable to another negotiating State; it seemed doubtful whether that other State, which had been responsible for the fraud or corruption, should be in a position to benefit from a rule by virtue of which the State which had been the victim of fraud or corruption would in certain circumstances lose the right conferred on it by articles 46 and 47.

57. The fact that articles 46 and 47 also covered multilateral treaties tended to complicate matters: the other parties might have a legitimate interest in seeing that the system proposed by the International Law Commission was maintained. Nevertheless, on balance and in view of the extreme rarity of cases of fraud and corruption in the conclusion of a treaty, his delegation was inclined to believe that no great harm would be done by deleting from article 42 the reference to articles 46 and 47. It was perhaps not pure coincidence that, in its commentary to article 42, the International Law Commission gave no reasons why articles 46 and 47 were included among the articles to which the principle of article 42 was applicable.

58. Consequently, although his delegation would listen attentively to the rest of the debate on article 42 and possibly adjust its final position, it was inclined to support that part of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) which would delete the reference to articles 46 and 47 in the opening sentence of article 42. On the other hand, it was strongly opposed to the deletion of sub-paragraph (*b*) proposed by the same group of countries, as the whole article would become meaningless without that sub-paragraph. It was also strongly opposed to deleting the reference to articles 57 and 59, as was proposed in that amendment.

59. His delegation supported the proposal by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1) to delete the reference to article 58, a proposal which was logical and juricidally well-founded.

60. Lastly, it approved of the principle underlying the amendment submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1), but had an open mind about the length of the period proposed: it might even be preferable not to mention a specific number of years. Further, instead of referring to " the date it first exercised rights or obtained the performance of obligations pursuant to the treaty ", which might create difficulties, it would be better to take as the starting point the entry into force of the treaty for the State invoking a ground for invalidating it.

61. Mr. MYSLIL (Czechoslovakia), speaking as a co-sponsor of the Finnish amendment (A/CONF.39/C.1/L.247 and Add.1), observed that the grounds for invalidity set out in article 58 could exist independently of the expressed will of the parties. Hence the rule in article 42 could not apply to those grounds.

62. The loss of the right to invoke a ground for invalidity was hardly conceivable in cases of fraud, corruption and, *a fortiori*, coercion. Coercion exercised at the time of the conclusion of a treaty could continue at the time of the alleged acquiescence, whether express or tacit. The Czechoslovak delegation accordingly supported the first part of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) and would vote against the Swiss amendment (A/CONF.39/C.1/L.340).

63. His delegation had doubts about the amendments to sub-paragraph (*b*) of article 42 and would abstain from voting on them. It was, however, opposed to the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and the Australian amendment (A/CONF.39/C.1/L.354), which made an unnecessary addition to the sub-paragraph.

64. Mr. RATTRAY (Jamaica) said that, as in most systems of municipal law, parties could not both approbate and reprobate in their contractual relations. The International Law Commission had sought in article 42 to lay down rather stringent conditions to preclude a State from invoking certain grounds for invalidity in certain circumstances.

65. The right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty was lost when two conditions were fulfilled: first, the State must be aware of the facts giving rise to the ground of invalidity and, secondly, the State must either have expressly agreed to renounce its right to invoke the ground of invalidity or be deemed by reason of its conduct to have renounced that right, being considered to have acquiesced in the validity of the treaty or its maintenance in force.

66. If a State was aware of the facts entailing invalidity and sought to avail itself of the right to invoke the ground of invalidity, it must resort to the procedure laid

down in article 62, that was to say, it must notify the other parties of the claim and must indicate the measure proposed to be taken with respect to the treaty and the grounds therefor. If the State failed to resort to that procedure, the failure in itself did not, under article 42, cause the State *ipso facto* to lose the right to invoke the invalidity at a later date. The failure to resort to the procedure after the discovery of the facts might indeed be *prima facie* evidence that the State renounced its right to invoke the invalidity, but it was not conclusive, and the International Law Commission had been wise to require, as a fundamental criterion, express agreement or tacit acquiescence.

67. In the international community, however, where might too often prevailed over right, the mere awareness of the facts and the existence of a right were meaningless if a State could not freely exercise its right to invoke the nullity of a treaty. The Commission had therefore been right to state the principle of acquiescence in general terms in article 42, sub-paragraph (*b*), and to explain in paragraph (5) of its commentary that the principle would not operate if the State in question had not been in a position freely to exercise its right to invoke the nullity of the treaty.

68. The Jamaican delegation could not support the amendment by Finland and Czechoslovakia (A/CONF. 39/C.1/L.247 and Add.1), which would permit a State at any time to terminate a treaty or suspend its operation if there had been supervening impossibility of performance, even though the parties had expressly or impliedly agreed that the treaty should remain valid; for that would unduly fetter the freedom of action of States. Nor could it support the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) which was inconsistent with the view adopted by the Committee, that the grounds of invalidity in articles 46 and 47 and articles 57 to 59 should have the effect of making a treaty voidable, but not void.

69. His delegation could not accept the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1), for if it was adopted a State would lose the right to invoke the grounds of invalidity set out in articles 43 to 47 after ten years, even if it was not then aware of the facts entailing invalidity. On the other hand, the Australian amendment (A/CONF.39/C.1/L.354) would largely allay the fears caused by the United States and Guyanese amendment.

70. The amendment submitted by Guyana (A/CONF.39/C.1/L.268) was essentially a matter of drafting. He interpreted the word " may " in the opening sentence of article 42 to mean that a State could not invoke the grounds in question if the conditions stated in the article were satisfied, but his delegation had no objection to the amendment's being referred to the Drafting Committee.

71. His delegation could not support the Spanish amendment (A/CONF.39/C.1/L.272) because it had great difficulty in understanding how a ground of invalidity such as fraud in procuring the conclusion of a treaty, could cease to exist.

72. Lastly, while it approved of the reasons for the Cambodian amendment (A/CONF.39/C.1/L.273), namely, that article 42 was based on the freedom of States to exercise their right to invoke grounds of invalidity and to renounce that right—since without that freedom there could be neither consent nor acquiescence—the Jamaican delegation considered that the principle was implicit in the International Law Commission's text.

73. Mr. BENYI (Hungary) said he was afraid that article 42 as it stood might be open to different and even contrary interpretations. The reference to articles 46 and 47 and 57 to 59 seemed calculated unduly to restrict the scope of the articles in Sections 2 and 3 of Part V of the draft. He found the opening sentence of the article too rigid; if, for example, after a breach of a treaty, the injured State nevertheless continued to fulfil its obligations under the treaty because it had good reason to hope that the defaulting State would change its attitude, it should not thereby lose the right to terminate the treaty.

74. With regard to the reference to article 58, his delegation favoured the amendment by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1) and the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) for the reasons given by their sponsors. In the event of supervening impossibility of performance, a State could neither expressly nor tacitly acquiesce in the maintenance in force of the treaty. His delegation thought that the benefit of the *rebus sic stantibus* rule should remain available to the parties, and it supported the eight-State amendment, which would delete the reference to article 59. It also agreed with the proposal in that amendment that the reference to articles 46 and 47, on fraud and corruption, should be deleted. On the other hand, it could not support the Swiss amendment (A/CONF.39/C.1/L.340).

75. Sub-paragraph (*b*) of article 42, would create a presumption that silence meant acquiescence in the loss of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. But, as had been pointed out in connexion with fraud, corruption and coercion, there were cases in which no other conduct was possible, so that silence might mean consent, refusal or indifference, as the case might be. The true significance of a State's silence must always be deduced from the circumstances. His delegation therefore supported the eight-State proposal to delete sub-paragraph (*b*).

76. Mr. SINCLAIR (United Kingdom) said that in general his delegation supported the text of the article submitted by the International Law Commission. The Commission's preliminary draft had been concerned with estoppel, whereas the revised draft was concerned with acquiescence. It should be noted that other articles in the draft provided for acquiescence and tacit consent, in particular article 17, paragraph 5, on the acceptance of reservations. His delegation understood that article 42 did not exclude the operation, under customary law, of the doctrine of estoppel in relation to any article of the convention, except those on coercion and *jus cogens*, which the Commission clearly intended to exclude.

77. It was true that the application of sub-paragraph (*b*) might raise practical problems, but that was no reason for deleting it; it was rather a reason for subjecting the legal rule it contained to some objective system for settling such issues. His delegation was therefore opposed to the eight-State amendment (A/CONF.39/

C.1/L.251 and Add.1-3), the effect of which would be to deny the concept of acquiescence, which was a clearly recognized rule of international law supported by a very considerable body of judicial authority and State practice. The principle of good faith required that a party should not be permitted to benefit from its own inconsistency of conduct to the detriment of other parties. There were certainly considerable risks of abuse in the series of articles to which article 42 referred, but as the representative of Guyana had so clearly demonstrated, those risks would be substantially increased if the concept of acquiescence by conduct was not adequately recognized. Part of the argument advanced against the Australian amendments to articles 43 and 45 to 48, introducing time-limits, had been that the point was sufficiently covered in sub-paragraph (*b*) of article 42. Since the Committee had decided that there was no need for time-limits in those articles, his delegation trusted it would recognize the need to retain sub-paragraph (*b*) of article 42.

78. His delegation could not support the amendment submitted by Spain (A/CONF.39/C.1/L.272). The determining factor in acquiescence was that the State should be aware of the facts, not that the ground of invalidity should have ceased to exist. Moreover, sub-paragraph (*b*) of the Commission's text presented a much more objective text than the Spanish amendment. The amendments proposed by Cambodia (A/CONF.39/C.1/L.273) and Guyana (A/CONF.39/C.1/L.268) seemed to be concerned with drafting and would no doubt be referred to the Drafting Committee. The amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) had the advantage of introducing a time element. The period of time to be adopted was, of course, open to discussion, but the principle in itself was attractive. For similar reasons, his delegation was in favour of the Australian amendment (A/CONF.39/C.1/L.354). In both cases it should be left to the Drafting Committee to decide on the period in question.

79. It had been suggested that articles 46 and 47 should be deleted from the list of articles referred to in article 42. His delegation did not see why; a State wishing to invoke fraud or corruption to invalidate a treaty had complete freedom to do so and its rights were fully protected by articles 46 and 47. Article 42 merely served to indicate that a State could also agree expressly to the validity of the treaty or acquiesce in its continued operation.

80. Mr. KOVALEV (Union of Soviet Socialist Republics) said that, as one of the sponsors of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3), he endorsed the arguments advanced at the previous meeting by the Venezuelan representative.

81. The principle stated in article 42 was certainly a safeguard against arbitrariness and should be included in the convention. But too broad an interpretation of that principle would be dangerous for small countries and for those which had recently freed themselves from the colonial yoke. The tacit acquiescence referred to in sub-paragraph (*b*) of article 42 was an unacceptable idea, because States which had freed themselves from colonial rule might still be deprived of freedom of consent long after gaining their independence. It was essential to enable them to repudiate the obligations imposed on them by the former metropolitan country; their mere silence should not be interpreted to mean that they freely accepted those obligations. Only a clearly expressed acquiescence could be legally valid. Consequently his delegation proposed that sub-paragraph (*b*) be deleted; but that deletion could not of course affect any decisions by international bodies which might already have been taken and had entered into force.

82. The delegation of the Soviet Union was opposed to the amendments submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and by Australia (A/CONF.39/C.1/L.354), which reflected a viewpoint diametrically opposed to its own. The United States delegation was trying to introduce notions taken from internal law. Such attempts, particularly a recent attempt to introduce the notion of prescription into international law, had proved to be very dangerous.

83. As to the field of application of article 42, although the International Law Commission had considered that the principle could not apply to cases of absolute nullity, that was to say, to cases in which the treaty had no legal existence, it had applied the principle to the situations referred to in articles 46 and 47, which scarcely differed from absolute nullity. To be convinced of that fact, it was only necessary to refer, for example, to the Commission's commentary on the effects of fraud. The reference to articles 46 and 47 should therefore be deleted from article 42. His delegation was also in favour of deleting the reference to articles 57 to 59, though it was aware that the nature of the nullity dealt with in article 57 was the subject of different interpretations.

84. The Swiss delegation was attempting by its amendment (A/CONF.39/C.1/L.340), to raise again a question that had already been settled by the Committee in a manner contrary to that delegation's wishes. Consequently, he did not support the amendment.

85. Mr. YASSEEN (Iraq) said that although maintenance of the *status quo* might satisfy a desire for stability, it should not be sought at the expense of justice. His delegation therefore regarded the idea underlying article 42 with some reserve.

86. The rule in question provided for the loss of a right. Such rules always called for strict interpretation; they could not be extended by analogy and the legislator must draft provisions of that nature with the greatest care.

87. The text of article 42 made the loss of the right to invoke a ground of nullity depend on the will of the State concerned and not on the deceptive appearance of the practice followed by that State. Although it was understandable that the International Law Commission had adopted the formula " must ... be considered as having acquiesced ", the basic idea was nevertheless that a State was free to accept or reject a situation which had been established contrary to the rules of international law.

88. The application of article 42 should not, however, be extended to cases of nullity *ab initio*, for in such cases there was no possibility of remedying the defect and the only solution was to conclude a new treaty. His delegation was therefore opposed to the amendments which would widen the scope of the article. On the other hand, it was in favour of those which would narrow

its scope by excluding cases in which the responsibility of the other party was manifest, such as fraud or coercion.

89. His delegation was against establishing a time-limit, as proposed in the amendments submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and by Australia (A/CONF.39/C.1/L.354), whatever its duration. The mere fact that a period of time had elapsed did not make it certain that the State concerned had really meant to acquiesce in the validity of the treaty. On the other hand, his delegation was generally in favour of the amendments which stressed the need to refer only to a clear acquiescence. It was mainly a question of drafting which could be studied by the Drafting Committee.

90. Mr. THIAM (Guinea) thought that the field of application of article 42 was such as to limit unduly the scope of the articles dealing with defective consent. The application of the rule in article 42 even to the cases of fraud and corruption dealt with in articles 46 and 47 was contrary to the legitimate desire for stability in international relations, since it favoured the perpetrator of serious offences; besides, it diminished the role of the moral element which was present in Part V, particularly in Section 2.

91. Sub-paragraph (*b*) of article 42 was a dangerous provision, because it contained a subjective element. It was difficult and dangerous to infer the true intention of a State from its conduct. If that sub-paragraph was to be retained, at least the subjective element should be eliminated.

92. Mr. MOUDILENO (Congo, Brazzaville) said the prevailing doctrine was that a right could not be extinguished independently of the express will of its beneficiary or of the legislator. But, leaving aside that doubtful theoretical question, it might be asked whether the International Law Commission had in fact taken a position in article 42 on the possibility of a right expiring in silence. The article did not appear to provide a formal answer to that question, as it left the fate of the right in the hands of the injured party. But in reality, and that was the first criticism that the text attracted, article 42 made the right into something relative, by linking its fate with the reaction of its beneficiary.

93. Moreover, by providing that acquiescence might be tacit, sub-paragraph (*b*) failed to furnish the serious safeguards that should accompany a provision relating to the loss of a right. The conduct of the State concerned was a difficult criterion to define and a delicate one to handle. His delegation had therefore joined in sponsoring the eight-State proposal (A/CONF.39/C.1/L.251 and Add.1-3) to delete sub-paragraph (*b*).

94. Incidentally, it was not correct to speak of acquiescence in the validity of the treaty, because the treaty in question was void *ex hypothesi*. It would be better to speak of renunciation of the right to invoke a ground of invalidity. That was a question for the Drafting Committee.

95. He noted that sub-paragraph (*b*) did not settle the fate of acts performed before the discovery of the defect and the renunciation of the right to invoke it. In view of those shortcomings and obscurities, the best solution would be to delete the sub-paragraph.

96. Mr. DE BRESSON (France) said that his delegation was willing to accept article 42 as drafted by the International Law Commission. But in view of the misgivings expressed during the debate, he thought that only the Cambodian amendment (A/CONF.39/C.1/L.273) could reassure certain speakers without hampering the settlement of cases that were of too special a character to serve as a basis for the adoption of general rules.

97. It should be recognized that, to be significant, tacit acquiescence in a treaty liable to be voided must have come about freely. But to go further might mean touching on fundamental problems and, in particular, calling in question the stability of territorial status.

98. His delegation was in favour of the Swiss amendment (A/CONF.39/C.1/L.340), as it considered that, even if force had been used, equity required that when coercion had ceased the injured State should be able to decide the fate of the treaty.

99. Mr. ARMANDO ROJAS (Venezuela) said that the sponsors of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) had intended to remain strictly within the limits of the principle on which article 42 was based. The fears expressed by the representative of Guyana seemed excessive, since colonialism and imperialism must henceforth be regarded as evils of the past. However, the sponsors of the amendment attached greater importance to the deletion of sub-paragraph (*b*) than to the deletion of the reference to articles 47 and 57 to 59.

100. After consultation, the sponsors had therefore agreed to withdraw the first part of their amendment and confine it to the deletion of sub-paragraph (*b*).

101. Mr. MARESCA (Italy) said that article 42 was conceived entirely in terms of the will of the parties. That will, though its expression was initially vitiated, could subsequently impart full legal force to a treaty in different ways. Acquiescence could be express or tacit.

102. The Italian delegation was opposed to the deletion of sub-paragraph (*b*) of article 42 and in favour of the amendments which would extend the cases in which the freely-expressed will of the injured State could remedy the defect.

103. For the sake of the stability of treaty relations, his delegation was also in favour of setting a time-limit beyond which a State would lose the right to invoke a ground for invalidating a treaty.

104. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had included the provisions of article 42 in its draft because it considered that a general principle of law was involved, which would be applicable in any case, even without such a provision. That principle was based on the notion of good faith and had often been applied in the decisions of international tribunals, including the International Court of Justice.

105. Although the principle was generally recognized, it could be formulated from different standpoints. It could be stated in terms of the renunciation of a right or of the principle that a State might not go back on a position which it had taken up and which it had led another State to act upon. The International Law Commission had found, however, that it could secure unanimity by

expressing the principle in terms of express agreement and tacit acquiescence implied from conduct. Thus formulated, article 42 had been adopted by 15 votes to none, with no abstentions.

106. With regard to the amendments before the Committee, he thought that those which deleted the references to some of the articles mentioned in article 42 would considerably limit its scope.

107. The Commission had considered that when a State had become aware of the facts referred to in articles 43 to 47 and 57 to 59, it was very unlikely to continue to regard the treaty as applicable. If, after having become aware of the facts, however, the State continued to act as though the treaty was still in force, a new situation arose in which good faith required that the State should be considered to have agreed to continued application of the treaty.

108. The Finnish and Czechoslovak amendment (A/CONF.39/C.1/L.247 and Add.1) would delete the reference to article 58. It could be argued, however, that if the State in question claimed that a situation had arisen which made performance impossible, the other party might nevertheless contest that claim. The first State might then continue to apply the treaty as though it were still in force, from which it could be concluded that it renounced the right to invoke impossibility of performance. It therefore seemed inadvisable to exclude the case referred to in article 58 altogether from the application of the principle stated in article 42.

109. Article 42 was designed to ensure the stability of international relations rather than that of treaties themselves. It was intended to provide protection against bad faith in the application of the rules in Part V.

110. As to the introduction of a time-limit, that was for the Committee of the Whole to decide, though it should retain the essential condition that the State concerned must have become aware of the facts. That was a vital element in the rule since, without knowledge, the obligation of good faith did not arise. The amendment submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) did not appear to respect that condition. To stipulate an absolute time-limit of ten years which did not run from the date on which the facts became known to the State concerned would result in a rule that differed from the principle on which article 42 was based.

111. Lastly, he found it difficult to accept the addition, proposed in the Spanish amendment (A/CONF.39/C.1/L.272), of the condition that the ground of invalidity must have ceased to exist. That would be making what should be the consequence of the rule into a condition for its application.

112. The CHAIRMAN put to the vote paragraph 3 of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) deleting sub-paragraph (*b*) of article 42.

At the request of the representative of Venezuela, the vote was taken by roll-call.

Japan, having been drawn by lot by the Chairman, was called upon to vote first:

In favour: Kenya, Mexico, Mongolia, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Colombia, Congo (Brazzaville), Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Hungary, India, Iran.

Against: Japan, Kuwait, Lebanon, Liechtenstein, Madagascar, Malaysia, Mali, Monaco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Portugal, Republic of Viet-Nam, Singapore, South Africa, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Algeria, Australia, Austria, Belgium, Brazil, Cambodia, Canada, Ceylon, Chile, China, Congo (Democratic Republic of), Denmark, Federal Republic of Germany, Finland, France, Gabon, Ghana, Guyana, Ireland, Italy, Ivory Coast, Jamaica.

Abstaining: Liberia, Morocco, Poland, Republic of Korea, Romania, Senegal, Sierra Leone, Syria, Thailand, Trininad and Tobago, Tunisia, United Arab Republic, Yugoslavia, Zambia, Afghanistan, Argentina, Central African Republic, Cyprus, Czechoslovakia, Dahomey, Ethiopia, Greece, Guinea, Holy See, Indonesia, Iraq, Israel.

Paragraph 3 of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) was rejected by 47 votes to 20, with 27 abstentions.

113. Mr. SUPHAMONGKHON (Thailand), explaining his delegation's vote, said that Thailand had been the victim of an application of the doctrine of estoppel by the International Court of Justice. He wished to emphasize that his Government did not endorse the reasoning on which the Court had based its judgement, in which a number of eminent judges had not concurred. His delegation had purposely refrained from entering into the discussion on article 42 and had abstained in the voting in order not to influence the deliberations of the Committee. It had wished to hear the objective views of representatives on the subject.

114. Mr. DE CASTRO (Spain) withdrew the first paragraph of his delegation's amendment (A/CONF.39/C.1/L.272).

115. The CHAIRMAN put to the vote the second paragraph of the Spanish amendment.

The second paragraph of the Spanish amendment (A/CONF.39/C.1/L.272) was rejected by 40 votes to 25, with 25 abstentions.

116. The CHAIRMAN put the Swiss amendment to the vote.

The Swiss amendment (A/CONF.39/C.1/L.340) was rejected by 63 votes by 12, with 16 abstentions.

117. The CHAIRMAN put to the vote the amendment submitted by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1).

The amendment was adopted by 42 votes to 13, with 36 abstentions.

118. Mr. SARIN CHHAK (Cambodia) withdrew his delegation's amendment (A/CONF.39/C.1/L.273).

119. The CHAIRMAN put to the vote the principle expressed in the Australian amendment (A/CONF.39/C.1/L.354), as requested by the Australian representative.

That principle was rejected by 44 votes to 23, with 24 abstentions.

120. Mr. WOZENCRAFT (United States of America) asked that only the principle expressed in the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) be put to the vote.

121. The CHAIRMAN put that principle to the vote.

The principle was rejected by 42 votes to 21, with 26 abstentions.

122. The CHAIRMAN suggested that article 42, as amended, should be referred to the Drafting Committee, together with the amendment by Guyana (A/CONF.39/C.1/L.268).

It was so agreed.

The meeting rose at 7.15 p.m.

SIXTY-EIGHTH MEETING

Tuesday, 14 May 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty), and *Proposed new article 62* bis

1. The CHAIRMAN invited the Committee to consider article 62 of the International Law Commission's draft [1] and the new article 62 *bis* proposed by Switzerland (A/CONF.39/C.1/L.348).

2. Mr. FUJISAKI (Japan), introducing his delegation's amendments (A/CONF.39/C.1/L.338 and L.339), said it was clear from paragraph (1) of the commentary that the International Law Commission regarded article 62 as a key provision and considered it essential that procedural safeguards should be included. So far as concerned paragraph 3, which would come into operation when a dispute arose over the application of the substantive provisions of Part V, his delegation had submitted an amendment (A/CONF.39/C.1/L.339) in the belief that the Commission's text did not provide satisfactory machinery for the settlement of disputes. Indeed, the Commission had admitted the possibility of a dispute being left unsolved when it stated in paragraph (5) of the commentary that " If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands ".

3. The system proposed by the Commission would be unsatisfactory not only to the State to which the claim was presented, but also to the claimant State. On the one hand, it would enable a State to get rid of a treaty obligation simply by advancing a claim not justifiable under any of the provisions of Part V; and on the other hand, it would operate against a State wishing to invoke a ground for invalidating, terminating or suspending a treaty in good faith. The whole structure of the draft convention, especially article 39, made it clear that the treaty was presumed to be valid unless and until the claim for its invalidity, termination or suspension was established; and it would be regrettable if a State with a justifiable claim were prevented from establishing that claim, merely because article 62 did not provide for effective means of settling disputes. It was admitted in paragraph (2) of the commentary that to subordinate the application of the principles governing the invalidity, termination and suspension of the operation of treaties to the will of the objecting State which declined to secure a solution was almost as unfair as to subordinate it to the arbitrary assertion of the claimant State.

4. The Japanese amendment was designed to provide a sure guarantee for the settlement of any dispute that might arise under Part V. His delegation proposed that, in the case of claims under article 50 or article 61, the dispute should be referred to the International Court of Justice at the request of either of the parties and that, in all other cases, if no solution was reached within twelve months through the means indicated in Article 33 of the United Nations Charter, the dispute should be referred to arbitration, unless the parties agreed to refer it to the Court.

5. Questions of *jus cogens* involved the interests of the entire community of nations, and the question whether a provision of a treaty was in conflict with a rule of general international law, and whether that rule was to be regarded as a peremptory norm, could be settled authoritatively only by the International Court of Justice; his delegation could not agree that a dispute of that kind should be left to private settlement between the parties through procedures established on an *ad hoc* basis.

6. In that connexion, his delegation wished to raise the broader problem of the role of judicial organs in the international community. It was not convinced by the arguments often raised against the jurisdiction of the International Court of Justice, and believed that it would be a sad mistake to place too much emphasis on the implications of this or that particular decision of the Court, thus losing sight of the invaluable contribution that the Court had made to the development of international law. Indeed, the number of times that the International Law Commission had quoted the Court's decisions as an authority on points of law in its draft, and the numerous references to the Court's decisions made by representatives in the Committee, testified to the extent of that contribution. Whatever the present defects of the Court might be, the Japanese delegation was convinced that the best course was to try to remedy those defects and to enhance the authority of the Court, rather than attempt to discredit it and undermine its effective operation.

7. With regard to procedures for the settlement of disputes under Part V not connected with articles 50

[1] The following amendments had been submitted: Japan, A/CONF.39/C.1/L.338 and L.339; France, A/CONF.39/C.1/L.342; Uruguay, A/CONF.39/C.1/L.343; Gabon and Central African Republic, A/CONF.39/C.1/L.345; Colombia, Finland, Lebanon, Netherlands, Peru, Sweden and Tunisia, A/CONF.39/C.1/L.346; Switzerland, A/CONF.39/C.1/L.347; Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Netherlands, Peru, Sweden and Tunisia, A/CONF.39/C.1/L.352/Rev.1/Corr.1; Cuba, A/CONF.39/C.1/L.353; United States of America, A/CONF.39/C.1/L.355.

and 61, as set forth in the proposed annex to the convention, his delegation had tried to work out a system under which an arbitral tribunal established with the active participation of the parties might bring about a sure and satisfactory settlement of the disputes referred to it. It hoped that its proposal would serve to allay the fears of some delegations of referring disputes for binding decision by an independent body; it also appealed to all delegations to try to rid themselves of any prejudice they might have in the matter and to give careful attention to the Japanese proposal.

8. The Japanese amendments to paragraphs 1 and 2 of article 62 (A/CONF.39/C.1/L.338) consisted, firstly, of inserting the words " void or " before the word " invalid " in the first line of paragraph 1, in order to establish beyond doubt that article 62 covered all the cases referred to in Section 2 of Part V, and, secondly, of deleting the phrase " except in cases of special urgency " from paragraph 2. That exception could constitute a dangerous loophole and make the entire system of procedural safeguards meaningless, since it provided for no minimum period of notice and referred to no system for authoritative determination of urgency.

9. Mr. DE BRESSON (France), introducing his delegation's amendment to paragraph 1 (A/CONF.39/C.1/L.342), said that a study of Part V showed that the International Law Commission had drawn a distinction between cases where the validity of a treaty might be contested in accordance with the provisions of articles 43 to 47, and those, covered by articles 48 to 50 and 61, where a treaty was void *ab initio*. Although that difference was not expressly stated anywhere in the draft convention, the difference of terminology used in the two groups of articles was evident, and the Committee must consider whether that difference affected the obligation to notify other parties of a claim of invalidity or an allegation of a ground for termination, withdrawal or suspension. In its comments on article 39, the French delegation had pointed out that the actual text of article 62 gave no clear answer to that important question.

10. A *prima facie* examination of article 39, paragraph 1, gave the impression that the second sentence was complementary to the first, and that the paragraph as a whole established no distinction between " relative " invalidity and invalidity *ab initio*; that interpretation also led to the assumption that article 62, paragraph 1, covered cases under articles 43 to 50 and article 61. A closer study of Part V showed, however, that that interpretation was unduly simple and that article 39, paragraph 1, might be held to refer to two distinct but parallel means of contesting validity.

11. In that event, it could be argued that article 62, paragraph 1, only covered claims of invalidity on the grounds referred to in articles 43 to 47. But the second sentence of article 39, paragraph 1, provided for no recourse to article 62 in the cases of invalidity *ab initio* covered by articles 48 to 50 and article 61, and the grounds of invalidity in such cases could be invoked without reference to article 62, paragraph 1, and even without the intervention of the parties. That interpretation was further corroborated by the difference in the terms used in paragraphs 4 and 5 of article 41 for States invoking " relative " invalidity and those claiming invalidity *ab initio*, and also by the absence of any reference to the provisions in question in article 42.

12. The possible consequences of that anomaly would be to enable any party to a treaty unilaterally to claim invalidity on the very grounds which were most difficult to establish, and to open the way to States other than the parties to benefit by the invalidity provided for by those articles.

13. It had been claimed that the International Law Commission had meant article 62 to apply to all the provisions of Part V, but the French delegation considered that no ambiguity should be allowed to remain on such a fundamental point, and it had introduced its amendment with the sole purpose of clarifying the text in accordance with the generally recognized meaning.

14. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.343) for two main reasons. Paragraphs 5 and 6 of the amendment were intended to strengthen the procedure proposed by the International Law Commission and to eliminate the possibility of unilateral acts, a possibility which would enable States to reject the principle *nemo judex in causa sua*. Paragraphs 1, 2 and 4 were designed to establish the necessary distinctions between the procedures set out in article 62 in respect of different causes of invalidity.

15. Paragraphs 5 and 6 of his delegation's amendment, which were designed to prevent unilateral assertion of grounds for invalidity, were not intended to compete with any more ambitious proposals for compulsory adjudication, arbitration or conciliation machinery. Indeed, the Uruguayan delegation might vote in favour of some of those proposals, which in any case would be put to the vote before its own amendment, because they were further removed from the original article; the Uruguayan proposal would only be voted on if those more far-reaching amendments were defeated. The majority of the Committee might consider the complicated procedure suggested in other proposals to be too rigid and controversial. Those proposals related mainly to major political disputes, and less to the minor, more technical differences which occurred in the daily work of the legal departments of Ministries of Foreign Affairs in connexion with humanitarian treaties and trade agreements, and for which a rigid and cumbersome procedure might be inappropriate.

16. Paragraphs 5 and 6 of the Uruguayan proposal were based, in accordance with the United Nations Charter, on the efforts of the parties themselves, supported by other States in the same part of the world, to effect settlements of disputes among themselves, having recourse to United Nations bodies only in the last resort. Another fundamental idea, also in keeping with the Charter, was that every dispute should be settled peacefully, in accordance with the special features of the case, according to Article 33, paragraph 1, of the Charter. Most of the disputes which could arise under the convention on the law of treaties would be covered by that procedure, and recourse to the two organs of the United Nations referred to in Article 35 would be necessary only in the event of failure of the efforts of the parties and other countries in the same region to settle the dispute.

17. Paragraph 5 of the Uruguayan proposal had the important feature of subordinating the allegation of violation of a treaty, as a ground for terminating or suspending the treaty, and the right to object to grounds for invalidating or terminating the treaty, to acceptance of the obligations of pacific settlement provided for in the United Nations Charter. The organs of the United Nations mentioned in the corresponding provisions of the Charter would be responsible for deciding the most appropriate means of settling the dispute.

18. The Uruguayan proposal in no way intended the United Nations organs referred to in paragraph 5 to act as arbitrators or judges in disputes; their sole function would be to make recommendations to the parties on the means to be used to settle their differences. That was why his delegation's text did not refer to Articles 37 and 38 of the Charter. The recommendations would not be binding, but the right to invoke invalidity would depend on acceptance of the recommendation: the claim of a State which did not accept the recommendations would not be regarded as valid.

19. The possibility that States parties to the convention might not abide by their obligations but might be guided by their preference for or friendship with one of the parties to a dispute was covered by the proposed paragraph 6. The provision that States allowing themselves to be thus influenced, rather than the claimant or objecting State, would thereby violate the convention might have an important moral and legal influence. In any case, the procedure to be followed would be laid down by the United Nations organ in question and, if the dispute continued, it would be subject to an impartial decision by a third party. The Uruguayan delegation accordingly proposed that the Commission's paragraph 5 should be deleted, since it introduced an element of ambiguity.

20. With regard to paragraphs 1, 2 and 4, his delegation proposed different procedures for different grounds of invalidity and termination. The Commission's failure to make that differentiation had been criticized in the Institute of International Law, where it had been pointed out that an injured party might be obliged to continue to be victimized until the procedures set out in article 62 had been completed. The Uruguayan delegation therefore proposed, in paragraph 1 of its amendment, that a party alleging a material breach of a treaty might unilaterally suspend its execution in whole or in part. That provision obviously referred to an allegation of breach made in good faith; in keeping with the structure of the convention, good faith was presumed. If, however, the allegation was made as a pretext, the provisions of paragraph 4, setting out the machinery for establishing the existence of a material breach, would come into operation. Finally, his delegation's text of paragraph 2 had the advantage of providing unequivocally that the treaty could not be suspended unilaterally in the case of claims under articles 43 to 50, 53, 56, 59 or 61.

21. Mr. BINDSCHEDLER (Switzerland) said that article 62 of the Commission's text wisely made provision for the requisite procedure in cases of dispute, but it had certain gaps. To begin with, it did not state whether or not the treaty remained in force after the notification had been made under paragraph 1. In his opinion the treaty should remain in force until the procedure had been concluded.

22. Paragraph 3 did not specify what should be the definitive solution of a dispute; presumably each Government would have to consider the position and act in good faith. If the dispute was referred to a United Nations body, the latter could only make recommendations and could not give a binding decision unless it was a case for the Security Council because there was a threat to the peace. If the dispute was brought before the International Court of Justice, the acceptance of all the parties would be needed unless they had signed the optional clause.

23. Paragraph 5 did not seem to be in conformity with the guarantees laid down in paragraph 1, and should be dropped.

24. In paragraph 1 of the Swiss amendment (A/CONF. 39/C.1/L.347), the word "*nullité*" had been replaced by the word "*annulation*" because the former was dangerous and might threaten the stability of treaty relations. The word "claim" had been replaced by the word "intention".

25. Under paragraph 3 of the amendment, the parties were given complete freedom to negotiate and agree upon a conciliation procedure, or arbitration, or submission to the International Court of Justice. The matter had to be referred to the Court or to an arbitral tribunal if the parties failed to reach agreement within the period prescribed in paragraph 3. Under paragraph 3, the objecting State was not permitted to abrogate the treaty or unilaterally choose a judicial procedure. If the period of six months prescribed in paragraph 4 were too short, it could be extended.

26. Paragraph 5 contained detailed provisions for the arbitral procedure as well as provisions for the appointment of the arbitrators, who should be appointed by the President of the International Court of Justice in the event of failure to agree between the parties, and not by a political figure such as the Secretary-General of the United Nations. The procedure should be as simple as possible and what was proposed was the classic procedure for arbitration.

27. Paragraph 6 stipulated that the treaty should remain applicable throughout the duration of the dispute and paragraph 7 laid down that if a party made the notification and did not have recourse to one of the tribunals referred to in paragraph 4, it was deemed to have renounced its claim of invalidity.

28. The provisions contained in paragraph 5 of the Commission's text had not been retained.

29. Mr. RIPHAGEN (Netherlands), introducing the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/ Corr.1), said there was general agreement with the provision contained in paragraph 3 of the Commission's text, but it was not enough to repeat the general obligation of all States to settle their disputes by peaceful means. Many delegations, including the sponsors of the joint amendment (A/CONF.39/C.1/L.352/Rev.1) which superseded the amendments in documents A/CONF./39/C.1/L.345 and L.346, considered that the particular character of the disputes in question made it necessary to go beyond a general obligation and lay

down special procedures of a compulsory character. Disputes relating to the interpretation and application of Part V of the convention did not relate to the implementation of a treaty, but to a preliminary question of whether a treaty concluded between States was valid. They involved matters of substance that were of great importance for the stability of treaty relations and peaceful relations between States.

30. The sponsors of the joint amendment considered that the convention should provide for a compulsory procedure for the settlement of disputes arising under article 62. The amendment was in the form of a full set of rules for the settlement of disputes, but the sponsors would be willing to entertain any modifications of detail, provided the underlying principles were left untouched. Reference should be retained to the general obligation under the Charter to seek a solution by peaceful means, with specific procedures provided for cases where there were no other provisions in force concerning the settlement of disputes. The amendment was intended to fill a gap. If the parties were unable to agree *ad hoc* on a means of settlement and a solution was not reached within a year, either party might request the Secretary-General to set in motion the settlement procedures laid down in the annex to the convention. The underlying principle in annex I was that there should be a conciliation phase, which, if unsuccessful, would be succeeded by arbitration, both phases being compulsory; and the provisions followed the classic procedures of conciliation and arbitration.

31. No conciliation or arbitration could succeed unless the conciliation commission or arbitral tribunal was properly constituted. The amendment therefore provided for their establishment within a reasonable time. Both the conciliation procedure and the arbitration procedure should allow each party to the dispute to designate two conciliators or arbitrators, as the case might be; and the president of the conciliation commission, or of the arbitral tribunal, should also be appointed on the basis of the equality of the parties. In most cases conciliation should suffice, and it would be unnecessary to submit the dispute to arbitration. In order to achieve the rapid establishment of a conciliation commission, the amendment provided for a permanent list of conciliators to be drawn up by the Secretary-General.

32. In view of the gravity of the disputes to which the amendment related, the whole international community would be interested in their settlement, and the amendment therefore provided that the Secretary-General should assist the conciliation commission, and also the arbitral tribunal, should one be set up. The expenses of those bodies, but not the costs of the parties' pleadings, would be borne by the United Nations.

33. There was a close link between the substantive provisions of Part V and the procedures laid down in article 62, which was the key to that part of the convention.

34. Mr. AUGE (Gabon) said that, for the convention on the law of treaties to contribute to the development of peaceful inter-State relations, there must be some machinery to prevent arbitrary action in cases where a party to a treaty invoked a ground of termination, withdrawal or suspension. The provisions of article 62 as drafted did not provide sufficient safeguards in that respect. They left the parties free to choose the mode of settlement but it was open to any party to the dispute to refuse settlement and to take unilateral measures in respect of the disputed treaty.

35. In order to provide those safeguards, the delegations of the Central African Republic and Gabon had submitted an amendment (A/CONF.39/C.1/L.345), but, to save time, they had subsequently decided to join the sponsors of the seven-State amendment (A/CONF.39/C.1/L.346) in submitting the consolidated amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1), which had just been introduced by the Netherlands representative.

36. The purpose of the consolidated amendment was to make provision for a specific and, if necessary, compulsory procedure. That procedure, however, would come into play only if one of the parties showed unwillingness to arrive at a solution in a dispute arising from the application of the convention on the law of treaties.

37. The amendment made provision for a conciliation commission and an arbitral tribunal. The composition of both bodies was based on the principle that the parties to a dispute should be able to choose their own judges. That approach was in conformity with the principle of the equality of States. In the same spirit, it was provided that the permanent list of conciliators should consist of two conciliators appointed by every Member of the United Nations and every party to the convention on the law of treaties.

38. The delegations of the Central African Republic and Gabon had been greatly concerned to ensure the reconciliation of States parties to a dispute after the settlement of that dispute in the conciliation proceedings. It was for that reason that they did not favour large conciliation bodies. Their proposals in that respect (A/CONF.39/C.1/L.345) had been accepted by the sponsors of the seven-State amendment (A/CONF.39/C.1/L.346) and incorporated in the consolidated amendment.

39. Although provision had been made in the consolidated amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) for an arbitration tribunal to settle disputes in the last resort, the sponsors had not considered it advisable to deprive the parties of the right to agree, after the failure of conciliation proceedings, to some other mode of adjudication, such as resort to the International Court of Justice. The most important point for the international community was that disputes should be settled peacefully. The consolidated amendment did not affect in any way the constituent instruments of regional organizations or the right of the parties to choose any mode of settlement they found convenient, while the machinery for the settlement of disputes embodied in the consolidated amendment would not involve excessive expense for the United Nations.

40. It was for those reasons that the delegations of the Central African Republic and Gabon had decided to withdraw their own amendment (A/CONF.39/C.1/L.345) in order to join in sponsoring the consolidated amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1).

41. Mr. ALVAREZ TABIO (Cuba), introducing his delegation's amendment (A/CONF.39/C.1/L.353), said

that its purpose was to exclude from the application of article 62 treaties which were legally void *ab initio* according to articles 48, 49 and 50.

42. A treaty obtained by means of the threat or use of force, or concluded in defiance of a rule of *jus cogens*, was not merely voidable at the request of one of the parties; it was legally non-existent. Nullity under articles 48, 49 or 50 operated *ipso jure* without any formal declaration to that effect.

43. It had been objected that voidness *ab initio* undermined legal security. But the contrary position, which would establish a presumption of *ab initio* validity of a treaty that was radically void, would represent the bankruptcy of justice. Such a concept of security would be empty of historical substance. When the concept of legal security was invoked, it could reasonably be asked: security for what? security for whom? There could be no question of maintaining indefinitely situations which constituted a denial of justice, or of perpetuating the subordination of the weak to the strong.

44. His delegation could not accept the concept of security at any price; it could only accept security resting on the principles of the United Nations Charter. It could accept the procedure in article 62 for the invalidation of a treaty which was voidable and would be prepared to contribute to any efforts to improve the text of the article, but it would not accept either compulsory arbitration or the jurisdiction of the International Court of Justice. A treaty which was null and void under one of the articles 48, 49 or 50 was not a treaty in force and therefore did not bind the parties.

45. It had been objected that the Cuban amendment (A/CONF.39/C.1/L.353) did not make any provision for a procedure to deal with those situations. There could be no doubt that it was not easy in such cases to devise a procedure which would not lead to a denial of justice. He hoped, however, that an acceptable formula would be found. Meanwhile, history showed that there was only one procedure for repudiating so-called treaties that were unequal, oppressive or unjust, which was still valid, and that was the right to resist oppression, as embodied in the Declaration of Philadelphia of 1776 and the French Declaration of the Rights of Man of 1789.

46. Mr. WOZENCRAFT (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.355), said that his delegation had been concerned at the fact that while the draft articles indicated many ways of initiating arguments on the validity of treaties they failed to provide for any means of settling them. He welcomed the reference in article 62 to Article 33 of the Charter, but Article 33 did not provide an assured method of protecting a party to a treaty against arbitrary action by another party purporting to terminate the treaty without real justification. Article 62 should enable the parties to select the best method of settlement, but in such a way that a party could not refuse settlement and at the same time remain free to take unilateral action. If the Conference was going to establish a whole series of grounds for the avoidance of treaty obligations, it was imperative to provide a mechanism for impartial determination in the matter. It was not the best way of upholding the integrity of treaties, or of avoiding threats to the peace, to leave it to the interested State to decide whether it was entitled to avoid its treaty obligations.

47. The first part of the United States amendment (A/CONF.39/C.1/L.355, part 1) was intended to bring greater clarity to the provisions of paragraph 2 of article 62; since it did not affect the substance of the article, he would suggest that it be referred to the Drafting Committee.

48. The proposal to insert a new paragraph 3 *bis* (A/CONF.39/C.1/L.355, part 2) was intended to ensure that, if the parties did not agree on another mode of settlement, or if no solution were reached within twelve months, either party could refer the dispute to the commission on treaty disputes for conciliation.

49. Particulars of the composition of that commission were given in a proposed annex to the convention (A/CONF.39/C.1/L.355, annex). Parties would be able to bring their disputes before the full commission or to request the establishment of a sub-commission. Pending settlement of the dispute, the commission or sub-commission would have the power to order provisional measures to preserve the rights of the parties.

50. It was an essential feature of the proposal that the commission would be an organ of the United Nations, authorized to request advisory opinions from the International Court of Justice (A/CONF.39/C.1/L.355, annex, article 4). In most cases, the commission would be called upon not only to establish the facts but also to reach conclusions on legal issues. However, in some cases it might be desirable to obtain an advisory opinion from the International Court on the legal issues involved. In the interests of a prompt decision, a provision had been included that, with the consent of the parties, the commission would request the Court to proceed in the most expeditious manner by forming a chamber under Article 26 of its Statute.

51. Another essential element was the reporting function of the proposed commission (A/CONF.39/C.1/L.355, annex, article 5). Experience with the constitutions of the International Labour Organisation and a number of regional organizations showed that such reporting functions had generally assisted in effecting a friendly solution of disputes.

52. The United States amendment made provision for the establishment of an arbitral tribunal (A/CONF.39/C.1/L.355, annex, articles 6 and 7) in the event of failure by the commission on treaty disputes to bring about a friendly solution; that two-stage formula was commonly used by regional organizations. For example, the Protocol of the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity dealt, in part 4, with settlements by conciliation, and in part 5 with arbitration.

53. The third part of the United States amendment (A/CONF.39/C.1/L.355, part 3) would introduce a new paragraph 4 in article 62, establishing a general rule that, when an objection had been raised to a measure proposed to be taken by a party claiming invalidity of a treaty, the measure could not be carried out until the matter was settled, unless either the other party agreed that the step could be taken, or the commission on treaty disputes, or the international tribunal competent in the matter, issued an order laying down provisional measures.

54. That same part of the amendment (A/CONF.39/C.1/L.355, part 3) would introduce a new paragraph 5 dealing with breach, as an exception to the rule in the new paragraph 4. In the case of breach, it was the practice of States to respond by suspending the operation of the treaty. That measure was necessary to protect the parties. If, for example, one party failed to pay for goods, the other must have the right to hold up delivery. The purpose of the proposed new paragraph 5 was to prevent abuses of that right. If the breach frustrated the object and purpose of the treaty, the party alleging material breach could suspend the operation of the whole treaty; but if the breach related to certain provisions only, suspension would be limited to those obligations which were directly related to the provisions allegedly breached.

55. In the absence of a convention on the law of treaties, *ad hoc* arrangements might be applied for the settlement of treaty disputes. But if a convention was to be concluded laying down rules governing termination and suspension, some permanent machinery was necessary. The proposed commission on treaty disputes would be a well-balanced, flexible and relatively inexpensive piece of machinery for the settlement of disputes. The commission could be expected to develop a substantial body of case-law which would be of great value to Foreign Ministries when drafting future treaties, or when confronted with potential treaty disputes.

56. The draft articles contained many provisions couched in the most general terms. For States to know what they could and could not do with respect to treaties, some better means of interpretation were needed than purely *ad hoc* conciliation groups or temporary arbitration panels. The proposed scheme would set up a body which would preserve the important qualities of flexibility and free choice of the parties. He commended it to the careful attention of delegations and would welcome constructive suggestions from them.

The meeting rose at 1 p.m.

SIXTY-NINTH MEETING

Tuesday, 14 May 1968, at 3.25 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(continued)* [1] and *Proposed new article 62* bis (A/CONF.39/C.1/L.348) *(continued)*

1. Mr. COLE (Sierra Leone) said that when the Committee was considering article 50, he had stated that it would be running counter to the settlement procedures laid down by the United Nations to request the compulsory application of certain pre-established procedures for the settlement of disputes arising out of the interpretation or application of the provisions of the convention. Under the United Nations Charter, countries were free to choose the means for the pacific settlement of disputes.

2. In his view, it was the present wording of article 62, in particular paragraph 3, which was most likely to obtain the widest possible agreement. The speedy and just settlement of disputes by peaceful means freely chosen in conformity with the principle of the sovereign equality of States should be the main objective of the Conference. Those amendments which proposed the establishment of compulsory arbitration procedures deserved to be considered, but he feared that they would incur criticisms similar to those made against the International Court of Justice, namely, that no judgement could be delivered impartially or without the intervention of political or extra-juridical considerations. Moreover, experience had shown that States were extremely reluctant to make use of the existing permanent arbitration machinery and it was unlikely that they would have recourse to the machinery it was proposed to set up. The vast majority of States seemed rather to favour *ad hoc* investigation bodies.

3. He was opposed to those amendments which tended to draw a distinction between articles 50 and 61, on the one hand, and certain other articles of Part V, on the other. In his opinion, all those articles were equally important. Accordingly, his delegation would vote in favour of the substance of article 62, and would only support amendments which would improve it.

4. Mr. BLIX (Sweden) said that he would like the Committee to approve the broad outline and not the details of the amendment of which his delegation was a co-sponsor (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The Drafting Committee or a working group might then study the drafting solutions adopted in the other amendments and embody them, if considered necessary, in the thirteen-State amendment, provided that they did not depart from the substance of that amendment.

5. His delegation believed that the three-stage procedure provided for in the amendment, namely a method of settlement freely chosen by the parties, conciliation and arbitration, had great advantages. In the first place, it was likely that the fact that the parties would be aware that there existed procedures which would be automatically available if they did not agree on a method would facilitate such an agreement. In the second place, the knowledge that the arbitration procedure was their last possibility would doubtless make them more inclined to accept a solution resulting from the process of conciliation. Also, the parties would know that any attempt at obstruction would not pay.

6. The procedure of conciliation seemed particularly appropriate for any issues that might arise in connexion with the application of Part V. It would enable the States concerned not only to consider the applicability of the various grounds of invalidity, termination or suspension of the operation of a treaty, but also to consider the possibility of settling their dispute by the modification or renegotiation of the treaty in dispute.

7. Acceptance of the thirteen-State amendment would offer the guarantee that every State could, if the case

[1] For the list of the amendments submitted to article 62, see 68th meeting, footnote 1.

should arise, invoke any of the articles of Part V to invalidate, terminate or suspend the operation of a treaty and have it established by a duly authorized body that the article invoked was applicable, or reach a settlement by conciliation.

8. Moreover, a State against which another State had unjustly invoked any of the articles of Part V would be effectively protected against abusive recourse to those articles and could have it authoritatively established that the article invoked was not applicable, or reach a settlement by conciliation.

9. His delegation was aware that a number of objections had been raised against provisions for making procedures for the settlement of disputes automatically available and in particular proposals that disputes should be referred to the International Court of Justice. It had been argued that the composition of the Court did not adequately represent the composition of the international community and that it applied " old law " which did not sufficiently reflect the interests of new States.

10. None of those objections was applicable to the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev 1/Corr 1). The composition of the proposed conciliation commission and arbitral tribunal was based on the principle of parity. Moreover, those bodies would not apply " old law ", but the principles set forth in the convention.

11. The novelty of some of the provisions of Part V of the convention, especially those dealing with *jus cogens*, made the establishment of an effective machinery for the settlement of disputes particularly desirable. A great part of what was today accepted as international law had been established, from the nineteenth century onwards, through the application of arbitration procedures. It would be regrettable not to develop the ideas in Part V by similar procedures.

12. It was reasonable that the costs of the conciliation commission or arbitral tribunal should be borne by the United Nations, as it was in the interest of the entire international community and not only of the litigant States that disputes should be submitted to those bodies. That provision of the thirteen-State amendment, together with the provisions under which certain tasks were to be entrusted to the Secretary-General and Members of the United Nations would, of course, have to be submitted in due course for approval by the General Assembly and acceptance by the Secretary-General. Since the amendment merely sought to complete article 62 and not to modify it, the procedures it proposed were of a subsidiary nature, compared with the other procedures that the parties might be obliged to employ under other instruments, such as the Charter of the Organization of African Unity.

13. The procedures for effecting a settlement suggested in the amendment should apply only to treaties concluded after the entry into force of the convention. Clearly, acceptance of that condition would not prevent any State from claiming the invalidity of old treaties on grounds derived from customary international law. The question of the applicability of the convention in point of time should be expressly regulated in one of the final clauses.

14. His delegation thought that the amendments by Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.347) were useful and it was ready to consider them as an alternative solution to the thirteen-State amendment if they were supported by the majority of delegations. It would adopt the same attitude towards the United States amendment (A/CONF.39/C.1/L.355), which went much further than the thirteen-State amendment. On the other hand, it hoped that if the latter amendment was favourably received by the majority of delegations, Switzerland, Japan and the United States might, in turn, accept it in place of the procedures they had proposed in their respective amendments. All those amendments had common features, since they all sought to establish the principle of an effective, automatically available procedure for settlement. The acceptance of that principle would largely determine the attitude of very many States towards Part V and the convention as a whole.

15. He had some doubt about the amendment by Uruguay (A/CONF.39/C.1/L.343), as it was probable that most of the disputes relating to the application of Part V would not be of such a serious character as to warrant the intervention of the General Assembly or other organs of the United Nations.

16. Lastly, the amendment by France (A/CONF.39/C.1/L.342) and the other Japanese amendment (A/CONF.39/C.1/L.338) related merely to drafting matters.

17. Mr. SOLHEIM (Norway) said the final outcome of the discussions on article 62 would determine whether the convention would have a really universal character and a satisfactory solution would therefore have to be found within the scope of the convention to the problem of the peaceful and compulsory settlement of disputes arising from its interpretation and application.

18. Paragraph (1) of the commentary on article 62 revealed that many members of the International Law Commission had thought that some of the grounds upon which treaties might be considered invalid or terminated or suspended under the provisions of Part V involved real dangers for the security of treaties. The Norwegian delegation fully shared their apprehensions. It was encouraging, however, to see that the Commission as a whole " considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation ".

19. Further, paragraph (4) of the commentary said that Governments in their comments had appeared to be at one in endorsing the general object of the article. But agreement had stopped there, and the Commission had been unable to solve the real problem, namely when the parties, after having followed the procedure laid down in article 62, could not reach an agreement on their dispute. What would become of the principle of the sovereign equality of States or the notion of mutual consent, which were the very basis of the negotiation, signature and ratification of treaties, if, without the requisite safeguards, the parties were allowed subsequently to rid themselves of their treaty obligations simply by claiming that a treaty was invalid under the convention? If one of the parties was convinced that it had a good case, it ought to accept some kind of independent court or tribunal without difficulty, if conciliation procedures failed. The Interna-

tional Court of Justice or an arbitral tribunal could perform those functions without being overburdened by work. The possibility of recourse to an independent court or tribunal would induce States to be careful when negotiating and concluding treaties, to agree to renegotiate treaties and to show greater willingness to seek a conciliation procedure. In any event, recourse to an independent court or tribunal would be necessary only in extremely rare cases.

20. The advantage of a system of arbitration, as compared with the jurisdiction of the International Court of Justice, was that the parties could themselves decide on the kind of tribunal they wished to set up. It was evident, however, that most arbitration systems suffered from a considerable defect: usually each party to a dispute named one or two of the members of the arbitral tribunal and the parties appointed the president of the board in common; as a result, a single person very often decided the matter. The Swiss amendment (A/CONF.39/C.1/L.347), allowing the parties to appoint by agreement three of the five members of the tribunal had certain advantages. Another point was that the arbitral tribunal usually did not give very extensive grounds for its conclusions. That disadvantage was obviated if the case was taken to the International Court of Justice, since under Article 56 of its Statute, its judgements must state the reasons on which they were based. In any event, whatever the procedure followed, it could not be expected that all the parties would agree with the decision. Some decisions might be hard to understand, but that was equally true of judgements of national courts.

21. The Norwegian delegation believed that the interests of small States would best be protected by compulsory judicial procedure before an independent court, and Norway itself had long ago accepted the compulsory jurisdiction of the International Court of Justice. Some such compulsory procedure must be provided in the convention, and his delegation would support any proposal to that end; it believed, however, that in the case of at least two provisions of the convention, disputes should be taken only to the International Court of Justice. In that respect, the Japanese amendment (A/CONF.39/C.1/L.339) contained some very useful provisions.

22. Mr. TRUCKENBRODT (Federal Republic of Germany) said the drafting and development of substantive rules of international law must be accompanied by the establishment of a corresponding procedure. That applied particularly to Part V of the draft convention, which, even where it merely restated principles of customary international law, contained notions which in many cases still had no precise legal meaning. If no provision were made for appropriate procedural guarantees in Part V, the codification of the law of treaties might weaken regard for the sanctity of treaties and undermine the stabilizing role of international law in international relations.

23. He supported article 62, paragraphs 1 and 2, of the International Law Commission's draft, but considered that paragraph 2 should specify whether a treaty which was void under articles 48, 49, 50 or 61 should be performed in good faith during the period in question. The term " void " used in those articles seemed to show that in such a case States were not bound by that obligation. Nevertheless, article 62, paragraph 2, did not give any special treatment to that form of nullity; it seemed, therefore, that even treaties which a party claimed to be void under articles 48, 49, 50 or 61 should be performed by it in good faith. From a practical point of view that seemed to be the only possible solution. One way to make the necessary clarification would be to bring articles 48, 49, 50 and 61 into line with article 62 by substituting the term " invalid " for " void " in those articles; another way would be to make specific reference in article 62 to the cases in which it was claimed that treaties were void *ipso jure*. That was a point of clarification, which had nothing to do with the fact that such treaties should be considered as void *ab initio* once their invalidity had been established.

24. As far as disputes over claims and objections under article 62, paragraphs 1 and 2, were concerned, neither article 62, paragraph 3, nor Article 33 of the United Nations Charter provided for compulsory settlement of disputes by a neutral court or tribunal. In his opinion, in view of the legal uncertainties and inherent dangers of Part V of the draft convention, no procedure would be adequate which did not provide for compulsory judicial settlement if the parties failed to settle their dispute by agreement. His delegation would welcome any solution which made the International Court of Justice responsible for interpreting Part V, but recognized that that solution might not be acceptable to other delegations. It would therefore support any decision providing simultaneously for compulsory *ad hoc* arbitration for all parties to the convention. The method of an optional protocol was, as Professor Briggs had stated in an article published in the *American Journal of International Law*, [2] clearly insufficient. On the other hand, it would be unwise to provide in article 62, paragraph 3, only for a compulsory judicial settlement; it would be preferable also to include a provision, as a first step, for a compulsory conciliation procedure based on the principle of parity and operating within the framework of the United Nations.

25. The amendments by Japan (A/CONF.39/C.1/L.338 and L.339), France (A/CONF.39/C.1/L.342), thirteen States (A/CONF.39/C.1/L.352/Rev.1/Corr.1), Switzerland (A/CONF.39/C.1/L.347) and the United States (A/CONF.39/C.1/L.355) improved article 62; his delegation could therefore support any of those amendments, but it was opposed to the Uruguayan amendment (A/CONF.39/C.1/L.343), which did not necessarily lead to compulsory judicial settlement, and the Cuban amendment (A/CONF.39/C.1/L.353). As opinions differed greatly on article 62, paragraph 3, the article should not be put to the vote before delegations had agreed on a compromise solution on the underlying principle of that paragraph. Lastly, he drew the Committee's attention to the fact that none of the amendments was clear about which party was entitled to claim the nullity of a treaty under article 50, which was designed to protect the international public order. In his opinion, not only the parties to a given treaty, but all States interested in the mainte-

[2] H. W. Briggs: " Procedures for establishing the invalidity or termination of treaties under the International Law Commission's 1966 draft articles on the law of treaties," *American Journal of International Law*, October 1967.

nance of public order, should normally be able to claim that a rule of *jus cogens* had been violated by the treaty.

26. Mr. NACHABE (Syria), said that article 62 had been drafted with great care. Ultimately, the parties had to seek a solution to their disputes by resorting to the means indicated in Article 33 of the Charter. The International Law Commission had considered that it could not go beyond the limits of that balanced compromise.

27. His delegation agreed with the Commission; the resulting formula was acceptable and the procedural safeguards it offered were adequate, since the parties had to resort to the means indicated in Article 33 of the Charter without any priority being given to any of them. The choice of the means was subject to agreement between the parties.

28. Recourse to compulsory jurisdiction or arbitration would obviously have been the ideal solution, but the justified apprehensions of many States, in particular the new States, with regard to that formula should be taken into account. Later, those apprehensions would doubtless disappear as, under the stimulus of the work done on codification, a more stable and more equitable international law based on the sovereign equality of States and respect for the rights and interests of all peoples, above all those of the new States, was progressively established. A member of the International Law Commission had said: " There was no conflict that was not amenable to settlement in accordance with rules of law. At the same time, any dispute could be charged with political implications, even one relating to a purely technical matter. It was for the State concerned to decide whether any particular dispute had political implications and whether it was or was not prepared to submit it to judicial settlement or arbitration[3]. "

29. The very great sacrifices frequently made by the new States to achieve independence explained and justified their hesitation in the present state of international relations with regard to compulsory jurisdiction and arbitration.

30. The Syrian delegation therefore favoured article 62 as it stood and did not support any of the amendments which would go beyond the limits it laid down.

31. Mr. GON (Central African Republic) reminded the Committee of the opinion his delegation had repeatedly expressed on the various means provided for in Article 33 of the Charter—to which article 62 of the draft referred—for the settlement of disputes. His delegation had always expressed reservations about the International Court of Justice, since its very restricted composition was far from representing the various legal systems of the modern world. The Court's judgement in the *South-West Africa* cases [4] had confirmed those reservations. On the other hand, the Central African Republic had always favoured the other means of settling disputes provided for in the Charter. The negotiation proceedings brought the parties to the dispute together and enabled them to start a discussion which, through the human contacts it involved, might achieve beneficial results. Resort to regional organizations had the advantage that disputes were submitted to bodies which, because of their thorough knowledge of the background, could work out satisfactory solutions to those disputes. Arbitration obviated reference to a judicial body whose composition might prevent it from understanding the importance of the problems involved; it was also the most flexible and most economic method.

32. With that in mind, his delegation had joined twelve other delegations in submitting an amendment (A/CONF. 39/C.1/L.352/Rev.1/Corr.1) of which the guiding principles were a determination to respect the provisions of article 62 and a desire to supplement them with a flexible and compulsory procedure intended to break the deadlock between the parties when all other means of settlement had been exhausted. Under the provisions of the paragraph 3 *bis* added by that amendment it was solely for the parties to the dispute to set in motion the initial stage of the procedure, namely conciliation.

33. His delegation had been opposed, and for the reasons he had stated would continue to be opposed, to recourse to any permanent body consisting of an arbitrarily determined and limited number of conciliators or arbitrators. The permanent list of conciliators provided for in annex I, paragraph (1), of the thirteen-State amendment would comprise jurists appointed by all the States Members of the United Nations or parties to the convention. If the attempt at conciliation failed, the parties could still resort to any other means indicated in Article 33 of the Charter. If a solution was still not forthcoming the dispute would be submitted to an arbitral tribunal at the request of one of the parties.

34. The amendment's sponsors had been guided by the provisions of the Convention on the settlement of investment disputes between States and nationals of other States, [5] the European Convention for the Protection of Human Rights and Fundamental Freedoms [6] and the Charter of the Organization of African Unity. [7] His delegation thought the amendment offered the necessary flexibility and realism and should provide a solution acceptable to all.

35. The appointment of the chairman or members of the conciliation commission or of the arbitral tribunal by the Secretary-General of the United Nations would not in any way be prejudicial to the functioning of the machinery provided for in the amendment, since the Secretary-General's choice would be limited by the list of conciliators and arbitrators, who would be qualified jurists appointed by the States parties to the convention. His delegation was of course aware that the Secretary-General was a political personality; but he was appointed by the General Assembly, the most representative organ of the United Nations, whereas the President of the International Court of Justice was nominated by the Court itself, which was a very restricted body.

36. The views he had expressed would govern his delegation's attitude towards the other amendments. He could not accept any amendment containing any allusion

[3] *Yearbook of the International Law Commission, 1966*, vol. I, part II, 845th meeting, para. 46.

[4] *I.C.J. Reports, 1966*, p. 6.

[5] United Nations, *Treaty Series*, vol. 575, p. 160.

[6] United Nations, *Treaty Series*, vol. 213, p. 221.

[7] United Nations, *Treaty Series*, vol. 479, p. 39.

whatsoever to the International Court of Justice. On the other hand, his delegation accepted the French amendment (A/CONF.39/C.1/L.342), which was purely a drafting matter.

37. Mr. OSIECKI (Poland) said that article 62 of the draft represented the current stage in the development of international relations. The reference to the means of settlement of disputes indicated in Article 33 of the Charter was a realistic formula which respected the sovereignty of States. The provisions of the Charter took into account the existence of different social, economic, political and, consequently, legal systems. The convention on the law of treaties should be similarly drafted. Moreover, the formula in Article 33 of the Charter had proved itself and, despite world developments, had not needed any alteration.

38. Compulsory jurisdiction had never been agreed to when it was a question of codifying a particular sphere of international relations, for example in the Conventions on the Law of the Sea, the Convention on Diplomatic Relations, and the Convention on Consular Relations. Further, fewer than half the Members of the United Nations had accepted the compulsory jurisdiction of the International Court of Justice, and in many cases acceptance had been accompanied by such reservations that their practical value remained an enigma.

39. In any case, the convention on the law of treaties was the least suitable of all for the institution of compulsory jurisdiction, because, in the case of that convention, the compulsory procedure would have to apply to all treaties, even those affecting vital interests traditionally regarded as not amenable to jurisdiction. There was nothing to justify such a leap forward at the present stage. The position was different in the case of treaties having a specific object, for instance financial or technical agreements. Poland was party to a number of such treaties containing a freely accepted and perfectly comprehensible limitation on the parties' sovereignty in the form of a compulsory jurisdiction clause. Thus Poland did not always adopt a negative approach to the principle of compulsory jurisdiction, although as far as the convention on the law of treaties was concerned, the scope and nature of the issues subject to compulsory jurisdiction would be impossible to foresee and difficult to establish.

40. His delegation supported the Cuban amendment (A/CONF.39/C.1/L.353), which had the advantage of excluding treaties that were void *ab initio* from the operation of article 62. That strengthened the position of a State which wished to rid itself of a treaty imposed by force or concluded in violation of *jus cogens*. His delegation's attitude to the other amendments would be in accordance with the views he had outlined.

41. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that article 62 was important because it determined the effectiveness not only of the future convention but of international law as a whole. By analogy with internal law, enforcement was sought through the creation of various types of international judicial bodies. It was said that there was no law without police, but that idea had its limits even in internal law. No governmental pressure could ensure the operation of a rule which conflicted with the fundamental requirements of contemporary life. That was even more true of international law. Despite the praise which the Swedish representative had bestowed on the international judicial system, it had to be recognized that it was not the essential factor in enforcing the rules of international law and ensuring their progressive development. What was essential was to introduce into that law rules which met the requirements of contemporary international relations, in other words universal norms. A host of rules governing vital day-to-day relations between States, as well as many of the treaties containing those rules, could do without arbitration clauses.

42. The existence of numerous international conflicts was not a reason for doubting the effectiveness of contemporary international law. In any case, arbitration did not eliminate conflicts. Even the Security Council, for example, had been unable to solve those submitted to it. The results of the activities of the International Court of Justice and of the many arbitrations which had taken place were not particularly strong arguments in their favour. It would also impair the effectiveness of international law if provisions stipulating compulsory arbitration were included in the draft, because in that case there would no longer be any hope of finding those States whose participation was indispensable among the parties to the convention.

43. International law was the fruit of co-operation between States; that was what gave it life. The more co-operation developed, the more international law would be needed and the more effective it would become. In its turn, the progress of international law would of course encourage co-operation between States. Without that co-operation, no arbitration could restore order. What was more, the existence of compulsory jurisdiction might prejudice co-operation between sovereign States.

44. That did not mean that the convention should not specify any procedure for settling disputes. The provisions of article 62, particularly paragraph 1, which stipulated prior notice, were extremely useful and would reinforce the *pacta sunt servanda* principle.

45. Most of the criticism had been directed against paragraph 3. Without innovating, it reflected very closely the contemporary life and law of the international community and protected parties to a treaty against arbitrary declarations of nullity.

46. For those reasons, his delegation favoured article 62 of the draft as presented by the International Law Commission, but with the improvement proposed in the Cuban amendment (A/CONF.39/C.1/L.353). The article seemed to reflect the general wishes of the Conference. His delegation was opposed to those amendments which would introduce compulsory arbitration, which was a costly, slow and inefficient process and could not be regarded as a universal remedy. Moreover, the object of the convention was not international law as a whole, but merely the law of treaties; consequently, arbitration should in any case be examined as a separate issue.

47. Mr. BREWER (Liberia) said there was no doubt that article 62 was a key article for the application of the provisions of Part V of the convention, and indeed of the convention as a whole. In order to ensure the observance of the important *pacta sunt servanda* principle

and to maintain the stability of treaties it was essential that limits should be imposed on the action of a State which wished to denounce a treaty and, consequently, that procedural provisions on the invalidity, termination and suspension of treaties should be included in the convention.

48. Article 62 in its present form provided the necessary safeguards for the settlement of disputes. Under the proposed procedure, the party invoking a ground for terminating a treaty or suspending its operation and the party which raised an objection to it must automatically seek a solution through the means indicated in Article 33 of the Charter. That article was broad enough in scope to cover practically all means of settling disputes, including recourse to the International Court of Justice. In paragraph (5) of its commentary the International Law Commission stated: " If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands. There would also remain the right of every State ... under certain conditions, to refer the dispute to the competent organ of the United Nations ". It had been said that the United Nations Charter was a living instrument. No doubt it was not complete and might be improved, but in order to give it greater significance, it would be well to refer to it as much as possible and, in particular, in drawing up the law of treaties.

49. It would be wrong to resort to the International Court of Justice for the settlement of any and every dispute that might arise in applying the provisions of the convention, for the Court was the supreme judicial organ of the United Nations and its prestige would thereby be impaired. At the national level, most cases were settled outside the courts, and there seemed no reason why, if the provisions of Article 33 of the Charter were strictly applied, the same should not be true on the international plane.

50. His delegation would be glad to learn the exact meaning of the expression " except in cases of special urgency " and why it had been placed in article 62, paragraph 2. The expression apparently permitted a State to act unilaterally.

51. The Liberian delegation would support article 62, which, in its opinion, provided adequate safeguards against arbitrary decisions.

52. Mr. MIRAS (Turkey) said article 62 contained no safeguard that could ensure the objective application of Part V of the convention and it might lead to all kinds of abuse. The procedural safeguards in the article consisted merely in a notification by the party which claimed that it had been injured; then ensued a waiting period. If the parties did not agree, article 62 referred them to Article 33 of the Charter, which, as everyone knew, was one of the weak points in that instrument, since it contained only a list of means of peaceful settlement without providing for a final solution by compulsory reference to a court or tribunal. Under those conditions, a party which claimed to have been injured had only one obligation, namely to wait for a few months. After that, it was free to take one or other of the measures set out in Part V. The International Law Commission's statement that if the parties should reach a deadlock " it would be for each Government to appreciate the situation and to act as good faith demands " meant that any party which might wish to rid itself of its treaty obligations would not be subject to control by any impartial authority.

53. His delegation was of the opinion that when there was an element of appreciation an impartial authority should intervene. That was not merely a question of procedure. Without machinery for impartial appreciation there could be no invalidation. A codification which was endeavouring to introduce into international law new rules likely to entail serious consequences should provide adequate jurisdictional safeguards instead of codifying rules borrowed from municipal civil law shorn of the jurisdictional safeguards normally attached to them. Article 33 of the Charter was quite inadequate for settling disputes under the régime of contemporary international law and it would be even less adequate in the case of the new rules in Part V. Either a new body should have been provided or an existing body should have been entrusted with applying those rules. Without those safeguards, article 62 was likely to upset the stability of treaties on which the maintenance of peace to a great extent depended. The great paradox in the draft articles was the attempt to establish a régime of international law without any provision for adjudication. The Turkish delegation could not therefore accept article 62 as it stood.

54. The Swiss amendment (A/CONF.39/C.1/L.347) offered the necessary safeguards provided by a court or tribunal for the application of Part V. It provided both for recourse to the International Court of Justice and for a committee of arbitration. The procedure for the composition of that committee was entirely satisfactory. The Turkish delegation would therefore support the amendment.

55. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that article 62 was important because it set out the principles of contemporary international law relating to the settlement of disputes. Under the terms of Article 2 (3) of the United Nations Charter, States must settle their disputes by peaceful means, but no special procedure was imposed on them. In contemporary international law, the main obligation was therefore to settle differences peacefully, but the means of such settlement were left to the free choice of States; that principle had been confirmed by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in 1966.[8] Article 62 accurately reflected the present situation. It provided for a procedure for the settlement of disputes based on Article 33 of the Charter; that procedure was simple, clear and concise and the International Law Commission had incorporated it in the draft convention, leaving to the States parties to the treaty the possibility of having recourse to the peaceful means of their choice.

56. During the debate, certain representatives had maintained that article 62 did not guarantee treaties sufficient stability. His delegation could not accept that interpretation: the procedure laid down in article 62

[8] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

prevented the parties from taking arbitrary measures with a view to the termination or suspension of the operation of a treaty and it was therefore essential to maintain it in its present form.

57. His delegation had not been convinced by the arguments of those representatives who had maintained that it was essential to provide for the compulsory settlement of disputes by an international court or tribunal. The law of treaties existed and had existed without compulsory jurisdiction. The decisions of the International Court of Justice, in particular that concerning South-West Africa, showed that the Court was hardly capable of ensuring the proper solution of disputes relating to the invalidity of a treaty or its termination or suspension. Several cases could also be quoted in which most States had rejected compulsory arbitration. Certain delegations had claimed that compulsory arbitration was the best means of solving disputes, but the history of international relations did not provide any confirmation of that claim. A review of events over the past hundred years showed that, except in the *Alabama* case, arbitration tribunals had never succeeded in settling any important dispute. The Permanent Court of Arbitration had examined about thirty cases only, some of which had been unduly protracted.

58. Consequently, his delegation saw no positive advantage in providing for compulsory arbitration or for the compulsory jurisdiction of the International Court of Justice, and approved the draft article submitted by the International Law Commission. That article imposed precise legal obligations; it reflected the present situation in international law and took account of the position of all the groups of States. It represented a reasonable compromise between the different currents of thought. In upsetting that compromise, the difficult balance achieved by the Commission would be destroyed and many Member States, including the USSR, would not be able to support article 62. Thus his delegation could not accept the amendments proposing compulsory jurisdiction. On the other hand, the Cuban amendment (A/CONF.39/C.1/L.353) was extremely interesting and deserved careful attention; for it would be unjust that a State on which an unequal treaty had been imposed by force should have to submit to the slow procedure laid down in article 62. In that case provision must be made for a simplified procedure.

59. Miss LAURENS (Indonesia) said that her delegation fully shared the view expressed by the International Law Commission in paragraph (4) of the commentary that with regard to the procedure applicable to the invalidity, termination or suspension of a treaty, article 62 represented " the highest measure of common ground that could be found among Governments as well as in the Commission ". It should be noted that the text of the article had been adopted by the International Law Commission by a very large majority and that the Asian-African Legal Consultative Committee meeting in New Delhi in December 1967 had decided almost unanimously that article 62 should be retained in the form proposed by the Commission.

60. As the article would be applicable to all treaties entered into between States, its scope would be too general for it to be possible to provide for compulsory jurisdiction. There was the added danger that the application of the provisions of Part V of the convention might give rise to such complicated disputes that it was difficult to determine in advance the best means of peaceful settlement.

61. Her delegation considered that, in the light of contemporary international opinion and practice, the general obligation incumbent upon States under international law, as set forth in Articles 2 (3) and 33 of the Charter, should serve as a basis for article 62. Perhaps the text of the article could be improved, but to provide for a specific means of settling disputes and to make it compulsory might create serious problems and lead to disputes which the Committee would have difficulty in solving. It seemed moreover doubtful whether such a provision could, in reality, help to solve the differences that might arise in the future between States in connexion with the application of the articles of the convention.

62. Mr. ROSENNE (Israel) said that his delegation was ready to accept the International Law Commission's proposed text of article 62. As the Commission had said, that text represented " the highest measure of common ground that could be found among Governments ". It was the most that could be attained in the absence of a substantial modification of the Charter and of present international practices. It was a fair compromise which did not go beyond the provisions of the Charter. His delegation did not think that the Conference was in a position to undertake the ambitious task of attempting to modify existing settlement procedures, or that it should look further ahead than the International Law Commission. He had already indicated his delegation's position, in principle, at the 54th meeting, during the consideration of article 50 and he thought there was no need to explain it again.

63. In its written observations (A/CONF.39/6) as well as in its statements in the Sixth Committee, his Government had drawn attention to certain remarks contained in paragraph (2) of the commentary, where it appeared that the balance between the objecting State and the claimant State was not always maintained. Article 62 and the substantive articles might be reconsidered from that point of view.

64. The amendment by France (A/CONF.39/C.1/L.342), paragraphs 1 to 4 of the amendment by Uruguay (A/CONF.39/C.1/L.343) and the first part of paragraph 5 of the United States amendment (A/CONF.39/C.1/L.355) were an improvement on the Commission's text. His delegation could support them because they increased the precision of that text.

65. On the other hand, his delegation was unable at the present stage to accept the proposals concerning the establishment of new organs or the institution of new procedures, the constitutionality of some of which might be open to question. Nor could it accept those proposals which nullified the compromise proposed by the International Law Commission. Several of those proposals were based on the idea that the disputes arising out of the application of Part V were, by their very nature, amenable to the jurisdiction of a court. Such disputes, however, would not relate to the convention, but to another treaty and would arise in concrete political

circumstances; for that reason, too rigid settlement procedures must be avoided. Contrary to what had been implied by certain speakers, his delegation considered that judicial and arbitral bodies could not exercise legislative functions such as that of establishing norms of *jus cogens*. It was for the parties themselves to settle disputes relating to treaties. Only in the last resort should recourse be had to United Nations organs, and the introduction of mandatory procedures into the convention might be counter-productive.

66. Further, the question of settlement procedures was the subject of examination by other United Nations bodies, and in particular by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Useful and interesting ideas had been put forward during that Committee's debates; it would be meeting again shortly and was to submit another report to the General Assembly. Consequently, it would be better if the Committee of the Whole decided not to close the debate on article 62 at the present session of the Conference, in the hope that, at the second session, the progress achieved by the United Nations would facilitate the solution of the special problems raised by article 62.

67. With regard to the Swiss proposal for a new article 62 *bis* (A/CONF.39/C.1/L.348), his delegation agreed that paragraph 4 of article 62 should be the subject of a separate article. Moreover, the principle stated in that paragraph could not and should not apply solely to Part V. It could be worded in more general terms by saying: " Nothing in the present Convention... ". In that case, the new article should be included in another part of the convention. As his delegation had already said, care must be taken that the convention did not override the will of the parties as expressed in their treaties and that it did not impose on them settlement procedures to which they had not agreed or which they had even rejected in certain cases. The Swiss amendment would bring out clearly the fact that an external element, in that case the convention, could not override an autonomous decision of the parties in respect of the settlement of problems primarily affecting them.

The meeting rose at 6 p.m.

SEVENTIETH MEETING

Tuesday, 14 May 1968, at 8.45 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (item 11 (a) of the agenda) *(continued)*

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(continued)* [1] and *Proposed new article 62* bis (A/CONF.39/C.1/L.348) *(continued)*

[1] For the list of amendments submitted, see 68th meeting, footnote 1.

1. Mr. RATSIRAHONANA (Madagascar) said that the settlement of disputes arising out of the operation of Part V of the draft was most important. Article 62 was therefore the key article of Part V, if not of the entire convention. The grounds for invalidating, or suspending the operation of, a treaty under the provisions of Part V of the draft would certainly be considerably reduced, if not removed altogether, unless some procedure was set up to deal with claims of invalidity or allegations of grounds for suspension, together with an appropriate procedure for settling any disputes arising during that process. It was therefore desirable to provide for both procedures with the maximum possible precision.

2. With regard to the first procedure, his delegation favoured the system prescribed by the International Law Commission in article 62, whereby a party which claimed that a treaty was invalid or which alleged a ground for suspending its operation, must not only notify the other parties of its claim or allegation but also indicate the measure which it proposed to take with respect to the treaty and the grounds for taking it.

3. As to the settlement of disputes, his delegation did not share the view expressed by the International Law Commission in paragraph (5) of its commentary on article 62 that it would be impossible to go beyond the provisions of Article 33 of the United Nations Charter " without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties ". In the opinion of the Malagasy delegation, to refrain from prescribing a compulsory settlement procedure was a facile solution which opened the door to abuse and dangers such as recourse to armed or unarmed coercion. It was time to lay down rules conducive to greater justice in international treaty relations; that could only exist to the extent that a compulsory system was established for settling disputes arising out of the operation of the future convention. The principle of compulsory solution was the best protection and the best guarantee for the stability of treaties. His delegation had therefore joined in sponsoring the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The conciliation and arbitration procedure it prescribed was flexible enough to preclude serious objections from States opposed to the principle of compulsory solution. Moreover, the amendment did not affect the ideas expressed in article 62 of the draft; it was merely an extension of that article, an extension which the Malagasy delegation considered useful in the context of the draft convention.

4. In its present form, the system of settling disputes between States by arbitration or judicial process had not given full satisfaction, and efforts should be redoubled to evolve a better system based on new principles.

5. Mr. OUTRATA (Czechoslovakia) referred to the controversy to which article 62 of the International Law Commission's draft had given rise. The criticism had come from the advocates of what were essentially two opposing views: on the one side, the conservatives, who would prefer the Commission to confine itself to a strict codification of what was already positive international law; and, on the other, the innovators, who would prefer the article to make a substantial contribution to the development of the law as at present in force. Both sides had

advanced weighty arguments which should not be underestimated.

6. In its initial examination of draft article 62, the Czechoslovak delegation had been struck by the fact that the Commission had not considered it necessary to formulate different rules according to whether the treaty was void *ab initio* in virtue of the substantive rules formulated in the preceding articles or whether it was one which a contracting party could legitimately terminate after it had been in operation for some time. For it might be asked whether it was right to impose a long and complicated procedure not only on a State which could establish its right to terminate a previously valid treaty, but also on a State which merely wished it to be officially placed on record that a certain text, although drawn up in the form of a treaty, had never acquired binding force. From that point of view, his delegation was in favour of the Cuban amendment (A/CONF.39/C.1/L.353).

7. Article 62, incidentally, was not the only case in which the International Law Commission favoured the party defending the validity of the treaty and called for substantial sacrifices from those entitled to terminate it; it did so in the interests of greater international legal security. In that respect, the Commission's draft was not only a codification of existing rules; it also represented, in fairly large measure, the creation of new legal rules and a development of the existing law. That development was entirely to the advantage of those in the fortunate position of defending treaties, even if their position proved untenable from the legal point of view.

8. According to existing international law, there was no doubt that a State was not bound to perform a void treaty, that it could terminate a treaty which had been the subject of a flagrant breach by the other party, and so on, and that in doing so it was not bound to follow any particular procedure. The procedure prescribed in article 62 was therefore an innovation which appreciably limited the rights previously enjoyed by States. Some delegations did not think the article went far enough, however, and the many amendments they had submitted aimed, subject to slight differences, at imposing on States compulsory arbitration or jurisdiction in the case of any international dispute that might arise with respect to the validity of a treaty or the right of a party to terminate it unilaterally. That would be an excessively bold measure, because it was common knowledge that compulsory arbitration and jurisdiction existed more in doctrine than in the practice of States and that the number of disputes so far settled by such organs was not very encouraging.

9. His delegation therefore thought that the time was not yet ripe for such a far-reaching decision. It supported the opinion expressed by the Commission in paragraph (4) of its commentary on article 62 that the text of the article represented the highest measure of common ground that could be found between the widely diverging views on the subject. His delegation would therefore vote in favour of the text in the draft articles, but it was prepared to examine any proposal which obtained general, or almost general, support.

10. In his delegation's view, then, the most important thing was that the future convention should be regarded as satisfactory by the international community as a whole. Any pressure to secure the adoption of an extremist solution in connexion with article 62 might jeopardize the valuable work already accomplished.

11. To facilitate progress, the Czechoslovak delegation suggested that the Committee of the Whole, instead of examining the amendments to article 62 in detail, should first discuss the question of principle, namely to what extent the majority of delegations were really prepared to go beyond existing international law.

Texts proposed by the Drafting Committee

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 16, 18, 19 and 20 as adopted by the Drafting Committee.

Article 16 (Formulation of reservations)

13. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 16 had been adopted by the Drafting Committee:

"*Article 16*"

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

"(*a*) the reservation is prohibited by the treaty;

"(*b*) the treaty authorizes only specified reservations which do not include the reservation in question; or

"(*c*) in cases other than those covered by paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty."

14. Owing to the length and complexity of articles 16 and 17, the Drafting Committee had considered that the two articles should not be combined in a single article. It had therefore not accepted the amendments to that effect.

15. In the introductory phrase of article 16, the Drafting Committee had replaced the nouns "*signature*", "*ratification*", etc., in the French and Spanish texts by the corresponding verbs in order to simplify the sentence and at the same time to bring it closer to the English text.

16. In the interest of greater clarity, the Drafting Committee had adopted the Polish amendment (A/CONF.39/C.1/L.136) to insert in paragraph (*b*) the word "only" between "authorizes" and "specified".

17. With regard to paragraph (*c*), the Drafting Committee had carefully examined the phrase "in cases where the treaty contains no provisions regarding reservations" in the International Law Commission's text. Some members of the Committee had considered that a treaty might conceivably contain a provision on reservation which did not fall into any of the categories contemplated in paragraphs (*a*) and (*b*), and the Drafting Committee had therefore decided to replace the phrase by "in cases other than those covered by paragraph (*a*) and (*b*)" in order to ensure that no gap was left.

18. The Drafting Committee had not accepted the other amendments referred to it; in particular, it had not thought it right to replace the words "the object and purpose of the treaty" by "the character or the purpose

of the treaty ", because the expression " the object and purpose of the treaty " had been used by the International Court of Justice and it was a notion found in many legal texts.

19. Mr. JAGOTA (India) asked for an explanation of the new wording of paragraph (*c*). The cases other than those covered by paragraph (*a*) were clear: they were cases where the reservation was not prohibited by the treaty or, in other words, was impliedly authorized; but it was hard to see what cases there were other than those covered by paragraph (*b*).

20. If the new wording meant that the terms of paragraph (*c*), namely the criterion of incompatibility with the object and purpose of the treaty, applied not only where the treaty contained no provisions regarding reservations, but also where reservations were authorized, that seemed to come to the same thing as if that criterion had been placed in the introductory phrase of the article, as some delegations had proposed.

21. Mr. ROSENNE (Israel) said he accepted the new draft of article 16 and especially the addition of the word " only " in paragraph (*b*). He wondered whether the Drafting Committee had any special reason for wording paragraph (*c*) " in cases other than those covered by paragraphs (*a*) and (*b*) " rather than simply " in other cases " or " in all other cases ".

22. Mr. HARRY (Australia) said he had no objection to the new draft. He noted that in the English text of paragraph (*c*) the words " covered by " were now used, whereas in article 17, paragraph 4, the wording used had been " falling under ". He suggested that the wording of the two provisions should be made uniform.

23. Mr. YASSEEN, Chairman of the Drafting Committee, said the Committee had given careful thought to the question put by the Indian representative. The expression " in cases where the treaty contains no provisions regarding reservations " in paragraph (*c*) of the International Law Commission's text might give the impression that the provision in paragraph (*c*) would not apply if the treaty contained any provision at all regarding reservations. But that was not what was meant. The test of incompatibility with the object and purpose of the treaty was applicable if, in the first place, reservations were not prohibited by the treaty and, in the second place, the reservation in question was not one of those expressly authorized by the treaty. It was a desire for clarity and precision, then, which had led the Drafting Committee to amend paragraph (*c*).

Article 16 was approved.

Article 18 (Procedure regarding reservations)

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 18 had been adopted by the Drafting Committee:

" *Article 18*

" 1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

" 2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

" 3. An express acceptance of, or an objection to, the reservation made previously to confirmation of the reservation does not itself require confirmation. "

25. In paragraph 1 of the article, in order to dispel any doubts on the scope of the provision, and using the Canadian amendment (A/CONF.39/C.1/L.158) as a basis, the Committee had inserted the words " contracting States and " before the words " other States entitled to become parties to the treaty ". The Committee had considered that the contracting States had, *a fortiori*, the right to be informed.

26. At the beginning of paragraph 3, using the Hungarian amendment (A/CONF.39/C.1/L.138) as a basis, the Committee had added the words " an express acceptance of, or ". That addition had entailed a slight change in the drafting of the remainder of the paragraph.

27. The Committee had not accepted any of the other amendments referred to it by the Committee of the Whole.

Article 18 was approved.

Article 19 (Legal effects of reservations)

28. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 19 had been adopted by the Drafting Committee:

" *Article 19*

" 1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

" (*a*) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

" (*b*) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

" 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

" 3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. "

29. In the interests of clarity, the Committee had inserted in paragraph 1 (*a*) the words " in its relations with that other party " after the words " for the reserving State ".

30. The Committee had not adopted any of the amendments referred to it by the Committee of the Whole. In particular, it had not considered it necessary to adopt the amendment by Ceylon (A/CONF.39/C.1/L.152) to add a new paragraph 4 to article 19, because it had found that the matter the amendment dealt with was already covered, in a somewhat different way, in article 17, paragraph 4 (*c*). In that provision, the term " is effective "

was general in scope and meant that the consent of the reserving State might be one of the expressions of consent required for the treaty to enter into force.

31. Mr. BARROS (Chile) observed that in the Spanish text of the opening phrase of paragraph 1 the term " *establecida* " had been replaced by " *que sea firme* ". No doubt it was hard to find an appropriate equivalent for the English " established " and the French " *établie* ". But the expression " *que sea firme* " might give rise to doubts because it was generally used of the final sentence of a court and could hardly apply to a reservation, which could be withdrawn. That translation problem might well be looked at again, and the original word " *establecida* " might perhaps be restored.

32. Mr. SEPULVEDA AMOR (Mexico) said he supported the Chilean representative's remark. The expression " *que sea firme* " was not appropriate. The Drafting Committee should try to find an adequate wording for the Spanish text.

33. Mr. YASSEEN, Chairman of the Drafting Committee, said that at the 59th meeting he had explained the Drafting Committee's method of work so far as concerned the text of the articles in the various languages. The Drafting Committee included members representing all the official languages of the Conference, and each could give his opinion on any expression in his own language; in addition, the Drafting Committee could request the assistance of the Conference's Language Services. Those were the circumstances in which the Drafting Committee had altered the Spanish version of paragraph 1.

34. Mr. DE LA GUARDIA (Argentina) said the Drafting Committee had had great difficulties with the expression to which the Chilean representative objected. In Spanish the term " *establecida* " could be construed to mean that the reservation had merely been formulated. The Expert Consultant had explained that the word " established " in the English text meant that the reservation was not only formulated but also accepted by the other party and that, consequently, it produced all the effects indicated in the article. The French-speaking members of the Drafting Committee had been divided about the meaning of the French term " *établie* "; it was held by some that the word meant that the reservation was simply formulated, and by others that it had been formulated and accepted by the other party. The Conference's Language Services had proposed the expression " *que sea firme* " for the Spanish text. For the time being, no one had been able to find a more satisfactory form of words.

35. In general, the change of a single word in an article might have repercussions on other articles which were not immediately perceptible. Consequently, the Committee of the Whole should approve the articles subject to any changes that might be considered necessary when the text was put in its final form.

36. The CHAIRMAN suggested that the Committee should approve article 19 subject to any improvement of the Spanish text that might be needed.

Subject to that reservation, article 19 was approved.

Article 20 (Withdrawal of reservations)

37. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not accepted any of the amendments to article 20 which had been referred to it, and it had adopted the International Law Commission's text as drafted.

38. Mr. ZEMANEK (Austria) said that, together with the delegation of Finland, his delegation had submitted an amendment (A/CONF.39/C.1/L.4 and Add.1) to add a new paragraph to the article with a view to dispelling possible doubts concerning the withdrawal of reservations. No objection had been made to the amendment during the discussion of the article at the 25th meeting. When introducing his delegation's sub-amendment (A/CONF. 39/C.1/L.167), the USSR representative had said that he disagreed with the Austrian amendment only on a minor point, which implied that he accepted it in principle. At the end of the debate, the Chairman had not followed the usual practice of putting substantive amendments to the vote but had referred the article and its amendments to the Drafting Committee. His delegation had not asked for a vote, but it had thought that the Drafting Committee, to which the amendment had been referred, would have considered that the Committee of the Whole had accepted it. To its surprise, the Drafting Committee had, on the contrary, taken no account of it.

39. Without wishing to raise the question whether the Drafting Committee had acted within its powers under rule 48 of the rules of procedure, his delegation wished to place on record that it deplored not only the fact that the amendment had been ignored but also the way in which it had been ignored.

40. Mr. BARROS (Chile) drew attention to a slight difference in form between paragraphs 1 and 2 in the Spanish text. The clause " Unless the treaty otherwise provides ", which came at the beginning of the sentence in the English and French versions, was usually transferred to the end of the sentence in the Spanish text. That had been done in paragraph 2, but not in paragraph 1. In the interests of symmetry, it would be better to employ the same form in paragraph 1.

41. Mr. YASSEEN, Chairman of the Drafting Committee, said in reply to the remark made by the Chilean representative that the formulation adopted for the Spanish text had been considered suitable by the Spanish-speaking members of the Drafting Committee, who had been assisted by the Conference's Language Services. Each language had its peculiarities, and absolute uniformity should not always be insisted on.

42. With reference to the Austrian representative's remark he expressed the hope that the question of the Drafting Committee's powers would not be raised, as matters of form and substance were always closely linked. He regretted that he had not at once explained that the reason why the Drafting Committee had not thought it necessary to adopt the Austrian and Finnish amendment was that it had been of the opinion that the idea expressed therein was already embodied in article 20. If a party withdrew a reservation, that reservation no longer existed; its effects were nullified and the treaty entered into force between the two parties.

Article 20 was approved.

The meeting rose at 9.50 p.m.

SEVENTY-FIRST MEETING

Wednesday, 15 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(continued)* [1] and *Proposed new article 62* bis *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 62 of the International Law Commission's draft, together with the proposed new article 62 *bis* (A/CONF.39/C.1/L.348).

2. Mr. FATTAL (Lebanon) said it had been stated very forcibly during the discussion that certain States would be unable to accept the convention on the law of treaties if article 62 were amended. A second group of States was equally firm that the only solution was to amend article 62; if the text were left unchanged, they would find it impossible to ratify the future convention. A third group of States was undecided which position to choose.

3. He quite understood the position of the USSR delegation, which adhered to the rigid traditional conception of sovereignty: that position suited a super-Power confident in its own prestige, which over a period of fifty years had grown strong behind its frontiers, by its own strenuous and unaided efforts. The position of small States and young States was very different however. The USSR representative had explained to them that article 62 would guarantee their freedom of action. But the shapeless and ambivalent provisions of article 62 would operate sometimes in the interest and sometimes against the interest of small States. Where two partners were unequal, it would favour the strong State against the weak State. As Lacordaire had said, as between the strong and the weak, the rich and the poor, freedom meant oppression and law meant enfranchisement.

4. For example, if a small, weak country like Lebanon were to invoke the *rebus sic stantibus* doctrine of article 59 in an endeavour to terminate a treaty with a big Power, the big Power would have a whole sheaf of weapons at its disposal. It was clearly better for a weaker country not to have to confront its stronger partner but to be able to interpose conciliators or freely chosen arbitrators.

5. It was perhaps true to say that the rules of international law on co-operation had developed without judges or policemen. As early as 1890, Jellinek had pointed out that international administrations were functioning smoothly; but that was because they were highly organized institutions with a solid structure. The tragedy of the convention on the law of treaties was that it did not appear to possess any structural organization whatever. That would have been of little consequence if the Conference had merely been codifying *lex lata*, which presupposed a substantial body of State practice and legal literature to serve for purposes of interpretation in case of difficulty. The position was entirely different where rules were *de lege ferenda* and had to be interpreted in a legal vacuum. As matters stood, that vacuum would be filled by the unilateral, subjective and sovereign interpretation of over one hundred individual States acting each on its own behalf.

6. In the absence of international institutions, the doctrine of the dual capacity *(théorie du dédoublement fonctionnel)* of the State was accepted in many matters. In the present case, a State party to an international dispute would act in three separate capacities: first, as party to the dispute; secondly, as judge in its own cause; and thirdly, as judge in the cause of its treaty partner. It must be admitted that that was rather too much.

7. It might be true that, as a general rule, the law was observed without the help of judges or policemen, but it was equally true that fear of the law-enforcement officers was a salutary deterrent. In any case, the conciliators and arbitrators mentioned in the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) were far from being judges or policemen. They would function very discreetly; in fact, the work of conciliators was secret and it was difficult to understand how it was possible to refuse conciliation. And although arbitration was in principle compulsory under the amendment, an arbitral award was not enforceable. Moreover, neither conciliation nor arbitration would come into play unless and until all the means of settlement specified in Article 33 of the Charter had been exhausted.

8. It had been objected that a large number of international conventions not embodying provisions for the compulsory settlement of disputes were concluded every year and functioned smoothly. The convention on the law of treaties was, however, different from other conventions. It had a constitutional character: it was not a mere treaty but a treaty to govern treaties. The convention on the law of treaties would regulate the main source of international law; it would modify the hierarchy of legal norms; it would determine the validity or invalidity of those norms. After its entry into force, it would no longer be possible to enact rules of international law otherwise than in accordance with its provisions. The convention would be the supreme law for international legislators.

9. The draft convention, moreover, contained new principles such as *jus cogens* and *rebus sic stantibus* which had been described as " dynamic " and which, for that very reason, needed a moderating element to avoid divergent and unilateral interpretations. It was hardly necessary to recall that the *rebus sic stantibus* principle had never operated in the past, despite its inherent fairness, precisely because there was no constitutional procedure to apply it.

10. If left to the subjective appreciation of the parties, the new and somewhat fluid principles embodied in the draft articles would involve the risk of resuscitating in a new form the well-known reservations regarding " vital interests " and " national honour " of States which had so often been made to conventions before the First World War, and which amounted to the negation of international law.

11. Mr. DIOP (Senegal) said he had already emphasized at the 43rd meeting the need for impartial determination of disputes arising out of allegations of invalidity under

[1] For the list of amendments submitted, see 68th meeting, footnote 1.

the provisions of Part V, Section 2. Against that background, he must now express his doubts regarding article 62. In the interests of brevity he would concentrate on the important provisions of paragraph 3 of the article and the amendments thereto.

12. The provisions of that paragraph as they stood were inadequate in that they merely referred back to those of Article 33 of the Charter. Those Charter provisions constituted a mere enumeration, by way of indication, of possible means of settlement; the choice of means was left to the free determination of the parties. That was something that his delegation could not accept where the convention on the law of treaties was concerned. It was essential to make provision for compulsory arbitration or adjudication in order to ensure the security of international treaty relations. In view of the dangerous repercussions which disputes over the validity of treaties could have, not only on international relations but even on peace itself, there must be some means of peaceful solution if the procedures of Article 33 were exhausted. Article 62, as it stood, did not provide such means, and so left a serious gap that must be filled.

13. His delegation commended the efforts of many delegations to remedy that defect. Of the various schemes which had been put forward, his delegation could not support that contained in the Japanese amendment (A/CONF.39/C.1/L.339) because it provided for adjudication by the International Court of Justice. He recognized the contribution made by the Court to international law, but there was a need to ensure fairer representation of all the legal systems of the world in institutions of that kind. Moreover, a single denial of justice was sufficient to discredit a judge. For similar reasons, his delegation could not support the Swiss amendment (A/CONF.39/C.1/L.347), although it did have the merit of giving the parties an option to resort to an arbitration commission instead of to the International Court of Justice. The United States amendment (A/CONF.39/C.1/L.355) provided for unduly complex machinery, including a cumbersome 25-member permanent commission, and he could not support it. Nor could he support the Uruguayan amendment (A/CONF.39/C.1/L.343), despite its noble inspiration, because of doubts regarding the effectiveness of " recommendations ".

14. He supported the scheme put forward in the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) which did not conflict with the provisions of article 62. Its purpose was to supplement those provisions by enabling a party to a dispute which had not been settled after a specified period to request the Secretary-General of the United Nations to bring into play the procedure indicated in the annex. That procedure represented a useful complement to the means of settlement specified in Article 33 of the Charter. With regard to that procedure, many speakers had lost sight of the fact that, at the conciliation stage, the conciliators, after ascertaining the facts, were called upon to make proposals to the parties for an amicable settlement. It was only in the absence of such a settlement that, as *ultima ratio*, the stage of compulsory arbitration would begin.

15. The scheme of compulsory arbitration provided in the thirteen-Power amendment contained all the safeguards which could be demanded by a party to a dispute confident in the justice of its cause: it offered easy access to the parties, provided for a speedy and uncomplicated procedure and was based on the principle of parity. Lastly, the scheme would not be very costly and the awards would be enforceable. A system of that type, based on conciliation machinery and compulsory arbitration within the framework of the means of pacific settlement of disputes, would make it possible to avoid unilateral interpretations and would thereby contribute to the stability of international relations and the maintenance of the rule of law.

16. Mr. PINTO (Ceylon) said that an effective article 62 could go a long way towards introducing an element of stability into the relationships arising under the proposed convention on the law of treaties. Unfortunately, paragraph 3 failed to deal with the problem of effective settlement of disputes; it merely incorporated by reference the methods and procedures for settlement set forth in Article 33 of the Charter.

17. Article 33 of the Charter simply enumerated the various modes of settlement available to the parties to a dispute. A mere catalogue of that nature was understandable in the context of political disputes likely to endanger international peace and security, for the Security Council stood behind the procedures enumerated. Without a corresponding presence in the proposed convention on the law of treaties, a catalogue of means of settlement remained a mere injunction to do no more than to seek a solution.

18. His delegation would give serious consideration to any mechanism which was flexible enough to give the parties to a dispute the widest freedom to use all possible means of arriving at a solution, but which would at the same time select one means of settlement and compel recourse to it for final determination of the dispute when all else had failed. Bearing in mind the injunction contained in Article 36 (3) of the Charter that legal disputes should as a general rule be referred to the International Court of Justice, the Court would seem to be the suitable organ for such final determination. However, such a proposal was not likely to gain much support because of some disappointment over recent decisions of the Court.

19. Compulsory conciliation would offer a workable and acceptable alternative, to be followed by arbitration in the event of failure of the efforts at conciliation. Most of the amendments submitted to article 62 reflected that approach. Although all contained some elements of interest, none of them, nor indeed article 62 as it stood, commended itself wholly to the delegation of Ceylon. Since a sound procedure for the settlement of disputes capable of gaining wide acceptance was of crucial importance to the proposed convention, he suggested that a decision on the actual text of article 62 be deferred, perhaps until the second session of the Conference. During the intervening period, consultations would be carried on by Governments for the purpose of formulating a procedure acceptable to the overwhelming majority of States.

20. The attitude of his delegation to the various amendments would be determined by the foregoing considerations. It was his delegation's understanding that, if the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) were accepted, it would apply only to future treaty relationships. The formula embodied

in that amendment would be more acceptable if provision were made for a new paragraph 3 *ter* stipulating that States were entirely free to contract out of the compulsory settlement scheme with respect to particular treaties or to particular provisions of the convention on the law of treaties. Such a paragraph would emphasize the *jus dispositivum* character of the scheme and the legitimate character of any agreement for an *ad hoc* settlement procedure tailored to a particular situation. That was not a formal proposal but merely a suggestion put forward in an effort to achieve a compromise.

21. Lastly, he supported in principle the Swiss proposal for a new article 62 *bis* (A/CONF.39/C.1/L.348), which would make it clear that article 62, regardless of its ultimate form, would not override settlement procedures agreed earlier between the parties to the dispute.

22. Sir Francis VALLAT (United Kingdom) said he must repeat his delegation's view that the proper interpretation and application of the future convention on the law of treaties, especially Part V, depended on the establishment of satisfactory procedures for the settlement of disputes.

23. He understood the representative of the USSR to have said that, if the procedures envisaged in the amendments to article 62 were adopted, his Government would not sign the convention on the law of treaties; if that understanding were correct, the Conference had reached a deadlock because, if article 62 were adopted in its present form, the convention would not be acceptable to a number of other Governments. The deep-rooted objection of the USSR to independent procedures in the application of law was difficult to understand and suggested opposition to justice itself, an opposition which had already been adumbrated when, at the 41st meeting, the USSR representative had said that the United States amendment to article 41 (A/CONF.39/C.1/L.260) " introduced a new element, the concept of justice, which only complicated matters ". Whether or not the record of the Soviet Union representative's statement was entirely accurate, it did now look as though it represented the basic policy of the Soviet Union.

24. The view of the United Kingdom delegation was that improvements to article 62 were vital in the interests of law and justice. The present text was ambiguous, unilateral and indefinite. It would not secure justice for the parties or maintain the interests of the international community. By leaving the whole matter to individual States, it did not even secure the uniform interpretation which ought to be of the essence of the codification of the law of treaties.

25. Those remarks were particularly relevant to articles 50 and 61, by virtue of which the validity of treaties would be governed by peremptory norms of international law. Such norms had been unheard of until a few years previously, and many States had until recently rejected even the idea of norms of general international law, let alone peremptory norms. The peremptory norms identified so far were few in number but they were, and must be, rules of law that were universally binding and from which there could be no derogation. Those norms must be applied not in the interests of the parties to the treaty but in the interests of the international community as a whole. To leave the identification, definition and application of peremptory norms to be determined by the interests of the individual parties concerned would mean retreat to chaos, not progress towards law and justice. Whatever might be done with regard to other draft articles, disputes arising out of articles 50 and 61 must be settled at the highest possible judicial level in the world. It would be destructive of the very concept of peremptory norms of general international law to leave those matters to the discretion of individual States.

26. The various amendments which had been proposed to article 62 had many interesting and useful features. However, it would be difficult for many delegations to make a choice in the matter without instructions from their Goverments.

27. Four main questions were involved. The first was whether the application of Part V, and particularly articles 50 and 61, would be left to unilateral action and to the decision of the parties concerned only. His delegation, like many others, felt that the only answer to that question was that there must be third party procedures for the application of those articles.

28. The second question was that of determining to which articles third party procedures should apply. His delegation's view was that there ought to be such procedures for the solution of problems arising out of the interpretation of all those articles whose application could involve questions of interpretation and the assessment of evidence in their application. They included all the articles in Part V, but above all the *jus cogens* articles 50 and 61. It was difficult to see how those articles could be acceptable to the international community without adequate procedures to protect its interests.

29. The third question was what would happen to the treaty if an objection was made under paragraph 1. The presumption should be in favour of the continuance of the treaty in force, unless there was some good reason to the contrary, and whether the reason was good could be satisfactorily decided only by some third party procedure. The interim situation should be dealt with by provisional measures decided upon by some independent authority: the States involved would be at loggerheads, and it would be unjust and wrong to allow one State to impose its will on the other.

30. Thus, the second and third questions both indicated the need for third party procedures, and the fourth question was, naturally, what those procedures should be. His delegation did not consider that a mere reference to Article 33 of the Charter was enough. The first procedure mentioned in that Article was negotiation, but although negotiation was desirable and necessary, experience had shown that it was often slow, frequently led to deadlock rather than solution, and might enable the recalcitrant State to impose its will, so that it could often be an obstacle rather than a means for the settlement of the dispute. Unless some special provisions were made in the convention, there would often be no progress beyond the stage of negotiation, because the parties would be unable to agree on any other means; and yet that seemed to be the wish of some delegations, even in the application of peremptory norms.

31. Under the various amendments, the choice seemed to lie between conciliation, arbitration and judicial settlement. Conciliation would undoubtedly be useful in

many cases, and might be made compulsory, but would not be the solution in every case, for if one of the parties rejected the proposals of the conciliator, some further procedure would be necessary if the dispute was to be settled. That left the alternatives of arbitration or recourse to the International Court of Justice.

32. The United Kingdom delegation would be satisfied if purely bilateral disputes were settled by arbitration, although ultimate resort to the International Court of Justice should not be excluded, especially in cases where the States concerned had already accepted the compulsory jurisdiction of the Court. On the other hand, in matters of such overriding importance as those covered by articles 50 and 61, reference to the Court seemed essential, for such questions could not be left to private and local arbitration. The development of a permanent universal jurisprudence was necessary in the interests of the whole international community, for if arbitral tribunals in different parts of the world arrived at different conclusions on the existence and the extent of an alleged peremptory norm, chaos and confusion would result, and the only tribunal that could really meet world needs was the International Court of Justice.

33. It had regrettably become fashionable to look with disfavour on the International Court of Justice, despite the fact that the Court was one of the principal organs of the United Nations, that all Members of the United Nations, as well as a number of other States, were parties to the Statute of the Court, and that the judges of the Court were elected by the joint action of the General Assembly and the Security Council. Moreover, every State which did not have a national of its own serving on the Court was entitled to nominate its own *ad hoc* judge for any case in which it was a party; indeed such States were, if anything, at an advantage, because they could select a judge particularly well suited for the case at issue. Although the performance of individual judges in certain cases might be criticized, there could be no doubt that, as a whole, they represented the cream of international juridical wisdom; many of them were former members of the International Law Commission.

34. It was sometimes alleged that the United Kingdom supported the Court because it knew that that body would decide in its favour; that allegation was absolutely unfounded. Since the United Kingdom had first accepted the compulsory jurisdiction of the Court in 1930, the number of cases it had won and the number of cases it had lost before the Court had been fairly evenly balanced. Since 1945, for example, it had lost the *Fisheries* case,[2] the *Anglo-Iranian Oil* case [3] and the *Ambatielos* case.[4] Incidentally, having lost the *Ambatielos* case on the questions of jurisdiction and obligation to arbitrate before the Court, the United Kingdom had ultimately won on the merits before an arbitral tribunal.

35. The United Kingdom supported the International Court of Justice because it was the supreme judicial organ of the United Nations and the only existing judicial body suitable for maintaining the authority of international law. Although the United Kingdom was convinced that all matters relating to *jus cogens* should be referred to the International Court of Justice, it believed that all the proposals before the Committee deserved further careful consideration, but doubted whether final and satisfactory conclusions could be reached at the current session of the Conference.

36. He could not conclude more appropriately than by quoting a passage from a work on the Law of Nations by the first Special Rapporteur on the law of treaties: " No lawyer is likely to doubt the desirability of a much greater readiness on the part of States than they at present show to accept the settlement of their disputes on the basis of law. The present unlimited freedom of States to reject that method of settlement is entirely indefensible; it makes possible the grossest injustices, and it is a standing danger to the peace of the world by encouraging the habit of States to regard themselves each as a law unto itself." [5]

37. Mr. SECARIN (Romania) said that the International Law Commission's continual concern for stability in treaty relations was clearly reflected in its realistic and moderate text of article 62 which provided, so to speak, a braking device for preventing any arbitrary or abusive exercise of the rights derived from the provisions of Part V of the draft convention. By means of that simple but effective procedural article, the will of a party invoking invalidity or alleging grounds for termination, withdrawal or suspension was subjected to the will of the other parties; thus, the claimant State was obliged to notify the other parties of its claim and give them the right to object thereto. The will of the objecting State was also subordinated to that of the claimant, by providing that the ultimate solution should be sought by the means laid down in Article 33 of the United Nations Charter. The Commission hat thus wisely refrained from a formulation which might have set up a machinery of coercion by entitling any of the parties to take direct action against another; that was the great merit of the proposed system.

38. The rules set out by the Commission, moreover, reflected the stage now reached in the development of international relations and international law, since they were based on world legal opinion and on State practice. The proposed procedures were in conformity with the fundamental principles of general international law, and especially with those of the sovereignty of States, of good faith in the performance of international obligations and of the pacific settlement of disputes.

39. The principle that States must fulfil in good faith the obligations assumed by them in their international relations, laid down in Article 2 (2) of the Charter, originated from the principles of the sovereignty and equal rights of States; observance of that principle, particularly in relation to the *pacta sunt servanda* rule, was a valuable protection against arbitrary allegations of invalidity and grounds for termination.

40. The system set out in article 62 was rooted in the procedures set out in the Charter for the peaceful settlement of disputes, although the invocation of grounds of invalidity, when objected to by another party, did not always assume the dimensions of a dispute. The principle that States should settle their international

[2] *I.C.J. Reports, 1951*, p. 116.

[3] *I.C.J. Reports, 1952*, p. 93.

[4] *I.C.J. Reports, 1952*, p. 28 and 1953, p. 10.

[5] Brierly, *The Law of Nations*, p. 368.

disputes by peaceful means had been formulated at its 1966 session, by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which declared *inter alia* that States should seek early and just settlement of their international disputes by one of the means provided for in Article 33 of the Charter " or other peaceful means of their choice ".[6] In seeking such a settlement the parties were to agree upon such peaceful means as might be appropriate to the circumstances and nature of the dispute, and the principle also stated that international disputes should be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. The International Law Commission had taken that stress on free choice into account in its wording of article 62.

41. Inter-State relations were based on the establishment of stable and normal relations: thus, one of the most important functions of diplomatic missions was to promote friendly and co-operative relations between the sending and receiving States, and when mutual respect and trust were established, the atmosphere was propitious for the friendly settlement of any dispute. Accordingly, the parties to a dispute must be able to choose the most appropriate means of settlement, in the light of the circumstances and nature of the dispute. They would first resort to negotiation, the efficacy of which had been amply confirmed by international experience: indeed, given realism, wisdom, patience and perseverance, States could always find acceptable solutions by negotiation.

42. For those reasons, the Romanian delegation was in favour of retaining the Commission's text of article 62, in the belief that it contained adequate guarantees for the stability of treaties. It considered that the adoption of a provision for compulsory jurisdiction or arbitration was inappropriate in a convention on the law of treaties, for such a course would lead to a rigid system, liable to restrict the development of future treaty relations. His delegation could therefore support none of the amendments providing for *a priori* establishment of judicial procedures to which the parties must resort in all cases, regardless of the nature of the treaty.

43. Mr. WERSHOF (Canada) said that, in his delegation's opinion, the procedures set out in article 62 should apply to the whole of Part V and that a separate article on disputes, covering other parts of the convention would have to be adopted later, when the final clauses were considered. Canada was in favour of a procedure which would enable States, acting in good faith, to settle their disputes informally if possible, and therefore agreed with the view that, unless the parties chose another means, after unsuccessful bilateral negotiations, there should be provision for a conciliation procedure to be invoked by either party. The machinery should be linked with the United Nations and based on parity, with each party to the dispute equally represented under a neutral chairman. If that procedure did not result in settlement, however, article 62 should provide for a second stage, entailing either arbitral or judicial settlement, which should be compulsory, and the outcome of which should be binding on the parties.

[6] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

44. His delegation considered that disputes under Part V could be equitably settled and the principle *pacta sunt servanda* respected only if the parties were obliged to go before an impartial third party. Some States were much more powerful than others, and compulsory recourse to impartial and binding arbitral or judicial settlement would ensure equal treatment for smaller States: the principle of the sovereign equality of States stipulated such equal treatment, but it was much less likely to be applied if smaller States had to deal directly with more powerful countries. The mere enumeration of possible means of settlement, as in Article 33 of the Charter, did not go far enough.

45. With regard to the proposals before the Committee, the first Japanese amendment (A/CONF.39/C.1/L.338) and the French amendment (A/CONF.39/C.1/L.342) had the merit of making it clear that the settlement procedures in article 62 applied to disputes under articles providing for invalidity *ab initio* and to those creating voidability. On the other hand, the Cuban amendment (A/CONF.39/C.1/L.353) was entirely unacceptable because it would give any State wishing to evade a treaty obligation the right, once it had alleged coercion or conflict with a rule of *jus cogens*, unilaterally to renounce its obligations under a treaty, without allowing any recourse whatsoever under the convention to the other State concerned.

46. The Canadian delegation could support the second Japanese amendment (A/CONF.39/C.1/L.339), especially the proposal that disputes relating to *jus cogens* should always be referred to the International Court of Justice. Peremptory norms were largely undetermined concepts of international law, and it would be in the interests of all members of the international community if the Court were enabled to pronounce on them, thereby building up precedents which were as yet lacking.

47. The Uruguayan amendment (A/CONF.39/C.1/L.343), as far as it went, represented an improvement on the Commission's draft, but unfortunately it did not go far enough. Although it provided for the possibility of compulsory third party settlement if recommended by the General Assembly or the Security Council, it failed to provide the essential element of assurance of decision. The Swiss amendment (A/CONF.39/C.1/L.347) seemed to be the clearest and simplest of the proposals and, moreover, fulfilled all the requirements which the Canadian delegation considered desirable, in providing for conciliation, to be followed, if unsuccessful, by compulsory recourse to the International Court or to arbitration, the decision to be binding on the parties. The United States amendment (A/CONF.39/C.1/L.355) offered a more complicated but consistent method, which the Canadian delegation could also support, although it considered the Swiss approach preferable.

48. Finally, the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) also provided for conciliation, to be followed by compulsory and binding arbitration. The Canadian delegation regretted that, although the possibility of recourse to the International Court of Justice by joint agreement of the parties was not excluded, the proposal made no reference even to the existence of the Court; it would be unfortunate if a convention drawn up under the auspices of the United

Nations did not provide for recourse to the very body which, under the Charter, was entrusted with jurisdiction on " all matters specially provided for in the Charter or in treaties and conventions in force ". It had been argued that article 62 should not provide for compulsory adjudication or arbitration because the Charter did not do so, but merely listed possible means of settlement in Article 33. It should be remembered, however, that before 1958 most of the multilateral treaties drafted under the auspices of the United Nations contained articles requiring the submission of disputes to adjudication by the Court, unless the parties agreed to some other settlement procedure. It was unreasonable, inequitable and unacceptable to enable individual parties to claim invalidity of a treaty under Part V of the convention against the protest of another party, without ensuring that at some point the dispute would be decided by a competent outside body. Such a provision was no more inconsistent with sovereignty than was the draft convention as a whole or, for that matter, the United Nations Charter itself.

49. His delegation could not support the Commission's draft, but would be prepared to accept the procedures proposed by Japan, Switzerland, the United States or the thirteen States.

50. Mr. STREZOV (Bulgaria) said that, in his delegation's opinion, the International Law Commission's text provided adequate procedural guarantees against arbitrary allegations of invalidity with a view to terminating or suspending the operation of a treaty which one party regarded as inconvenient. The Commission had dealt realistically with the means of settling any disputes which might arise in that regard. His delegation's careful study of the observations of Governments on the Commission's draft led it to concur with the view expressed in paragraph (4) of the commentary that the article " represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question ". The solution was based on the general obligation for States to settle their international differences by the peaceful means set out in Article 33 of the United Nations Charter. That Article contained a wide range of possible solutions of problems which might arise in connexion with the application of Part V.

51. The Bulgarian delegation could not understand the arguments of those who urged compulsory judicial or arbitral settlement as the only solution, for that amounted to renunciation of the machinery provided for in Article 33 of the Charter. His delegation fully supported the simple and clear provisions of paragraphs 4 and 5 of the Commission's text.

52. Although his delegation appreciated the efforts of the sponsors of various amendments to the text, it could not support any proposals which directly or indirectly implied compulsory recourse to arbitration or to the International Court of Justice. On the other hand, it took a favourable view of proposals, such as the Cuban amendment (A/CONF.39/C.1/L.353), which did not provide for compulsory recourse to arbitral or judicial settlement.

53. Mr. SAINIO (Finland) said that the fundamental principle underlying the law of treaties was *pacta sunt servanda*, which meant that no provisions of the convention should encourage unilateral withdrawal from treaty obligations. On the other hand, it would be most unrealistic not to allow a party to denounce or withdraw from a treaty on certain exceptional grounds such as, for instance, a grave breach by the other party or a fundamental change of circumstances. However, it would be unjustified to allow the nullity, termination or suspension of the operation of a treaty to be invoked by one party as a mere pretext for getting rid of inconvenient treaty obligations.

54. His delegation had frequently asserted the importance of the procedural provisions to be applied whenever a party claimed a treaty to be invalid or invoked grounds of nullity, termination or suspension. The just and effective implementation of the rules in Part V was one of the main conditions for the reasonable and useful general application of the convention.

55. According to article 62, the first step was for a party claiming that a treaty was invalid or alleging a ground of termination, withdrawal from or suspension of the operation of a treaty, to notify the other party. The next stage depended on whether an objection was made; if it was not made before the expiry of a reasonable period, then the party could take the measure it had proposed, as provided in article 63.

56. The main provisions regulating the procedure to be followed in cases of dispute were laid down in paragraphs 3 and 4, and under the former the parties were required to seek a solution through the means enumerated in Article 33 of the Charter.

57. His delegation agreed in principle with the provisions of article 62, which constituted progress so far as concerned the settlement of disputes about the validity or invalidity of treaties, but it was aware of the difficulties that could arise in cases when the procedural safeguards in paragraphs 3 and 4 could not be applied. When one party was unwilling to refer a dispute to the means of pacific settlement proposed by the other, the latter could denounce or withdraw from the treaty. Such a solution would be inimical to international peace and security, and would reduce the significance of the new convention.

58. A treaty should in principle remain in force until all disputes concerning its invalidity or termination had been settled, and his delegation would therefore support amendments that would strengthen the procedural safeguards in article 62; that was why it was one of the sponsors of the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The organ for conciliation and arbitration proposed in the amendment would have a good chance of solving disputes referred to it, but that was not to deny the importance of the judicial machinery of the United Nations. His Government had consistently worked to strengthen the position of the International Court of Justice as the principal judicial organ of the United Nations, and was also in favour of referring disputes to peaceful means of settlement as enumerated in Article 33 of the Charter. Disputes over the interpretation and application of the present convention would usually be typical legal disputes which, under Article 36 (3) of the Charter, should as a general rule be referred to the International Court.

59. The thirteen-State amendment did not exclude the Court's jurisdiction, but did not make recourse to it compulsory because of the reluctance of certain States to accept its jurisdiction. On the other hand, the arbitral procedure provided for in the amendment was compulsory. The special conciliation and arbitration machinery would not increase the number of permanent organs of the United Nations and the conciliators would be selected from a list of qualified jurists drawn up by the Secretary-General. The proposed procedure would not be too burdensome for the United Nations.

60. The conciliation machinery had some points of similarity with the fact-finding procedure approved by the General Assembly at its last session. The conciliation commission would have to establish the facts as well as the legal elements of the disputes, though the former would be subordinate in importance. The amendment would provide a solid basis for a just, effective and flexible procedure.

61. Mr. DE BRESSON (France) said that the work of codification and development of law would endanger the stability of treaties unless proper safeguards were provided. The provisions in Part V of the draft could give rise to a great deal of uncertainty as to the conditions of their application. Articles 43 to 48 contained concepts derived from private law and required an objective establishment of the facts, something which was far from easy, as was demonstrated by the vast extent of jurisprudence in the matter.

62. Notions of relative nullity and nullity *ab initio* had not been defined as to their contents and effects, and their transposition from private law to international law was liable to create many difficulties. The provisions contained in articles 41 paragraph 3 (*b*), 42 (*b*), 53 paragraph 1, 55, 56, 57, 59 paragraph 1, 65 paragraph 2 (*b*) and 67 paragraph 1, all demanded a conclusion on the intention of the parties as well as a judgement on intangible factors.

63. Article 62 was not entirely adequate, because paragraph 3 prescribed the means of seeking a solution among those listed in Article 33 of the Charter, without requiring the adoption of a binding and compulsory procedure. Thus no precise means were laid down for the settlement of disputes, and the article was silent about the consequences of failure to find a solution if an invocation of nullity by one party were contested by the other. Those gaps in the article would lead to uncertainty.

64. All the amendments, with the exception of the Uruguayan amendment (A/CONF.39/C.1/L.343), provided for a compulsory means of settling disputes arising under Part V. The Japanese amendment (A/CONF.39/C.1/L.339) made a distinction between disputes concerning rules of *jus cogens*, which should be referred to the International Court of Justice, and other disputes, which should go to the Court or to an arbitral tribunal, but those provisions were not sufficient for articles 50 and 61. He subscribed to paragraph 3 *bis* in the Japanese amendment (A/CONF.39/C.1/L.339), which removed any doubts as to the status of the treaty before a decision was reached on the dispute.

65. The Swiss amendment (A/CONF.39/C.1/L.347) was acceptable, but it was the thirteen-Power amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) which was most likely to meet the needs of the case by providing the appropriate machinery for the settlement of disputes. It wisely distinguished between conciliation and judicial settlement. A procedure likely to bring States together would have the merit of making recourse to arbitration unnecessary. The idea of asking the Secretary-General to designate a list of conciliators was a useful innovation. On the other hand, the designation of arbitrators might cause difficulties. The formula contained in the thirteen-State amendment would safeguard the interests and equality of States, because the conciliation and arbitration bodies would be constituted on a parity basis. The system proposed was both flexible and efficacious, and the compulsory recourse to conciliation, arbitration or other judicial procedures would offer a guarantee that disputes would be solved. Despite the positive elements in the United States amendment (A/CONF.39/C.1/L.355), its proposal to submit disputes to a commission of twenty-five might be unwieldy and hamper a rapprochement between the States concerned. He would support the thirteen-Power amendment, which would go far towards fulfilling the hopes of the international community in peace and justice because the machinery of conciliation and arbitration it proposed would guarantee the sovereign equality of States.

66. Mr. KHLESTOV (Union of Soviet Socialist Republics), exercising his right of reply, said that the United Kingdom representative was making an entirely mistaken attempt to link up two different points. He was trying to create the impression that if a State opposed the compulsory jurisdiction of the International Court of Justice or compulsory arbitration, that State was opposed to justice. Nothing could be further from the truth. It was a well-known fact that, of the 124 States Members of the United Nations, only some forty-odd recognized the compulsory jurisdiction of the International Court. But that in no way meant that the remaining eighty States were against justice.

67. As to the statement of the Soviet Union representative at the 41st meeting, it had merely pointed out that the inclusion in article 41 of the United States amendment (A/CONF.39/C.1/L.260), which contained a reference to justice, would be inappropriate, since it would introduce a new concept which, given the character of the article, would be out of place; the statement could not in any way be interpreted to mean that the USSR was opposed to justice. Incidentally, there had been 27 votes in favour of the United States proposal, 14 against and 45 abstentions. If the United Kingdom representative's reasoning were carried to its logical conclusion, it would mean that the States which had voted against the amendment or abstained—nearly sixty in all—were against justice, which clearly was not true.

68. The United Kingdom representative's claim that the Soviet Government was opposed to justice in international relations was entirely without foundation. The USSR advocated peace and its foreign policy was in the interest of all peoples. In the United Nations, for example, it had been on the initiative of the USSR that the Declaration on the abolition of colonialism had been adopted—an act that clearly aimed at the establishment of justice in international relations. Of course, the United Kingdom representative did not like that Declaration because its

purpose was to liquidate colonialism, but there could be no doubt that it represented an act of justice. The same could be said of the Declaration on non-intervention, which had been adopted by the General Assembly on USSR initiative.

69. He categorically rejected that attempt to slight his delegation and regretted that the United Kingdom representative should have made such a statement.

The meeting rose at 1 p.m.

SEVENTY-SECOND MEETING

Wednesday, 15 May 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

Article 17 (Acceptance of and objection to reservations)[1]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement about article 17.

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not submitted a final text for article 17, as some of the amendments to that article dealt with the question of general and restricted multilateral treaties, on which the Committee of the Whole had not yet taken a decision. The Drafting Committee had circulated the text it had provisionally adopted for article 17 (A/CONF.39/C.1/L.344) because that text raised quite a different problem, concerning which it hoped to receive immediate instructions from the Committee of the Whole.

3. Paragraph 3 of the text of article 17, as amended by the Committee of the Whole, could be divided into two parts, the first of which read:

> " When a treaty is a constituent instrument of an international organization and unless it otherwise provides, the reservation requires the acceptance of the competent organ of that organization ".

4. That part reproduced, with a slight drafting change, the whole of paragraph 3 contained in the International Law Commission's draft. The second part had been added by the Committee of the Whole after the adoption of the United States amendment (A/CONF.39/C.1/L.127). It read as follows:

> " but such acceptance shall not preclude any contracting State from objecting to the reservation ".

5. The Drafting Committee wished to receive instructions from the Committee of the Whole concerning the legal effect of the objections to which the second part of paragraph 3 referred.

6. Article 17, paragraph 4 (*b*) dealt with the legal effects of an objection to a reservation. It read:

> "(*b*) an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State; ".

7. But paragraph 4 opened with the words:

> " In cases not falling under the preceding paragraphs of this article... ".

8. In other words, paragraph 4 (*b*) did not apply to an objection to a reservation that had been accepted by the competent organ of an international organization, since that type of objection came under paragraph 3.

9. It might therefore be argued that, in the present text of article 17, that type of objection was void of legal effect. The régime laid down in paragraph 4 of article 17 could of course be applied by analogy to those objections. The Drafting Committee was uncertain whether that had been the Committee's intention when it had adopted the United States amendment.

10. Even if that had been the intention, it should be noted that the last phrase in paragraph 3 of article 17, as adopted by the Committee of the Whole, concerned a complex problem that raised numerous difficulties which could not be settled merely by a provision in the convention. It affected the functioning of international organizations and went beyond the law of treaties, having regard to the limits set by the convention itself. It belonged rather to topics included in the International Law Commission's agenda, such as the relations between States and intergovernmental organizations. He reminded the Committee of the Whole that, at its 11th meeting, it had adopted a resolution (A/CONF.39/C.1/2) which recommended to the General Assembly that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations.

11. Consequently the Drafting Committee felt bound to recommend to the Committee that it should not retain the words that had been added in conformity with the United States amendment. It would be better to leave it to the International Law Commission to study first of all the question of international organizations as a whole, as it did not seem possible to find an acceptable solution to that question within the context of the convention on the law of treaties.

12. Mr. SWEENEY (United States of America) pointed out that the purpose of the United States amendment (A/CONF.39/C.1/L.127) had been perfectly clear and fully understood by all the members of the Drafting Committee. There had been no question of authorizing a reservation or an objection to a reservation likely to affect the internal functioning of an organization. His delegation had merely wished to say that a State could always make a reservation that did not in any way affect the internal functioning of an organization and that another State could always object to that reservation.

13. Nevertheless, in view of the drafting difficulties that the idea in the amendment would cause if it was to be adapted to the provisions of article 17, his delegation was ready to agree that its amendment should not be included in the article. His delegation's position on the idea in the amendment remained unchanged, however. The situation with which it dealt remained covered by the general rules of existing international law.

[1] For discussion of article 17, see 21st to 25th meetings.

14. The CHAIRMAN suggested that the Committee should not include in article 17 the text of the United States amendment (A/CONF.39/C.1/L.127) and that it should refer the article, as amended, back to the Drafting Committee.

It was so agreed. [2]

15. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 21 to 25 adopted by the Drafting Committee.

Article 21 (Entry into force) [3]

16. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 21 adopted by the Drafting Committee read:

"*Article 21*

" 1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

" 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

" 3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

" 4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty shall apply from the adoption of its text ".

17. Before referring article 21 to the Drafting Committee, the Committee of the Whole had approved, subject to drafting changes, the principle in the United Kingdom amendment (A/CONF.39/C.1/L.186), which had proposed the addition of a new paragraph 4 concerning certain provisions of a treaty that had legal effect prior to the entry into force of the treaty.

18. The Drafting Committee had introduced changes in the wording of paragraph 3 in the International Law Commission's text and in the paragraph 4 proposed by the United Kingdom.

19. In paragraph 3, the Drafting Committee's changes had been confined to a few drafting improvements, but in paragraph 4 it had gone further. It had tried to set out the provisions covered by that paragraph more clearly. Thus it had expressly mentioned the provisions regulating reservations and the functions of the depositary. It had replaced the expression " and other related procedural matters " by the more general formula " other matters arising necessarily before the entry into force of the treaty ". It had preferred to say that those provisions " shall apply " rather than " have legal effect " as proposed in the United Kingdom amendment. Lastly, it had stated that the provisions in question should apply from the adoption of the text of the treaty; some delegations had objected that the United Kingdom amendment had omitted that detail.

20. The Drafting Committee had rejected all the amendments referred to it by the Committee of the Whole relating to the first three paragraphs of article 21.

21. Mr. HARRY (Australia) said that in the English version of the Drafting Committee's text the expression " from the adoption of its text " did not bring out sufficiently clearly that the reference was solely to the time of the adoption of the text. The present wording could be taken to imply the existence of a cause-and-effect relationship. He thought that the English version would correspond more nearly to the French and Spanish texts if the expression " from the time of the adoption of its text " were used.

22. Mr. YASSEEN, Chairman of the Drafting Committee, confirmed that the expression in question meant that the provisions contained in that paragraph should apply from the time of the adoption of the text of the treaty.

23. The CHAIRMAN suggested that the Committee should approve the text of article 21, subject to the change in the English version proposed by the Australian representative.

Article 21 was approved, subject to that change.

Article 22 (Entry into force provisionally) [4]

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 22 adopted by the Drafting Committee read:

" *Article 22*

" 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

" (*a*) the treaty itself so provides; or

" (*b*) the negotiating States have in some other manner so agreed.

" 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. "

25. Before referring article 22 to the Drafting Committee, the Committee of the Whole had adopted a proposal by Czechoslovakia and Yugoslavia (A/CONF.39/C.1/L.185 and Add.1) to amend paragraph 1 of the article so as to allow the provisional application of a part of a treaty as well as the provisional application of a treaty. The Committee of the Whole had also approved of the principle of including a new paragraph concerning the termination of the provisional entry into force or provisional application of a treaty, contained in the amendments submitted by Belgium (A/CONF.39/C.1/L.194) and by Hungary and Poland (A/CONF.39/C.1/L.198).

26. The Drafting Committee had made a few changes in article 22. In the opening sentence of paragraph 1, as

[2] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to " restricted multilateral treaties " and " general multilateral treaties " until the second session of the Conference. Further consideration of article 17 was therefore postponed.

[3] For earlier discussion of article 21, see 26th meeting.

[4] For earlier discussion of article 22, see 26th and 27th meetings.

worded in the amendment by Czechoslovakia and Yugoslavia, the Committee had replaced the expression " a treaty... may be applied provisionally " by the words " a treaty... is applied provisionally ". It had considered that the former expression might be interpreted to mean that the parties were left free not to apply the treaty provisionally, even when such application was prescribed by the treaty. The Drafting Committee had also simplified the text of sub-paragraph (*a*). Since paragraph 1, as now worded, expressly referred to the provisional application of part of a treaty, the Committee had deleted paragraph 2 of the International Law Commission's text, which had merely stipulated that the rule in paragraph 1 applied to the entry into force provisionally of part of a treaty. It was true that the Committee of the Whole had rejected a proposal (A/CONF.39/C.1/L.165) to delete paragraph 2 of the Commission's text; but the idea contained in that paragraph was now included in paragraph 1 and the Drafting Committee had not therefore disregarded the wishes of the Committee of the Whole.

27. Paragraph 2 of the Drafting Committee's text was based on the amendments by Belgium and by Hungary and Poland to which he had already referred.

28. The Drafting Committee had rejected all the other amendments referred to it.

Article 22 was approved.

Articles 23 (Pacta sunt servanda) [5] and 23 *bis* (new article)

29. Mr. YASSEEN, Chairman of the Drafting Committee, said that without prejudging the place it was to occupy in the draft convention, the Committee of the Whole had approved the principle stated in the amendment by Pakistan (A/CONF.39/C.1/L.181) to add to article 23 the following phrase:

" and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty ".

30. The Drafting Committee had decided to recommend that the Committee of the Whole should adopt article 23 as worded in the International Law Commission's text. In the Spanish version, the word " *ejecutado* " had been replaced by the word " *cumplido* ".

31. With regard to the amendment by Pakistan, the Drafting Committee had considered it indispensable that the *pacta sunt servanda* rule should constitute a separate article, because of its great importance in the context of a general convention on the law of treaties. It had therefore embodied the amendment in an additional article immediately following article 23 and numbered 23 *bis*.

32. The Drafting Committee had, however, made certain changes in the wording proposed in the amendment by Pakistan. In particular, it had replaced the words " constitution " and " laws " by the expression " internal law ", which was the subject of article 43. The Committee had also specified in the text of article 23 *bis* that the rule laid down therein was without prejudice to article 43, because there might be a certain overlapping between those two articles.

33. Article 23 *bis* therefore read:

"*Article 23* bis

" No party may invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 43. "

34. The Drafting Committee had been unable to adopt any of the other amendments referred to it by the Committee of the Whole. In particular, it had rejected the joint amendment by Bolivia, Czechoslovakia, Ecuador, Spain and the United Republic of Tanzania (A/CONF.39/C.1/L.118) to replace the expression " Every treaty in force " by the expression " Every valid treaty ". The Committee wished to point out that it had regarded that proposal as a drafting amendment which it had not thought it advisable to adopt.

35. The Drafting Committee had not considered it necessary to accept the other amendments referred to it. In particular, it had decided not to add the words " in conformity with the provisions of the present convention " proposed in the Cuban amendment (A/CONF.39/C.1/L.173), as in its opinion those words were implicit in the text.

36. Mr. JACOVIDES (Cyprus) said that as he had been absent during the debate on article 23, he had been unable to explain his delegation's position. He wished to state that his delegation approved of the action of the International Law Commission and the Drafting Committee in limiting the application of the *pacta sunt servanda* rule to treaties in force. Without that provision, the article might have led to the false application of that fundamental rule. It was clear that the principle expressed in article 23 applied subject to the observance of all the other rules of the convention relating to the validity of treaties. Accordingly, his delegation fully supported article 23 as drafted.

37. Mr. ALCIVAR-CASTILLO (Ecuador) recalled that when the Committee of the Whole had considered article 23, the delegations of Bolivia, Czechoslovakia, Ecuador, Spain and the United Republic of Tanzania had submitted, for the reasons they had explained at the 28th and 29th meetings, an amendment (A/CONF.39/C.1/L.118) to replace the words " Every treaty in force " by the words " Every valid treaty ". The Committee had referred that amendment to the Drafting Committee.

38. In the report he had just submitted, the Chairman of the Drafting Committee had said that that Committee had regarded the proposal as a drafting amendment and had not thought it advisable to adopt it.

39. His delegation accepted the Drafting Committee's view, as it showed quite clearly that the idea of " treaty in force " went beyond the formal validity dealt with in articles 21 and 22 of the draft and that the notion of " the validity of a treaty ", or " treaty in force ", was linked to the validity of the substance of the instrument and thus to its legal effects.

40. Mr. MYSLIL (Czechoslovakia) noted that the Drafting Committee had preferred the words " treaty in force " to the words " valid treaty " which five delegations, including his own, had proposed in their amendment to article 23 (A/CONF.39/C.1/L.118). His delegation had taken note of the statements made by the representatives of the United Kingdom and France, among others, at the Committee's 29th meeting, and the statement just made by

[5] For earlier discussion of article 23, see 28th and 29th meetings.

the Chairman of the Drafting Committee according to which a treaty in force was a treaty that was in force in accordance with the provisions of the convention, a treaty that was valid under international law. His delegation considered that interpretation of the expression " in force " as admissible and it was therefore ready to accept article 23 as drafted by the International Law Commission and adopted by the Drafting Committee.

41. The Drafting Committee might, however, reconsider whether the *pacta sunt servanda* principle was really in its right place in the draft, for in its present position it seemed closely associated with the articles relating to entry into force, whereas the application of the principle was also connected with other parts and sections of the draft convention.

42. Mr. TAYLHARDAT (Venezuela) said that article 23 *bis* touched on the very complex question of the relationship between international law and internal law. His country could not recognize the supremacy of any obligation over its constitutional law. In a judgement delivered on 29 April 1965, the Supreme Court of Venezuela had proclaimed that the Constitution took precedence over treaties.

43. Mr. KEMPFF MERCADO (Bolivia) said that his delegation supported article 23 as adopted by the Drafting Committee, on the understanding that the expression " treaty in force " meant a treaty that was valid in accordance with the provisions of the present convention.

44. Mr. BARROS (Chile) said that he was somewhat surprised that a debate which he had believed closed had been reopened. The Drafting Committee had merely introduced a minor drafting change in the Spanish text of article 23, by replacing the word " *ejecutado* " by the word " *cumplido* ". The substance remained unchanged and all the International Law Commission's comments on the article and its scope remained valid. After the long debate that had taken place in the Committee of the Whole concerning the replacement of the words " in force " by " valid ", his delegation failed to understand how it could now be maintained that the two expressions had the same meaning. It was his impression, however, that, on the proposal of some of its sponsors, the five-State amendment (A/CONF.39/C.1/L.118) had not been put to the vote in the Committee of the Whole.

45. He would merely remind the Committee of the statement made by the Chilean representative at the 29th meeting; his delegation abided by the opinion it had expressed on that occasion.

46. His delegation noted that the text of article 23, as adopted by the Drafting Committee, had the same meaning as in the International Law Commission's draft, since the wording had not been changed.

47. Mr. MARTINEZ CARO (Spain) said that in accordance with the five-State amendment (A/CONF.39/C.1/L.118), of which his delegation was a co-sponsor, and with the statement made by its representative at the 29th meeting, his delegation interpreted the expression " treaty in force " as covering not only a treaty which, from the formal point of view, had entered into force, but also all the conditions of form, substance and procedure that determined the validity of a treaty. His delegation reaffirmed its conviction that the *pacta sunt servanda* rule could apply only to valid treaties, since only valid treaties must be performed in good faith.

48. Mr. DE LA GUARDIA (Argentina) said that some treaties might contain constitutional reservations, in which case, for the application of the treaty, the relevant provisions might be invoked to the extent of those reservations.

Articles 23 and 23 bis *were approved.*

Article 24 (Non-retroactivity of treaties) [6]

49. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 24 adopted by the Drafting Committee read:

" *Article 24*

" Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. "

50. The Drafting Committee had rejected the three amendments that had been referred to it by the Committee and had adopted the English text of article 24 as drafted by the International Law Commission. In the French text, the Committee had deleted the word " *tout* " before the expression " *fait antérieur* ", as it had considered it superfluous. It had also redrafted the Spanish text so as to eliminate the ambiguities in the original text.

51. It had not accepted the Finnish amendment (A/CONF.39/C.1/L.91) to add the words "Subject to the provisions of article 15 and ", because article 15 did not relate to the retroactive application of a treaty. The obligations imposed on States were based on article 15 itself. Neither had the Committee accepted the Cuban amendment (A/CONF.39/C.1/L.146) to replace the words " any act or fact which took place " by the words " any act or fact which was completed ". Such a modification would have created difficulties of terminology; what mattered was that the act or fact had taken place before the date of the entry into force of the treaty. The Japanese amendment (A/CONF.39/C.1/L.191) to amend the opening words of article 24 had not been adopted; the Committee had preferred to retain the International Law Commission's wording, which was used in other articles:

Article 24 was approved.

Article 25 (Application of treaties to territory) [7]

52. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 25 adopted by the Drafting Committee read:

" *Article 25*

" Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory ".

53. The Committee of the Whole had referred article 25 to the Drafting Committee with a single amendment, that by the Ukrainian SSR (A/CONF.39/C.1/L.164). The Drafting Committee had adopted that amendment with-

[6] For earlier discussion of article 24, see 30th meeting.

[7] For earlier discussion of article 25, see 30th and 31st meetings.

out a change. The International Law Commission's text had provided that the application of a treaty extended to the entire territory of each party, whereas the new text stated that a treaty was binding upon each party in respect of its entire territory. The latter formula had been considered preferable.

54. Mr. SINCLAIR (United Kingdom) said that his delegation approved the text of article 25 as submitted by the Drafting Committee, on the understanding that the expression " its entire territory " applied solely to the territory over which a party to the treaty in question exercised its sovereignty.

Article 25 was approved.

55. Mr. DE LA GUARDIA (Argentina) drew attention to the difficulties of translating the text into the different working languages. He hoped that the Spanish texts would be carefully revised.

56. The verb " *mallograr* ", which had been criticized by the Chilean representative in connexion with article 15, occurred again in the Mexican amendment to article 68 (A/CONF.39/C.1/L.357).

57. Mr. SEPULVEDA AMOR (Mexico) pointed out that the text of the amendment in question used the terms employed in article 15. It was only a provisional draft and, of course, if the Spanish text of article 15 were modified, that of article 68 would be similarly amended.

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(resumed from the 71st meeting)* and *proposed new article 62* bis (A/CONF.39/C.1/L.348) *(resumed from the 71st meeting)*

58. The CHAIRMAN invited the Committee to resume its consideration of article 62 [8] and of the proposed new article 62 *bis*.

59. Mr. KRISHNADASAN (Zambia) said that in accordance with what it had stated at the 56th meeting, his delegation had studied with interest all the proposals to strengthen article 62 by an independent and impartial system of settling disputes, and in particular by the establishment of conciliation and arbitration procedures.

60. It approved of the underlying principles of several amendments: the thirteen-State amendment (A/CONF. 39/C.1/L.352/Rev.1/Corr.1), the Swiss amendment (A/CONF.39/C.1/L.347), the Japanese amendment (A/CONF.39/C.1/L.339) and the United States amendment (A/CONF.39/C.1/L.355), but found it difficult, owing to the way in which they were worded, to give them its unqualified support. Nevertheless, they deserved careful consideration. If they failed to obtain the Committee's support, his delegation would favour the idea contained in paragraphs 4, 5 and 6 of the Uruguayan amendment (A/CONF.39/C.1/L.343), which would make paragraph 3 of the International Law Commission's text more effective by providing for the possibility of compulsory third party settlement.

61. Nevertheless, a valuable step forward would have been taken if the Committee could see its way to formulating a more positive rule. Of course, it was important that the proposed scheme should be acceptable to the overwhelming majority of the Governments represented at the Conference. The emphasis should be on flexibility and not necessarily on international coercion as feared by some delegations. In the final analysis, the acceptance or non-acceptance of establishing conciliation and arbitration procedures under article 62 depended on the view taken of international society. If whole-hearted co-operation and genuine trust were regarded as possible at the present stage, there should not be any real objection to tightening up the rules contained in article 62. States that feared the " partiality " of arbitral tribunals should remember their own past behaviour. For instance, many States had accepted similar provisions in bilateral and multilateral agreements. The special role of the President of the International Court of Justice in the appointment of arbitrators had also been accepted. The question was whether the climate of international society was such that the task of appointing arbitrators—if the parties failed to do so—might be entrusted to an international official of the highest integrity and impartiality.

62. His delegation favoured paragraph 5 of the Swiss amendment (A/CONF.39/C.1/L.347): in case of disagreement between national arbitrators, the majority of the committee of arbitration would be composed of neutral, non-national members. Thus the chairman of the arbitration committee would not be solely responsible for deciding the case. Admittedly, States might perhaps find it very difficult to submit all economic and political treaties to compulsory arbitration. Consequently, the Committee might try to define those questions in respect of which Governments might be willing to accept arbitration unconditionally and without reservation. An alternative solution, already suggested by the Ceylonese representative, would be to add to article 62 a clause providing that States might agree in advance, in future treaties, not to apply the provision of article 62 concerning compulsory settlement.

63. In view of the complexity of the problems involved, Governments might perhaps wish to give the matter further consideration before arriving at a final decision on article 62.

64. If the Committee accepted the International Law Commission's view that the present state of international opinion did not allow of a more vigorous rule than that contained in article 62 in its present form, his delegation would support that text, in the firm conviction that justice was the aim of all.

65. Mr. MARESCA (Italy) thought that article 62 was the keystone of the convention. If that article was well conceived, the satisfactory functioning of the convention would be ensured. If it was inadequate, the balance and operation of the convention would be seriously compromised. It was impossible to stop half-way. After carefully determining the grounds on which treaties might be considered void or as having terminated or been suspended, it was essential to establish a system whereby all the provisions laid down could operate in a regular and legitimate manner. Without a system of guarantees there would obviously be disequilibrium. The International Law Commission had realized that, and it was to be commended for having inserted article 62 in the draft convention.

[8] For the list of the amendments submitted, see 68th meeting, footnote 1.

66. The question was whether the article was satisfactory. His delegation did not think so. The impression it gave was that the International Law Commission had not completed its task. It was for the Conference to continue the work. What was needed to make a system of safeguards complete? First, States must be left completely free to choose the manner of settling their disputes. That was the first stage, in other words the period of negotiation. If, however, the States concerned failed to find a solution, they reached the second stage, namely conciliation: they endeavoured to reach agreement by appealing to a body which tried to arrive at a compromise. The States still remained free. If conciliation failed to produce any practical result, it was followed by the third stage, namely, arbitration. But that was only as a last hope, when States had been unable to come to any arrangement for settling the matter. As it was essential to find a definitive solution, the States must be helped by a provision for an independent arbitral body. A fourth aspect of the system of guarantees was that it was based on international solidarity, as any dispute arising out of a treaty raised problems not only for the parties to the treaty, but for the entire international community. It was in the interest of every State that the stability of treaties and the settlement of disputes should be ensured. The merit of the amendments submitted was that they endeavoured to provide a complete system of safeguards.

67. In particular, the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) took account of the successive stages of negotiation, conciliation and arbitration. It stipulated precisely the composition of the conciliation commission and the arbitral tribunal and provided that the Secretary-General of the United Nations should, in certain circumstances, appoint the members of those bodies. Lastly, the amendment incorporated a new idea: the expenses of the conciliation commission and the arbitral tribunal should be borne by the United Nations. That would be a striking instance of international solidarity.

68. The amendment should have the support of all States, great or small, young or old, since all had the same interests. For new States it would be clear confirmation of their sovereignty, as it would enable them, if necessary, to bring their disputes before an international tribunal, and it was known that the law protected the weak. Powerful States had nothing to fear, for they would thus be following one of the noblest historic traditions. The great philosophers, jurists and moralists had been preaching since ancient times the need to resolve international disputes peacefully.

69. Mr. WARIOBA (United Republic of Tanzania) said he wished to emphasize the importance of article 62. The proposed amendments did not seem to improve the text. In his delegation's view, the article should both prevent the parties from taking unilateral action that would endanger the stability of treaties and protect parties claiming the invalidity of the treaty from any inconsiderate attitude that might be adopted by the objecting parties. The procedure must also be effective.

70. It had been argued that article 62, as it stood, did not provide for any means of final settlement in case of a deadlock. The proposed machinery did not seem to be more effective than the provisions of article 62 and would make the procedure too long. After all, it was not always the claimant party that was in the wrong and the procedure proposed should contain elements that would protect that party. For that purpose, it must be as short as possible. Some of the procedures proposed were so lengthy that a claimant State might be prevented by the deliberately malicious attitude of the objecting party from taking action.

71. It had also been objected that article 62 did not make any provision for the compulsory settlement of disputes. His delegation was not in favour of compulsory jurisdiction. The attitude of States towards international tribunals was far from encouraging. The Statute of the International Court of Justice contained an optional clause on compulsory jurisdiction, which only some forty States had accepted. Further, the majority of States that had accepted it had attached conditions which deprived the clause of effect.

72. His delegation questioned how far the proposed jurisdiction could be really compulsory. The idea of conciliation, arbitration and judicial settlement had already been embodied in paragraph 3 of article 62. What guarantees were there that a State would submit to compulsory jurisdiction and that it would abide by the decisions? The performance of international tribunals had not been encouraging and it was fair to say that the present trend was for States to settle their disputes outside those bodies. And it could not be said that solutions of that kind had not been effective and objective.

73. In his delegation's view, the convention as a whole contained ample provisions for the settlement of disputes. First of all, the principle of good faith during the negotiation and conclusion of a treaty ensured the security and stability of treaties. Why should it be supposed that States would not act in good faith? Thousands of treaties existed that were being performed in good faith, whatever the difficulties of carrying them out. Claims of invalidity or suspension were the exception and the procedure laid down in article 62 could be regarded as sufficient to deal with such exceptions.

74. Under that article, the party alleging invalidity was required to notify the other party of the grounds for its claim and the measures it proposed to take. Clearly, that ruled out any possibility of the arbitrary termination of the treaty. Moreover, the other party had only a three months' period in which to formulate an objection. That was an equitable provision that protected the rights of both parties. If they were unable to settle their disputes in that manner, it was for the governments concerned to appreciate the situation and to act as good faith demanded.

75. That was a fair, acceptable and effective procedure. In fact, most disputes had been solved by the means indicated in paragraph 3 of article 62. If they could not be settled in that way, it was because States adopted an attitude such that even compulsory jurisdiction would serve no purpose. Those cases were so rare that they did not constitute a danger to the security and stability of treaties and they did not justify the adoption of a rule that would do more harm than good.

76. It had also been argued that States should not be authorized to take bilateral decisions on questions affecting the entire community of nations. But in most

cases more than two parties would be involved. Further, even if provision was made to bring the dispute before an international tribunal, that would not prevent the parties from deciding questions of international law bilaterally.

77. His delegation could not support those amendments that sought to include provision for compulsory jurisdiction. Some of those amendments also sought to apply different treatment to various articles in Part V. His delegation agreed with the International Law Commission that the same procedure should apply to all grounds of nullity, termination or suspension of the application of treaties. The United Kingdom representative had said that some of the articles in the convention were new and contained rules concerning which bilateral decisions should not be allowed. His delegation did not share that view. In the past, States had denounced treaties on grounds that involved principles of great importance to the community of nations as a whole, but it had never been contended that they should not be permitted to decide their disputes bilaterally. In any case, article 62 dealt with the settlement of disputes; it was not meant to be a legislative procedure on international law. If important principles were involved, it was for the purpose of arriving at an agreement.

78. Some amendments, for instance the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) and the United States amendment (A/CONF.39/C.1/L.355), contained annexes prescribing the composition and powers of the proposed organs and the procedure they should follow. No annex of that type had been proposed in connexion with paragraph 3 of article 62. Such annexes were out of place and merely served to show that compulsory jurisdiction in international law contained certain weaknesses.

79. The thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) provided for too long a procedure. Moreover, the usefulness of making conciliation compulsory was not apparent.

80. The United States amendment (A/CONF.39/C.1/L.355) sought to place on the claimant party the onus of establishing that no other party had communicated an objection. His delegation failed to understand why it was always sought to place the objecting State in a favourable position. Once again, that was evidence of the notion that the claimant parties were always considered to be in the wrong and the objecting States always right. His delegation did not agree that the United States proposal was merely a drafting amendment.

81. During the discussion, certain delegations had stated that their position on articles such as articles 50 and 59 depended on the content of article 62. Undoubtedly, article 62 was a key article of the whole draft convention and it would affect the attitude of many States. For its part, the Tanzanian delegation supported article 62 as it stood. It hoped that the criticism levelled against that article had been made in good faith and that it was not designed to frustrate the whole codifying work of the Conference.

82. Mr. MWENDWA (Kenya) said the International Law Commission had been right in stating in its commentary that article 62 " represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question."

83. The Kenyan delegation had come to the conclusion that the Committee should approve article 62 as at present worded, as it gave adequate protection against the arbitrary assertion of the invalidity, termination or suspension of the operation of a treaty. Under paragraph 3 of the article, the parties were bound, if objection was raised, to seek peaceful means of settling their disputes as indicated in Article 33 of the Charter of the United Nations. The parties must fulfil those obligations in good faith. Further, any State, whether a Member of the United Nations or not, had a right, in certain conditions, to refer a dispute to the competent organ of the United Nations.

84. It would be remembered that the Geneva Conventions on the Law of the Sea, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations had not included provisions on compulsory means of settling disputes. In his delegation's opinion, the Conference should seek optional, as opposed to compulsory, means of settling disputes.

85. The question of the peaceful settlement of disputes was at present under study by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, and it would be most unfortunate if the Conference took any action which might hinder that Committee's work. The Committee of the Whole should preferably recognize that the matters of principle raised by the various amendments to article 62 should be studied by the Special Committee in the wider and more general context of the peaceful settlement of disputes.

86. Compulsory settlement of disputes through judicial or arbitral machinery could not be accepted by all members of the international community overnight. There were still vast areas of international law which were ill-defined, and the greater part of international law was made up of traditional and inequitable rules consonant with the interests of only a few States. Besides, some of the new areas of international law, space law for example, had been created by only a few great Powers. That being so, the smaller States were reluctant to submit themselves to the compulsory settlement of disputes for fear that justice might be sacrificed to political expediency.

87. Modern international law could not be reduced to a legal technique. In internal law it was possible to fit clearly delineated facts and situations into a known mould, but that was not so with international law. Many more vital aspects might be involved than appeared at first sight. It was well known, too, that some eminent jurists had treated certain crucial problems in a perfunctory manner. They had dealt with the problems according to the law, but in a way unrelated to the constantly changing realities of the international situation. Such success as had been obtained in international law had been brought about by the application of the principles of good faith, conciliation and common sense, upon which the International Law Commission based its confidence for the future application of article 62.

88. Law could not remain immutable, but it could not be forced upon the international community if the latter

refused to accept it. In his opinion, the International Law Commission had been right to refrain from bringing notions of internal law and doctrinal conflicts into the area of international law. Greater co-operation among States was the prerequisite for any acceptance by the international community of procedures for the compulsory settlement of disputes.

89. Contrary to what some delegations had stated, the Charter of the Organization of African Unity did not provide for compulsory arbitration.

90. International tribunals were constituted by men who might well possess honesty and intellectual integrity to the highest degree but remained the product of their education and still harboured the sympathies and prejudices of that education. For that reason, it would be better, for the time being, to let the methods for settling disputes remain optional.

91. The Committee should draw a distinction between cases where a vote was taken to approve a text by the International Law Commission which Governments had had time to study at leisure, and cases in which the problems dividing the Committee were basic problems raised by proposals which had been submitted for the first time during the Conference's work. The amendment to article 49 submitted by Afghanistan and a number of other delegations (A/CONF.39/C.1/L.67/Rev.1 and Corr.1 and Add.1) and the amendments to article 62 proposing the establishment of a compulsory jurisdiction were cases in point.

92. The sponsors of the amendment to article 49, although certain to obtain a large majority in the Committee of the Whole, were not pressing their amendment to a vote, in order to avoid dividing the Committee on that point. The sponsors of amendments to include compulsory jurisdiction in article 62 would have to assume a heavy responsibility when deciding whether their amendments should or should not be put to the vote.

93. Mr. JACOVIDES (Cyprus) said he thought the method for settling disputes among States should be flexible and take into account the particular circumstances of each case. The prime consideration was that States should settle their disputes by peaceful means in such a manner that peace and security, and justice, were not endangered. That principle, which was expressed in Article 2 (3) of the United Nations Charter, was the logical corollary of the principle in paragraph 4 of that Article. The peaceful solution of international disputes was therefore a peremptory norm of general international law. He pointed out that under Article 2 (3) and Article 1 (1) of the Charter, international disputes were to be settled in accordance with international law and the principles of justice.

94. His delegation fully supported article 62, paragraph 3, since Article 33 of the Charter gave a long list of means of peaceful settlement to which the States Members of the United Nations were bound to resort. Among those means, settlement by the International Court of Justice raised a very special problem, because there were situations in which a solution based exclusively on the letter of the law produced unfair results, and it was doubtful whether, in international affairs, courts could serve the cause of peace by ruling on political conflicts or assuming functions which were essentially legislative. Moreover, the jurisdiction of the International Court of Justice suffered from a number of drawbacks, in particular owing to the geographical basis of its membership, the inability of parties to foresee its decisions with sufficient certainty, and the absence of effective means of enforcing its decisions. Further, it could not be said that its decisions were always reached impartially without the intervention of political or extra-judicial considerations. All those factors considerably limited the Court's usefulness as a judicial organ of the United Nations.

95. On the other hand, the United Nations as a political organization, and particularly the Security Council, the General Assembly and the Secretary-General, could play a very effective role in settling international disputes arising out of a treaty, above all when the political element prevailed in the dispute.

96. Chapter VI of the Charter gave the Security Council important functions for that purpose, but owing to its voting procedure, its effectiveness in settling international disputes had often proved illusory. Nevertheless, in some cases the Council had been able to reach unanimous agreement on procedures such as mediation and good offices, which had yielded just and equitable results.

97. The General Assembly also had a very important part to play in that connexion. Under Article 10 of the Charter it had the right " to discuss any questions or any matters within the scope of the present Charter ". Moreover, under Article 14, it could " recommend measures for the peaceful adjustment of any situation, regardless of origin ", which obviously covered situations arising from disputes originating in treaties. Although the resolutions of the General Assembly were only recommendations, the authority of that body should not be underestimated.

98. The Secretary-General, too, could play a very constructive part in the peaceful settlement of disputes. He was forbidden under Article 100 of the Charter to seek or receive instructions from any government or from any other authority external to the Organization. He was thus in an exceptional position for settling disputes.

99. Having studied article 62 in detail, his delegation had reached the conclusion that it would be unrealistic at the present stage to go further than the International Law Commission. He thought that recourse to the means prescribed in Article 33 of the Charter would result in just and peaceful solutions. As the International Law Commission had pointed out in its commentary, there would also remain the right of every State to refer the dispute to the competent organ of the United Nations.

100. He could not support the substantive amendments submitted by Japan (A/CONF.39/C.1/L.339), Switzerland (A/CONF.39/C.1/L.347) or the United States (A/CONF.39/C.1/L.355), for the reasons he had stated. The Uruguayan amendment (A/CONF.39/C.1/L.343) was useful because it emphasized the need for accepting peaceful settlement procedures recommended by the competent United Nations organ.

101. The thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1), which, while accepting article 62,

sought to supplement it, contained interesting ideas and deserved further consideration. Although it went further than the International Law Commission's text by providing for a compulsory conciliation procedure, which could be followed by arbitration, it was nevertheless based on the principle of equality, and did not go outside the limits of the United Nations. The provisions for the appointment of the chairmen of the conciliation commission and arbitration tribunal by the Secretary-General, and for the United Nations to bear all the expenses of those bodies, had certain advantages. However, since the amendment had only been submitted quite recently, he had not had time to assess all its implications. While fully reserving his Government's position, he thought it might be preferable for the sponsors of the amendment not to press it to a vote at the present stage. It would perhaps be advisable to give Governments time for reflection and consultation until the following year before taking a final decision.

102. Mrs. ADAMSEN (Denmark) said the Danish delegation thought that the draft of article 62 proposed by the International Law Commission, the result of a compromise between the differing opinions of Governments and members of the Commission, did not provide a real solution to the problems arising out of the settlement of disputes in connexion with the application of the provisions of Part V. On the contrary, the article would open the door to many abuses. If the text was adopted as drafted, a party to a treaty, after exhausting the procedures laid down in paragraphs 1 and 2, would be able to decide unilaterally not to apply the treaty, to assert that it was invalid, to terminate it, withdraw from it or suspend its operation. In other words, it would be possible for a State to be the judge of its own case, and that would entail serious danger to treaty relations among States and to peace.

103. The Danish Government had always advocated and encouraged the settlement of disputes between States by recourse to an impartial third party; such a solution would make it possible to secure a peaceful and just settlement and to establish and affirm the rules of international law applicable to such disputes. It was not only the small and weak States which had an interest in including rules to that effect in article 62; the entire international community would benefit.

104. Although it believed that some means of settling disputes by independent adjudication was necessary, the Danish delegation was well aware that it would be hard to find a solution acceptable to the great majority of States. It was ready to support proposals for the reference of disputes, or certain kinds of dispute, to the International Court of Justice. But it was inclined to think that a system of settling disputes by a combination of compulsory conciliation and arbitration would have a better chance of obtaining the widespread support which was essential. For that reason it had joined with twelve other States in submitting an amendment to that effect (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The solution was obviously not an ideal one. The wording might be improved, clarified or simplified. The principle it embodied, however, seemed to strike a happy mean between the various suggestions put forward and should attract a large number of votes.

105. Mr. KEITA (Guinea) said that, though article 62 was perhaps not perfect, it had certain merits which should not be underestimated. It took full account of State practice. The Conference's objective should be to adopt a final solution acceptable to a large majority of States or even all of them. The Conference should base itself on the precedents established by the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations, which did not contain a compulsory jurisdiction clause.

106. A provision for compulsory recourse to the International Court of Justice should not be included in article 62, since Article 36, paragraph 2, of the Statute of the Court itself provided only for the faculty to recognize the Court's compulsory jurisdiction, a faculty of which only a few Member States of the United Nations had so far made use; moreover, they generally attached conditions to that recognition which considerably limited its scope.

107. The international community did not, at the present time, have any practical means of executing the judgements of the International Court of Justice. Everything depended on good faith, loyalty and the observance by States of the commitments into which they had entered. The feasibility of recourse to a compulsory jurisdiction should not, therefore, be overestimated.

108. His delegation was not opposed to the amendments to improve the form of article 62. The amendments proposing the establishment, within the United Nations, of a conciliation commission or arbitral tribunal were worth considering, provided that they did not include a compulsory clause.

The meeting rose at 6.25 p.m.

SEVENTY-THIRD MEETING

Thursday, 16 May 1968, at 10.30 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(continued)* [1] and *Proposed new article 62* bis (A/CONF.39/C.1/L.348) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 62 of the International Law Commission's draft and of the proposed new article 62 *bis*.

2. Mr. DEVADDER (Belgium) said that a convention on the law of treaties would be incomplete without suitable machinery for the settlement of disputes, especially those arising under Part V. The danger was that a State might arbitrarily invoke grounds of invalidity, suspension or termination in order to release itself from

[1] For the list of amendments submitted, see 68th meeting, footnote 1.

irksome obligations; and if there were no impartial machinery to deal with disputes, uncertainty would ensue. Such machinery was needed more particularly in order to protect the interests of small and weaker States. As with internal constitutional law, rules that were as precise as possible and the possibility of submitting disputes to independent bodies were a guarantee of the law being applied and the weak being protected.

3. The procedure contemplated in article 62 was not effective enough, and stronger safeguards were essential. Useful elements had been proposed in the Japanese (A/CONF.39/C.1/L.339), Swiss (A/CONF.39/C.1/L.347), United States (A/CONF.39/C.1/L.355) and thirteen-State (A/CONF.39/C.1/L.352/Rev.1/Corr.1) amendments, but he could not support the Uruguayan amendment (A/CONF.39/C.1/L.343), which did not go far enough. He supported the French amendment (A/CONF.39/C.1/L.342) and the first Japanese amendment (A/CONF.39/C.1/L.338).

4. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that article 62 was regarded as a key article by several members of the Commission. Since a treaty régime was the result of consent between the parties, unilateral suspension, termination or withdrawal must not be permitted. The procedure laid down in article 62 offered some guarantee against unilateral and arbitrary action and provided for recourse to one of the means laid down in Article 33 of the Charter at the party's own choice. Article 62 represented a compromise between extreme views.

5. His delegation could not support any of the amendments proposing compulsory arbitration or compulsory jurisdiction by the International Court of Justice and could only agree to arbitration accepted by all the parties. Treaties varied widely in character, some being important and others minor, so that a separate decision had to be reached in each case. The world community was certainly not ready to accept compulsory arbitration, as was demonstrated by the fact that the Commission's draft on arbitral procedure had been rejected by the General Assembly.[2] For those reasons his delegation could not support either the Swiss or the United States amendment.

6. Paragraph 3 in the Japanese amendment (A/CONF.39/C.1/L.339) was not satisfactory, because the International Court of Justice did not create *jus cogens*. The text of article 62 would certainly be improved, however, by the adoption of the Cuban amendment (A/CONF.39/C.1/L.353).

7. The Uruguayan amendment (A/CONF.39/C.1/L.343) deserved examination but the "competent organ" referred to in paragraph 5 should be specified.

8. Mr. MUTUALE (Democratic Republic of the Congo) said that nearly all the amendments were based on the idea that the means for pacific settlement of disputes set out in Article 33 of the Charter were insufficient. In fact, what was lacking was the will of States to have recourse to them. The principle of good faith did not at present guide States in their policy. The Charter required States to settle their differences by peaceful means, and Article 33 represented a broad and flexible compromise.

[2] See General Assembly resolution 1262 (XIII).

9. Mr. JAGOTA (India) said that article 62 did not deal with a question of the law of treaties but with the settlement of disputes. There had been general hesitation in accepting compulsory jurisdiction, whether of conciliation commissions, arbitral tribunals or the International Court of Justice, mainly because of the inadequacy of their institutional structure and out of financial considerations. So far, all three had been optional. The International Law Commission's draft on arbitral procedure had been adopted by the General Assembly only as a model set of rules,[3] the main reason being the reluctance of States to accept compulsory arbitration. Even the Human Rights Committee, which was a conciliation committee, could be invested with functions of conciliation only if the parties had made the optional declaration provided for in article 41 of the International Covenant on Civil and Political Rights.[4]

10. The question of compulsory arbitration or adjudication for settling disputes about the interpretation or application of the provisions of a convention had also been raised at the Conference on the Law of the Sea in 1958, the Conference on Diplomatic Relations in 1961 and the Conference on Consular Relations in 1963, and optional protocols had been adopted on the subject. The question had been further discussed by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, but no provisions on compulsory arbitration or adjudication had yet been accepted.

11. The question to be faced was how to prevent unilateral and arbitrary denunciation of treaty obligations. The Commission had proposed a twofold solution. First, it had defined, as precisely and objectively as possible, the conditions under which the various grounds of invalidity, termination and so on, might be invoked, and secondly, it had included article 62, which prescribed a procedure whereby a State invoking any grounds of invalidity, termination, etc., must give notice to the other parties regarding its claim, allowing them time to make objections. The article went on to provide that, if objection was raised, a solution should be sought through the means listed in Article 33 of the Charter.

12. As was started in paragraph (5) of the commentary, the Commission had been of the opinion that if, after recourse to one of the means indicated in Article 33, the parties reached a deadlock, it would be for each Government to appreciate the situation and to act as good faith demanded. There would also remain the right of every State, whether a Member of the United Nations or not, to refer the dispute to the competent organ of the Organization. If parties had accepted obligations based on good faith, their performance must also be ultimately based on good faith, and a State acting in bad faith would be violating its general obligations under international law to settle its disputes by peaceful means in such a manner that international peace and security were not endangered.

13. A compulsory settlement procedure would be an adequate remedy against a State invoking grounds of invalidity, termination, etc., in an arbitrary manner, but

[3] *Ibid.*

[4] The text of the Covenant is annexed to General Assembly resolution 2200 (XXI).

the reverse side of the coin had not been given due consideration, namely, the possibility that a party might raise frivolous objections and involve the legitimate claimant State in protracted and expensive proceedings.

14. Article 62 provided, as the Commission had stated in paragraph (6) of its commentary, "a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty". The convention would constitute the fundamental law of treaties and would regulate the entire field of the conclusion, continuation or termination of treaties; and the Conference should not therefore decide in haste on settlement procedures which might hinder the growth of treaty law and of the law of settlement procedure itself. The Conference should confine itself to preventing unilateral and arbitrary denunciation of treaty obligations. Small and developing States did not have adequate advisory staffs or arbitrators to spare for compulsory arbitral procedures, and for a few years they would have to depend on the resources of the more developed States. The expense involved in compulsory arbitration or other procedures might also be beyond their capacity to bear. He would support the Commission's draft of article 62 in its present form.

15. Mr. MATINE DAFTARY (Iran) said that while there seemed to be a wide measure of agreement on article 62, or at least on paragraph 3, its key provision, a number of delegations wanted to fill the gaps in that provision by establishing a whole series of new institutions for the application of Article 33 of the Charter. All that would make an extremely cumbersome provision. Indeed, he wondered how a large conference could hope to succeed in a few days where the International Law Commission had failed after working on its draft for more than five years.

16. Any government wishing to submit a dispute on the interpretation of the convention to the compulsory jurisdiction of the International Court of Justice could follow the procedure laid down in Article 36 of the Court's Statute. The Commission's draft on arbitral procedure had not found favour with governments because of their excessively cautious attitude, and his efforts at the Conferences on the Law of the Sea and on Diplomatic Intercourse and Immunities to persuade States to accept the compulsory jurisdiction of the International Court had been unsuccessful. Perhaps the International Law Commission could be asked to deal with the problem of the reference of disputes to the means of settlement laid down in Article 33 of the Charter. In the meantime it would appear that article 62, as drafted by the Commission, was the highest measure of common ground that could be found among governments: perhaps a small working group, possibly consisting of the sponsors of the amendments, could prepare, before the Conference met again the following year, an optional protocol concerning the submission of disputes to an arbitral tribunal or to the International Court.

17. Mr. SUPHAMONGKHON (Thailand) said that it would be ideal if, in relations between States, the same procedure could be applied as in municipal law, where a conflict between two parties on the application or the validity of a contract could be settled, failing any other acceptable arrangement, by referring the case to a competent court of justice. Unfortunately that stage had not yet been reached in international relations. Compulsory judicial settlement or arbitration of disputes in international relations remained the ultimate objective. In present world conditions, however, it would be rather ambitious to insist upon them as the only form of solution of international disputes.

18. That did not mean that governments rejected arbitration or judicial settlement. All governments, including that of Thailand, had in fact included provision for those modes of settlement in an increasing number of recent bilateral and multilateral treaties. None the less, from there to the concept of the general justiciability of all treaty disputes was a step that States might hesitate to take without further study. Compulsory jurisdiction would undoubtedly be the law of the future. Meanwhile, realism indicated the need to accept article 62 as the possible law of the present.

19. Mr. JELIC (Yugoslavia) said that the Yugoslav Government, in its comments, had expressed its satisfaction with article 62 and with the International Law Commission's conclusion that it would not be realistic to provide for compulsory adjudication.

20. A number of amendments had been submitted providing, in one form or another, for compulsory arbitration. They all had valuable features. The Swiss amendment (A/CONF.39/C.1/L.347) would adroitly neutralize the political factor in the settlement of disputes. The United States amendment (A/CONF.39/C.1/L.355) embodied the idea of a commission representing the various legal systems of the world; the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) provided for a permanent list of conciliators; the Uruguayan amendment (A/CONF.39/C.1/L.343) contained a valuable reference to Articles 35 and 36 of the Charter.

21. In itself, the idea of compulsory arbitration would not in principle be unacceptable to the Yugoslav delegation. But the real problem was to ensure universal acceptance of the future convention, and it must be recognized that to many delegations compulsory adjudication or arbitration was not acceptable. It would therefore not be realistic at the present stage to make provision for it. He did not believe that, without compulsory arbitration, the whole treaty system and the *pacta sunt servanda* rule would crumble. The system embodied in Article 33 of the Charter had been accepted by all for disputes such as those relating to political matters, economic questions and boundary problems, any of which could affect the vital interests of a State. There was therefore no reason why the same reliance should not be placed on Article 33 for disputes relating to treaties.

22. It would not be wise to try to settle the problem of compulsory arbitration by means of a vote until efforts had been made to reach an agreed solution. As between the present text of article 62 and compulsory arbitration, there was room for accommodation. One solution could be an optional protocol; another might be to render compulsory only the conciliation procedure. Yet other solutions might be put forward.

23. If a generally acceptable formula were not found, the Yugoslav delegation would vote in favour of article 62.

It reserved its final position on the French amendment (A/CONF.39/C.1/L.342).

24. Mr. CALLE Y CALLE (Peru) said that his delegation had submitted an amendment to article 39 (A/CONF.39/C.1/L.227), to make it clear that a treaty would be void only if invalidity had " been established as a result of the application of the procedure laid down in article 62 ". It had also submitted an amendment (A/CONF.39/C.1/L.230) to article 49, the purpose of which had been to stress that, for a treaty to be void under that article, it must be established that the treaty had been procured by an illegal threat or use of force. He must now once again emphasize the need for procedural safeguards in respect of such articles as articles 42 to 59. Cases of conflict with the rule of *jus cogens* also required impartial elucidation and determination. In fact, it was not only the articles on invalidity and termination which called for procedural safeguards. Other articles of the draft contained references to such vague concepts as " the object and purpose of the treaty " and called for similar safeguards for their application.

25. The Cuban amendment to article 62 (A/CONF.39/C.1/L.353) would exclude from the application of article 62 the cases envisaged in articles 48, 49 and 50. If that amendment were to be adopted, an allegation of invalidity on grounds of coercion, or of violation of a rule of *jus cogens*, would not be subject to impartial examination. The result would be to create a situation of inequality as between the State alleging invalidity and the other party or parties to the treaty. A party contesting an allegation of invalidity would thus be unable to secure an objective settlement of the dispute.

26. In the formulation of the various substantive articles, the general approach had been very progressive, and many quite broad provisions had been adopted. It was unfortunate that a similarly progressive spirit had not been shown with regard to the settlement of disputes, and that article 62 went no further than to restate the contents of Article 33 of the Charter.

27. He noted that there was general agreement that the right to invoke grounds of invalidity, termination or suspension should be subject to procedural safeguards, so as to avoid unilateral or arbitrary action by one of the parties to a treaty.

28. The amendments by Japan (A/CONF.39/C.1/L.339), Uruguay (A/CONF.39/C.1/L.343), Switzerland (A/CONF.39/C.1/L.347), the United States (A/CONF.39/C.1/L.355), and the thirteen States (A/CONF.39/C.1/L.352/Rev.1/Corr.1) all purported to supplement the provisions of article 62 by providing adequate procedural machinery for the application of the future convention on the law of treaties. The Uruguayan amendment (A/CONF.39/C.1/L.343) had the special merit of specifying that a party wishing to invoke a ground of termination, invalidity or suspension must accept in advance the Charter obligations on pacific settlement and must undertake to abide by any recommendation of a competent United Nations organ. All those amendments took as their starting point the situation to which the application of article 62, paragraph 3, as it now stood, might in the end give rise. They provided for compulsory means of settlement only for the case in which no solution had been reached by the means specified in Article 33 of the Charter. Those supplementary means of settlement would be compulsory but not generally mandatory, for States parties to the future convention on the law of treaties would remain absolutely free to accept a compulsory adjudication or arbitration that was restricted to the specific purposes of the convention.

29. Article 62 as it now stood represented *lex lata* in so far as the settlement of disputes was concerned, since it simply referred back to Article 33 of the Charter. The amendments to which he had referred were *de lege feranda* and represented progressive development.

30. He wished to place on record his delegation's view that article 62, in whatever form it was finally adopted, would apply only to the States parties to the future convention on the law of treaties; and, like the whole of that convention, it would apply only to treaties concluded after the entry into force of the convention. Furthermore, all provisions on procedural matters must be understood as being without prejudice to the methods and procedures used in the past by States for the settlement of disputes, by virtue of treaties which included specific provisions on such settlement, or by virtue of other treaties, particularly regional treaties, on the settlement of disputes.

31. All the amendments contained useful elements, and the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) constituted an acceptable basis for discussion. His delegation would support any proposal for the setting up of a working group to endeavour to devise a formula likely to attract the widest possible support for the future convention.

32. Mr. YAPOBI (Ivory Coast) said that, while it was true that the provisions of Article 33 of the Charter reflected the existing position, they were not sufficient as far as the draft convention on the law of treaties was concerned. Paragraph 3 of article 62 provided that the parties could, if they so agreed, refer a dispute on the invalidity or termination of a treaty to adjudication or arbitration. But no solution was provided for the case in which the parties could not agree on a means of settlement. In view of the grave consequences which would flow from the application of any one of the substantive provisions on invalidity or termination, an impossible situation would thus be created.

33. His delegation could not accept a legal vacuum. It would be inadmissible to provide for grave sanctions, such as invalidity or termination, without at the same time making some provision for the implementation of those sanctions. It was for those reasons that his delegation had joined with twelve other delegations in sponsoring the amendment contained in document A/CONF.39/C.1/L.352/Rev.1/Corr.1.

34. Much had been made of the need to respect the sovereign equality of States. But a State which became a party to a treaty could not invoke its sovereignty in order to evade a provision of the treaty. A claim to absolute sovereignty in such circumstances would amount to a denial of international law. It was in the interests of the smaller countries that some machinery should be set up to ensure the observance of treaty provisions. In the absence of such machinery, it would be the smaller countries that would suffer, since inevitably the strong

would impose their views on the weak. The inclusion in the draft convention of provisions on impartial determination of disputes by an authority accepted in advance by the parties would uphold the principle of equality in international relations. Failure to include provision for such machinery would make the future convention on the law of treaties void of all content. The purpose of procedural rules was to provide the means for the application and enforcement of the substantive rules. One set of rules was the indispensable complement of the other.

35. He would urge the opponents of the compulsory objective determination of disputes to put aside narrow nationalist considerations and join in taking a step forward in ensuring the paramountcy of international law. Such an approach would be realism indeed and would respond to world needs in the twentieth century.

36. Mr. FERNANDO (Philippines) said that the overriding concern of all delegations was to formulate a convention which would be both progressive and workable. In that sense, article 62 was a crucial provision, for although considerable advances were implicit in the articles already approved, the work of the Conference might be doomed to futility unless the procedure to be followed with regard to claims of invalidity and grounds of termination, withdrawal or suspension was really effective. Although there seemed to be a wide variety of opinions on possible approaches to a solution of the problem raised in paragraph 3 of article 62, there were indications that eventual agreement might be reached, even if it were only on postponing the final decision.

37. It was to be hoped, however, that all participants would accept the view that some kind of third-party procedure was essential. If the decision were left to the parties themselves, the stronger States might be tempted to impose their will arbitrarily. If the fundamental principle of third-party procedure for settling disputes was accepted, the next question would be, what form that procedure should take. The Japanese delegation proposed in its amendment (A/CONF.39/C.1/L.339), which had been supported by the United Kingdom delegation, that all disputes relating to *jus cogens* should be referred to the International Court of Justice. The Philippine delegation would go even further in suggesting that all the other questions raised in Part V should be referred to the Court, since they were essentially legal in character, irrespective of any political implications they might contain; they must be settled by jurists skilled in international law and dedicated to the ideals of justice and impartiality.

38. The Philippine delegation was fully aware of the opposition to which such a proposal might give rise, but would suggest that such opposition was not insuperable. Further reflection might minimize the tenacity with which the converse view was held. Indeed, it was not impossible to increase the membership of the Court, in order to ensure not only a wider geographical distribution, but, what was more important, a more equitable representation of the various legal systems. Such a step would undoubtedly extend the scope of the compulsory jurisdiction of the Court; but if the necessary reforms were made in the composition of the Court, the choice of judges, their number and the procedure to be followed, objections to the Court's compulsory jurisdiction might become less intense. Certainly the Philippine delegation hoped that, whatever solution were adopted in connexion with article 62, the result would be a more sympathetic and less uncharitable attitude towards the International Court of Justice.

39. Mr. SAMAD (Pakistan) said that the International Law Commission had rightly described article 62 as a key provision for the application of Part V of the convention, since the arbitrary assertion by one party, in the face of an objection from another party, of the grounds on which a treaty should be invalidated, terminated or suspended, would jeopardize the security of treaties.

40. In paragraph 3 of article 62, the Commission proposed a procedure based on Article 33 of the United Nations Charter. But that procedure was based on the consent of the parties, and it was not clear what would happen to a treaty when the parties could not agree to any of the means of settlement set out in Article 33. In particular, the Commission's text did not make it clear whether, in such cases, the treaty would be terminated or whether it would continue in force. The Pakistan delegation was convinced that any subjective interpretation would constitute a threat to peace and to the stability of treaties; and it endorsed the views of those delegations which proposed third-party procedures for the settlement of disputes under Part V as a whole, and especially under articles 50 and 61: peremptory norms of general international law must be authoritatively determined by the highest judicial organ of the United Nations.

41. Third-party procedures might take the form of conciliation, arbitration and judicial settlement in succession; but conciliation often led to a deadlock, and his delegation considered that the means offered in the Commission's paragraph 3 were inadequate. It was in favour of compulsory conciliation or arbitration, or judicial settlement, in that order of priority, at the request of either party. It therefore supported the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1), and it was also in favour of the Swiss proposal (A/CONF.39/C.1/L.348) and the United States amendment (A/CONF.39/C.1/L.355), in that order of preference. The Japanese amendment (A/CONF.39/C.1/L.339) seemed to be too inflexible with regard to disputes arising under articles 50 and 61, although its proposals with regard to other disputes under Part V were acceptable in principle. The Uruguayan amendment (A/CONF.39/C.1/L.343) also had some merit, but he could not support the Cuban amendment (A/CONF.39/C.1/L.353), the effect of which would be to delete any reference to article 50.

42. Despite the statement in paragraph (4) of the commentary that the article represented the highest measure of common ground that could be found among governments, as well as in the Commission, on that question, delegations would surely agree that the matter needed to be explored further before the second session of the Conference, in order to provide for a more adequate machinery than that set out in paragraph 3 of the Commission's text. In view of the exceptional importance that the convention would assume in international relations, it seemed essential to provide for an ultimate means, failing agreement between the parties, whereby

authoritative rulings or decisions could be given by a third party or tribunal at the request of either party, in all cases of disputes concerning the interpretation and application of treaties. The cost of such procedures to the parties should not deter the Conference from accepting more adequate means of settlement, in the interests of justice.

43. Mr. EUSTATHIADES (Greece) said that the problem before the Committee was one of almost unprecedented complexity, particularly since it naturally had considerable political implications. Despite those political aspects, however, it would be undesirable for States to adopt collective political attitudes to article 62, resulting, for instance, in the alignment of the smaller and weaker countries against the large and powerful States. Greece's experience of a century of independence following a long period of foreign domination placed its representative in a good position to urge the smaller, new States to look forward, rather than back to the colonial past, and to bear in mind that their dearly won independence could not be maintained unless stability prevailed over uncertainty in the law of treaties.

44. The procedure set out in article 62 was, so to speak, a two-edged sword, and indeed it might well be that in future the powerful States would consider it to be in their interest to try to evade former treaty obligations; the fact that the convention would govern future treaties clearly militated in favour of the smaller States, and they should resist the urge to allow their attitude towards article 62 to be influenced by political-group considerations, for the consequent loss in treaty stability would outweigh the undoubted advantages they had gained through the approval of some of the substantive provisions of Part V.

45. The International Law Commission's text of article 62 should be considered from the point of view of whether it in fact succeeded in eliminating a danger to the security of treaties which would lie in arbitrary application of the provisions of Part V. The Committee should appreciate the Commission's wisdom in confining itself to setting out the general rule that disputes under Part V must be settled peacefully, instead of exceeding its terms of reference by laying down more specific rules. Nevertheless, it was doubtful whether that general rule provided the guarantees essential for smaller and new States.

46. Some speakers in the debate had asked what would happen after negotiations failed and the other means referred to in Article 33 of the Charter had to be resorted to: who would decide which means would be used? What body would take the decision after the means had been chosen? Article 33 left the choice of means to the parties, but what would happen if they could not agree on a choice? And who would be the parties involved: the parties to the dispute, all the parties to the treaty, or, in the case of disputes under articles 50 and 61, the entire international community?

47. It had been argued that the decisions in question could be taken by the existing competent organs of the United Nations, but that solution had two shortcomings. First, those organs were essentially concerned with disputes constituting a threat to international peace and security or to friendly relations between States, and by no means all disputes arising under Part V could be so described. Secondly, even in such serious cases, it might be undesirable to use the basically political approach of the existing United Nations organs.

48. It therefore seemed desirable, in the case of most disputes under Part V, to seek a solution in an area less dominated by political considerations than that of the Charter. The means enumerated in Article 33 (1) of the Charter, might be resorted to, but in the absence of agreement between the parties on the choice of means, uncertainty would still prevail in treaty relations. Alternatively, provision might be made for the inclusion in future treaties of clauses on the settlement of disputes under Part V; but that solution also presumed the prior agreement of the parties, and might therefore jeopardize the very conclusion of multilateral treaties between large numbers of States. It could be argued that States would in time become accustomed to including such clauses in treaties; that would not, however, apply to States which did not ratify the convention on the law of treaties, and in any case, the international community could not afford the luxury of leaving treaty relations in a state of instability for a long period.

49. Unless a specific apolitical procedure could be found, treaty law would finally be based either on the decisions of political organs and national parliaments, or on the good faith of the contracting parties. His delegation considered that the certainty of an objective procedure was preferable to trusting in unilateral good faith. A pre-established and sure procedure must offer smaller States the essential guarantees of competence, impartiality, and rapidity: it was in the light of those minimum criteria that his delegation had studied the amendments before the Committee.

50. The United States amendment (A/CONF.39/C.1/L.355) met the criterion of competence by providing for a commission on treaty disputes, consisting of highly qualified jurists representing the principal legal systems of the world. The Japanese amendment (A/CONF.39/C.1/L.339) had the advantage of distinguishing between the *jus cogens* articles and the rest of Part V, but was unlikely to meet with widespread approval owing to its provision for compulsory resort to the International Court of Justice. The Swiss proposal (A/CONF.39/C.1/L.347) had considerable merit: it contained the sound provision of compulsory resort to Part IV, Chapter III, of the 1907 Hague Convention for the Pacific Settlement of International Disputes,[5] it did not provide for unduly long delays, and its paragraphs 6 and 7 eliminated all possible ambiguity. All those amendments provided for third-party procedures, but were still far from attaining the goal of watertight guarantees for the smaller States.

51. In the first place, his delegation considered that solution in the early stages should be optional, not compulsory. Secondly, some of the amendments provided for a very long period for settlement: for example, the procedure set out in the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) would take about four years to complete. Thirdly, the Swiss amendment, though admirable in other respects, provided that any party could unilaterally bring a dispute before the International Court of Justice; that proposal could hardly

[5] *British and Foreign State Papers*, vol. 100, pp. 307-311.

gain widespread support. Finally, some of the amendments advocated impartial settlement by only three people: surely, the degree of security of the guarantees would be commensurate with the number of objective opinions brought to bear on the dispute, and it might be wise to consider establishing a special permanent arbitral body.

52. Many important questions had been left open. Thus, the Committee had not yet considered the serious problems of the consequences of invalidity, dealt with in Section 5 of Part V, to which article 62 was also related. Moreover, if invalidity were claimed in connexion with a collective treaty and some parties objected to the claim while others did not, it was not clear what effect the decision of a competent organ would have in respect of the non-objecting States. Moreover, complicated situations might arise if different parties to a collective treaty agreed on different means of settlement, and the competent bodies reached different verdicts.

53. In view of those outstanding problems and of the many others that might arise, it would be most unwise of the Committee to adopt any hasty decision on article 62. In particular, delegations should not adopt positions dictated by political affiliations, but should bear in mind that the establishment of sound guarantees was of primary importance to all States. Such an important decision could not be taken under pressure of time, and should be postponed for mature reflection.

The meeting rose at 1.5 p.m.

SEVENTY-FOURTH MEETING

Thursday, 16 May 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) and *Proposed new article 62* bis *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 62 of the International Law Commission's draft and the proposed new article 62 *bis*.

2. Mr. El DESSOUKI (United Arab Republic) said that the International Law Commission's draft article on the procedure to be followed in cases of invalidity provided a suitable basis for regulating that difficult and controversial matter. He congratulated the Commission on having provided the Conference with a comprehensive and detailed formula which could be accepted by States as a general rule, since the proposed wording was balanced and effective.

3. He agreed with previous speakers that the article should be retained as it stood, though it would also be wise to take account of other evidence of recent State practice, including that to be found in the Charter of the Organization of African Unity. Article 19 of that Charter laid down that member States undertook to settle all disputes among themselves by peaceful means, and to that end had decided to establish a commission of mediation, conciliation and arbitration, whose composition and terms of reference were to be defined in a separate protocol. All the participants in the Conference regarded article 62 as the key article in Part V of the convention, but it was also necessary to stress the importance of the relations between that article and Article 33 of the United Nations Charter, which laid down the principle that States should settle their international disputes by peaceful means in such a manner that international peace and security were not endangered. Some delegations had said they were in favour of compulsory arbitration because it would be a safeguard for small States. He could not agree with that view; compulsory arbitration, or any other procedure of that kind, would only be satisfactory if the parties to a dispute were equal in all respects. The principle of compulsory arbitration could be applied to regional treaties concluded by regional organizations, but not to a higher convention such as that on the law of treaties.

4. The delegation of the United Arab Republic was in favour of article 62 as it stood.

5. Mr. DE CASTRO (Spain) said his delegation had always attached great importance to good faith in international relations and considered that the progressive trend in international law should be encouraged. It hoped that the Committee would succeed, in an atmosphere of conciliation and harmony, in working out a system satisfactory to the great majority of States.

6. The basic idea of article 62 should be regarded as an important contribution towards the completion of the draft convention. The article was not perfect, but it provided a useful starting point and a basis for negotiation. The fears expressed about it seemed exaggerated. Some speakers had criticized the article because it did not provide for any system of compulsory settlement of disputes; others refused to consider compulsory jurisdiction.

7. The Spanish delegation considered that in order to maintain international public order and ensure good relations between States, a system of compulsory jurisdiction must be established, with firm guarantees of impartiality and efficacy. It would be difficult to devise such a system: the Committee could not do so just by adopting a few amendments or by voting. In order to allow delegations time for reflection, no decision should be taken at the present session of the Conference. A working party representing all the different views might perhaps be set up to make a careful examination of all the amendments.

8. Mr. HAYES (Ireland) said his delegation considered it essential to avoid a situation in which the invalidity or termination of a treaty on any of the grounds set out in Part V would be determined by unilateral decision, for that would undermine treaty law and weaken respect for international obligations. Article 62 should therefore be strengthened. It should provide that disputes, if they could not be settled by agreement between the parties, must be submitted to machinery for compulsory and binding independent adjudication. That machinery,

whatever its form, must be capable of producing a decision within a reasonable time and provision must be made for the operation of the treaty pending the final decision.

9. The Japanese (A/CONF.39/C.1/L.339), Swiss (L.347), United States (L.355) and thirteen-State (L.352/Rev.1/Corr.1) amendments contained interesting ideas and proposed systems which were acceptable in principle and workable in practice. The Irish delegation was prepared to support any of those amendments, or indeed any combination of proposals drawn from them which recommended itself to a substantial majority of States.

10. Mr. DADZIE (Ghana) said his delegation had already expressed the view that the convention must provide more effective machinery for the settlement of disputes. Article 62 as it stood was incomplete for the purposes of the convention. His Government's decision to advocate something stronger for the settlement of disputes than the system outlined in article 62 had not been taken lightly. Earlier, his Government had believed the article to be sufficient, so that at the meeting of the Asian-African Legal Consultative Committee held in New Delhi, the delegation of Ghana had supported it. After very careful consideration, however, his Government had come to the conclusion that, if the substantive articles of the draft convention were adopted, it would be in the interests not only of Ghana but also of the international community to strengthen the provisions of article 62. The Committee had approved the basic substantive articles and must now take a decision on article 62.

11. One question his delegation had been much concerned with was that of the International Court of Justice, which was the principal legal organ of the United Nations. It was the duty of jurists, both on the municipal and on the international plane, to uphold the dignity of legal tribunals and to encourage respect for their decisions. But unfortunately the International Court of Justice, which was the most important court in the world, was suffering from a crisis of confidence that must disturb all jurists. What was to be done? Should the jurisdiction of the Court be refused in all circumstances because of a lack of faith in the justness of some of its decisions, or should corrective measures be taken in the proper forum and at the appropriate time, in order that the Court's proceedings might adequately reflect the values of the modern world, thanks to a more rational and equitable composition of its membership? Those were questions that all countries would have to answer before long.

12. Ghana, like many other countries, had not accepted the compulsory jurisdiction of the International Court of Justice *ipso facto* and without special agreement under the provisions of Article 36 of the Court's Statute. However, there was nothing to indicate that, if it had a dispute with another State about the interpretation of a treaty, Ghana would be unwilling to submit to the jurisdiction of the International Court of Justice, despite the Court's unfortunate decision in the *South West Africa* case. The reason why Ghana had not declared itself unconditionally in favour of compulsory jurisdiction was that it believed there were disputes which, though they might relate to a breach of an international obligation, were not amenable to judicial settlement and could be better settled in a political context.

13. In the light of those considerations, it would not have been difficult for his delegation to accept the jurisdiction of the International Court of Justice for the interpretation of treaties. His delegation was realistic, however, and recognized that the time was not propitious for inserting that formula in the draft convention. It had therefore adopted a very flexible position, but it held firmly to the view that the convention must provide effective machinery for objective and independent interpretation. If the Conference was codifying *lex lata* in the international sphere, it must also codify the system for settlement of disputes. For centuries, international courts and arbitral tribunals had been the corollary of international law. What would international law be without the decisions of such bodies, which were so profusely cited by the International Law Commission in its commentaries?

14. Not one delegation had questioned the need for, and usefulness of, article 62. All the amendments before the Committee took the draft article as their starting point and were complementary to it. Some of those amendments were good and some were not, but they all suggested that article 62, as it stood, fell short of its logical conclusion. Two schools of thought had dominated the Conference since it had begun; one wished to retain the draft articles submitted by the International Law Commission, and the other wished to make sure that the articles adopted did not contain any element that might cause instability in treaty relations. Draft article 62 did not quite measure up to the second criterion, and in those circumstances it did not seem possible to insist on its retention as it stood. The Committee should therefore examine the various amendments carefully to see whether it could find a common denominator which would constitute a satisfactory compromise.

15. His delegation could not accept the view put forward by the representative of Israel, that all or most disputes likely to arise from the operation of the convention would not be amenable to the jurisdiction of a court and would have to be settled otherwise than by judicial or arbitral tribunals. Of course, some of those disputes might include elements that were preponderantly political, but if they were questions of the interpretation of the provisions of a treaty, they might be eminently amenable to judicial settlement. That was why article 62 provided for all sorts of procedures and why all the amendments were based on its text. His delegation shared the view of the authors of amendments, that a decision must eventually be arrived at that was binding on the parties to the dispute.

16. His delegation did not understand the argument that independent third party settlement was contrary to the interests of small States. Experience had shown that, in the absence of such settlement machinery, it was easier for powerful States to obtain unfair advantages. The question was how to ensure the impartiality of judicial bodies. The point had been made that their members had prejudices resulting from their educational, economic and social backgrounds, which were apt to be reflected in their decisions. But the International Law Commission's draft articles had been prepared by men with very

different backgrounds, who had nevertheless managed to produce a text that had been warmly acclaimed.

17. It had also been urged that the procedure for the settlement of disputes established by the Organization of African Unity was voluntary and that that was the kind of system that should be adopted. It was open to question, however, whether the advocates of such a system were satisfied with the present situation in certain parts of Africa.

18. Several delegations had suggested that the decision on article 62 should be postponed until the next session. His delegation was opposed to any move to postpone decisions on important and controversial articles; the Conference had stated that it would examine 75 articles, and that was what it should do. His delegation suggested that informal discussions should be held between the interested parties and that the vote on article 62 should be postponed until Tuesday, 21 May. That would allow delegations time to consult their Governments, if they needed to do so.

19. Sir Humphrey WALDOCK (Expert Consultant) said that the Liberian representative had asked a question about the words " except in cases of special urgency ", in paragraph 2. Those words had been intended by the International Law Commission to provide for cases of sudden and serious breach of a treaty which might call for prompt reaction by the injured party to protect itself from the consequences of the breach. That same preoccupation seemed to have led the delegation of Uruguay to submit its amendment (A/CONF.39/C.1/L.343).

20. The debate had shown that delegations attached great importance to the formulation of article 62. The Commission's observation that it was a key article had been cited repeatedly. It was interesting to note that, although the provisions of the article had met with strong criticisms, no delegation had questioned the need to provide safeguards for the security of treaties in connexion with the application of the rules in Part V. It was not the practice of the Commission, when submitting draft conventions to the General Assembly, to include a general article on the settlement of disputes concerning their interpretation or application. The present draft contained no such general article either. But the Commission had nevertheless thought it essential to provide procedural safeguards for the application of Part V, if the rules it contained were not to involve a serious risk for the stability of treaties and be a source of international friction. It had recognized, however, that the question of such safeguards had some connexion with the procedure for the settlement of disputes between States.

21. The Commission had concluded that the article, as provisionally adopted in 1963, represented the highest measure of common ground that could be found among Governments on the question. It had also considered that the procedures prescribed in article 62 were the minimum required as checks on arbitrary action. It had intended those procedural checks to apply to all the grounds of invalidity, termination and suspension, including those in articles 48, 49 and 50. The opening words of the article, "A party which claims that a treaty is invalid...", were designed to cover both cases in which a State invoked a defect of consent and cases in which it alleged invalidity on grounds of *jus cogens*. Those words had been criticized as not making the point entirely clear. The French amendment (A/CONF.39/C.1/L.342) was an improvement in that respect. It followed from what he had said that the Cuban proposal (A/CONF.39/C.1/L.353) to exclude articles 48, 49 and 50 from the operation of article 62 was contrary to the Commission's intention.

22. Paragraph 3 had been the subject of a great deal of criticism. In it, the Commission had stipulated that, in the event of a dispute, the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter. Although the Commission had not thought that it would go beyond Article 33, it had nevertheless considered the possibility of the parties reaching a deadlock, in which case it would be for each Government " to act as good faith demands ", as stated in paragraph (5) of the commentary. Many delegations thought the provisions insufficient; that was a matter for the Conference to decide. It was to be hoped that the Committee of the Whole would succeed in working out a procedure acceptable to all States.

23. Paragraph 5 had been criticized by implication in the Swiss and Uruguayan amendments (A/CONF.39/C.1/L.347 and L.343); that criticism seemed justified to some extent. The question had not been raised during the discussion but it deserved consideration.

24. Mr. MWENDWA (Kenya) moved that the discussion on article 62, the various amendments thereto and the proposed new article 62 *bis* be adjourned until Tuesday 21 May at the latest, in order to allow delegations time to study them more thoroughly and hold informal consultations.

25. Mr. DADZIE (Ghana) seconded the Kenyan representative's motion.

26. The CHAIRMAN put the motion for adjournment to the vote.

The motion for adjournment was adopted. [1]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 27 to 34 adopted by the Drafting Committee.

Article 27 (General rule of interpretation) [2]

28. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 27 adopted by the Drafting Committee read as follows:

"*Article 27*

" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

" 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

" (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

[1] For resumption of the discussion of article 62 and the proposed new article 62 *bis*, see 80th meeting.

[2] For earlier discussion of article 27, see 31st to 33rd meetings.

" (*b*) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

" 3. There shall be taken into account, together with the context:

" (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

" (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

" (*c*) any relevant rules of international law applicable in the relations between the parties.

" 4. A special meaning shall be given to a term if it is established that the parties so intended. "

29. The Drafting Committee had added the words " or the application of its provisions " at the end of paragraph 3 (*a*); that addition was based on the Pakistan amendment (A/CONF.39/C.1/L.182). In paragraph 3 (*b*), it had brought the English text into line with the French, Russian and Spanish texts by substituting the word " agreement " for the word " understanding ". It had rejected the other amendments referred to it.

30. Mr. HARRY (Australia) said he would like to ask why the Drafting Committee had rejected his delegation's amendment (A/CONF.39/C.1/L.210). The proposed deletion of the word " subsequent " in paragraph 3 (*a*) had been designed to bring out the point that any agreement between the parties regarding the interpretation of a treaty must be taken into account, whether such agreement had been reached before or after the conclusion of the treaty.

31. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had studied the Australian amendment carefully, but had considered that the word " subsequent " was absolutely necessary in paragraph 3 (*a*), because if the agreement between the parties on interpretation were not subsequent to the conclusion of the treaty, it might be regarded as part of the context. Paragraph 2 stated that " the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty ". An agreement relating to interpretation made when the treaty was concluded was therefore part of the context. Paragraph 3 dealt with another matter, for it provided, among other things, that any subsequent agreement should be taken into account together with the context. Thus the agreements it referred to did not have the same value as concomitant agreements relating to the interpretation of the treaty, which were regarded as part of the context of the treaty.

32. Paragraph (ii) of the Australian amendment, to insert the word " common " before the word " understanding ", related only to the English version, in which the word " understanding " had now been replaced by the word " agreement "; the French and Spanish versions used the words " *accord* " and " *acuerdo* ". Clearly, an agreement was always common and could not be unilateral.

33. Mr. HARRY (Australia), thanking the Chairman of the Drafting Committee for his explanation, said it seemed to him that an agreement might form part of the context if it was made in connexion with the conclusion of a treaty, even if it was not made at exactly the same time as the treaty was concluded.

Article 27 was approved.

Article 28 (Supplementary means of interpretation) [3]

" *Article 28*

" Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

" (*a*) leaves the meaning ambiguous or obscure; or

" (*b*) leads to a result which is manifestly absurd or unreasonable. "

34. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had adopted article 28 without change. It had rejected the Spanish amendment (A/CONF.39/C.1/L.217) to insert the phrase " subsequent acts of the parties " because it considered that the words " any subsequent practice ", in article 27, were sufficient.

Article 28 was approved.

Article 29 (Interpretation of treaties in two or more languages) [4]

35. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 29 adopted by the Drafting Committee read as follows:

" *Article 29*

" 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

" 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

" 3. The terms of the treaty are presumed to have the same meaning in each authentic text.

" 4. Except in the case mentioned in paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. "

36. As proposed in the United States amendment (A/CONF.39/C.1/L.197), the Drafting Committee had made the first sentence of paragraph 3 of the International Law Commission's text into a separate paragraph. The remainder of paragraph 3 had become the new paragraph 4. The Drafting Committee had considered that the first sentence of paragraph 3 should form a separate paragraph because the idea it expressed was quite different from that stated at the end of the paragraph.

[3] For earlier discussion of article 28, see 31st to 33rd meetings.

[4] For earlier discussion of article 29, see 34th meeting.

37. The Drafting Committee had inserted the word " authentic " between the words " comparison of the " and " texts " in paragraph 4. That insertion was made necessary by the division of paragraph 3 into two separate paragraphs.

38. Adopting the idea proposed in the United States amendment, the Drafting Committee had replaced the words " meaning which as far as possible reconciles the texts " at the end of the article by the words " meaning which best reconciles the texts, having regard to the object and purpose of the treaty ". The Drafting Committee had not accepted the other amendments referred to it.

Article 29 was approved.

Article 30 (General rule regarding third States) [5]

"*Article 30*

"A treaty does not create either obligations or rights for a third State without its consent."

39. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had rejected the amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.221) and had adopted without change the International Law Commission's text, which clearly stated the principle that a treaty did not create either obligations or rights for a third State without its consent.

Article 30 was approved.

Article 31 (Treaties providing for obligations for third States) [5]

40. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 31 adopted by the Drafting Committee read as follows:

"*Article 31*

"An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing the obligation and the third State has expressly accepted that obligation."

41. The Drafting Committee had carefully considered the Mongolian amendment (A/CONF.39/C.1/L.168) to reverse the order of articles 31 and 32 so that the rights of States would be mentioned before their obligations. The majority of the Drafting Committee had considered that, since those articles dealt with the effects of the rule that a treaty did not create either obligations or rights for a third State, the obligations, to which that rule applied even more strictly than to the rights, should be mentioned first. The provisions relating to obligations were a direct consequence of the principle stated in article 30. With regard to rights, it might be said that the provisions adopted by the International Law Commission established a certain presumption and that they did not strictly apply the principle stated in article 30. The Drafting Committee had therefore preferred not to change the order adopted by the International Law Commission.

42. The Drafting Committee had made only one change in article 31. It concerned the article—in the grammatical rather than the legal sense—used before the word " means "—in French " *moyen* " and in Spanish " *medio* ". In the English and Spanish versions the indefinite article was used, in the French the definite article. The Committee had found the French text more logical and had amended the English and Spanish texts accordingly. The Russian text did not require any change.

Article 31 was approved.

Article 32 (Treaties providing for rights for third States) [5]

43. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 32 adopted by the Drafting Committee read as follows:

"*Article 32*

" 1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

" 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."

44. Article 32 had been referred to the Drafting Committee with the Japanese amendment (A/CONF.39/C.1/L.218) to add the words " Unless the treaty otherwise provides " at the beginning of the last sentence of paragraph 1. The Committee had adopted that amendment, but for stylistic reasons had placed the additional words at the end rather than at the beginning of the sentence.

Article 32 was approved.

Article 33 (Revocation or modification of obligations or rights of third States) [5]

45. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 33 adopted by the Drafting Committee read as follows:

"*Article 33*

" 1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

" 2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State."

46. Article 33 had also been referred to the Drafting Committee with one amendment: that submitted by the Philippines (A/CONF.39/C.1/L.211). The Committee had preferred to retain the International Law Commission's text with only a single change, namely, the deletion of the adjective " mutual " before the word " consent ". The latter term was clearly defined in the text by the phrase that followed it.

Article 33 was approved.

[5] For earlier discussion of articles 30, 31, 32 and 33, see 35th meeting.

Article 34 (Rules in a treaty becoming binding through international custom) [6]

47. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 34 adopted by the Drafting Committee read as follows:

"*Article 34*

" Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such, or as a general principle of law."

48. The Committee of the Whole had adopted two amendments, submitted by Mexico (A/CONF.39/C.1/L.226) and Syria (A/CONF.39/C.1/L.106) respectively, to the International Law Commission's text of article 34. The Mexican amendment added the words " or as a general principle of law " at the end of the article; the Syrian amendment added the words " recognized as such ". The only question before the Drafting Committee had been the order in which the two phrases should be placed. In the original French text of the Syrian amendment, the adjective " *reconnue* " was in the feminine. It was clear, therefore, that the amendment referred only to the expression " customary rule of international law ". The Drafting Committee had therefore placed the Syrian amendment immediately after that expression and before the Mexican amendment, though the latter had been adopted first by the Committee of the Whole.

49. Mr. TAYLHARDAT (Venezuela) said that during the discussion of article 34, the Venezuelan delegation had submitted an amendment (A/CONF.39/C.1/L.223), to delete the article, which it considered to be incompatible with the principle of the sovereignty of States. Except where a rule of *jus cogens* was concerned, Venezuela would not assume obligations it had not formally accepted, still less obligations it had expressly rejected.

Article 34 was approved.

Article 63 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [7]

50. The CHAIRMAN invited the Committee to resume its consideration of the International Law Commission's draft articles.

51. Mr. BINDSCHEDLER (Switzerland), introducing his delegation's amendment to article 63 (A/CONF.39/C.1/L.349), said that the same problem had already been raised in the Swiss amendment to article 39 (A/CONF.39/C.1/L.121), to replace the word " invalidity " by the word " invalidation ". His delegation was opposed to the notion of invalidity *ipso facto* and for that reason proposed that the title of the article be changed to " Instruments of execution ", which was a general notion covering all the measures referred to in article 62 for claiming the invalidity of a treaty and for terminating, withdrawing from or suspending the operation of a treaty.

52. Mr. BRODERICK (Liberia) said that paragraph 2 of article 62 allowed the parties a certain time in which to raise objections and, according to article 63, if no party had raised any objection within that time, the party claiming the invalidity of a treaty or invoking a ground for termination, withdrawal from or suspension of the operation of a treaty must execute an instrument and communicate it to the other parties. If an objection had been raised by another party, however, a solution must be sought in accordance with paragraph 3 of article 62, and for that reason, paragraph 1 of article 63 should not mention paragraph 3 of article 62. Paragraph 1 of article 63 could only apply to paragraph 2 of article 62, that was to say, to cases in which the other parties had raised no objection. Paragraph 2 of article 63 was in conformity with the rule laid down in article 6 concerning full powers.

53. His delegation could not support the Swiss amendment (A/CONF.39/C.1/L.349). The title it proposed was vague and did not bring out the relationship between articles 62 and 63, which had been logically established by the International Law Commission. As to paragraph 1 of the amendment, it would be confusing to refer to the procedures to be followed as " measures " and to call either of them an instrument. According to his delegation's understanding of the International Law Commission's draft, there were two stages, the first being notification and the second communication of the instrument, provided no objection had been raised to the notification.

54. The Liberian delegation would therefore vote in favour of the International Law Commission's text, subject to the deletion from paragraph 1 of the reference to paragraph 3 of article 62.

55. The CHAIRMAN said that the Swiss delegation had requested that its amendment be referred to the Drafting Committee and that consideration of it be deferred until article 39 had been approved.

56. Mr. WERSHOF (Canada) said he would like the Expert Consultant to explain why the International Law Commission had inserted the rule contained in paragraph 2 of article 63. A formal treaty would probably be signed by the Minister for Foreign Affairs, but different Governments had different practices. As far as Canada was concerned, the Head of State and the Head of Government had not signed treaties for a great many years. Moreover, the representative who communicated the instrument would often be the accredited Ambassador, who would therefore be required under paragraph 2 to produce full powers.

57. Sir Francis VALLAT (United Kingdom) said he would like the Expert Consultant to explain two points raised in the Swiss amendment (A/CONF.39/C.1/L.349). First, one of the effects of that amendment seemed to be to delete the expression " pursuant to the provisions of the treaty " from paragraph 1 of article 63. If a notification was to be made in conformity with the provisions of a treaty, it would be made pursuant to the provisions of the treaty and not in virtue of paragraph 1 of article 63. At first sight that idea seemed to be logical, since a treaty might also provide for notification to the depositary, so that it should not be necessary also to provide for communication of the instruments to the

[6] For earlier discussion of article 34, see 35th and 36th meetings.

[7] The following amendment had been submitted: Switzerland, A/CONF.39/C.1/L.349.

other parties in virtue of paragraph 1 of article 63. Secondly, the Swiss amendment would replace the words " paragraphs 2 or 3 " by " paragraphs 1 and 2 ". That part of the amendment seemed to be justified, as it would certainly be necessary to communicate instruments pursuant to paragraphs 1 and 2 of article 62, whereas that was not so evident with respect to paragraph 3.

58. Mr. DE BRESSON (France) said that the Swiss amendment could not be fully appraised until the Committee of the Whole knew what was to be the exact wording of article 62. The French delegation had not submitted any amendment to article 63, as it was convinced that the text of that article depended on the content of article 62. The expression " declaring invalid " in paragraph 1 could have a completely different meaning depending on what system was adopted for the procedures on which the establishment of invalidity might depend.

59. He therefore supported the Swiss delegation's request that its amendment be referred to the Drafting Committee: when it saw the final formulation of article 62, the Committee of the Whole would have to draw its conclusions regarding article 63.

60. Sir Humphrey WALDOCK (Expert Consultant), replying first to the representative of Canada, said that some examples from the past had led the International Law Commission to prescribe the observance of certain forms for the acts referred to in article 62. The Commission had stated the rule in paragraph 2 rather shortly, for although it had considered that its inclusion in the article would be useful, it had not wished to reproduce there the provisions concerning the powers of a State's representative for the conclusion of treaties. The rule might, perhaps, seem a little too strict, but the International Law Commission had thought that in practice it would not cause any difficulty.

61. As to the reference to article 62, article 63 did not apply to the mere notification that might occur under paragraph 1 of article 62; such application would seem to be inconsistent with the general idea of the procedure provided for in article 62. The reference to paragraph 2 raised no particular difficulty. The International Law Commission had considered the reference to paragraph 3 justified because, after the procedures referred to in that paragraph had been gone through, it seemed possible and even probable that they might be followed by some act which fell under article 63. It would be difficult, however, to know whether that was a sound viewpoint until the ultimate fate of the provisions of article 62 was known.

62. In reply to the United Kingdom representative, he said that if the treaty contained detailed provisions on the procedure to be followed with respect to the instruments referred to in article 63, those provisions would, of course, apply. Perhaps the proviso " unless the treaty otherwise provides " should have been added to article 63. But the Commission had considered the more frequent case in which a treaty contained a provision concerning the right of denunciation, but no details of procedure. In that case it would be desirable for the denunciation to be carried out though an instrument communicated to the other parties or the depositary, whichever was appropriate.

63. The CHAIRMAN suggested that article 63 be referred to the Drafting Committee together with the Swiss amendment for consideration in the light of the eventual decision on article 62.

It was so agreed.[8]

Article 64 (Revocation of notifications and instruments provided for in articles 62 and 63)

Article 64 was referred to the Drafting Committee.[9]

Article 65 (Consequences of the invalidity of a treaty) [10]

64. Mr. DE BRESSON (France) said that his delegation had decided to withdraw the first of its amendments to article 65 (A/CONF.39/C.1/L.48). Its other amendment (A/CONF.39/C.1/L.363) was the logical sequel to his delegation's comments on article 39, paragraph 1, and to its amendment to article 62, paragraph 1 (A/CONF.39/C.1/L.342). The French delegation had pointed out at that time that the inclusion of a sentence on the establishment " of the invalidity of a treaty " in article 39, paragraph 1, confused the whole question of the conditions for establishing invalidity, and it had therefore supported the Swiss proposal (A/CONF.39/C.1/L.121) to delete that sentence and had suggested that it be specified in article 62 that that article definitely governed all the cases of invalidity set out in Part V. The French delegation now considered it desirable, in order to make the system absolutely clear, to specify at the beginning of article 65, which dealt with the consequences of the invalidity of a treaty, that the effect of the various grounds of invalidity which could be invoked under articles 43 to 50 and under article 61 was the invalidity of the treaties impeached under those articles, and that such invalidity could only be established by the procedures set out in article 62.

65. The French delegation believed that, without in any way changing the substance of Part V, it would thus be possible to achieve more satisfactorily the plan the Conference wished to adopt for Part V, which would define successively the cases of invalidity, in articles 43 to 50 and article 61, the procedure for establishing such invalidity, in article 62, and the consequences of invalidity, in articles 65 and 67.

66. Mr. MAKAREWICZ (Poland), commenting briefly on the amendment which his delegation had submitted jointly with the Bulgarian delegation (A/CONF.39/C.1/L.278), said that the word " imputable " in article 65, paragraph 3, seemed too vague and unnecessarily introduced an element of subjectivity. Paragraph (4) of the International Law Commission's commentary to the article referred to " a party whose fraud, coercion or corrupt act has been the cause of the nullity of the treaty ". The authors of the amendment preferred wording on those lines because it was clearer and more objective. It was a matter of drafting which could be referred to the Drafting Committee.

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[8] For resumption of the discussion of article 63, see 81st meeting.

[9] For resumption of the discussion of article 64, see 83rd meeting.

[10] The following amendments had been submitted: France, A/CONF.39/C.1/L.48 and L.363; Bulgaria and Poland, A/CONF.39/C.1/L.278; Australia, A/CONF.39/C.1/L.217; Switzerland, A/CONF.39/C.1/L.358; United States of America A/CONF.39/C.1/L.360.

67. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.297) to article 65, paragraph 1, said that the reference to a " void treaty " was inappropriate and might be misleading. First of all, articles 43 to 47 did not refer to " void treaties ", but to defects in consent which a State could invoke to contest the validity of a treaty; and secondly, the use of the words " void treaty " did not make it clear that the application of all the provisions relating to grounds of invalidity was subject to the procedures laid down in article 62. The Australian delegation had therefore proposed the wording " a treaty established as invalid under the present convention ". That wording was used in article 39, paragraph 1, and the word " invalidity ", which was used in article 62 and in the title of article 65 itself, was the general term for the effect of the provisions of articles 43 to 50. The wording proposed in the amendment would not prejudice the distinction made between the cases dealt with in articles 43 to 47 and those referred to in articles 48 to 50. In the former case, a treaty was considered valid unless the State concerned invoked a ground of invalidity, as provided in article 62. In the latter case, where invalidity was established under article 62, the treaty was void *ipso facto*, and if the parties wished to maintain their obligations, they must conclude a new treaty.

68. The proposed change was a drafting matter and the amendment could therefore be referred to the Drafting Committee.

69. Mr. BINDSCHEDLER (Switzerland), introducing his delegation's amendment (A/CONF.39/C.1/L.358), said that the proposal to replace the word " void " by the word " invalidated " in paragraph 1, was intended to make it clear that what was involved was not nullity *ipso facto*, and that the invalidity must be established according to the procedure laid down. On that point, he endorsed the French representative's remarks.

70. The second Swiss proposal was to delete paragraph 3. That paragraph introduced an inequality of treatment between the parties which was not necessarily justified. The fact that paragraph 2 did not apply to the party to which the defect was imputable might lead to injustice because the defect could have originated long ago. In the meantime another Government might have succeeded the guilty Government, and it would be unjust not to allow it to apply for the restoration of the previous situation, in the same way as the other party. Further, the new Government might have performed in good faith a number of acts which there was no reason to consider unlawful.

71. Acts performed by private persons must also be taken into account. A peace treaty, for example, might regulate matters of nationality or civil law. It would be unjust and incompatible with the stability of law to attack acquired rights by invalidating acts performed by private persons in conformity with the terms of such a treaty, on the ground of a defect in the State's consent. Private persons should not suffer through the faults of their Government.

72. Lastly, the non-applicability of paragraph 2 to the State to which the defect was imputable was of a penal character, which was contrary to the basic principles of international law. It would therefore be better to delete paragraph 3, which had definite disadvantages and did little to increase the efficacy of the provisions on invalidity.

73. Mr. KEARNEY (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.360), said that it proposed first a rewording of paragraph 1, on the lines of the Australian and French amendments. That part of the amendment could be referred to the Drafting Committee.

74. It then proposed the deletion of paragraphs 2 (*a*) and 3. The various formulations adopted in articles 43-50 raised questions of the theoretical and practical consequences of invalidity. From the theoretical point of view, the legal effect of acts performed pursuant to an invalid treaty was a question of State responsibility. The United States amendment limited the article to the legal effect of invalidity on the provisions of the treaty, which was not a question of State responsibility, and to the practical aspect of the question of those acts.

75. The sanctions provided for in paragraphs 2 (*a*) and 3, which were a matter of State responsibility, would not always prove satisfactory in practice, however reasonable they might be. In the case of sales of perishable foodstuffs, for example, restitution was not always desirable or even possible. A fraudulent act could suffice to vitiate consent without being sufficiently reprehensible to justify denying the guilty party any right of recovery. That party might have performed its obligations in full and the treaty be invalidated before the other party had rendered any performance.

76. Such a limited range of sanctions, with their possibly harsh results, might discourage the parties from settling their disputes amicably and encourage them to seek the maximum benefit from the invalidity. Moreover, it was an underlying principle of the convention that treaties should continue to be performed until invalidity was established. But the parties would be disinclined to perform their obligations gratuitously while the invalidity was being discussed, if they knew that paragraph 3 denied them any right of recovery.

77. For all those reasons, he hoped the Committee would agree to delete paragraphs 2 (*a*) and 3.

78. Mr. STREZOV (Bulgaria) said that his delegation was the joint author with the Polish delegation, of an amendment to paragraph 3 (A/CONF.39/C.1/L.278), to replace the word " imputable " by an expression corresponding to the idea expressed by the International Law Commission in paragraph (4) of its commentary; the amendment was purely a drafting matter.

79. For the remainder of the article, his delegation favoured the Commission's wording, which was sufficiently comprehensive.

80. Mr. CALLE Y CALLE (Peru) said that in one way or another the amendments submitted by Australia (A/CONF.39/C.1/L.297), Switzerland (A/CONF.39/C.1/L.358), the United States (A/CONF.39/C.1/L.360) and France (A/CONF.39/C.1/L.363) all reworded paragraph 1 so as to bring article 65 into line with the other articles of the convention, particularly article 62. That aim was fully justified. The long debate on article 62 had shown that the majority of the Committee considered that the procedure laid down in article 62 should apply to all the grounds of invalidity that could be invoked. Of

the four amendments to which he had referred, the French seemed the clearest, because it expressly specified article 62, as had been done with other articles. It might perhaps be useful if the Committee were to vote on the proposed changes to paragraph 1.

81. Mr. BISHOTA (United Republic of Tanzania), referring to the Australian amendment (A/CONF.39/C.1/L.297), said that a legal distinction must be made between the word " void ", which applied to the cases dealt with in articles 48, 49 and 50, and the word " invalid ". By article 41, paragraph 5, the separability of treaty provisions was not permitted in the cases falling under articles 48, 49 and 50, whereas it was permitted in the other cases.

82. Sir Humphrey WALDOCK (Expert Consultant) said that the words " void treaty " had been used to cover all cases of invalidity. The Commission had considered that article 39, paragraph 1, should remove all doubt as to the meaning of those words. The drafting proposals before the Committee deserved consideration.

83. The changes proposed in the other paragraphs of article 65 related to substance. The International Law Commission had included those provisions at the request of Governments, which, in their written comments, had expressed the wish that the Commission should define the conditions for liquidating the situation resulting from invalidity. The representatives of Switzerland and the United States had objected, not without some justification, that the provisions adopted might prove too strict. It was for the Conference to decide whether or not the usefulness of those provisions made up for the shortcomings that had been pointed out.

84. The CHAIRMAN said that all the amendments to paragraph 1 and the amendment by Bulgaria and Poland to paragraph 3 only affected the drafting. He therefore suggested that the Committee refer to the Drafting Committee the Australian amendment (A/CONF.39/C.1/L.297), the Swiss amendment to paragraph 1 (A/CONF.39/C.1/L.358), the United States amendment to paragraph 1 (A/CONF.39/C.1/L.360), the French amendment (A/CONF.39/C.1/L.363) and the amendment by Bulgaria and Poland (A/CONF.39/C.1/L.278).

It was so agreed.

85. The CHAIRMAN put to the vote the United States amendment (A/CONF.39/C.1/L.360) to paragraph 2.

The United States amendment to paragraph 2 was rejected by 39 votes to 28, with 20 abstentions.

86. The CHAIRMAN put to the vote the amendments by Switzerland (A/CONF.39/C.1/L.358) and the United States (A/CONF.39/C.1/L.360) to delete paragraph 3.

The Swiss and United States amendments to delete paragraph 3 were rejected by 46 votes to 24, with 17 abstentions.

Article 65, with the drafting amendments, was referred to the Drafting Committee.[11]

The meeting rose at 6 p.m.

[11] For resumption of the discussion of article 65, see 83rd meeting.

SEVENTY-FIFTH MEETING

Friday, 17 May 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 66 (Consequences of the termination of a treaty)

1. The CHAIRMAN invited the Committee to consider article 66 of the International Law Commission's draft.[1]

2. Mr. DE BRESSON (France) said that his delegation's amendment (A/CONF.39/C.1/L.49) was based on the general proposition that some of the provisions of the draft relating to multilateral treaties sometimes did not apply to a category of instrument which his delegation described as " restricted multilateral treaties ". France believed that, in view of the character of those treaties, they must enter into operation immediately, and that the principle of separability did not apply to them. The amendment could be referred to the Drafting Committee, which already had a number of similar amendments before it.

3. Mr. EVRIGENIS (Greece) said that, in his delegation's opinion, some of the draft articles had been approved with undue haste, and insufficient attention had perhaps been paid to the wording of the texts that had been referred to the Drafting Committee. The Greek delegation could support the substance of article 66, though the rule might be difficult to apply. In particular, it seemed to be rather bold to draw a distinction between the release of the parties from any obligation further to perform the treaty and the statement that the termination of a treaty did not affect the right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. There seemed to be an element of contradiction between sub-paragraphs 1 (*a*) and 1 (*b*), but his delegation could accept the International Law Commission's formulation on the understanding that the words " legal situation of the parties created through the execution of the treaty " applied to any legal situation all the conditions of which had been fulfilled by the execution of the treaty prior to its termination, and that subsequent non-execution of the treaty, under article 66, did not have the automatic effect of reversing that situation.

4. His delegation also wished to comment on the form of article 66, in a general way which might apply to other provisions of the draft. Where the concordance of the various authentic texts was concerned, his delegation believed that the English text might be regarded as the original, and the other texts as translations. Nevertheless, those translations were sometimes not entirely adequate. Unless the Conference wished to give additional importance to article 29, on the interpretation of treaties in two or more languages, every effort should be made to bring the versions of the text even closer from the point of view of both grammar and logic. The Greek delegation was considering submitting a number of pertinent comments at a later stage of the Conference.

[1] An amendment had been submitted by France (A/CONF.39/C.1/L.49).

For the time being, it merely wished to draw attention to a point on which the English and French texts of article 66 seemed to differ slightly. In sub-paragraph 1 (*a*), the temporal terms " further " and " *dès lors* " did not relate to the same verb in the English and French texts; the English text referred to " any obligation further to perform the treaty ", whereas the French read " *libère dès lors les parties de l'obligation d'exécuter le traité* ". Although such discrepancies might be regarded as minor points, it was not impossible that they might give rise to differences of interpretation.

5. Finally, the title of the article mentioned only the consequence of the termination of a treaty, although paragraph 2 was also concerned with denunciation and withdrawal. A title must be brief, but comprehensive enough to cover all the contents of the article, and his delegation wished to draw that point to the attention of the Drafting Committee, which might reconsider the titles of other articles in the light of those remarks.

6. Mr. BRIGGS (United States of America) said that the relationship between article 66 and article 41, on the separability of treaties, might be clarified by inserting the words " or a part thereof " after " termination of a treaty " in the introductory part of paragraph 1, and consequentially changing sub-paragraph 1 (*a*) to read: " ... further to perform the provisions of the treaty that have terminated ". The Drafting Committee might consider that suggestion.

7. Mr. DE CASTRO (Spain) said that he too had a criticism to make of the wording of article 66. The wording " does not affect any right, obligation or legal situation " was too broad, since the obligations of a party created through the execution of a treaty, as well as some rights depending on its execution, must be affected by termination. The Drafting Committee should try to clarify the text, in order to avoid misinterpretations.

8. The CHAIRMAN suggested that article 66 be referred to the Drafting Committee together with the French amendment (A/CONF.39/C.1/L.49) and the oral proposals made during the meeting.

It was so agreed.[2]

Article 67 (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law)[3]

9. The CHAIRMAN invited the Committee to consider article 67 of the International Law Commission's draft.

10. Mr. CASTRÉN (Finland) said that his delegation had submitted an amendment to article 67 (A/CONF.39/C.1/L.295) for the same reasons as it had given for its proposals in connexion with articles 41, 50 and 61.

11. Since article 67 also referred to treaties conflicting with *jus cogens* rules, the Finnish delegation considered that that provision should also be subject to the principle of separability set out in article 41.

12. Mr. SEPULVEDA AMOR (Mexico), introducing his delegation's amendment to sub-paragraph 1 (*b*) (A/CONF.39/C.1/L.356), said that the invalidity or termination of some treaties conflicting with peremptory norms of general international law might affect not only the mutual relations of the parties, but also their future conduct. Examples of such treaties were those conflicting with the *jus cogens* rules relating to genocide or slavery. The amendment was designed to strengthen and broaden the obligation in sub-paragraph 1 (*b*), and conformed with the statement in paragraph (1) of the commentary that the question which arose in consequence of the invalidity was not so much one of the adjustment of the position of the parties in relation to each other as of the obligation of each of them to bring its position into conformity with the rule of *jus cogens*.

13. Mr. ALVAREZ TABIO (Cuba) said he had his doubts regarding article 67, particularly paragraph 2 (*b*), which appeared to contradict the clear and forthright terms of article 61. Article 61 specified that, if a new rule of *jus cogens* was established, any existing treaty which was in conflict with that rule became void and terminated. Clearly then, the nullity did not operate retroactively; the treaty ceased to be legally valid as from the date of the emergence of the new rule of *jus cogens*. Since the case was one of nullity his delegation could not accept the statement in paragraph (2) of the commentary to article 61, that the new rule of *jus cogens* " does not annul the treaty, it forbids its further existence and performance ". That statement was in flat contradiction with the rule stated in the article, that the treaty " becomes void and terminates ".

14. As in other cases of nullity, the consequences of invalidity under article 61 should be governed by the principles embodied in article 65. Since the emergence of a new rule of *jus cogens* had the effect of releasing the parties from any obligation to perform the treaty, it was paradoxical to say in article 67 that the nullity of the treaty would not affect rights, obligations or legal situations created through the execution of the treaty prior to its termination. It was true that the new *jus cogens* rule would not operate *ex tunc* and would therefore not affect a right, obligation or legal situation created before the treaty became void. But it was a very different matter to state that such rights, obligations and situations could be maintained after the treaty had become void, without the express consent of the parties. If that proposition were accepted, the treaty would not be void, it would be terminated.

15. His delegation had no objection to the proposition that acts performed in good faith in reliance on a treaty, at a time when both parties considered it valid, did not become illegal solely by reason of the subsequent invalidation of the treaty. That proposition, however, applied only to acts the performance of which had actually been completed. The situation was different in the case of an act which had been performed while the treaty was valid but which continued in existence after the treaty had become void. There could be no question of invoking the doctrine of acquired rights in the case of acts with a continuing legal effect. Moreover, the concept of acquired rights was not appropriate in public international law, which did not always involve rights of a material character.

16. He therefore suggested that paragraph 2 (*b*) should not refer to rights, obligations and legal situations created prior to the termination of the treaty, but rather

[2] For resumption of the discussion of article 66, see 80th meeting.

[3] The following amendments had been submitted: India, A/CONF.39/C.1/L.256; Finland, A/CONF.39/C.1/L.295; Mexico, A/CONF.39/C.1/L.356

to a situation resulting from the execution of the treaty prior to its invalidation.

17. The amendments submitted to article 67 could tend to weaken the substantive rule embodied in article 50, which clearly provided for voidness *ab initio*, and in any case for a declaration of nullity which operated *ex tunc*.

18. Mr. MIRAS (Turkey) said that his delegation was opposed to article 67 for the same reasons as it had invoked in objecting to articles 50, 61 and 62. It would vote against the article if and when the occasion arose for it to do so.

19. Mr. SINCLAIR (United Kingdom) said that the Commission's text of article 67 was not satisfactory to his delegation. To begin with, sub-paragraph 1 (*a*), since it involved reparations, was concerned with a question of State responsibility which did not fall within the purview of a convention on the law of treaties. Indeed, article 69 specifically excluded cases of State responsibility from the convention. In the hypothetical case of a treaty which should be considered void in its entirety because its essential object and purpose was the illegal use of force, the treaty would be void under article 50, but if the parties were obliged to eliminate the consequences of an act performed in reliance on a provision of that treaty, responsibility would undoubtedly arise; the matter would come before the Security Council, which might order the necessary measures to be taken, and paragraph 1 of article 67 would hardly be adequate for dealing with the situation. Moreover, in cases where one provision of the treaty conflicted with a peremptory norm of *jus cogens*, an endless chain of remote consequences might come into play, in the case of boundary treaties for example, and negotiations would be required in order to see which consequences could be eliminated.

20. With regard to the question of the relationship between article 67 and article 41, on the separability of treaties, his delegation considered that the use of the term " any provision " in sub-paragraph 1 (*a*) had the effect of admitting the separability of treaties void under article 50; under paragraph 2, however, the parties were released from any obligation further to perform " the treaty ". The Drafting Committee should consider that wording carefully in the light of the relationship between articles 67 and 41, perhaps along the lines proposed by the Finnish delegation in its amendment (A/CONF.39/C.1/L.295).

21. Paragraph 2 was concerned with the consequences of the termination of the treaty even when it contained provisions for its own termination, and prevailed over those provisions. Article 66, paragraph 1, contained similar provisions, which, however, were worded in residual form, for the reasons given in the last sentence of paragraph (2) of the commentary to that article; perhaps paragraph 2 of article 67 could also be worded in residual terms.

22. Mr. DE BRESSON (France) said that the French amendment to paragraph 1 of article 65 (A/CONF.39/C.1/L.363), which had been referred to the Drafting Committee, had been designed to emphasize the dependence of that article on article 62. His delegation believed that the situation with regard to article 67 was similar, and hoped that the Drafting Committee would consider the relationship between articles 67 and 62.

23. The ultimate wording of sub-paragraph 2 (*a*) depended, of course, on the final text of article 61. In the debate on article 61, the French delegation had expressed the opinion that, in view of the Committee's decision on article 50, the reference to nullity in article 61 should be deleted. The Drafting Committee might also take that situation into account in connexion with article 67.

24. The French delegation could support the Finnish amendment (A/CONF.39/C.1/L.295) and had no objection in principle to the Mexican amendment (A/CONF.39/C.1/L.356), although the proposed addition was already implicit in the Commission's text of sub-paragraph 1 (*b*).

25. Mr. ALCIVAR-CASTILLO (Ecuador) said that his delegation fully endorsed the views expressed by the Cuban representative on the shortcomings of sub-paragraph 2 (*b*). Indeed, in its comments on the draft articles (A/CONF.39/6, page 8), his Government had recommended that the following sentence be added to sub-paragraph 2 (*b*): " If it is desired that specific provisions of the treaty which are not in conflict with the new norm of *jus cogens* should remain in force, it will be necessary for a new treaty to be concluded ". That proposal should be considered by the Drafting Committee.

26. His delegation regarded the amendments to article 67 as attempts to weaken the article; the procedure of referring substantive amendments to the Drafting Committee was a subtle means of reversing the decisions of the Committee of the Whole. That course had been followed in connexion with article 65. The Ecuadorian delegation considered that the Finnish amendment, which was an attempt to resurrect a principle rejected by the Committee, was a substantive proposal and should be voted on as such.

27. Mr. BINDSCHEDLER (Switzerland) said that his delegation could not accept article 67, for the reasons which it had advanced in objecting to article 50. Like the Turkish delegation, his delegation would vote against the article if the occasion arose.

28. Mr. TALALAEV (Union of Soviet Socialist Republics) said that article 67 was closely linked with articles 41, 50 and 61 and that fact must be taken into account when reaching a decision about its wording. It dealt with invalid treaties conflicting with a peremptory norm of international law, such as unequal treaties, colonial treaties and enforced treaties which were incompatible with the basic principles of modern international law. Governments were required to eliminate the consequences of any act done in reliance on any provision which conflicted with a peremptory norm of general international law, and to bring their mutual relations into conformity with such norms.

29. The Finnish amendment (A/CONF.39/C.1/L.295) sought to reintroduce the idea of separability which had already been rejected when discussing article 41; it also conflicted with the idea behind article 50. It could not be accepted that treaties violating fundamental principles of the international legal order could be valid in part; they were null *ab initio* and as a whole. Consequently he could not support either the Finnish or the Mexican amendment (A/CONF.39/C.1/L.356).

30. He agreed with the Cuban and Ecuadorian representatives that the wording of paragraph 2 (*b*) should be improved.

31. Mr. CASTRÉN (Finland) said he must point out to the representatives of Ecuador and the Soviet Union that the Finnish amendment to article 50 had not been rejected but had been referred to the Drafting Committee without a vote. His delegation was not seeking to reintroduce that amendment.

32. Mr. HARRY (Australia) said that during the discussion on article 50, he had stated that his delegation could not take any final position until agreement had been reached on the definition of a peremptory norm; the same applied in the case of article 67.

33. He agreed with paragraph 2 (*b*). It would be inequitable if the rights and obligations created by a treaty which at the time of its conclusion was entirely legal, could be affected by the emergence of a subsequent peremptory norm.

34. The Finnish amendment should be discussed by the Drafting Committee in connexion with article 41.

35. Mr. WERSHOF (Canada) said that the Ecuadorian representative was unnecessarily apprehensive about the Finnish amendment; the Committee of the Whole had not yet taken any decision on it, as would be seen from the summary record of the 66th meeting. The Finnish amendment to article 41 had been one of substance and his delegation had been strongly in favour of it. If it were accepted, then some change would become necessary in article 67.

36. Paragraph 2 of article 67 must be retained and would be greatly improved by the adoption of paragraph 2 of the Finnish amendment.

37. Mr. MARESCA (Italy) said that the notion of nullity in article 67 was not a purely theoretical one, but was linked with the procedural guarantee in article 62. Paragraph 1 (*a*) seemed to trespass beyond the present convention into the realm of State responsibility, which was explicitly excluded by article 69; it should therefore be removed.

38. His delegation had consistently supported the principle of separability, which would make for the stability of treaty relations, and therefore considered that the Finnish amendment should be taken into account. He supported the French amendment (A/CONF.39/C.1/L.363).

39. Mr. DE CASTRO (Spain) said that article 50 was being attacked during the discussion on article 67, but the Committee could not now go back on its decision on article 50 or attempt to vary its meaning.

40. If a treaty had no legal force under article 65, paragraph 1, then it could also have no legal effects. Out of a desire for caution, the Commission had introduced limitations on the drastic effects of article 65 in paragraph 1 (*a*) of article 67.

41. The question was, should they give legal validity to treaties which had been condemned under provisions concerning essential validity, and maintain the *status quo* by strengthening treaties imposed by force or procured by fraud. He could not agree with the Italian representative's view that the question of State responsibility was not pertinent to the question of validity.

42. The Committee would have to vote on article 67, conscious of its great responsibilities in that regard.

43. Mr. SMALL (New Zealand) said that he had reserved his delegation's position on article 50 and would have to do the same on article 67, until such time as he knew the content of articles 50 and 62, particularly whether adequate safeguards would be built into the latter article. He agreed with the observations made by the United Kingdom representative, and also supported the Finnish amendment. The Mexican amendment was unobjectionable, though it would seem that its underlying idea was already implicitly covered in article 67. The wording of the amendment would certainly need to be carefully considered by the Drafting Committee.

44. Mr. ARIFF (Malaysia) said that he had no firm views on the question of separability, but would think it not unreasonable to allow separability so that a treaty of which only one provision conflicted with a peremptory norm need not fall as a whole.

45. In his opinion the content of article 50 could not be reconciled with article 67, paragraph 1 (*a*), and the Committee would have to devise a different text for the latter.

46. The CHAIRMAN said that the Finnish amendment to article 41 had been referred to the Drafting Committee at the sixty-sixth meeting. It could be voted on when the Drafting Committee submitted its report on that article.

47. Mr. ALCIVAR-CASTILLO (Ecuador) said that the only thing which his delegation would be prepared to accept was that the amendment by Finland to article 67 (A/CONF.39/C.1/L.295) should remain in abeyance until the Committee had taken a final decision on the amendment by Finland to article 41 (A/CONF.39/C.1/L.144). If the Drafting Committee were to incorporate that amendment in article 41, the Ecuadorian delegation would request a vote on it and would vote against it.

48. Mr. MYSLIL (Czechoslovakia) said he shared the views of the previous speaker. He did not consider it advisable to refer to the Drafting Committee amendments which involved points of substance.

49. Mr. TALALAEV (Union of Soviet Socialist Republics) said he also supported the procedural suggestion by the representative of Ecuador.

50. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 67 to the Drafting Committee; the amendments by Finland (A/CONF.39/C.1/L.295) and Mexico (A/CONF.39/C.1/L.356) would remain in abeyance until a decision had been taken on article 41.

It was so agreed.[4]

Article 68 (Consequences of the suspension of the operation of a treaty)[5]

51. The CHAIRMAN invited the Committee to consider article 68 of the International Law Commission's draft.

[4] For resumption of discussion of article 67, see 82nd meeting.

[5] An amendment had been submitted by Mexico (A/CONF.39/C.1/L.357.

52. Mr. SEPULVEDA AMOR (Mexico), introducing his delegation's amendment (A/CONF.39/C.1/L.357), said that it purported to add, at the end of paragraph 2, the words " or to frustrate the object of the treaty ". The concept of non-frustration was the subject of article 15 and the situation envisaged in article 68 was somewhat similar to that contemplated in article 15.

53. Mr. HARRY (Australia) pointed out that article 15, in the form in which it had emerged from the Drafting Committee, used the wording " defeat the object and purpose of a treaty ". It had been approved in that form by the Committee of the Whole at its sixty-first meeting.

54. Mr. SEPULVEDA AMOR (Mexico) said he could accept that wording. The additional words to be introduced under the Mexican amendment would therefore be " or to defeat the object and purpose of the treaty ". As far as the Spanish text of article 15 was concerned, it had been agreed at the sixty-first meeting that the term " *malograr* " was inadequate and that it would be preferable to use the word " *privar* " or " *frustrar* ". If the change was made there, it should also be made in the proposed addition to article 68.

55. Mr. YASSEEN (Iraq) said that the additional words proposed by the Mexican delegation were unnecessary. The text as it stood was broad enough to cover the obligation not to defeat the object and purpose of the treaty. Without the Mexican amendment, the text would prohibit all " acts tending to render the operation of the treaty impossible ". That language would necessarily cover the acts envisaged in the Mexican amendment.

56. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 68 to the Drafting Committee, together with the Mexican amendment.

It was so agreed. [6]

The meeting rose at 12.35 p.m.

[6] For resumption of discussion of article 68, see 82nd meeting.

SEVENTY-SIXTH MEETING

Friday, 17 May 1968, at 3.20 p.m.
Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 39 (Validity and continuance in force of treaties) *(resumed from the 40th meeting)*

1. The CHAIRMAN invited the Committee to resume its consideration of article 39 of the International Law Commission's draft.[1]

2. Mr. CHAO (Singapore), introducing his delegation's amendment (A/CONF.39/C.1/L.270), said that the word " Every " should be substituted for the words " Subject to paragraphs 2 and 3, a " at the beginning of the new paragraph 1 which the amendment proposed.

3. The amendment did not make any substantive change in the International Law Commission's wording; it merely sought to express in precise and positive terms what that wording implied. During the earlier discussion of article 39, some delegations had been uncertain whether the article stated a presumption of the validity or of the invalidity of treaties. The addition of the new paragraph proposed by Singapore would dispel all doubt as to the meaning of the article and would make for a better sense of continuity between article 39 and the preceding articles.

4. Mr. DE BRESSON (France) said that the French delegation, in its three interventions on articles 39, 62 and 65, had maintained that the second sentence of article 39, paragraph 1, was liable to create a regrettable ambiguity with respect to the operation of the rules of invalidity laid down in Part V. It had therefore proposed that the sentence in question, which dealt with the effects of invalidity, be transferred from article 39 to the beginning of article 65. If that proposal were adopted, article 39, paragraph 1, would deal merely with cases of invalidity and make no reference to its effects.

5. He supported the Swiss amendment (A/CONF.39/C.1/L.121) to the extent that it entailed the deletion of the second sentence of article 39, paragraph 1, but its wording was not satisfactory. In his view, the first sentence of paragraph 1 should be left as it stood in the draft.

6. Mr. BINDSCHEDLER (Switzerland) said that the problem raised by the wording of article 39 and the amendments thereto was closely connected with whatever solution was finally adopted for article 62, because it was difficult to separate the procedure from the rules of substance. He therefore moved that further discussion of article 39 and the amendments thereto be adjourned to 21 May.

7. Mr. DE BRESSON (France) seconded the Swiss representative's motion. It was difficult to vote on article 39 at the present stage because the problem it raised was connected not only with article 62 but also with the precise formulation of paragraph 1 of article 65. If the Drafting Committee accepted the French proposal to transfer the second sentence of article 39, paragraph 1, to article 65, that would solve that particular problem.

8. The CHAIRMAN put the motion for adjournment to the vote.

The Swiss motion for adjournment was adopted. [2]

Article 69 (Cases of State succession and State responsibility) [3]

9. Mr. HARASZTI (Hungary), introducing his delegation's amendment (A/CONF.39/C.1/L.279), said that the effect on treaties of an outbreak of hostilities was one of the most controversial problems of international law.

[1] For earlier discussion of article 39, see 39th and 40th meetings.

[2] For resumption of the discussion of article 39, see 81st meeting.

[3] The following amendments had been submitted: Hungary and Poland, A/CONF.39/C.1/L.279; Switzerland, A/CONF.39/C.1/L.359; Japan, A/CONF.39/C.1/L.365.

Rules had evolved in international practice, but had lost much of their value owing to the increasing number of exceptions. Yet it was evident that, even if many treaties were not directly affected by an outbreak of hostilities, some were terminated and others inevitably suspended.

10. The International Law Commission had preferred not to deal with the problem in the draft convention and had stated its views on the matter in paragraph 29 of the introduction to its report. The Hungarian delegation fully approved the Commission's argument but still thought that the convention should contain an express reference to the case of the outbreak of hostilities.

11. On the basis of article 39, it would obviously be impossible to claim that the outbreak of hostilities had terminated a particular treaty or suspended its operation, since the case was not covered in Part V of the convention. A similar question, namely, the effect of State succession on treaties, had been satisfactorily solved in article 69. There was no denying that in the case of a succession of States, some treaties lost their legal force and others retained it. The International Law Commission had rightly refrained from dealing with that very difficult problem in the draft convention, but it had expressly referred to it in article 69. His delegation thought the same attitude should be taken with respect to the case of the outbreak of hostilities.

12. Mr. BINDSCHEDLER (Switzerland) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.359) was to complete the article. He did not understand why the International Law Commission had decided to insert in article 69 a general reservation concerning cases of State succession and State responsibility but had preferred not to mention the case of the outbreak of hostilities.

13. He endorsed the remarks of the Hungarian representative and considered that the International Law Commission had been right to refrain from dealing in the convention with the problem of the effect of hostilities on treaties. The amendment by Hungary and Poland (A/CONF.39/C.1/L.279), as well as his own delegation's amendment, should be examined by the Drafting Committee.

14. Mr. FUJISAKI (Japan), introducing his delegation's amendment (A/CONF.39/C.1/L.365), said that the enumeration in article 69 was by no means exhaustive; there were several other matters relating to other areas of international law that could be mentioned. The reference to hostilities in the amendments submitted by Switzerland (A/CONF.39/C.1/L.359) and Hungary and Poland (A/CONF.39/C.1/L.279) might be useful, but there was no certainty that the list would then be complete. The scope of the reservation could not be stated in general terms in the operative part of the convention, and his delegation had therefore proposed that the reservation be included in the preamble. He asked that the general principle expressed in his delegation's amendment be put to the vote in the Committee.

15. Mr. NAHLIK (Poland) said that the question raised in the amendment co-sponsored by his delegation (A/CONF.39/C.1/L.279) had already been dealt with in the written observations submitted by his Government. Paragraph 2 of article 39 showed that the list of grounds mentioned in the International Law Commission's draft for the termination or even suspension of the operation of a treaty must be considered exhaustive. But the general clauses contained in article 51, relating to the termination of a treaty by consent of the parties, and in article 54, relating to the suspension of the operation of a treaty by consent of the parties, were sufficiently broad to be considered as subsidiary rules covering a number of grounds that "classic" international law mentioned separately. Nevertheless, the omission of any clause relating to the effects on treaties of an outbreak of hostilities could create uncertainty. The International Law Commission's attempt, in paragraph (2) of its commentary to article 69, to justify that omission was not, in his delegation's view, convincing.

16. Undoubtedly, the attitude of international law to war had changed radically during the last fifty years. Not only war, but all recourse to armed force, even any threat of such recourse, had been expressly prohibited. Nevertheless, although in another guise, armed conflicts, and so hostilities, still occurred. Obviously, no one thought of applying in such cases the traditional rule that war automatically abrogated all treaties between belligerents. But an outbreak of hostilities might have some effect on the fate of treaties. The situations that might arise were admittedly different from those of former times. A distinction should be drawn, for example, between bilateral treaties and multilateral treaties, between treaties to which only the belligerents were parties and treaties to which neutrals were also parties, between treaties the application of which presupposed normal relations and treaties concluded specially for the case of armed conflict, between treaties stipulating continuing obligations and treaties creating a durable, objective situation, and so on.

17. Contemporary writers were very circumspect in dealing with the problem, but they did not ignore it. It would be difficult for the Conference to enter into all the aspects of the problem, but the convention on the law of treaties, which was to be a codifying instrument, could not ignore the existence of the problem. Article 69 should therefore at least include a reservation concerning the outbreak of hostilities, similar to the one adopted by the International Law Commission itself in respect of the problems of State succession and State responsibility.

18. Since an amendment similar to that co-sponsored by Poland had been proposed by the Swiss delegation (A/CONF.39/C.1/L.359), it would be advisable to refer both amendments to the Drafting Committee.

19. With regard to the amendment by Japan (A/CONF.39/C.1/L.365), he did not think it would be sufficient merely to include the reservation in the preamble.

20. Sir Francis VALLAT (United Kingdom) said that article 69 should be as complete as possible. Consequently, he was glad that further consideration of article 39 had been deferred, as his delegation's position on that article would depend on the final text adopted for article 69.

21. He supported the principle of the amendments by Hungary and Poland (A/CONF.39/C.1/L.279) and by Switzerland (A/CONF.39/C.1/L.359), but thought it would be preferable just to adopt the idea expressed in

those amendments and then to refer them to the Drafting Committee. Questions of State succession and of the outbreak of hostilities affected treaties and had been left outside the scope of the convention. On the other hand, the question of international responsibility had been touched upon in several articles. The order in which the questions should be mentioned in the article should also be studied. He doubted the usefulness of transferring article 69 to the preamble, as proposed in the Japanese amendment (A/CONF.39/C.1/L.365), but thought that the question of substance raised in that amendment also deserved to be studied by the Drafting Committee.

22. Mr. ALVAREZ (Uruguay) said he supported the arguments developed by the International Law Commission in paragraph (2) of its commentary to justify its omission from article 69 of the case of an outbreak of hostilities. Both the International Law Commission's 1956 draft on the law of the sea and the four conventions adopted by the first United Nations Conference on the Law of the Sea, held at Geneva in 1958, contained rules to be applied in time of peace. From the legal standpoint, it would be necessary to examine whether the insertion proposed in the amendments to article 69 was compatible with the relevant provisions of the Charter.

23. Mr. WERSHOF (Canada) said he considered that the amendments to article 69 raised a question of substance on which the Committee should take a decision before referring them to the Drafting Committee.

24. Mr. MARESCA (Italy) said that he supported the Swiss amendment (A/CONF.39/C.1/L.359) and the Hungarian and Polish amendment (A/CONF.39/C.1/L.279). Other codifying conventions, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, had expressly referred to the case of armed conflict.

25. The idea in the Japanese amendment (A/CONF.39/C.1/L.365) was interesting. There were, in fact, other matters that concerned the question of treaties and which the International Law Commission had been reluctant to include in the convention. An example was the question of the "most-favoured-nation clause", which was not confined to commercial or customs law but had multiple applications, even in diplomatic and consular law. That was only one example in a whole series of questions that had not been settled by the convention. It would therefore be preferable to adopt a broader formulation to indicate that a range of questions belonging to another branch of international law had not been mentioned in article 69.

26. Sir Francis VALLAT (United Kingdom) proposed that for voting purposes the Japanese amendment be divided into two parts. The first vote would relate to the replacement of article 69 by a paragraph of the preamble to the convention; the second vote would be on the desirability of including a general reference such as that stated at the end of the amendment.

27. Mr. FUJISAKI (Japan) said he was quite willing for his amendment to be voted on in two parts.

28. The CHAIRMAN put the first part of the Japanese amendment (A/CONF.39/C.1/L.365) to the vote.

The first part of the Japanese amendment was rejected by 64 votes to 4, with 20 abstentions.

29. The CHAIRMAN put the second part of the Japanese amendment to the vote.

The second part of the Japanese amendment was rejected by 45 votes to 22, with 20 abstentions.

30. The CHAIRMAN put the principle contained in the amendments by Hungary and Poland (A/CONF.39/C.1/L.279) and by Switzerland (A/CONF.39/C.1/L.359) to the vote.

The principle contained in both amendments was adopted by 72 votes to 5, with 14 abstentions.

31. Mr. VARGAS (Chile) said his delegation had voted for the amendments by Hungary and Poland and by Switzerland, though he thought there was a mistake in the Spanish version of the former. The word "*ruptura*" before the words "*de las hostilidades*" was not correct. It would be better to say "*comienzo*" or "*abertura*", which corresponded better to the French "*ouverture*" and the English "outbreak".

32. Mr. EUSTATHIADES (Greece) said that the Greek delegation preferred the Swiss amendment, because the words "between States" in the amendment by Hungary and Poland might imply that the exception applied to treaties concluded between States participating in hostilities, whereas armed conflict might also have consequences for the relations between belligerent and neutral States. Also, it would be better to say "armed conflict of an international character" instead of "hostilities".

33. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 69, as amended, to the Drafting Committee.

It was so agreed.[4]

Article 70 (Case of an aggressor State)[5]

34. Mr. FUJISAKI (Japan), introducing his delegation's amendment (A/CONF.39/C.1/L.366), said that the scope of article 70 was both too narrow, because it dealt only with cases of aggression and overlooked other serious violations of the Charter, and too broad, because the "measures taken in conformity with the Charter" might be interpreted as including measures taken unilaterally by a State. The Japanese delegation was therefore proposing that the article should deal with the obligations arising for States in general, and not only for an aggressor State, in consequence of a binding decision by the Security Council.

35. Mr. SUPHAMONGKHON (Thailand) said his delegation fully supported the principle in article 70. It had, however, submitted an amendment to that article (A/CONF.39/C.1/L.367) because it believed that the use of the words "aggressor" and "aggression" might give rise to difficulties. The efforts of the League of Nations and the United Nations to define aggression

[4] For resumption of the discussion of article 69, see 82nd meeting.

[5] The following amendments had been submitted: Japan, A/CONF.39/C.1/L.366; Thailand, A/CONF.39/C.1/L.367.

had so far been unsuccessful, despite the great hatred that aggression had always aroused in nations. Moreover, the United Nations had recently been led to take certain measures of implementation without specifying that there had been an aggression. The amendment by Thailand, which eliminated the terms " aggressor " and " aggression ", was in conformity with Article 103 of the Charter. It could be referred to the Drafting Committee as it was a drafting matter.

36. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that he had been astounded when he had read the amendments. The amendments to article 70 had neither political, nor legal, nor moral justification.

37. On the political plane, although the outstanding contemporary problem was the defence of peace, the Conference was not entitled to restrict the scope of the sole but important article on aggressor States in any way whatsoever.

38. On the legal plane, to defend aggression was contrary to the fundamental principles of international law and especially the rule of *jus cogens* prohibiting the use of force. The provisions of the Charter, notably Article 2 (4), Article 53 and Article 103 deprived the amendments of all legal basis. To accept such amendments would mean weakening the entire international legal system on which peace had been founded since the Second World War.

39. On the moral plane, those amendments were a veritable sacrilege, for they derided the fifty million dead which the last world war had cost mankind. His own country had had 5 million killed, one out of every nine inhabitants, and the war had brought misery to every home. He had never imagined that in Vienna, where Soviet soldiers killed in the fight against aggression were buried beside Beethoven's tomb, a delegation could rise to defend the aggressor, especially in Human Rights Year.

40. The two amendments (A/CONF.39/C.1/L.366 and L.367) were totally unacceptable. Article 70 established a minimum norm on which there could be no compromise.

41. Mr. ALVAREZ TABIO (Cuba) said he supported article 70, for it stated a self-evident rule. To delete that rule would undermine the United Nations system which had been established to save mankind from the scourge of war. He was therefore against the amendments by Japan and Thailand, which could alter the substance of article 70.

42. Mr. MOUDILENO (Congo, Brazzaville) said he endorsed the comments of the two previous speakers and would vote against the two amendments to article 70.

43. His delegation vehemently protested against the proposal to delete the word " aggressor ", just as it had already protested when it had heard delegations claim that the word " corruption " was unseemly. Chapter VII of the Charter dealt expressly with aggression, to which it devoted more than ten articles. Furthermore, the Japanese amendment (A/CONF.39/C.1/L.366) misread the process by which decisions of the international community were formed. It was only in the last resort that the Security Council came into play. The Charter accorded a very substantial role to action by Member States, in particular under Articles 43, 45, 48 and 49. Article 51 of the Charter recognized that every State enjoyed the right of legitimate self-defence, a natural right which could be exercised to repel aggression without awaiting a decision by the Security Council. The Japanese amendment would infringe that inalienable right.

44. Mr. TRUCKENBRODT (Federal Republic of Germany) said that, as indicated in paragraph (4) of the commentary to article 70, there was no need to include a reservation of the kind proposed in a general convention on the law of treaties. There was nothing to prevent its retention, but its meaning must be absolutely clear. It should neither create a convenient loophole for the termination of treaties which a party no longer found convenient, nor be so formulated as to impose a particular solution to problems that arose in particular situations. The reservation should be neutral.

45. The text, as it stood, was unsatisfactory. The International Law Commission had not succeeded in eliminating the dangers to which it had itself drawn attention in the commentary, in particular the danger arising out of the use of the terms "aggressor" and "aggression", which were controversial. However, since article 70 referred to the United Nations Charter, his delegation took the view that those words had to be interpreted in the light of Chapter VII of the Charter, concerning binding decisions of the Security Council.

46. The amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367) were far clearer than the draft article. However, in view of the interpretation he had just mentioned, his delegation would not object formally to the retention of the article in its present form, although its attitude would depend on the general economy of the convention.

47. Sir Francis VALLAT (United Kingdom) said he doubted whether it was really necessary to retain a provision such as article 70. The question was already settled by Article 103 of the Charter, at least as far as States Members of the United Nations were concerned. It would doubtless be preferable to rely on the provisions of the Charter. In any case, the words "aggression" and " aggressor " had to be interpreted in the light of Article 39 of the Charter, which empowered the Security Council to determine the existence of any act of aggression, make recommendations and decide what measures should be taken.

48. His delegation had noted with interest the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367), but it would accept the opinion of the Committee and therefore would abstain from voting.

49. Mr. BINDSCHEDLER (Switzerland) said that the provision in article 70 seemed out of place in a convention on the law of treaties. The consequences of measures taken under the Charter in case of aggression affected not only treaties but many other spheres. Moreover, the wording of the article was ambiguous, because " measures taken in conformity with the Charter " could mean the binding decisions taken by the Security Council under Chapter VII of the Charter, but also individual or collective measures of self-defence taken under Article 51 of the Charter. If article 70 referred to those measures as well, there would be the danger

to which paragraph (3) of the commentary referred, and which the International Law Commission had sought to avoid.

50. The Swiss delegation was therefore in favour of deleting the article, or, failing that, of improving the wording. It supported the Japanese amendment (A/CONF.39/C.1/L.366) because it deleted the terms "aggressor" and "aggression" and referred to the binding decisions of the Security Council.

51. Mr. MUTUALE (Democratic Republic of the Congo) said he would vote against the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367) if they were put to the vote. Under the Japanese amendment, the operation of article 70 depended on binding decisions by the Security Council; that raised thorny problems, particularly the question of what organ was competent to decide juridically that a State was an aggressor. The General Assembly, at its last session, had set up a committee of thirty-five members to study the question of aggression. It was not for the Conference to anticipate the outcome of the work of that Committee.

52. He was in favour of article 70, which formulated a useful reservation with adequate precision. He hoped that the authors of the amendments would not press them to a vote.

53. Mr. KOUTIKOV (Bulgaria) said that the Japanese amendment (A/CONF.39/C.1/L.366) was totally unacceptable to his delegation. It was far from having the clarity and precision of the wording submitted by the International Law Commission. The Japanese proposal introduced disturbing elements and completely destroyed the idea implicit in the original text, which was based on measures taken in conformity with the Charter of the United Nations in the case of aggression by a State. Those considerations also applied to the Thailand amendment (A/CONF.39/C.1/L.367). His delegation would therefore vote against those two amendments and in favour of article 70 of the International Law Commission's draft.

54. Mr. TALALAEV (Union of Soviet Socialist Republics) said his delegation had a very special moral right to speak with wrath of aggression and aggressor States. As a consequence of the aggression of which it had been the victim during the Second World War, the Soviet Union had suffered human and material losses which no State and no people had experienced throughout the history of mankind. The Soviet Union had had 20 million killed, a number equal to the population of a large modern State. The Soviet delegation therefore fully supported those delegations which considered that the very idea of eliminating the reference to aggression from article 70 was tantamount to sacrilege. Of course, it was easy enough for States which had not suffered in their flesh and in their blood, States which had remained neutral or whose neutrality had been guaranteed, to assert that the article was out of place. But the USSR could not forget the history of its sufferings.

55. The amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367) transformed the question of the measures to be taken against an aggressor into a quite different question, namely, that of the measures in general in connexion with a treaty which might be taken either by the Security Council, according to the Japanese amendment, or under the Charter, according to the Thai amendment. Such measures might have nothing to do with aggression. The Security Council might, for example, take binding decisions relating to a procedure for settling a dispute.

56. The amendments would reduce the scope of article 70 to nothing. But article 70 was closely linked with articles 30, 31 and 49, which had already been adopted. Obviously article 31 could not apply to an aggressor, and though resort to force was prohibited under article 49, that article did not cover legitimate resort to force as a measure against an aggressor State. Otherwise, it would mean placing on the same footing a peace treaty imposed by an aggressor on the victim of the aggression, and a treaty imposed on the aggressor after its defeat.

57. War of aggression was the most serious international crime. They were not dealing with any rights or benefits which an aggressor might claim, but only with the aggressor's obligations.

58. He was surprised at the objection that the notion of aggressor State was still ill-defined. It was essential to avoid confusing two problems, one the definition of a term and the other the inclusion in the convention of a principle which no one questioned. The notion of force had not been defined either, and yet it was expressly referred to in Article 4 (2) of the Charter and in article 49 of the draft Convention.

59. Article 70 was entirely consistent with the fundamental principles of the Charter and of contemporary international law. The Soviet Union delegation, therefore, fully supported the article and would vote against the amendments by Japan and Thailand.

60. Mr. FUJISAKI (Japan) said he regretted very much that representatives who had spoken against his delegation's amendment (A/CONF.39/C.1/L.366) had completely misunderstood its sense and purpose. When introducing the amendment, he had clearly indicated that his delegation could see no reason for limiting the application of article 70 to cases of aggression. The amendment was designed not only to condemn aggressors but also to extend the application of the article to all cases—including the case of aggression—in which a binding decision had been taken by the Security Council.

61. The representative of the Ukrainian SSR had referred to Article 53 of the Charter, but no such retrospective implication was to be found either in the text of article 70 or in the commentary to it. It therefore seemed all the more necessary to adopt the Japanese amendment in order to dispel any doubt on the matter.

62. Mr. MAKAREWICZ (Poland) said the convention should contain a clause such as article 70. Aggression was the greatest of crimes and always caused upheavals in international relations. There were always important problems to settle after a war, and provision must be made for the measures necessary to prevent an aggressor from continuing to constitute a danger. Those measures found their expression in concrete treaties imposing appropriate obligations on the aggressor State. The entry into force and continuance in force of such treaties might not depend on the will of the aggressor State. It was therefore extremely important to provide clearly

that the present convention was without prejudice to any obligation under a treaty which might arise for an aggressor State as a consequence of measures taken in conformity with the United Nations Charter with reference to that State's aggression. Without such a provision, articles 31 or 49 and perhaps some others could lead to a dangerous confusion. Article 70 was the natural complement to articles 31 and 49. The Polish delegation would like to stress that it fully supported article 70 as it stood.

63. As for the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367), since any obligation arising out of the Charter by virtue of Article 103 prevailed over any other commitment of States Members of the United Nations, there was no need to repeat that in a convention on the law of treaties. What should be stressed in the convention on the law of treaties was the case of an aggressor State, for which certain obligations might arise after its aggression had been liquidated. For those reasons the Polish delegation was opposed to the amendments.

64. Mr. KEARNEY (United States of America) said that article 70 raised a problem because it was not clear, especially with regard to the grounds and effects of measures taken in conformity with the Charter of the United Nations. The Japanese amendment (A/CONF.39/C.1/L.366) had the merit of clarifying the position and of not confining itself to a single area in which the Security Council might take a decision. It not only dealt with aggression, but it covered any decisions that the Security Council might take and provided a safeguard with respect to such decisions. The United States delegation would support the amendment.

65. Mr. NACHABE (Syria) said the Japanese amendment (A/CONF.39/C.1/L.366) modified the precise application of article 70 and weakened its substance. The amendment by Thailand (A/CONF.39/C.1/L.367), to eliminate the words "aggressor" and "aggression", was unjustified, since article 70 dealt specifically with the case of an aggressor State.

66. Mr. BOLINTINEANU (Romania) said his delegation was in favour of article 70 as drafted by the International Law Commission. The article certainly dealt with the case of an aggressor State, against which measures must be taken in conformity with the relevant provisions of the Charter. Such measures might have an effect on the articles to which article 70 was related. The Romanian delegation was therefore opposed to the amendments.

67. Mr. MEGUID (United Arab Republic) said that his delegation considered that article 70 should be retained in its present form and that it could not accept the two amendments for the reasons already given by previous speakers. It had been said that aggression had not been defined, but that was no reason for deleting the words "aggressor State" from article 70. One thing that was certain was that the use of armed force was an undeniable element in aggression. Obvious and recent examples might be cited. The delegation of the United Arab Republic would therefore vote for the retention of article 70 as it stood.

68. Mr. WERSHOF (Canada) said his delegation strongly endorsed the United Kingdom representative's observations. It was not sure that such an article was necessary in a convention on the law of treaties and it had some doubts about the clarity of the text submitted by the International Law Commission. It was, however, prepared to accept that text.

69. The amendments by Japan and Thailand (A/CONF.39/C.1/L.366 and L.367) were reasonable and should have been examined more objectively. However, in view of the objections to which they had given rise, the Canadian delegation would abstain from voting on them.

70. The delegation of the Ukrainian SSR had expressed its indignation at the amendments in exaggerated terms and attributed unworthy motives to their authors. The Canadian delegation regretted that very much, all the more since it saw nothing reprehensible in the purpose for which the amendments had been submitted in the context of the law of treaties.

71. Mr. SUPHAMONGKHON (Thailand) said he was surprised at the reactions to his delegation's amendment. He had explained the reasons for submitting that amendment in his introductory statement. His delegation was in full agreement with the principle set out in article 70; its only doubt concerned the meaning of the word "aggression". Should an attempt be made to define that term in article 2 of the convention? Also, the reservations contained in article 70 were too restrictive; the article did not cover all the measures that might be taken by the United Nations. In his delegation's view, the scope of article 70 should be broadened.

72. Mr. HARRY (Australia) said that the Committee did not have to discuss the notion of aggression, because no State was in favour of aggression. Nor did it have to revert to questions already dealt with in articles 49 and 50. Nor, finally, did it have to define aggression. What it had to consider was a situation where an act of aggression had been committed.

73. There were two possible cases. In the first case, a State had committed an aggression against another State and the Security Council had taken a binding decision to institute measures against the aggressor. A peace treaty might follow and in that case article 70 rightly provided that the convention should contain nothing prejudicial to any obligation arising out of such a treaty. In the second case, a State made an armed attack on another State and the latter, either alone or in agreement with other States, adopted measures which might be taken in conformity with the Charter. Should article 70 then apply? The present wording confused the two situations. In his delegation's view, it should be referred to the Drafting Committee for examination in the light of the observations by delegations and the Japanese amendment (A/CONF.39/C.1/L.366), which sought to limit the application of article 70 to the first case.

74. Mr. MWENDWA (Kenya) said that his delegation did not question the motives of the authors of the amendments. But the present text of article 70 was quite clear; it formulated a reservation by referring to an aggressor State and the Charter of the United Nations.

75. With regard to the definition of aggression, a Committee was already studying that question and could be fully relied upon. Accordingly, his delegation supported

article 70 of the International Law Commission's draft and would oppose the amendments. A fundamental issue was involved which could not be referred to the Drafting Committee. The amendments should be put to the vote.

76. Mr. YASSEEN (Iraq) said be also thought that article 70 was very clear and presented no difficulty. The argument that aggression had not been defined could not be accepted, because the application of a legal rule did not depend on the definition of the terms it contained. The organs responsible for applying the Charter were obliged to define aggression in each particular case. Under the present international legal system, aggression constituted the supreme crime. Consequently it must be expressly mentioned in the draft convention, even if only in connexion with a reservation.

77. With regard to the amendments by Japan and Thailand, he did not question the good faith of their authors, but they were not acceptable because they did not mention aggression. Even if the Committee wished to broaden the scope of the rule stated in article 70, it would be necessary to mention aggression and then add something to cover the other measures that might be taken by the United Nations. His delegation was in favour of the original text and against the proposed amendments.

78. Mr. BREWER (Liberia) said that the amendments by Japan and Thailand went a little further than the original text in that they dealt with measures taken against a State in conformity with the Charter of the United Nations, whether or not it was an aggressor State. It should be remembered, however, that the title of the article was " Case of an aggressor State ". It would be preferable to amend both the title and the text to ensure that the article applied equally to the aggressor State and the State against which measures had been taken in conformity with the Charter. All that was needed was to add the words " or any other State " after the words " for an aggressor State " in the third line, and the words " or any other activities contrary to the provisions of the Charter of the United Nations " at the end of the article.

79. The CHAIRMAN said he would first put to the vote the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367).

The amendment by Japan was rejected by 58 votes to 7, with 27 abstentions.

The amendment by Thailand was rejected by 54 votes to 4, with 30 abstentions.

80. Mr. DE BRESSON (France) said, in explanation of his vote, that his delegation could not subscribe to any proposal intended to settle within the limits of the debate the most difficult political problems. He was convinced that the proposed amendments could not have had that purpose, and had preferred to abstain from voting on texts which it considered to be technical, and the scope of which was accordingly difficult to assess. His delegation supported article 70 as it stood.

81. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 70, with the oral amendment by Liberia, to the Drafting Committee.[6]

It was so agreed.

The meeting rose at 6 p.m.

[6] For resumption of the discussion of article 70, see 82nd meeting.

SEVENTY-SEVENTH MEETING

Monday, 20 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 71 (Depositaries of treaties) and *Article 72* (Functions of depositaries) [1]

1. The CHAIRMAN invited the Committee to consider articles 71 and 72 of the International Law Commission's draft.

2. Mr. CASTRÉN (Finland), introducing his amendment to article 71 (A/CONF.39/C.1/L.248), said that its purpose was to complete the provisions of the article so as to take into account those cases where there was more than one depositary. In its written comments, the IAEA had mentioned the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water of 1963 and the Treaty on Outer Space of 1966 as recent examples of treaties providing for three depositaries instead of the traditional number of one. It was necessary to have due regard to that novel practice, which would no doubt continue in the future.

3. The first part of his amendment to article 72 (A/CONF.39/C.1/L.249) was designed to modify the wording of paragraph 1 (*a*) so that the depositary's duties regarding custody should cover amendments to the treaty, as well as the original text of the treaty, as suggested by FAO in its written comments. The second part purported to alter the wording of paragraph 1 (*e*) so as to make clear that it was not only the States entitled to become parties to the treaty, but also those which were already parties, that must be informed of all acts, communications and notifications relating to the treaty.

4. Mr. ARIFF (Malaysia), introducing his delegation's amendments to articles 71 and 72 (A/CONF.39/C.1/L.290/Rev. 1 and L.291), said that they would have the

[1] The following amendments had been submitted:

To article 71—Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1), Finland (A/CONF.39/C.1/L.248), Bulgaria, Byelorussian SSR, Cambodia, Guinea, Mali and Mongolia (A/CONF.39/C.1/L.351), Mexico (A/CONF.39/C.1/L.372).

To article 72—Finland (A/CONF.39/C.1/L.249), Byelorussian SSR (A/CONF.39/C.1/L.364), Mongolia (A/CONF.39/C.1/L.368), United States of America (A/CONF.39/C.1/L.369), Mexico (A/CONF.39/C.1/L.372).

To articles 71 and 72—Malaysia (A/CONF.39/C.1/L.290/Rev.1 and 291) and China (A/CONF.39/C.1/L.328).

effect of transferring from article 71 to article 72 the statement that the " functions of a depositary of a treaty are international in character ". Since article 72 dealt with the functions of depositaries, that improvement was fully in line with the International Law Commission's conception of the two articles and the principles underlying them.

5. Mr. KIANG (China), introducing his delegation's amendment (A/CONF.39/C.1/L.328), said that it purported to make two changes in articles 71 and 72. The first was to insert the adjective " multilateral " before " treaty " in both paragraphs of article 71; it was only multilateral treaties, as distinct from bilateral treaties, which called for the services of a depositary.

6. The second change was to transfer paragraph 2 of article 71, which set out the character of the functions of the depositary, to article 72. That arrangement would be more logical in view of the title of article 72, " Functions of depositaries ".

7. Mr. SEPULVEDA AMOR (Mexico), introducing his delegation's amendment to article 71 (A/CONF.39/C.1/L.372), said that it purported to insert in paragraph 1, after the words " international organization ", the additional words " or the chief administrative officer of the organization ". That amendment was based on a suggestion by the Secretary-General of the United Nations (A/6827/Add.1, p. 17), who had pointed out that " In the practice of the United Nations, the depositary is the Secretary-General and not the organization itself ".

8. His delegation's amendment to paragraph 1 (*a*) of article 72 (A/CONF.39/C.1/L.373) was based on the written comment by FAO (A/6827/Add.1, p. 26) that the paragraph in question " refers only to the original text of the treaty; amendments are not mentioned in this sub-paragraph, nor in any of the subsequent provisions ". Accordingly, it was proposed in his amendment to insert the words " and of any amendment thereto " after the words " of the treaty " in the sub-paragraph in question.

9. Mr. BLIX (Sweden), introducing on behalf of the sponsors the three-State amendment to article 71 (A/CONF.39/C.1/L.236 and Add.1), said that its purpose was to cover the present State practice of occasionally designating more than one State as depositaries. Without expressing any opinion on that novel practice, his delegation felt that it was undoubtedly permissible and must be taken into account in the wording of paragraph 1 of article 71.

10. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the depositary played an essential role in the implementation of a treaty, and treaties were, as was well known, one of the most important means of strengthening friendly relations between States and thus in furthering the cause of international peace. Consequently, the articles on the depositaries of treaties were important.

11. Introducing the six-State amendment to paragraph 2 of article 71 (A/CONF.39/C.1/L.351), he said that its sponsors fully accepted the provisions of that paragraph but felt it desirable to specify the obligation of a depositary State to act impartially, irrespective of the state and character of the relations between itself and another State transmitting any of the notifications and communications referred to in article 73. As a sovereign State, the depositary State was entitled to have its own policy. That policy, however, must only affect its acts as an ordinary party to the treaty; when acting as depositary, a State was in duty bound to act impartially, regardless of the state and character of its relations with any other State.

12. Introducing his delegation's amendment to article 72 (A/CONF.39/C.1/L.364), he said that it purported to make two changes in the article, the first to replace in sub-paragraph 1 (*d*) the words " a signature, an instrument or a reservation is in conformity with the provisions of the treaty and with its articles " by the words " the documents relating to the treaty are correctly drawn up ". The language of the International Law Commission's text was unduly wide; it appeared to suggest that the depositary could interpret the treaty, and a reservation to a treaty in particular. Such functions belonged to a State party to a treaty, not to a depositary. That amendment was fully in line with the concept that a depositary must act impartially and not as a State party, when performing the international function of depositary.

13. Mr. STREZOV (Bulgaria), speaking as a sponsor of the three-State amendment to paragraph 1 of article 71 (A/CONF.39/C.1/L.236 and Add.1), said that it would take into account the existing State practice of designating not one depositary State but several. Apart from the examples already given, he believed that the same idea had been incorporated in the draft treaty on the non-proliferation of nuclear weapons. The practice appeared to be growing and had not given rise to any technical difficulty.

14. Speaking as one of the sponsors of the six-State amendment to paragraph 2 of article 71 (A/CONF.39/C.1/L.351), he said that the proposed addition was fully in keeping with the text of the paragraph as drafted by the International Law Commission. The concept of impartiality in the performance of the international functions of the depositary logically implied that the state and character of the relations between a depositary State and the State transmitting a notification or communication should have no effect on the performance of those functions. If they had any such effect, the depositary would not be acting impartially.

15. Mr. KHASHBAT (Mongolia), introducing his delegation's amendment to paragraph 2 of article 72 (A/CONF.39/C.1/L.368), said that it was for the insertion of a sentence reading: " The appearance of a difference shall not affect the impartial performance by the depositary of its functions as specified in paragraph 1 of this article. " The text as it stood merely indicated that, in the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary had the duty to bring the question to the attention of the other States concerned or of the organization concerned. The purpose of his amendment (A/CONF.39/C.1/L.368) was to make it clear that the impartial performance of the functions of the depositary must not in any way be affected by the emergence of a difference. The obligation of the depositary to act in that manner was implicit in the duty to perform its functions impartially and was in keeping with the inter-

national character of those functions. The amendment was therefore essentially of a drafting character.

16. Mr. BEVANS (United States of America), introducing his delegation's amendment to article 72 (A/CONF.39/C.1/L.369), said that its purpose was to bring the article into conformity with customary depositary practice. A treaty normally specified at least some of the functions to be performed by the depositary. Certain other functions were understood to exist as a result of practice. From time to time, however, certain functions needed to be performed which had not been anticipated and had therefore not been specified in the treaty. Such functions were usually related to the customary depositary functions and could be performed more efficiently and conveniently by the depositary than by any other agent. In such cases, the States concerned agreed to entrust the new functions to the depositary.

17. The United States amendment to the opening sentence of paragraph 1 (A/CONF.39/C.1/L.369) would make it clear that any functions not specified either in the treaty or in draft article 72 could appropriately be performed by the depositary by agreement of the States concerned, without the treaty actually having to be amended.

18. The United States amendment further purported to introduce a new paragraph 1 (*a*) which would include in the enumeration of the depositary's functions " Preparing the original text for signature in the languages specified ". The text of a treaty that was signed was almost invariably prepared by the depositary, either in typescript or in printed form.

19. His amendment would also alter the wording of the present paragraph 1 (*a*) so as to introduce a reference to the custody of " full powers, instruments of ratification, accession, acceptance or approval and notifications communicated to " the depositary. All such instruments and notifications were integral parts of the depositary's secretariat records and were of considerable importance.

20. It further proposed the inclusion, as one of the functions of the depositary, of registration of the treaty with the Secretariat of the United Nations. Almost invariably, the depositary had the most complete and authoritative information regarding a treaty and was in the best position to perform not only the initial function of registration but also to register subsequent developments, additional signatures, ratifications, accessions, acceptances or approvals, as well as any corrections, amendments or terminations. It was customary for the depositary to perform all the registration functions and he understood that the United Nations Secretariat had informally indicated its preference that registration of a treaty be effected by the depositary.

21. Lastly, his amendment proposed that, in paragraph 2 of article 72, the words " other States entitled to become parties to the treaty " be replaced by the words " other signatory or contracting States ". That wording would cover not only States that had signed the treaty but also States that had given their consent to be bound by it without being signatory States. The change was necessary in paragraph 2 because the proviso, " unless the treaty otherwise provides ", in paragraph 1 did not apply to paragraph 2. Actually, even if it did apply, it would be necessary, in order to give it effect, to include a special provision in the treaty, and such a provision was rarely, if ever, included in a multilateral treaty.

22. The phrase " States entitled to become parties " was inappropriate in paragraph 2 because States that had signed a treaty, or had given their consent to be bound by it, had a much more direct and serious interest in the performance of the functions of the depositary than States which had not had anything to do with the treaty. The present provisions of paragraph 2 would be cumbersome, and would delay not only the bringing of questions to the attention of the States most concerned but also the settlement of those questions. The proposed change would bring the text of the article into conformity with the statement in paragraph (8) of the commentary to article 72 that paragraph 2 laid down the general principle that the duty of the depositary was to bring the question to the attention of the other negotiating States. Paragraph (1) of the commentary to article 72 stated that the article had been patterned on the lines of the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7). The practice outlined in that publication might be appropriate for a world-wide international organization like the United Nations but would not necessarily be the most appropriate where a relatively small international organization, or a State, served as depositary.

23. Mr. RATTRAY (Jamaica) said that the draft convention covered all written international agreements, bilateral and multilateral, formal and informal. In view of the wide variety of instruments involved, it would be most unwise to make it mandatory to designate a depositary for each and every treaty, irrespective of its character. The International Law Commission's text of article 71 merely established the procedure for designating the depositary, and article 73 indicated the procedure to be followed where no depositary was designated. State practice showed no trend towards making designation of a depositary mandatory, and the three-State amendment (A/CONF.39/C.1/L.236 and Add.1) introduced an unnecessary complication by indicating that a depositary should be designated in all cases. The Jamaican delegation could not vote for that amendment.

24. Mr. WERSHOF (Canada) said that his delegation strongly supported the purpose of paragraph 2 of article 71, but had some doubts concerning the usefulness of paragraph 1 as drafted by the International Law Commission. His delegation could not agree with the Jamaican representative that the Commission's text did not make the designation of a depositary mandatory. It would be more appropriate if the imperative " shall " were replaced by the permissive " may ". In practice, depositaries were seldom designated for bilateral treaties in simplified form, while in the case of multilateral treaties with a very limited number of parties, each State often received a copy of the original treaty, none being designated as depositary. The Canadian delegation hoped that the Expert Consultant would comment on that point, and also on the question, raised in the Chinese amendment (A/CONF.39/C.1/L.328), whether article 71 should relate only to multilateral treaties.

25. His delegation agreed with the proposals in the three-State amendment (A/CONF.39/C.1/L.236 and Add.1) and

the Finnish amendment (A/CONF.39/C.1/L.248), that more than one State could be designated as depositaries of a multilateral treaty. On the other hand, it could not support the six-State amendment (A/CONF.39/C.1/L.351), although it sympathized with the motives for it; the wording was too vague and broad to justify the inclusion of the additional phrase.

26. With regard to article 72, the Canadian delegation would be grateful if the Expert Consultant would enlarge on the intentions of the International Law Commission with regard to the use of the word " reservations " in sub-paragraph 1 (*d*). It was stated in paragraph (4) of the commentary that it was no part of the functions of the depositary to adjudicate on the validity of an instrument or reservation; also that, if an instrument or reservation appeared to be irregular, the proper course of a depositary was to draw the attention of the reserving State to the matter and, if the latter did not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention in accordance with paragraph 2 of article 72. His delegation presumed that, in drafting the sub-paragraph, the Commission had tried to reflect the existing practice of the Secretary-General of the United Nations, as set out in paragraph (8) of the commentary to articles 16 and 17. It would accordingly like to know whether the Expert Consultant agreed with its understanding of the effect of sub-paragraph 1 (*d*) in the following hypothetical case. If a depositary received a reservation which was not prohibited by sub-paragraphs (*a*) or (*b*) of article 16, but which might be considered by the depositary to be incompatible under sub-paragraph (*c*), it should refrain from commenting on the possible incompatibility of the reservation, and simply inform the States mentioned in sub-paragraph 1 (*e*) of article 72 of the text of the reservation, leaving it to each of them to draw its own conclusion. On the other hand, if the reservation were prohibited by sub-paragraphs (*a*) or (*b*) of article 16, the depositary would have the right and duty, under sub-paragraph 1 (*d*) of article 72, to bring the matter to the attention of the reserving State.

27. His delegation considered that the amendments by the Byelorussian SSR (A/CONF.39/C.1/L.364) and Mongolia (A/CONF.39/C.1/L.368) introduced undesirable substantive changes into the article, and it would therefore vote against them.

28. Mr. ROSENNE (Israel) said that his delegation had re-examined article 71 in the light of certain comments particularly those of the Secretary-General of the United Nations (A/6827/Add.1) and the Council of Europe (A/CONF.39/7), which were in various ways reflected in the amendments of Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1), Finland (A/CONF.39/C.1/L.248) and Mexico (A/CONF.39/C.1/L.372). Although his delegation had no serious objection to those amendments, if it were decided to retain paragraph 1 of article 71, it wished to point out that the proposals were possibly more controversial than they would at first sight appear to be.

29. That had led his delegation to question whether paragraph 1 was necessary at all, and whether in any event it was correctly worded, for it could be read as a mandatory directive to States to designate a depositary when no such directive was intended. The paragraph stated no essential legal rule and it might be preferable to delete it altogether, rather than amend it; his delegation hoped that the Drafting Committee would consider that suggestion, which seemed to be supported by the statement in paragraph (1) of the commentary that, in re-examining the article at its seventeenth session, the Commission had revised its opinion as to the utility of the rules and had concluded that the matter should be left to the States which had drawn up the treaty to decide. Since no residual rule was proposed, a purely descriptive paragraph seemed to be out of place.

30. On the other hand, paragraph 2 stated an essential rule of law, consisting of the two elements of the international character of the depositary functions and the depositary's duty to act impartially in their performance. Since those two elements went together, the Israel delegation could not support the proposals of Malaysia (A/CONF.39/C.1/L.290/Rev.1) and China (A/CONF.39/C.1/L.328) to transfer the element of international character to article 72, which merely dealt with the technical aspects of the depositary's functions. It also considered that the point raised in the six-State amendment (A/CONF.39/C.1/L.351) was adequately covered in the original text, so that the amendment was not essential.

31. With regard to paragraphs 1 and 2 of the Chinese amendment (A/CONF.39/C.1/L.328), his delegation believed that there was no justification for introducing such an inflexible rule, since, although occasions on which a depositary was designated for treaties which were not multilateral were certainly rare, they were not unknown; the International Law Commission had considered the matter carefully in 1962 and 1965, and had deliberately decided not to be so restrictive.

32. His delegation believed that article 72 should be kept more or less as it had been drafted by the Commission, subject to appropriate changes to take into account the views of those governments and international organizations which had had wide experience of administering treaties as depositaries. It would be prepared to support the amendments of Finland (A/CONF.39/C.1/L.249), the United States (A/CONF.39/C.1/L.369) and Mexico (A/CONF.39/C.1/L.373), all of which contained useful and necessary clarifications; it should be borne in mind, however, that in some cases the depositary of amendments was different from the depositary of the original treaty, and the text should therefore not be too rigid. Although paragraph 3 of the Byelorussian amendment (A/CONF.39/C.1/L.364) was correct in principle, his delegation considered that, as in the case of the six-State amendment to article 71 (A/CONF.39/C.1/L.351), the point was adequately covered in article 71, and that it was not essential to repeat it in article 72. The same could be said of the Mongolian amendment (A/CONF.39/C.1/L.368).

33. Mr. ZEMANEK (Austria), referring to the provision in paragraph 1 of article 71 that the depositary could be a State or an international organization, said that in practice the depositary in the latter case was often the chief administrative officer of the organization, not the international organization itself. That differentiation had been recognized by the International Law Commission when it had referred to the competent organ of an international organization in sub-paragraph 1 (*a*)

of article 28 of its 1962 draft; but in 1965 the article had been rephrased as a residuary rule, and it had then been pointed out that the reference to a competent organ might give rise to difficulties, by necessitating a detailed examination of the constitution of the organization concerned. Since the paragraph was no longer drafted in residuary terms, however, the Austrian delegation considered that those objections no longer held good, and it could therefore support the Mexican amendment (A/CONF.39/C.1/L.372).

34. Mr. DE BRESSON (France) said that his delegation considered it essential to state unequivocally in article 71 that a depositary must act exclusively as the mandatory of the parties, that its functions were, so to speak, notarial, and that it consequently had no right to prejudge the opinion of the parties when a problem arose which affected not the form but the substance of the treaty or cast doubt on the relations between the parties. His delegation did not consider that the Commission's text made the position clear enough, and it would support any amendment which would remedy that shortcoming.

35. With regard to article 72, the French delegation wished to raise two major points. First, it was important to specify whether the term " States entitled to become parties to the treaty ", used in sub-paragraph 1 (*b*), 1 (*e*) and 1 (*f*) and in paragraph 2, meant all the States interested in the treaty by reason of its object, or only the contracting States and the States which had taken part in the negotiation, or perhaps the signatory States which had subsequently failed to ratify the treaty. The extent of the depositary's responsibility would depend on the answer to that question. For example, if it meant all the States interested in the treaty by reason of its object, then the depositary would have to notify all the States Members of the United Nations, and if the definition extended to signatories which had not ratified the treaty, the depositaries might be obliged to send notifications to States which had failed to ratify signatures appended as long as 50 years previously. Those illustrations showed how important it was to clarify the point.

36. Secondly, sub-paragraph 1 (*d*) gave the erroneous impression that a depositary had the right to decide whether the substance as well as the form of an instrument or reservation was or was not compatible with the provisions of the treaty. It was self-evident that the depositary had no such right, and sub-paragraph 1 (*d*) should be reworded so as to eliminate any possible ambiguity in that respect.

37. With regard to some points of lesser importance, his delegation doubted whether it was realistic to provide in sub-paragraph 1 (*a*) for cases where the custody of the original text of the treaty was not entrusted to the depositary. If sub-paragraph 1 (*a*) were retained in its existing form, sub-paragraph 1 (*b*) should be amended to provide for cases where the depositary did not have custody of the original text. His delegation also considered that the depositary could hardly be made responsible for preparing " any further text in such additional languages as may be required by the treaty ", if that meant that the translations were to be prepared by the depositary. The Drafting Committee should consider all those points very carefully.

38. Mr. SARIN CHHAK (Cambodia) said that the purpose of the Byelorussian amendment to article 72 (A/CONF.39/C.1/L.364) was to clarify the meaning of the Commission's text and emphasize the impartial character of the depositary. That point had been clearly brought out in the last sentence of paragraph (2) of the Commission's commentary to article 71. The Commission had reflected both theory and practice in articles 71 and 72, making it plain that a depositary could not exercise control over contracting States. That consideration would guide him in the way he voted on the amendments to the two articles.

39. Mr. MARESCA (Italy) said that the role of the depositary had changed in recent years. Previously it had always been a State, but now it could also be the executive head of an international organization. Sometimes there were several depositaries, as in the case of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water. A depositary's functions were international and called for complete impartiality. The notion of the international character of the depositary had been well brought out in the Malaysian amendment to article 72 (A/CONF.39/C.1/L.291) and should be expressed at the beginning of Part VII. An explanation was also needed of the meaning of the phrase " the States entitled to become parties to the treaty ", used throughout article 72.

40. He supported the Finnish amendment to article 71 (A/CONF.39/C.1/L.248) and the United States (A/CONF.39/C.1/L.369) and Mexican (A/CONF.39/C.1/L.373) amendments to article 72. The Mongolian amendment (A/CONF.39/C.1/L.368) was unnecessary, because the term " impartially " in article 71, paragraph 1, was already quite comprehensive.

41. Mr. HARRY (Australia) said that the Commission's text was generally acceptable. It was merely descriptive but usefully recognized the modern practice of designating international organizations as depositaries. He had understood article 71, paragraph 1, as not requiring the parties to appoint a depositary in all cases but as saying that, if they wished to do so, they could provide for it either in the treaty itself or in some other manner. He could accept the change suggested by Canada whereby the word " shall " would be replaced by the word " may ".

42. The Finnish amendment (A/CONF.39/C.1/L.248) provided for the appointment of more than one depositary and should be adopted. The three-State amendment (A/CONF.39/C.1/L.236 and Add.1), which seemed to require negotiating States to designate a depositary in all cases, did not conform to practice. As was contemplated in article 73 of the draft, there could be cases where no depositary was appointed. The Chinese amendment (A/CONF.39/C.1/L.328) was perhaps not absolutely necessary but could be examined by the Drafting Committee, which could also consider what should be the best place for article 71, paragraph 2.

43. The intention of the six-State amendment to article 71 (A/CONF.39/C.1/L.351) was not clear. He assumed that it was intended to add something to the principle laid down in article 71 that a depositary's functions were international in character and that it was under an obligation to act impartially. In the event of a difference between a State and a depositary over the performance of the latter's functions, the depositary could not act irrespective of the state of its relations with other States

entitled to become parties. It could not be expected to communicate direct with States with which it did not have diplomatic relations, but it could still impartially communicate notifications through the competent organ of the United Nations or through a third State. He did not consider that the six-State amendment clarified the Commission's text, which was adequate.

44. He supported the Finnish (A/CONF.39/C.1/L.249) and United States (A/CONF.39/C.1/L.369) amendments to article 72 but did not think there was any justification for the Mongolian (A/CONF.39/C.1/L.368) or Byelorussian (A/CONF.39/C.1/L.364) amendments, which sought to deal with situations already sufficiently provided for in paragraph 2 of article 71.

45. One point should be made more explicit in paragraph 2 of article 72, namely, that the depositary had no competence to adjudicate in the event of a difference between a State and the depositary.

46. Mr. MEGUID (United Arab Republic) said that, as stated in paragraph (4) of the commentary to article 72, it was no part of the functions of a depositary to adjudicate on the validity of an instrument or reservation. That principle had been confirmed in General Assembly resolution 528 (VI). As the Conference was engaged in codifying the law of treaties, it should refrain from extending the functions of depositaries. Therefore article 72 1 (*d*) should be interpreted restrictively.

47. Miss POMETTA (Switzerland) said that article 71 indicated sufficiently clearly the impartial character of a depositary's functions; there was therefore no need to elaborate that point.

48. The terms of article 72 corresponded to the practice of Switzerland with respect to the treaties of which it was the depositary; in particular, it was correct that, as stated in paragraph 1 (*e*), it was the depositary's function to transmit acts, communications and notifications relating to the treaty and to its application. The Swiss delegation wished to state, however, that in the opinion of its Government, the depositary was not required to transmit communications of a purely political nature relating to disputes which might arise between contracting States or States entitled to become parties. That was how her Government understood paragraph 1 (*e*).

49. Mr. RAJU (India) said that, as indicated in article 71, a depositary might be a State or an international organization, as designated by the negotiating States in the treaty or in some other manner. Its functions were international and it had to act impartially, without giving any weight to its political opinion as to the status of the State or government sending in notifications or communications. Even if the depositary had not recognized the State which was entitled to send its notifications or communications under the terms of the treaty, it must perform its functions impartially and irrespective of its own opinion. It must also be impartial in regard to whether the objection or reservation filed by a State was compatible with the provisions of the treaty and whether that State was entitled to be counted for the purposes of bringing the treaty into force.

50. A difference might arise between a State and a depositary about the latter's performance of its functions. In that event, under article 72, paragraph 2, the depositary had to bring the question to the attention of the other States entitled to become parties to the treaty or to the competent organ of the international organization concerned.

51. The Commission's draft articles did not refer to the recent practice of having several depositaries, nor were the consequences of the various entities acceding to a treaty by depositing their instruments with one or other depositary made clear. Ostensibly all the parties to the treaty would have identical status regarding their rights and obligations *inter se* under the treaty.

52. The three-State amendment to article 71 (A/CONF.39/C.1/L.236 and Add.1) was of a drafting nature and could be considered by the Drafting Committee. He would prefer to see the clause concerning the international character of the depositary's function kept in article 71, paragraph 2, rather than transferred to article 72, as proposed in the Malaysian amendment (A/CONF.39/C.1/L.291). The six-State amendment (A/CONF.39/C.1/L.351) would clarify the Commission's text and he supported it. The Chinese amendment (A/CONF.39/C.1/L.328) should be considered by the Drafting Committee, but he could not support the second part of it. Neither the Byelorussian (A/CONF.39/C.1/L.364) nor the Mongolian (A/CONF.39/C.1/L.368) amendments seemed necessary. The United States amendment (A/CONF.39/C.1/L.369) was acceptable, with the exception of paragraph 5. He supported the first, but not the second, part of the Finnish amendment (A/CONF.39/C.1/L.248) and also the Mexican amendment (A/CONF.39/C.1/L.373) to article 72.

53. Mr. SINCLAIR (United Kingdom) said that his delegation supported the Commission's text of article 71, which was expository and clearly reflected established international practice. Article 28 of the draft adopted by the Commission in 1962 had been formulated in terms of residual rules for the appointment of a depositary of a multilateral treaty when the treaty made no provision. A formulation in terms of residual rules would have been useful, but his delegation could still support the expository article proposed by the Commission.

54. Most of the amendments to article 71 were of a drafting character and he doubted whether they would significantly improve the text. The additional wording proposed in the six-State amendment (A/CONF.39/C.1/L.351) was unnecessary because the obligation of a depositary to act impartially already covered the point. He was puzzled to know what was intended by the phrase " the state and character of the relations between the depositary State and the State transmitting the notifications ". If it referred to the absence or severance of diplomatic relations between the two, then he would not dispute that the obligation of impartiality imposed on the depositary the duty to receive notifications through a protecting power. But the amendment could be interpreted as going wider than that, and his delegation could not therefore support it.

55. Passing to article 72, he said that there seemed to be some inconsistency in the drafting of paragraph 1. Subparagraph (*e*) required that the depositary should inform the States entitled to become parties to " acts, communications and notifications relating to the treaty ", but under paragraph 1 (*c*) the depositary was required to receive only notifications. Under paragraph 1 (*d*), the function of

the depositary was limited to examining whether " a signature, an instrument or a reservation " was in conformity with the provisions of the treaty and of the present articles. That function should surely equally extend to the examination of notifications and communications. The Drafting Committee should consider the wording of those sub-paragraphs carefully.

56. The United States amendment (A/CONF.39/C.1/L.369) had considerable merit. In the case of a multilateral treaty, it was normally the function of a depositary to prepare the original text for signature in the various languages and he could therefore support paragraph 2 of the United States amendment. He also agreed that the depositary retained custody not only of the original text of the treaty but also of the various instruments referred to in paragraph 3 of the United States amendment. Unless the treaty otherwise provided, the depositary normally registered the treaty with the United Nations, so that the new sub-paragraph (*h*) proposed in paragraph 4 was acceptable. The differences between a State and a depositary should be considered only by those States which had taken definite steps in the direction of becoming parties to the treaty and he therefore supported the slight revision of paragraph 2 proposed in paragraph 5 of the United States amendment. The Mongolian amendment (A/CONF.39/C.1/L.368), on the other hand, was neither necessary nor desirable and might weaken the force of the obligation to act impartially.

57. The Byelorussian amendment (A/CONF.39/C.1/L.364) seriously affected the scope of the depositary's functions. The depositary was the guardian of the treaty and was not only entitled but obliged to examine whether signatures, instruments, notifications or reservations conformed to the provisions of the treaty and of the present convention. He would vote against that amendment.

The meeting rose at 1 p.m.

SEVENTY-EIGHTH MEETING

Monday, 20 May 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 35, 40 and 43 to 49 proposed by the Drafting Committee.

Article 35 (General rule regarding the amendment of treaties) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that only the Spanish version of article 35 had been altered. The Drafting Committee had replaced the words " *todo tratado* " by the words " *los tratados* ".

Article 35 was approved.

[1] Fore arlier discussion of article 35, see 36th and 37th meetings.

Article 40 (Obligations under other rules of international law) [2]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 40 adopted by the Drafting Committee read as follows:

"*Article 40*

" The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law."

4. In addition to replacing the words " present articles " by " present convention ", the Drafting Committee had made further changes in the International Law Commission's text. In order to bring the French version into line with the English and Spanish versions, it had replaced the words " *lorsqu'ils découlent de la mise en œuvre* " by the words " *résultant de l'application* ". In the English version, it had substituted the word " provisions " for " terms " before the words " of the treaty ", and in the French text the word " *dispositions* " for " *termes* " before the words " *du traité* ". That brought those versions into line with the Spanish version, which used the word " *disposiciones* ".

5. It had rejected the three amendments referred to it by the Committee of the Whole and had decided to re-examine the terminology of the article later, in the light of other provisions of the draft articles, in particular article 39 when it was referred to it by the Committee of the Whole.

Article 40 was approved.

Article 43 (Provisions of internal law regarding competence to conclude a treaty) [3]

6. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 43 adopted by the Drafting Committee read as follows:

"*Article 43*

" 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

" 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

7. At its forty-third meeting, the Committee of the Whole had referred article 43 to the Drafting Committee after making two changes. First, it had approved an amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1) to alter the closing words of the article to read: " unless that violation of its internal law was of fundamental importance and manifest ". The Drafting Committee had considered that the discussion, and particularly the statement by the Peruvian representative, had clearly shown that the Committee of the

[2] For earlier discussion of article 40, see 40th meeting.

[3] For earlier discussion of article 43, see 43rd meeting.

Whole had intended those words to refer to manifest violations of rules of fundamental importance, and not, as the text suggested, fundamental violations of any rule, regardless of its importance. It had therefore amended the closing words of the article to read: " unless that violation was manifest and concerned a rule of its internal law of fundamental importance ".

8. Secondly, the Committee of the Whole had approved an amendment by the United Kingdom (A/CONF.39/C.1/L.274) to add a sentence reading: "A violation is manifest if it would be objectively evident to any State dealing with the matter normally and in good faith ". The Drafting Committee had thought it necessary to clarify the meaning of the words " dealing with the matter normally ", and had therefore worded the sentence to read:

> "A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith ".

It also decided that the sentence should form a separate paragraph.

9. In the Spanish version of paragraph 1 of the article, the words " *con violación* " had been replaced by the words " *en violación* ".

10. Mr. ROSENNE (Israel) said his delegation reserved its position regarding the text of article 43. The Drafting Committee had worded the article in accordance with the decisions of the Committee of the Whole, but the resulting text was not an improvement on the International Law Commission's wording.

11. Mr. CARMONA (Venezuela) said that the wording approved by the Drafting Committee was consistent with the amendments approved by the Committee of the Whole and improved the text of the article. Nevertheless, that wording was not entirely satisfactory to the delegations which had expressed concern on the subject when the Committee of the Whole had discussed the article; it did not solve the problems which the article might create for Parliaments. His delegation therefore reserved its position on the article.

12. Mr. CUENDET (Switzerland) said his delegation reserved its right to revert to the issues raised by article 43 at the second session of the Conference.

Subject to the above reservations, article 43 was approved.

Article 44 (Specific restrictions on authority to express the consent of the State) [4]

13. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 44 adopted by the Drafting Committee read as follows:

"*Article 44*

> " If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent."

14. Before referring article 44 to the Drafting Committee, the Committee of the Whole, at its forty-fourth meeting, had approved a Mexican amendment (A/CONF.39/C.1/L.265) to add the words " or of the depositary " after the words " of the other negotiating States ". With that addition, article 44 referred to the case in which specific restrictions on the authority to express the consent of a State were notified by the State to the depositary and not direct to the other negotiating States.

15. The Drafting Committee had found that that situation was covered by article 73, sub-paragraph (*c*), which stipulated that if a notification was transmitted to a depositary, it was to be " considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1 (*e*) ". That provision of article 73 provided negotiating States with a guarantee, which might be impaired if the express reference to the depositary were retained in article 44. The Drafting Committee had therefore deleted the reference. It had also replaced the words " brought to the knowledge of " by the words " notified to ", which made it possible to apply the provisions of article 73. It had considered it unnecessary to add the word " expressly ", as proposed by the Japanese amendment (A/CONF.39/C.1/L.269) which had been referred to the Drafting Committee by the Committee of the Whole.

16. In addition to the Japanese amendment, the Drafting Committee had also had before it a Spanish amendment proposing a new text for article 44 (A/CONF.39/C.1/L.288). It had decided that the International Law Commission's text was preferable.

17. In the Spanish version, the words " *por determinado tratado* " were replaced by the words " *por un tratado determinado* ".

18. Mr. TENA IBARRA (Spain) said that, in the discussion of article 44 in the Committee of the Whole, his delegation had submitted an amendment (A/CONF.39/C.1/L.288) proposing a substantive change and a drafting change. The substantive change was similar to that proposed in the Japanese amendment (A/CONF.39/C.1/L.269).

19. The Committee of the Whole, in a single vote, had pronounced in favour of the principle of notification. His delegation thought that, if it were decided to retain article 44, provision should be made for notification. Further, the International Law Commission's wording did not express the idea in question clearly and the terms used were neither legal nor elegant, owing to the repetitions. The Spanish delegation had therefore thought it necessary to propose an amendment containing new wording.

20. His delegation reserved the right to revert to the matter at the second session of the Conference and to re-submit its amendment.

Subject to the above reservation, article 44 was approved.

Article 45 (Error) [5]

Article 46 (Fraud) [6]

Article 47 (Corruption of a representative of the State) [7]

[4] For earlier discussion of article 44, see 44th meeting.

[5] For earlier discussion of article 45, see 44th and 45th meetings.

[6] For earlier discussion of article 46, see 45th, 46th and 47th meetings.

[7] For earlier discussion of article 47, see 45th, 46th and 47th meetings.

Article 48 (Coercion of a representative of the State) [8]

21. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 45 to 48 had been approved by the Committee of the Whole and referred back to the Drafting Committee with a single amendment by the United States relating to the English title of article 48 (A/CONF.39/C.1/L.277). The Drafting Committee would defer a final decision on that amendment until it had considered all the titles adopted by the International Law Commission for the various parts, sections, and articles of the draft.

22. The Drafting Committee had not made any change in the English version of articles 45 to 48, but in paragraph 2 of article 45 it had modified the French and Spanish versions of the English expression " to put on notice ". The new wording was based on the translation of that expression in the judgment of the International Court of Justice in the *Temple of Preah Vihear* case.[9] In the Spanish version of articles 45 and 46, the words " *Todo Estado* " had been replaced by the words " *Un Estado* ", and in paragraph 1 of article 45 the words " *y que constituyera* " had been replaced by the words " *y constituyera* ".

Article 45 was approved.

23. Mr. CARMONA (Venezuela) said that his delegation reserved its position on articles 46 and 47 for the reasons explained during the debate on those articles at the forty-fifth meeting of the Committee of the Whole.

Subject to the above reservation, articles 46 and 47 were approved.

Article 48 was approved.

Article 49

(Coercion of a State by the threat or use of force)[10]

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that in adopting the amendment submitted by Bulgaria and twelve other States (A/CONF.39/C.1/L.289 and Add.1), the Committee of the Whole had inserted the expression " international law embodied in " between the words " principles of " and " the Charter of the United Nations ". It had then referred article 49, as amended, to the Drafting Committee without further modification.

25. The Drafting Committee had not made any change in the English and French texts of the article, but in the Spanish text the expression " *con violación* " had been replaced by the words " *en violación* ", to bring the Spanish version into line with the English and French texts. The text accordingly read:

> " A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. "

26. Mr. BINDSCHEDLER (Switzerland) asked whether there was any difference in meaning between the words " without any legal effect ", used in article 48, and the word " void ", used in article 49. If there was a difference in terminology, then there must presumably be a difference in meaning.

27. His delegation could not accept articles 48 and 49, as it thought that the words " without any legal effect " and " void " should be replaced by the word " voidable ". The articles should provide not for the nullity *ipso facto* of a treaty, but for the possibility of invalidating it when nullity had been established in conformity with the required procedure.

28. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Committee of the Whole had referred article 48 to the Drafting Committee without any modification of the expression to which the Swiss representative objected. It was not for the Drafting Committee to introduce a substantive change in an article.

29. With regard to article 49, no amendment to replace the word " void " had been submitted to the Committee of the Whole. Consequently, the Drafting Committee had not been asked to make any change.

30. Mr. MIRAS (Turkey) said that he agreed with the Swiss representative's observations.

31. Mr. DE BRESSON (France) said that, for reasons of principle which had been explained during the debate on article 49, his delegation would not oppose the adoption of article 49 as it stood. However, it would be advisable, at the appropriate juncture, to define the precise meaning of the concepts referred to in the various articles of Part V concerning cases of invalidity.

32. Mr. SINCLAIR (United Kingdom) said that his delegation would not oppose the adoption of article 49. As he had already said, the final acceptance by his delegation of that article and the articles that had just been approved would depend on the inclusion of satisfactory procedures in article 62.

33. Mr. HARRY (Australia) said he agreed with the remarks of the French representative; he reserved his delegation's position on article 49.

Subject to the above reservations, article 49 was approved.

34. Mr. AL-RAWI (Iraq) said that his delegation accepted the formulation of article 49, which reflected the wishes of most members of the Committee, but wished to put on record that it interpreted the idea of force as including not only armed force but any form of economic or political pressure.

35. The CHAIRMAN invited the Committee to resume its consideration of the articles of the International Law Commission's draft.

Article 71 (Depositaries of treaties) and

Article 72 (Functions of depositaries)
(resumed from the previous meeting)

36. Mr. MAKAREWICZ (Poland) said that the growing number of multilateral treaties conferred ever-increasing importance on the depositary, which must act in an impartial manner and in the interests of the entire international community. Nevertheless, in international practice there had been cases in which a depositary had acted in an impartial manner towards certain States but had shown a discriminatory attitude towards other States. The depositary generally justified its attitude by saying that it did not recognize a particular State. Such conduct was incompatible with the international character of the depositary's functions and constituted an abuse

[8] For earlier discussion of article 48, see 47th and 48th meetings.

[9] *I.C.J. Reports, 1962,* p. 26.

[10] For earlier discussion of article 49, see 48th, 49th, 50th, 51st and 57th meetings.

of powers on its part. By refusing to accept an appropriate instrument of a given State, a depositary arbitrarily precluded that State from entering into treaty relations with other parties to a treaty, thus interfering with the smooth development of treaty relations.

37. Unless the treaty otherwise provided, a depositary was required to receive instruments of ratification, accession, acceptance or approval, without making any distinction between States. Further, in conformity with the principle of the sovereign equality of States, every State was entitled to decide for itself whether or not it wished to have treaty relations with other States. When Poland functioned as a depositary, as in the case of the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, [11] it acted in an absolutely impartial manner and regardless of such considerations as relations or recognition. That did not, of course, preclude Poland, in its capacity as a party, from expressing its own policy with regard to certain countries.

38. His delegation took the view that participation in multilateral treaties was without prejudice to the question of the recognition or maintenance of diplomatic relations. The Committee had already expressed its opinion on that question when it had approved by a large majority an amendment to article 60 which provided that severance or absence of diplomatic relations between two or more States did not prevent the conclusion of treaties between those States. The conclusion of a treaty did not affect the situation in regard to diplomatic relations.

39. Thus the Committee had already confirmed the underlying principle of the six-State amendment (A/CONF.39/C.1/L.351). The same principle should therefore be reproduced in the provisions concerning the functions of depositaries.

40. The principle according to which " the conclusion of a treaty does not affect the situation in regard to diplomatic relations ", which had also been approved by the Committee, dispelled all doubts as to the possible effects of the six-State amendment. His delegation considered that the amendment to article 60 and the six-State amendment would guarantee the smooth functioning of the depositary's machinery.

41. He supported the amendment by Bulgaria, Sweden and Romania (A/CONF.39/C.1/L.236 and Add.1), which took account of current practice. The Malaysian amendment (A/CONF.39/C.1/L.290/Rev.1) related to a question of form but did not seem to improve the wording of article 71.

42. His delegation was also in favour of the substantive amendments to article 72 by the Byelorussian SSR (A/CONF.39/C.1/L.364) and Mongolia (A/CONF.39/C.1 L.368), which stressed the principle of the impartial performance of the functions of depositaries and thus helped to promote good relations between States.

43. Mr. EUSTATHIADES (Greece) said that his delegation would support any amendment to Part VII of the draft designed to cover all situations as far as possible, and to avoid political difficulties. That meant applying three principles: flexibility, discretion in designating the depositary, and impartiality of the depositary.

44. The principle of flexibility should apply both to the status and functions of the depositary, and to the classes of treaty covered by the provisions relating to the deposit of instruments. Thus, so far as article 71 was concerned, the Greek delegation supported the Finnish amendment (A/CONF.39/C.1/L.248), which made provision for cases in which there was more than one depositary. It also supported the Mexican amendment (A/CONF.39/C.1/L.372), which took into account the practice followed by certain international organizations, in particular the Council of Europe, the secretariat of which was not an organ of the organization. Similarly, it would be useful to provide, in paragraph 1, that States could agree among themselves on the scope of the functions they wished to entrust to the depositary. The Greek delegation therefore supported paragraph 1 of the United States amendment. On the question of the designation of the depositary, he agreed with the Canadian representative that it should be optional rather than compulsory. Consequently, he could not support the amendment by Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1), which would have the effect of making the designation of the depositary more nearly obligatory.

45. Lastly, it was not enough to say that the depositary was under an obligation to act impartially in the performance of its functions. It must not be entrusted with functions which would expose it to the risk of acting in a way that might seem to lack objectivity and impartiality. As the French representative had said at the previous meeting, the supervision exercised by the depositary should be restricted to formalities. It should not be required to make any substantive or political judgment. The Greek delegation therefore supported the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.364), which limited the depositary's functions to technical tasks. Both in practice and in theory, the Secretary-General of the League of Nations had been denied competence to make certain substantive judgments relating to the registration of treaties.

46. The French representative had also mentioned other points which were a source of danger. The Drafting Committee's attention should be specially drawn to the expression " States entitled to become parties to the treaty ", used in article 72. Apart from the problem of judgment raised by that form of words, it might well be asked whether it did not give the depositary an unduly onerous technical task and one, moreover, which did not meet the needs of the international community. In principle, only contracting States, signatory States and States which had taken part in the negotiation needed to receive such communications. Other States could first express their wish to be informed about the performance of the treaty. The formulation for paragraph 2 proposed in the United States amendment (A/CONF.39/C.1/L.369) was a very good solution and the Greek delegation supported it.

47. Mr. THIAM (Guinea), speaking as a co-sponsor of the six-State amendment to article 71 (A/CONF.39/C.1/L.351), said that particular attention should be paid to the question of the depositary's impartiality, since that was essential to the stability of treaties and consequently to the development of international co-operation. Like the other delegations sponsoring the amendment, the

[11] League of Nations, *Treaty Series*, vol. 137.

delegation of Guinea considered that the obligation of impartiality should be more clearly stated. Problems might well arise when the depositary was an international organization of which the State making the notification was not a member; or the depositary might be a State which did not have diplomatic relations with the notifying State, either because relations had been broken off or because they had never existed, the depositary State not having recognized the notifying State. Or again, relations between the two States might be going through a period of crisis. In all such cases, there should be no possibility of the depositary's impartiality being called in question. That was the purpose of the amendment.

48. It might perhaps be better to replace the words " the depositary State " by " the latter " in the text of the amendment in order to avoid giving the impression that the functions of a depositary were always entrusted to a State.

49. Mr. SECARIN (Romania) said that the rules drawn up by the International Law Commission in articles 71 and 72 were designed to give the depositary a legal status enabling it to play its essential part in the application of multilateral treaties. The importance of such treaties in international life was such that the provisions relating to the depositary should take account of new arrangements and methods adopted in practice, in order to ensure more effective operation of the treaties. One such method was to entrust the function of depositary to several States; that should be taken into account in the future convention. The Romanian delegation had therefore joined the Bulgarian and Swedish delegations in sponsoring their amendment (A/CONF.39/C.1/L.236). It was in favour of the Finnish amendment (A/CONF.39/C.1/L.248) for the same reasons. Those two amendments could be referred to the Drafting Committee, but if the Committee of the Whole wished to take a decision on them, it could vote on the principle. The words "shall designate" in the three-State amendment (A/CONF.39/C.1/L.236) did not make the procedure for designating depositaries compulsory; it was merely a possibility left to the discretion and will of the parties to a multilateral treaty.

50. In view of the international nature of its functions, the depositary must be strictly impartial. The nature of the relations between the depositary and a State sending notifications or communications concerning its participation in a treaty should have no influence on the impartiality of the depositary. Article 71 should mention that point expressly. The Romanian delegation would therefore support the six-State amendment (A/CONF.39/C.1/L.351).

51. Sir Humphrey WALDOCK (Expert Consultant) said that in article 71, paragraph 1, the International Law Commission had intended to state a declaratory, not a mandatory, rule. There had even been some question of framing the content of paragraph 1 in the form of a definition of depositary, and placing it in paragraph 2. The Commission had preferred, however, to devote paragraph 2 solely to the important substantive provision it now contained. It had been said that the words " shall be designated " appeared to be mandatory. That had not been the Commission's intention, however, and it was to be hoped that the Drafting Committee would find an appropriate form of words.

52. It had been asked whether the functions of a depositary were confined to multilateral treaties. The Commission had considered the question, but since there were sometimes depositaries for bilateral treaties, it had thought that it should not exclude them.

53. With regard to article 71, paragraph 1, it had been said that there might be more than one depositary. The International Law Commission had been aware of that practice, but had considered that the expression " a State " was very general and could equally cover cases in which there were two or three depositaries. Further, the practice introduced complications into the operation of the depositary system and, though it might sometimes be a useful expedient, the Commission had come to the conclusion that it should not press the point. If the Committee of the Whole wished to refer to that practice expressly, however, that would be consonant with the International Law Commission's intention and with modern practice.

54. It had been proposed that the words " or the chief administrative officer of the organization " should be added in paragraph 1. By " international organization ", the Commission had, of course, meant both the organization and its organs.

55. The word " impartially " in article 71, paragraph 2 should apply, in the Commission's view, to all the depositary's obligations in respect of a treaty for which it was to perform the functions of depositary.

56. Numerous comments had been made on article 72. The Canadian representative had asked for an explanation of paragraph 1 (*d*). His interpretation of it was correct. In the opinion of the International Law Commission, a depositary notified of reservations falling under article 16, sub-paragraph (*c*), that was to say, reservations incompatible with the object and purpose of a treaty, must communicate the text of the reservation to the other States concerned and leave it to them to decide the question of compatibility.

57. The Commission had made a very clear distinction between the functions of a depositary set out in paragraph 1 (*d*) and those in paragraph 2. Paragraph 2 dealt with cases in which there were differences of opinion between a State and the depositary about the application of paragraph 1 (*d*). In such cases, the matter was discussed with the other States concerned; consultations must be held; the depositary could not take any decision on the matter.

58. In his opinion, the expression " States entitled to become parties to a treaty " was too broad. The Commission had intended it to designate signatory States and any State entitled to become a party under the terms of the treaty; cases of succession of States were not covered. The proposal in the United States amendment (A/CONF. 39/C.1/L.369) to refer to " signatory and contracting States " was a compromise which deserved consideration by the Drafting Committee.

59. It had been asked whether the registration of treaties should not be part of a depositary's functions. The International Law Commission had studied that problem, but had come to the conclusion that the function of registration might cause difficulties, in view of the rules applied by the General Assembly where the depositary was an international organization. There were very strict rules on the subject. The Commission had come to the conclu-

sion that it would be unwise to mention registration as one of the functions of a depositary without making a more thorough study of the relationship between the provision and the rules on the registration of treaties applied by the United Nations.

60. The CHAIRMAN said he would invite the Committee to vote on the various amendments to articles 71 and 72.

61. Mr. ARIFF (Malaysia) said he wished to withdraw his delegation's amendments (A/CONF.39/C.1/L.290/Rev.1 and L.291).

62. Mr. BLIX (Sweden) said that since there was no great difference between the amendment by Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1) and the second Finnish amendment (A/CONF.39/C.1/L.248), he would suggest that a vote be taken on the principle expressed in those amendments, that " one or more States " might be designated as depositary.

It was so agreed.

63. The CHAIRMAN said that, after the vote on the principle expressed in those amendments, he would put the remaining amendments to article 71 to the vote, paragraph by paragraph where necessary.

The principle expressed in the two amendments was adopted by 77 votes to none, with 5 abstentions.

Paragraphs 1 and 2 of the Chinese amendment (A/CONF.39/C.1/L.328) were rejected by 39 votes to 9, with 19 abstentions.

Paragraph 3 of the Chinese amendment was rejected by 35 votes to 8, with 27 abstentions.

The Mexican amendment (A/CONF.39/C.1/L.372) was adopted by 40 votes to 10, with 32 abstentions.

64. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that, as a result of the comment by the representative of Guinea, the sponsors of the six-State amendment (A/CONF.39/C.1/L.351) had decided to replace the words " the depositary State " by the words " the latter ".

The six-State amendment, as thus revised, was rejected by 25 votes to 23, with 28 abstentions.

65. The CHAIRMAN said that if there were no objection he would take it that the Committee agreed to refer article 71, as thus amended, to the Drafting Committee.[12]

It was so agreed.

66. The CHAIRMAN said he would put the various amendments to article 72 to the vote, paragraph by paragraph where necessary, beginning with the United States amendment.

Paragraph 1 of the United States amendment (A/CONF.39/C.1/L.369) was adopted by 46 votes to 12, with 28 abstentions.

Paragraph 2 of the United States amendment was adopted by 45 votes to 4, with 32 abstentions.

Paragraph 3 of the United States amendment was adopted by 71 votes to none, with 13 abstentions.

Paragraph 4 of the United States amendment was adopted by 59 votes to none, with 22 abstentions.

Paragraph 5 of the United States amendment was adopted by 55 votes to one, with 29 abstentions.

67. The CHAIRMAN said he would now put the Byelorussian amendment (A/CONF.39/C.1/L.364) to the vote. Paragraph 3 would be voted on after paragraph 1 since, if it were rejected, paragraph 2 fell, while if it were adopted, paragraph 2 followed automatically.

Paragraph 1 of the Byelorussian amendment was adopted by 32 votes to 24, with 27 abstentions.

Paragraph 3 of the Byelorussian amendment was adopted by 35 votes to 16, with 33 abstentions.

68. The CHAIRMAN said there now only remained the Finnish, Mongolian and Mexican amendments. In the case of the Mexican amendment (A/CONF.39/C.1/L.373) what he would put to the vote would be the principle contained in that amendment and in the Finnish amendment to paragraph 1 (*a*).

*The Finnish amendment (A/CONF.39/C.1/L.249) to paragraph 1 (*e*) was adopted by 64 votes to 2, with 18 abstentions.*

The Mongolian amendment (A/CONF.39/C.1/L.368) was adopted by 29 votes to 28, with 29 abstentions.

*The principle contained in the Mexican amendment and in the Finnish amendment to paragraph 1 (*a*) (A CONF.39/C.1/L.249), that amendments to the treaty be mentioned in paragraph 1 (*a*), was adopted without opposition.*

69. The CHAIRMAN said that if there were no objection he would take it that the Committee agreed to refer article 72, as thus amended, to the Drafting Committee. [13]

It was so agreed.

Article 73 (Notifications and communications)

Article 73 was approved and referred to the Drafting Committee [14]

Article 74 (Correction of errors in texts or in certified copies of treaties) [15]

70. Mr. VEROSTA (Austria), introducing his delegation's amendment to paragraph 2 (*a*) (A/CONF.39/C.1/L.8/Rev.1), said that paragraph (4) of the International Law Commission's commentary contained an important statement relating to the correction of errors, which read: " The technique is for the depositary to notify all the interested States of the error or inconsistency and of the proposal to correct the text, while at the same time specifying an appropriate time limit within which any objection must be raised ". It was desirable that the temporal element should also be mentioned in the text of article 74, and that was the purpose of his delegation's amendment.

71. His delegation's amendment to sub-paragraph 2 (*b*) (A/CONF.39/C.1/L.9) was of a drafting nature and could be referred to the Drafting Committee.

72. Mr. BEVANS (United States of America) said that his delegation's amendment (A/CONF.39/C.1/L.374) sought to bring article 74 into conformity with the practice

[12] For resumption of the discussion of article 71, see 82nd meeting.

[13] For resumption of the discussion of article 72, see 82nd meeting.

[14] For resumption of discussion of article 73, see 82nd meeting.

[15] The following amendments had been submitted: Austria A/CONF.39/C.1/L.8/Rev.1 and L.9; United States of America A/CONF.39/C.1/L.374 and Congo (Brazzaville), A/CONF.39/C.1/L.375.

of depositaries. The use of the words " contracting States " overlooked two important considerations. First, it might be desirable to reach agreement on a correction before any of the signatory States had become " contracting States ". Secondly, there might be several contracting States within a relatively short period, but for various reasons certain signatory States might not yet have become contracting States; for example, their Parliament might not have been in session.

73. To replace the rule in article 74, which had been considered too strict, it had been suggested that States which had participated in the negotiation should be consulted before a treaty entered into force. That solution also seemed to be too restrictive. In some instances a multilateral treaty would be brought into force after only two ratifications by signatories and it would be unwise to deprive the other signatory States of the right to consider a proposed correction, particularly if only a very short period had elapsed since the treaty was signed. A literal application of article 74 would be unrealistic in view of the practice followed by depositaries. Some negotiating or signatory State might object to a correction yet never become a contracting State, but the likelihood of such an objection would seem so remote that it did not justify the restrictive wording of article 74.

74. Mr. MOUDILENO (Congo, Brazzaville) introducing his delegation's amendment (A/CONF.39/C.1/L.375), said that the verb " find " expressed an objective criterion, whereas the words " are agreed " contained a subjective element. Also, for the French version, the word " *rectification* " seemed more appropriate than the word " *correction* ".

75. Mr. WERSHOF (Canada), referring to the Austrian amendment to paragraph 2 (*b*) (A/CONF.39/C.1/L.9), said that the words " States entitled to become parties " had a wider meaning than " signatory and contracting States ". He was afraid that a hurried change of the terms used in the convention might be detrimental to the harmony of the terminology employed in the various articles. He wondered why the Austrian delegation had restricted its amendment to paragraph 2(*b*).

76. Mr. VEROSTA (Austria) said that, when proposing the change in question, his delegation had assumed that the Drafting Committee would examine all the articles containing expressions such as " negotiating States " and " contracting States ". The scope of article 74 had to be widened as much as possible in order to enable States entitled to become parties to express their views on the correction of errors.

77. Mr. HARRY (Australia) said there was a difference between the case covered by paragraph 2 (*b*) in the Austrian amendment, and the other cases to which the United States amendment (A/CONF.39/C.1/L.374) referred. Only contracting States, and States which by signing the treaty had expressed a wish to become contracting parties, should be entitled to decide whether the text contained an error and to make any appropriate corrections; but the depositary should notify the error, and the proposal to correct it, to all States entitled to become contracting parties.

78. Sir Francis VALLAT (United Kingdom) said he supported the observations of the Australian representative, which should be considered by the Drafting Committee. The words " signatory and contracting States " met all practical requirements with regard to the correction of errors in treaties.

79. The CHAIRMAN put to the vote the Austrian amendment to paragraph 2 (*a*) (A/CONF.39/C.1/L.8/Rev.1).

The Austrian amendment was adopted by 39 votes to 7, with 38 abstentions.

80. The CHAIRMAN put to the vote the Austrian amendment to paragraph 2 (*b*) of article 74 (A/CONF.39/C.1/L.9).

The Austrian amendment was adopted by 27 votes to 7, with 43 abstentions.

81. The CHAIRMAN put to the vote the United States amendment to paragraphs 1, 2 (*a*) and (*c*), and 3-5 (A/CONF.39/C.1/L.374).

The United States amendment was adopted by 65 votes to none, with 14 abstentions.

82. The CHAIRMAN put to the vote the Congo (Brazzaville) amendment (A/CONF.39/C.1/L.375).

The Congo (Brazzaville) amendment was rejected by 21 votes to 13, with 48 abstentions.

83. The CHAIRMAN said that, if there were no objections, he would take it that the Committee agreed to refer article 74, together with the amendments by Austria and the United States, to the Drafting Committee. [16]

It was so agreed.

The meeting rose at 5.50 p.m.

[16] For resumption of discussion of article 74, see 82nd meeting.

SEVENTY-NINTH MEETING

Tuesday, 21 May 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 75 (Registration and publication of treaties)

1. The CHAIRMAN invited the Committee to consider article 75 of the International Law Commission's draft. [1]

2. Mr. KUO (China) said that the Chinese amendment (A/CONF.39/C.1/L.329 and Corr.1) was of a purely drafting nature. As article 75 was obviously based on Article 102 of the Charter, an express reference to the latter article should be made and its wording should be followed as closely as possible. For that reason the word " party " had been replaced by the words " any party ".

[1] The following amendments had been submitted: China, A/CONF.39/C.1/L.329 and Corr.1; Byelorussian Soviet Socialist Republic, A/CONF.39/C.1/L.371; United States of America and Uruguay, A/CONF.39/C.1/L.376.

3. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that the aim of his delegation's amendment (A/CONF.39/C.1/L.371) was to simplify article 75 while keeping to its fundamental meaning. Every treaty must be registered with the United Nations Secretariat and that was important both for the theory and practice of international treaty relations, for reinforcing democratic trends and for upholding *jus cogens*. In the English text of the amendment the word " and " should be inserted after the word " filing " and the comma removed.

4. Mr. BEVANS (United States of America), introducing the amendment sponsored by the delegations of Uruguay and the United States (A/CONF.39/C.1/L.376), said that the United Nations Secretariat was in favour of the registration of treaties by depositaries, but in some instances certain technical difficulties stood in the way of such a procedure. For example, many treaties for which the Organization of American States (OAS) was depositary did not contain any provision regarding their registration, and in order for them to be registered with the United Nations, the OAS had first to obtain the agreement of all parties. Similarly, when States Members of the United Nations were depositaries for treaties containing no provision on registration, they were unable to register them unless every party agreed. The joint amendment was designed to overcome those technical difficulties. The new paragraph 2 would make it unnecessary for the OAS to obtain the agreement of each party to the many inter-American treaties awaiting registration, and would also make it possible for certain international organizations and States not members of the United Nations to register treaties for which they were depositaries.

5. Paragraph 2 did not relieve States of the duty to register a treaty in the event of an organization or a depositary failing to do so.

6. Mr. BADEN-SEMPER (Trinidad and Tobago) said that he did not think that the Conference was competent to consider what was in fact an amendment to Article 102 of the Charter proposed in the joint amendment (A/CONF.39/C.1/L.376). It was for the United Nations itself to ensure that the Regulations concerning the Registration and Publication of Treaties and International Agreements were observed. He had abstained from voting on the United States amendment to article 72 and would abstain on the joint amendment to article 75.

7. Mr. MARESCA (Italy) said that the difference between Article 102 of the Charter and article 75 was that the former was directed to States Members of the United Nations and the latter to the contracting parties to the present convention. The depositary had to register treaties as part of his international functions and as part of the duties assigned to him by the parties to the treaty. He agreed with the joint amendment, but considered that the Byelorussian amendment went outside the competence of the Conference, which could not create obligations for non-parties to the convention.

8. Mr. ALVAREZ (Uruguay) said it had been asserted that the joint amendment was not compatible with Article 102 of the Charter. But that was not the case. It could not in any way affect the provisions of Article 102, which were binding on all States Members and must take precedence over any other provision. The joint amendment prescribed a simple procedure for the registration of treaties. If the depositary or international organization acting as depositary failed to register a treaty, each State was under an obligation to do so. That obligation dated back to the Covenant of the League of Nations and originated in President Wilson's determination to have all treaties published, so that there should be no more secret agreements.

9. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the amendment by the Byelorussian SSR was very useful because it removed any vagueness in the Commission's text and accorded with General Assembly resolution 97 (I) establishing the Regulations concerning the Registration and Publication of Treaties and International Agreements. It was also in keeping with the Commission's intention, as stated in the commentary to article 75.

10. The joint amendment, which provided a simplified procedure for registration, was acceptable, and he would vote for it. The Uruguayan representative was right in saying that it was in no way incompatible with Article 102 of the Charter.

11. Mr. BEVANS (United States of America) said that the joint amendment was certainly in conformity with Article 102 of the Charter, which was mandatory, but did not state who was to carry out the registration. The purpose of the joint amendment was to see that that act was carried out expeditiously, and it would in no way derogate from the United Nations regulations concerning registration.

12. He supported the Byelorussian amendment, which, among other merits, would have the advantage of saving the United Nations money.

13. Mr. RATTRAY (Jamaica) said he could not understand how the Committee could be discussing an amendment to article 75 when it had already reached a decision about the registration of treaties by approving the United States amendment (A/CONF.39/C.1/L.369) to article 72. The only difference was that there was no escape clause in article 75 as there now was in article 72, which contained the proviso " unless the contracting States otherwise agree ".

14. Mr. VEROSTA (Austria) said he supported the amendment by the United States and Uruguay, but suggested that it be modified so as to refer also to the possibility of the chief administrative officer of an organization carrying out the registration.

15. Mr. BEVANS (United States of America) said that a modification on those lines was acceptable. His delegation considered that the United States amendment to article 75 was complementary to its amendment to article 72, and that both were necessary.

16. Sir Humphrey WALDOCK (Expert Consultant) said that it would be appropriate to include in article 75 a reference to the filing and recording of a treaty, as suggested in the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.371). However, the wording to be used should perhaps be " for registration or filing and recording, and publication ". In addition, the words " after their conclusion " should be replaced by the words "after their entry into force ". In accordance with Article 102 of the

Charter, it was not the conclusion but the entry into force of a treaty which generated the obligation to register it with the United Nations Secretariat.

17. The idea embodied in the amendment by the United States and Uruguay (A/CONF.39/C.1/L.376) was admirable; it would simplify the registration of certain types of treaties. The subject matter of the amendment could be covered by States in their treaties, and by international organizations by adopting a suitable general resolution on the subject.

18. He agreed with the slight misgivings expressed by the Italian representative on the subject of amendments which appeared to create obligations for States in general. A provision of that type could be said to encroach upon the rules which had been adopted in articles 30 to 33 on the subject of treaties and third States. The International Law Commission had been careful, when drafting article 75, to speak only of treaties " entered into by parties to the present articles ".

19. The CHAIRMAN said he would first put to the vote the principle embodied in the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.371), on the understanding that the Drafting Committee would take into account the Expert Consultant's remarks. He would then put the joint amendment and the Chinese amendment to the vote.

The principle embodied in the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.371) was adopted by 56 votes to 4, with 26 abstentions.

The amendment by the United States of America and Uruguay (A/CONF.39/C.1/L.376) was adopted by 61 votes to none, with 25 abstentions.

The amendment by China (A/CONF.39/C.1/L.329 and Corr.1) was rejected by 20 votes to 5, with 51 abstentions.

20. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 75 to the Drafting Committee with the amendments which had been adopted.

It was so agreed.

The meeting rose at 11.40 a.m.

EIGHTIETH MEETING

Tuesday, 21 May 1968, at 5.5 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXT PROPOSED BY THE DRAFTING COMMITTEE

Article 50 (Treaties conflicting with a peremptory norm of general international law) *(jus cogens)*

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of article 50 adopted by the Drafting Committee. [1]

[1] For earlier discussion of article 50, see 52nd-57th meetings.

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 50 adopted by the Drafting Committee read:

" *Article 50*

" A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. "

3. By adopting the United States amendment (A/CONF.39/C.1/L.302) the Committee of the Whole had decided that the opening words of article 50 should read: " A treaty is void if, at the time of its conclusion, it conflicts... ". It had then referred the article to the Drafting Committee with two amendments, one submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) and the other by Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2). The Committee of the Whole had specified that it had approved the principle of *jus cogens*, and that the amendments referred to the Drafting Committee related to drafting only.

4. The Drafting Committee had decided that the amendment by Finland, Greece and Spain would clarify the text, and had therefore inserted the phrase " a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole ". Only the word " recognized " was used in the three-Power amendment, but the Drafting Committee had added the word "accepted" because it was to be found, together with the word " recognized ", in Article 38 of the Statute of the International Court of Justice.

5. The Drafting Committee had also decided to divide article 50 into two sentences, the first setting out the rule, and the second defining a peremptory norm of general international law for the purposes of the convention.

6. In view of the new wording of article 50, the Drafting Committee had thought it unnecessary to adopt the Romanian and USSR amendment, because the new text was in keeping with the intentions of the sponsors of that proposal.

7. It appeared to have been the view of the Committee of the Whole that no individual State should have the right of veto, and the Drafting Committee had therefore included the words " as a whole " in the text of article 50.

8. Mr. CASTRÉN (Finland) drew attention to the amendment (A/CONF.39/C.1/L.293) which his delegation had submitted to the Committee of the Whole. In view of the link between the amendment and article 41 on separability, the Finnish delegation had provisionally withdrawn its amendment, pending a final decision on article 41, which was now being considered by the Drafting Committee. It therefore reserved the right to revert to the question of the application of the principle of separability to article 50 when article 41 came back from the Drafting Committee.

9. Mr. MIRAS (Turkey) said that, although he appreciated the Drafting Committee's efforts to produce a new text of article 50, he was unable, for the reasons he had already given, to support the new text, since it retained the

essential features of the original draft article. His delegation requested that article 50 be put to the vote.

10. Mr. HAYES (Ireland) said that his delegation agreed in principle that there should be a rule under which a treaty would be void if its provisions conflicted with *jus cogens*. The Irish delegation had no objection to the text proposed by the Drafting Committee, but wished to point out that it would be impossible to define *jus cogens* in such a way as to determine beyond doubt that a rule of international law was peremptory in character. It was therefore essential to establish independent machinery for adjudicating on alleged violations of *jus cogens*. His delegation reserved its position on article 50 pending a decision on procedure, and would therefore abstain in the vote.

11. Mr. BARROS (Chile) asked the Chairman of the Drafting Committee to give further details of the meaning of the words " as a whole " added by the Drafting Committee.

12. Mr. YASSEEN, Chairman of the Drafting Committee, explained that by inserting the words " as a whole " in article 50 the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.

13. Mr. RUEGGER (Switzerland) said that although he appreciated the Drafting Committee's considerable efforts to take into account the views expressed on article 50, his delegation still thought it was essential to include in the convention a clear, watertight text containing the necessary guarantees, and also to provide that the treaty should be voidable but not void. He agreed with the Turkish representative that the article should be put to the vote; the Swiss delegation could not vote in favour of article 50 as drafted.

14. Mr. DADZIE (Ghana) said that, after listening carefully to the explanations given by the Chairman of the Drafting Committee regarding the phrase " as a whole ", his delegation felt that the idea thus expressed was implicit in the concept of " the international community of States " and the words " as a whole " might therefore be interpreted otherwise than in the sense indicated by the Chairman of the Drafting Committee. In view of the ambiguity of those words, the Ghanaian delegation would ask for a separate vote on them.

15. The CHAIRMAN invited the Committee to vote on the phrase " as a whole " in the Drafting Committee's text of article 50.

The phrase was approved by 57 votes to 3, with 27 abstentions.

16. The CHAIRMAN put to the vote the text of article 50 adopted by the Drafting Committee.

At the request of the representative of Turkey, the vote was taken by roll-call.

Kenya, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Kenya, Kuwait, Lebanon, Liechtenstein, Madagascar, Malaysia, Mali, Mexico, Mongolia, Morocco, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, San Marino, Saudi Arabia, Sierra Leone, Singapore, Spain, Sweden, Syria, Thailand, Trinidad and Tobago, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Algeria, Argentina, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, China, Congo (Brazzaville), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Dominican Republic, Ecuador, Ethiopia, Finland, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Jamaica.

Against: Monaco, Switzerland, Turkey.

Abstaining: Liberia, New Zealand, Norway, Senegal, South Africa, United Kingdom of Great Britain and Northern Ireland, Australia, Austria, Belgium, Canada, Chile, Denmark, Federal Republic of Germany, France, Gabon, Ireland, Italy, Japan.

The text of article 50 was approved by 72 votes to 3, with 18 abstentions.

17. Sir Francis VALLAT (United Kingdom), explaining his delegation's vote, said that the new text was a considerable improvement on the original draft article. Nevertheless, the United Kingdom delegation reserved its position, pending the decisions to be taken on the separability of treaties in article 41 and on procedure in article 62, and it had therefore abstained in the voting.

18. Mr. KEARNEY (United States of America) said that his delegation had voted for the text of article 50 submitted by the Drafting Committee as being better than that of the original draft. The United States delegation was still concerned about the links between articles 50 and 62. It had found it possible to vote for article 50 on the understanding that it would be possible to establish a system for the impartial settlement of disputes arising from the application of article 50 and other articles. If such a system could not be set up, the United States delegation would be obliged to reconsider its position on article 50 and on some other articles.

19. Mr. DE BRESSON (France) said that his delegation had abstained because it could not take a definite stand on article 50 until the fate of certain related articles was known.

20. Mr. DADZIE (Ghana) said that his delegation had voted for article 50, although it objected to the words " as a whole ". It was no surprise to his delegation to see that delegations notoriously opposed to the principle of *jus cogens* regarded the present text as an improvement on the original, since the improvement lay exclusively in the addition of the words " as a whole ". Nevertheless, the Ghanaian delegation was relying on the explanation of the meaning of those words given by the Chairman of the Drafting Committee.

21. Mr. BLIX (Sweden) explained that he had voted for article 50 subject to the adoption in due course of a system for the impartial settlement of disputes, without which the provision in article 50 might threaten the stability of contractual relations.

22. Mr. MARESCA (Italy) said that, although the Italian delegation was in favour of the principle in article 50, it had felt bound to abstain because of the close link between that provision and the machinery which the Conference should establish for the settlement of any disputes arising out of that article. His delegation sincerely hoped that it would be able to reconsider its position as soon as possible.

23. Mr. DEVADDER (Belgium) explained that his delegation was in agreement with the content of article 50 but had had to abstain because acceptance would depend on how the problems raised by article 62 were solved.

24. Mr. IPSARIDES (Cyprus) said that his delegation unreservedly supported the principle of *jus cogens*. It had no objection to the expression " as a whole " but would have preferred the formula " binding the international community " rather than " recognized ... by the international community " because the latter expression was subjective in character. However, he was satisfied with the explanations given by the Chairman of the Drafting Committee and had therefore voted both for the words " as a whole " and for article 50.

25. Mr. WERSHOF (Canada) said he had abstained for the same reasons as the United Kingdom representative, although he appreciated the improvements introduced in the text of article 50 by the Drafting Committee.

26. Mr. BARROS (Chile) explained that his delegation had had to abstain, because although the present text of article 50 was much more satisfactory than that of the draft, the provision in question was linked to other articles whose fate was not yet known. The acceptance by his delegation of the principle of *jus cogens* was not in doubt, however, and it hoped to be able to reconsider its position on article 50.

27. Mr. CRUCHO DE ALMEIDA (Portugal) said that his delegation had voted for article 50 in the hope that an acceptable solution would be found for all the problems created by articles 41 and 62. However, it reserved its position in the event of that not being achieved.

28. Mr. FLEISCHHAUER (Federal Republic of Germany), explaining his vote, said that, at the 55th meeting, his delegation had stated that it recognized the existence of peremptory rules of international law. It was therefore not opposed to the inclusion of article 50 in the convention on the law of treaties. However, as the notion of *jus cogens* was a new one, a definition of the criteria for determining that a rule was peremptory in character was needed. The new wording of article 50 was a step in the right direction, but his delegation was not sure for the time being whether it was sufficiently precise. Given that uncertainty, the danger of abuse, and the fact that no satisfactory solution had as yet been found for the question of the procedural safeguards in article 62, his delegation had abstained in the vote.

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(resumed from the 74th meeting)* and *Proposed new article 62* bis *(resumed from the 74th meeting)*

29. The CHAIRMAN invited the Committee to resume its consideration of article 62 of the International Law Commission's draft and of the proposed new article 62 *bis*.[2]

30. He announced that the draft resolution submitted by Ceylon and Czechoslovakia (A/CONF.39/C.1/L.361) and that submitted by the Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Netherlands, Peru, Sweden and Tunisia (A/CONF.39/C.1/L.362) had been withdrawn.

31. Mr. JAGOTA (India) said that article 62 had been discussed at great length; he therefore proposed that it be put to the vote forthwith, together with the amendments relating to it.

32. Mr. DADZIE (Ghana) said he supported the Indian representative's proposal; delegations had already stated their position on article 62. In approving article 62, the Committee should base its action on the conclusions set out by the International Law Commission in paragraph (4) of its commentary. It should certainly be possible the following year, or in the not too distant future, to make a further move towards the establishment of stricter and more binding methods of settling disputes.

33. Mr. RIPHAGEN (Netherlands) said that the sponsors of the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) had come to the conclusion that the substance of their amendment was compatible with the present wording of article 62. Accordingly, they had decided to withdraw their amendment to article 62 and to propose instead a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.2), the substance of which would be similar to that of the amendment just withdrawn. At the same time the sponsors of the new draft article proposed that consideration of their proposal and the vote on it should be postponed until the following session of the Conference.

34. Mr. FUJISAKI (Japan) said that, in view of the proposed new article 62 *bis*, the substance of the Japanese amendment to article 62 (A/CONF.39/C.1/L.339) should be regarded as an amendment to the new article 62 *bis* and should therefore be examined at the next session. His delegation reserved the right to modify the text of that amendment in due course.

35. Mr. KEARNEY (United States of America) pointed out that the United States amendment to article 62 (A/CONF.39/C.1/L.355) was based on the same considerations as the new article 62 *bis* and could therefore be studied at the same time. However, some aspects of the problem which might arise in connexion with the termination or suspension of the operation of a treaty by virtue of the convention had not been dealt with comprehensively in the new article 62 *bis*. He had in mind, for example, the method to be followed in the case of the breach of a treaty under article 57 and the

[2] For earlier discussion, see 68th-74th meetings.

question of how to give legal content to the series of articles in Part V, which were framed in very general terms.

36. Mr. ALVAREZ (Uruguay) said that, for the reasons given by previous speakers, his delegation could agree that its amendment to article 62 (A/CONF.39/C.1/L.343) should be studied at the same time as the new article 62 *bis* at the next session, but it reserved the right to modify its amendment if necessary.

37. Mr. RUEGGER (Switzerland) said he agreed to his amendment (A/CONF.39/C.1/L.347) being examined at the same time as article 62 *bis* at the next session, but reserved his delegation's position entirely on the subject of article 62.

38. Mr. DE BRESSON (France) said that his delegation's amendment (A/CONF.39/C.1/L.342) was aimed solely at clarifying a system which it did not seek to change. His delegation wished to state clearly that any case of invalidity, whether *ab initio* or relative, was subject to the procedure laid down in article 62. It was not a matter of questioning the possible difference in character between the two, but of clarifying the wording, which was in some respects ambiguous.

39. Mr. ALCIVAR-CASTILLO (Ecuador) said that the French amendment was not a drafting matter, since it involved the disappearance of the word " invalid " in paragraph 1. He asked that it be put to the vote.

The French amendment (A/CONF.39/C.1/L.342) was adopted by 39 votes to 31, with 20 abstentions.

40. Mr. ALVAREZ TABIO (Cuba) said he withdrew his delegation's amendment (A/CONF.39/C.1/L.353). He wished to emphasize, however, that in his view a treaty that was void under articles 48, 49, and 50 did not bind the parties and that there was no question of claiming its invalidity, since it was null and void *ab initio*.

41. The CHAIRMAN said that article 62 of the draft had been adopted and would be referred to the Drafting Committee with the French amendment (A/CONF.39/C.1/L.342).

42. Mr. RUEGGER (Switzerland) said that the Swiss delegation did not support article 62 and could not state its position on article 62 *bis* at the present stage.

43. Sir Francis VALLAT (United Kingdom) said he reserved his delegation's position on article 62. Its attitude would depend on a number of points, including the presumption in favour of the continued validity of treaties when an objection had been made to a notification. The problem had been raised in the United States amendment and could be studied by the Drafting Committee.

44. A phrase should be added to paragraph 3 providing that " meanwhile the presumption shall be that the treaty continues in force and in operation " so as to avoid any doubt on the status of a treaty when an objection had been made under article 62.

45. Mr. MIRAS (Turkey) said that, for the reasons he had stated at the 69th meeting, the Turkish delegation was opposed to the present wording of article 62.

46. Mr. WERSHOF (Canada) said that if article 62 had been put to the vote, his delegation would have voted against it, since it did not approve the present wording. Examination of the proposed new article 62 *bis* at the next session of the Conference would perhaps provide an opportunity for improving the article. He asked whether the Japanese amendment to article 62 (A/CONF.39/C.1/L.338) had been withdrawn.

47. The CHAIRMAN said that the Japanese delegation had withdrawn the second part of its amendment (A/CONF.39/C.1/L.338), relating to paragraph 2; he therefore suggested that the Committee vote on the part of the amendment which related to paragraph 1.

48. Mr. BLIX (Sweden) thought it unnecessary to vote on the first part of the Japanese amendment, since it covered the same ground as the French amendment just adopted.

49. Mr. FUJISAKI (Japan) said he agreed with the Swedish representative.

50. Mr. KEARNEY (United States of America) said that his delegation was still concerned about the problem of establishing a system for the settlement of disputes. His delegation's position on article 62 would be decided only when that point had been settled.

51. Mr. JAGOTA (India) said that his delegation's understanding of the decision which had just been taken was that article 62 had been adopted as representing a minimum agreement by the Committee. The substance of the amendment in document A/CONF.39/C.1/L.352/Rev.1/Corr.1 would be considered at the next session of the Conference as a proposed new article 62 *bis*. The sponsors of amendments to paragraph 3 of article 62 had withdrawn them or did not press them. If their sponsors so wished, those amendments could therefore be resubmitted at the next session as amendments to article 62 *bis*.

52. The CHAIRMAN confirmed that the new article 62 *bis* would be considered at the second session along with all the amendments in question, which would be recast and submitted as amendments to the new article.

53. Mr. EUSTATHIADES (Greece) said that, in view of the procedure just adopted with regard to article 62, his delegation reserved its position on the provisions of that article and also on any provisions which might be adopted to supplement it in the light of the discussion on the proposal to insert a new article 62 *bis*.

54. Mr. HARRY (Australia) said that the Australian delegation reserved its position on article 62. It was his understanding that article 62 had been adopted and referred to the Drafting Committee with the French amendment.

55. Mr. DE BRESSON (France) said that his delegation had no objection to the decision just taken to adopt article 62 and refer it to the Drafting Committee. However, the French delegation could not take a final position until it knew what was going to happen to article 62 *bis*.

56. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation accepted article 62, paragraph 3, as far as it went. Nevertheless, its final position

on article 62 would depend on the additional procedural safeguards which it hoped would be added in article 62 *bis*.

57. Mr. MARESCA (Italy) said that his delegation favoured the principle embodied in article 62 but reserved its position on the actual text of that article until a decision had been reached on article 62 *bis*.

58. Mr. SMALL (New Zealand) said that his delegation reserved its position on article 62 pending a decision on article 62 *bis* in 1969.[3]

Proposed new article 76

59. The CHAIRMAN invited the Swiss representative to introduce the new article 76 proposed by his delegation (A/CONF.39/C.1/L.250).

60. Mr. RUEGGER (Switzerland) urged delegations to reflect carefully until the next session of the Conference on the meaning, scope and advantages of the Swiss proposal submitted in document A/CONF.39/C.1/L.250. The proposal was to include in the draft convention an article providing for the settlement of disputes regarding the interpretation and application of the convention of the law of treaties. The proposal followed logically from the position adopted by Switzerland at all the conferences on the codification of international law which had taken place in the past decade. The problem was very different from that raised by article 62. The purpose of the proposal was to make provision for the settlement of disputes arising from the interpretation and application of the convention itself. The Federal Government of Switzerland attached great importance to the question. It might be asked why, in formulating its proposal, Switzerland had not drawn, for example, on the text of the clause adopted by the Institute of International Law,[4] a model clause which reflected contemporary legal practice and technique. The reason was that his country had thought it preferable to adopt as a basis a text which had become familiar at United Nations codification conferences, namely the text included in the optional protocols to various recent conventions.

61. At the 1958 Geneva Conference on the Law of the Sea, the Swiss delegation had urged the inclusion, in the actual text of each of the conventions which had resulted from that Conference, of an article providing for the compulsory settlement by arbitration or adjudication of disputes arising out of the interpretation or application of those conventions. When the proposals were not adopted, the Swiss delegation had taken the initiative of proposing [5] that an optional protocol should be attached to the conventions on the law of the sea, feeling that some link, however inadequate or fragile, must be established between the first codification conventions and the systems already established and confirmed by the community of nations for stating the law. The solution thus proposed by Switzerland as a temporary one had been taken up later in connexion with other conventions. A number of delegations, while recognizing that compulsory arbitration and adjudication pointed the way to the future, had nevertheless felt that it was still too early at present to take that path. The Swiss delegation hoped those delegations would not maintain their reservations with regard to the inclusion in the present draft convention of a compulsory clause on the interpretation or application of the articles so far adopted. The inclusion of such a clause would constitute the best guarantee of the good faith reaffirmed in the convention.

62. Those who opposed the idea of compulsory arbitration for the settlement of disputes often invoked the prerogatives of State sovereignty. Yet many of them had agreed to be bound by compulsory clauses in such multilateral conventions as the Constitution of the International Labour Organisation, the Convention on the Prevention and Punishment of the Crime of Genocide,[6] the Supplementary Convention on the Abolition of Slavery,[7] the International Convention on the Elimination of All Forms of Racial Discrimination,[8] and the 1965 Convention on Transit Trade of Land-Locked States.[9] For example, article 16 of the last-named convention, which had been adopted by a two-thirds majority, specified that disputes relating to the interpretation or application of the convention would be settled by arbitration at the request of either party.

63. It was therefore difficult to understand why States which had agreed to be bound by important conventions whose interpretation and application was subject to compulsory settlement by impartial adjudication or arbitration, could have any real difficulty in approving the same legal principle in the convention that was to govern the law of treaties.

64. The doctrine of State sovereignty and the concept of an all-powerful State free to act arbitrarily had led to the undermining of many moral values which should be common to all mankind. The opinions of all must of course be respected. But the "new" States, whose entry into the international community had been so warmly welcomed, should reflect before being swayed by an understandable distrust of old methods. As far as Switzerland was concerned, nearly seven centuries of democracy had taught it that negotiation must be supplemented by arbitration. The many hundreds of arbitral awards handed down in the territory of the Swiss Confederation between the year 1200 and the beginning of the sixteenth century had no doubt greatly contributed to strengthen the bonds between the very diverse elements which formed the Swiss nation of today.

65. He suggested that no decision should be taken on the Swiss proposal at that session of the Conference. The Committee appeared to be heading sensibly towards the decision to postpone for a time a decision on such fundamental articles as article 62. The problem dealt with in the Swiss proposal was quite different from the one discussed at length in connexion with article 62. That article dealt with the procedural safeguards and guarantees which must surround the invalidation, termination or suspension of treaties, whereas the pro-

[3] For resumption of the discussion on article 62, see 83rd meeting.

[4] See *Annuaire de l'Institut de Droit international, 1956*, vol. 46, pp. 365-367.

[5] *United Nations Conference on the Law of the Sea, Official Records*, vol. II, pp. 110 and 111, document A/CONF.13/L.24, annex I.

[6] United Nations, *Treaty Series*, vol. 78, p. 277.

[7] United Nations, *Treaty Series*, vol. 266, p. 40.

[8] See annex to General Assembly resolution 2106 (XX).

[9] See *Official Records of the Trade and Development Board, Second Session, Annexes*, agenda item 6, document TD/B/18.

posed new article 76 dealt exclusively with disputes relating to the interpretation or application of the text of the convention. Although the two problems were quite distinct, differences of opinion on the subject of article 62 might well have repercussions on the decisions which the Committee might take on the Swiss proposal. It was therefore preferable to allow Governments time for reflection.

66. The CHAIRMAN suggested that consideration of the Swiss proposal (A/CONF.39/C.1/L.250) should be deferred until the second session of the Conference.

It was so decided.

Postponement of consideration of amendments containing specific references to "general multilateral treaties" and "restricted multilateral treaties"

67. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed to defer consideration of all amendments to add a specific reference to general or restricted multilateral treaties until the second session of the Conference.

It was so decided.

The meeting rose at 6.50 p.m.

EIGHTY-FIRST MEETING

Wednesday, 22 May 1968, at 11.20 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts of articles 51-54, 56-60 and 69 *bis* adopted by that Committee.

2. The Drafting Committee had not submitted any text for article 55 because some of the amendments to that article which had been referred to it touched on questions of substance not yet settled by the Committee of the Whole. [1]

Article 51 (Termination of or withdrawal from a treaty by consent of the parties) [2]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 51 adopted by the Drafting Committee read:

"*Article 51*

"A treaty may be terminated or a party may withdraw from a treaty,

"(*a*) in conformity with the provisions of the treaty allowing such termination or withdrawal; or

"(*b*) at any time by consent of all the parties after consultation with the other contracting States."

4. The Drafting Committee had made two changes. The word "provision" in sub-paragraph (*a*) had been put in the plural and the same change had been made in sub-paragraph (*a*) of article 54 because a treaty might contain several provisions on its termination or on the withdrawal of a party. With regard to sub-paragraph (*b*), the Netherlands delegation had proposed (A/CONF.39/C.1/L.313) that the clause be amended to read "at any time by consent of all the contracting States". The Drafting Committee considered that the contracting States which were not yet parties to the treaty should not have the power of decision in connexion with the termination of a treaty, but that they had the right to be consulted in the matter. It had therefore confined itself to adding the words "after consultation with the other contracting States" at the end of sub-paragraph (*b*). Finally, in the Spanish version, the words "*poner término*" had been replaced by "*dar por terminado*".

5. Mr. WERSHOF (Canada) said it was not clear to his delegation how a contracting State under article 51 could be a State which was not a party to the treaty. The "parties" referred to in sub-paragraph (*b*) must be those defined in article 2, sub-paragraph 1 (*g*), or States which had consented to be bound by the treaty and for which the treaty was in force. He would therefore appreciate an explanation of the reason for differentiating between the parties and the other contracting States in sub-paragraph (*b*).

6. Mr. YASSEEN, Chairman of the Drafting Committee, said that that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States, which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States, not parties to the treaty, for the limited period in question.

Article 51 was approved.

Article 52 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force) [3]

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 52 adopted by the Drafting Committee read:

"*Article 52*

"Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force."

8. The Committee of the Whole had referred article 52 to the Drafting Committee with a United Kingdom amendment (A/CONF.39/C.1/L.310) to delete the words "specified in the treaty as". The Drafting Committee considered that the number of parties necessary for the entry into force of a treaty might conceivably not be specified in the treaty itself, and had adopted the United

[1] See 80th meeting, para. 67.

[2] For earlier discussion of article 51, see 58th meeting.

[3] For earlier discussion of article 52, see 58th meeting.

Kingdom amendment. In the Spanish version, the Drafting Committee had transposed the words " *Salvo que el tratado disponga otra cosa al respecto* " to the end of the article.

9. Mr. EVRIGENIS (Greece) pointed out that the word " *nécessaire* " used in the French version of the article did not correspond to the title, where the word " *exigé* " was used. The title should be brought into line with the text.

10. Mr. YASSEEN, Chairman of the Drafting Committee, said that the titles of all the articles would be re-examined in the Drafting Committee.

Article 52 was approved.

Article 53 (Denunciation of a treaty containing no provision regarding termination) [4]

11. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 53 adopted by the Drafting Committee read:

" *Article 53*

" 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

" (*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

" (*b*) a right of denunciation or withdrawal may be implied from the nature of the treaty.

" 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article ".

12. The International Law Commission's text of paragraph 1 set out a rule and an exception preceded by the word " unless ". By adopting a United Kingdom amendment (A/CONF.39/C.1/L.311), the Committee of the Whole had added a second exception, and the Drafting Committee had divided the paragraph into an introductory clause and two sub-paragraphs, (*a*) and (*b*), setting out the two exceptions. Sub-paragraph (*b*) consisted of the United Kingdom amendment, which had been slightly redrafted. In the introductory clause of the Spanish version, the words "*ni faculte para denunciarlo o retirarse de él*" had been replaced by " *ni prevea la denuncia o la retirada del mismo*" and the words "*de denuncia o retirada*" by " *de denuncia o de retirada*".

13. The only change in paragraph 2 was that the words " *Toda parte* " in the Spanish version had been replaced by " *Una parte* ", to bring the text into line with the English and French.

14. Mr. CASTRÉN (Finland) said that, in his delegation's opinion, the addition of the new provision contained in sub-paragraph 1 (*b*), according to which the right of denunciation or withdrawal might be implied solely from the nature of the treaty, introduced an element of uncertainty into article 53 and thus weakened the principle of the stability of treaties. The Finnish delegation had already drawn the attention of the Committee of the Whole to that danger at the 59th meeting, during the discussion of article 53, and it asked for a separate vote on sub-paragraph 1 (*b*), in the hope that it would be deleted.

[4] For earlier discussion of article 53, see 58th and 59th meetings.

15. Mr. BISHOTA (United Republic of Tanzania) said that, at the same meeting, his delegation had suggested in the Committee of the Whole that the word " unilateral " be inserted before " denunciation " in article 53 in order to avoid the possible interpretation that a treaty could be denounced even if all the parties agreed not to admit that possibility.

16. Mr. ARMANDO ROJAS (Venezuela) said that the text of article 53 submitted by the Drafting Committee was not satisfactory to his delegation, for the reasons it had advanced against the article at the 59th meeting.

17. The CHAIRMAN said he would invite the Committee to vote first on sub-paragraph 1 (*b*).

Sub-paragraph 1 (b) *was approved by 56 votes to 10, with 13 abstentions.*

Article 53 as a whole was approved by 73 votes to 2, with 4 abstentions.

Article 54 (Suspension of the operation of a treaty by consent of the parties) [5]

18. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had made no change in the text of article 54, and had not seen fit to adopt the two amendments which had been referred to it with the article.

Article 54 was approved.

Article 56 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty) [6]

19. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 56 adopted by the Drafting Committee read:

" *Article 56*

" 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

" (*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty, or

" (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

" 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties. "

20. Article 56 dealt with cases where parties to a treaty concluded a further treaty relating to the same subject matter. In the English version of the International Law Commission's draft, the subsequent treaty was sometimes called the " further " treaty, sometimes the " later " treaty, and sometimes the " subsequent " treaty; similar terminological variations appeared in the French and Spanish versions. In order to introduce some uniformity, the Drafting Committee had chosen the adjective " later " for the English, " *subséquent* " for the French and " *posterior* " for the Spanish versions.

[5] For earlier discussion of article 54, see 59th meeting.

[6] For earlier discussion of article 56, see 60th meeting.

For reasons of elegance, however, the Drafting Committee had decided to use the adverb " *ultérieurement* " instead of " *subséquemment* " in the introductory part of paragraph 1 and the word " *ulteriormente* " in the Spanish version. The Drafting Committee had also included the word " later " in the first line of sub-paragraph 1 (*a*), in order to avoid any possible ambiguity. In the last phrase of that sub-paragraph, it had omitted the word " thenceforth ", which seemed to be superfluous, and had replaced the term " by the later treaty " by the words " by that treaty ". With regard to sub-paragraph (*b*), the Drafting Committee had adopted the Romanian amendment (A/CONF.39/C.1/L.308), which related to the French version only, and which entailed a slight change in the structure of the sentence.

21. Since the term " *du traité* " in the French version of paragraph 2 seemed to refer to the subject of the sentence, " *le traité précédent* ", the Drafting Committee had replaced that term by the words " *de ce traité* ". In the Spanish version, the term " *se deduce* " had been replaced by " *se desprende* ", in accordance with the procedure adopted for other articles of the draft.

22. Mr. BARROS (Chile) said that the placing of the word " *unicamente* " in the Spanish version of paragraph 2 might lead to misinterpretation. He hoped that the Drafting Committee would take that comment into account.

Article 56 was approved.

Article 57 (Termination or suspension of the operation of a treaty as a consequence of its breach) [7]

23. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Committee of the Whole had approved the International Law Commission's text of article 57 and had referred it to the Drafting Committee without any amendments. The Drafting Committee had observed that sub-paragraph 2 (*a*) and 2 (*c*), if read literally, seemed to establish rights to terminate a treaty or to suspend its operation, which were not subject to the procedure laid down in article 62. Since some doubts had been expressed as to whether that had been the intention of the Committee of the Whole when it had approved article 57, the Drafting Committee had decided to submit the article to the Committee of the Whole without any change, but to draw attention to the legal consequences involved.

24. Sir Francis VALLAT (United Kingdom) said that his delegation was very dissatisfied with the way in which article 57 had been dealt with, owing to pressure of time. Delegations had obviously not paid proper attention to the provisions of the article, especially those of paragraph 2; there were inconsistencies between sub-paragraphs (*a*), (*b*) and (*c*) which could lead to the most serious consequences. Under sub-paragraph (*a*), parties to a treaty other than the one alleged to be in breach could by unanimous agreement suspend the operation of the treaty and, in contrast with sub-paragraph (*b*), that could be done without in any way invoking the procedures set out in the treaty. There might conceivably be something to be said for that in the case of the unanimous agreement of the other parties, but he doubted whether such was the case, for where the number of parties to a treaty was small, the disagreement between one party and the rest should not be decided unilaterally. Where sub-paragraph (*c*) was concerned, it was hardly proper to give a single party the unilateral right to suspend the operation of the treaty without going through the procedures laid down in the convention.

25. If that point could not be clarified, his delegation would be obliged to enter a strong reservation to article 57.

26. Mr. MIRAS (Turkey) said that article 57 would be unacceptable to his delegation unless the final text of article 62 provided for compulsory adjudication. Meanwhile, the Turkish delegation was obliged to reserve its position on article 57.

27. Mr. DE BRESSON (France) said that his delegation had the same reservations to make to article 57 as the United Kingdom delegation.

28. Mr. KEARNEY (United States of America) said that, in view of the serious ambiguity concerning the procedures set out in sub-paragraphs 2 (*a*) and 2 (*c*), the United States delegation also wished to enter a reservation in respect of article 57.

Article 57 was approved, subject to the reservations expressed by the United Kingdom, Turkish, French and United States delegations.

Article 58 (Supervening impossibility of performance) [8]

29. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 58 adopted by the Drafting Committee read:

" *Article 58*

" 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

" 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation of the treaty or of any other international obligation owed to any other party to the treaty. "

30. Paragraph 1 of article 58 derived from the International Law Commission's text which the Committee of the Whole had referred to the Drafting Committee, together with the Netherlands amendment to replace the words " as a ground for terminating " by the words " as a ground for terminating or withdrawing from the treaty " (A/CONF.39/C.1/L.331). The Drafting Committee had adopted that amendment in slightly modified form so as to avoid repetition of the word " treaty ".

31. Paragraph 2 was new. It had been proposed by the Netherlands delegation in the same amendment and adopted by the Committee of the Whole. The Drafting Committee had made the following drafting changes. In the first phrase, after the words " may not be invoked ", it had inserted for purposes of greater precision the words " as a ground for terminating, withdrawing from or suspending the operation of a treaty ". Out of a

[7] For earlier discussion of article 57, see 60th and 61st meetings.

[8] For earlier discussion of article 58, see 62nd meeting.

similar concern for precision, it had reworded the last two lines of the paragraph.

32. In submitting article 58 to the Committee, the Drafting Committee wished to emphasize that the destruction or disappearance of an object of a treaty did not constitute a permanent impossibility of performance if the object could be replaced.

33. In the Spanish version the words "*imposibilidad de ejecutar*" had been replaced by the words "*imposibilidad de cumplir*" and the words "*poner término*" by the words "*dar por terminado*" so as to bring the wording into line with that of other articles.

34. Mr. EVRIGENIS (Greece) said that in the English version the word "permanent" related to the disappearance of an object of a treaty, whereas in the French version it seemed to refer to both the disappearance and the destruction.

35. Mr. BARROS (Chile) said that on that point the English, French and Spanish versions were not concordant and would have to be brought into line.

36. Mr. FERNANDO (Philippines) said that he had doubts about the final clause in paragraph 2, which seemed to impose a penal sanction because a party would not be able to invoke the impossibility of performance as a ground for terminating, withdrawing from or suspending the operation of a treaty.

37. Mr. YASSEEN, Chairman of the Drafting Committee, said that the article reflected positive international law beyond which the Commission had not wished to go.

38. Sir Humphrey WALDOCK (Expert Consultant) said that the Commission's intention had been for the word "permanent" to qualify the word "disappearance", though conceivably it could also apply to the destruction of the object of a treaty. It should be borne in mind that, although the object of a treaty might temporarily disappear or be destroyed, it might be possible later for something to be restored.

Article 58 was approved.

Article 59 (Fundamental change of circumstances)[9]

39. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 59 adopted by the Drafting Committee read:

"*Article 59*

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

"(*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

"(*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

"2. A fundamental change of circumstances may not be invoked:

"(*a*) as a ground for terminating or withdrawing from a treaty establishing a boundary;

"(*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation of the treaty or of any other international obligation owed to any other party to the treaty.

"3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke that ground for suspending the operation of the treaty."

40. The Commission's text for article 59 did not contemplate a fundamental change of circumstances providing a ground for the suspension of the application of a treaty but only for its termination or for withdrawal from it. In order to fill that gap the Committee of the Whole had approved the addition, in paragraph 1, of a reference to the suspension of the application of the treaty, as proposed by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333).

41. The Drafting Committee had noted that it would be difficult to solve the problem by the mere mention in paragraph 1 of the suspension of the application of the treaty, since that might give the impression that the application of article 59 extended to purely temporary fundamental changes of circumstances, which was not apparently the Committee's intention. The Drafting Committee believed that the Committee of the Whole wished a party to have the choice between invoking article 59 for the suspension of the application of a treaty, and invoking it for purposes of termination or withdrawal. In some circumstances a party might prefer a simple suspension to breaking contractual relations, since the former offered greater possibilities of seeking a common solution to the difficulties caused by a fundamental change of circumstances by means, for example, of a revision of the treaty. In order to express that idea more clearly and to avoid any misunderstanding, the Committee had dealt with the matter by adding a paragraph 3 to the text drafted by the Commission.

42. The Drafting Committee had introduced two other changes in the text. In paragraph 1 (*b*) of the English version, the expression "scope of obligations" had been replaced by the phrase "extent of obligations". The meaning of that phrase should be sought in the French and Spanish versions, namely, "*portée des obligations*" and "*alcance de las obligaciones*". Though the English word "extent" seemed to render the words "*portée*" and "*alcance*" better than the word "scope", it did not fully satisfy the Committee, which hoped that, during the interval between the two sessions, the language services would be able to find a better translation.

43. In all the language versions the Committee had brought the wording of paragraph 2 (*b*) into line with that adopted for the similar provision in article 58, paragraph 2. In the Spanish version, the phrase "*poner término*" had been replaced by the phrase "*dar por terminado*" and the word "*ejecutarse*" had been replaced by the word "*cumplirse*", as in other articles of the draft.

44. Mr. WERSHOF (Canada) said that the Committee of the Whole had approved in principle the proposal by the Canadian and Finnish delegations to introduce the idea of suspension in article 59, leaving the wording to

[9] For earlier discussion of article 59, see 63rd to 65th meetings.

the Drafting Committee. He was not sure that the solution suggested by the Drafting Committee was the best, since the matter should not be a question of choice for the party. Some fundamental changes of circumstances might be irreversible, justifying termination or withdrawal, and some might not be permanent. He therefore reserved his delegation's right to suggest alternative wording at the next session.

45. Mr. KEMPFF MERCADO (Bolivia) said he supported article 59, with the exception of paragraph 2 (*a*).

46. Mr. NACHABE (Syria) said that paragraph 2 (*a*) was acceptable, on condition that treaties fixing frontiers by force and in violation of the principle of self-determination were regarded as null *ab initio*.

47. Mr. MIRAS (Turkey) said that, for the reasons he had given at the 64th meeting, during the general debate on article 59, his delegation could not support the article unless a judicial procedure were provided for in article 62. He therefore reserved his position.

48. Mr. FERNANDO (Philippines) said he accepted article 59 but considered that the words " or of any other international obligation owed to any other party to the treaty " in paragraph 2 (*b*) should be explained.

49. He agreed with the Syrian representative regarding paragraph 2 (*a*).

Article 59 was approved.

Article 60 (Severance of diplomatic relations) [10] and article 69 *bis* (new article)

50. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 60 adopted by the Drafting Committee read:

" *Article 60*

" The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty. "

51. The Committee of the Whole had approved a Hungarian amendment (A/CONF.39/C.1/L.334) for the insertion of the words " and consular " between the words " diplomatic " and " relations ". The Drafting Committee had used the word " or " instead of the word " and ", which seemed more in conformity with the sponsor's intention. In the French version, the word " *relations* " had been repeated before the word " *consulaires* ".

52. The Committee of the Whole had also approved in principle an amendment by Italy and Switzerland (A/CONF.39/C.1/L.322) to add at the end of the article the words " unless those legal relations necessarily postulate the existence of normal diplomatic relations ". That wording had been modified so as to take account of the Hungarian amendment to the beginning of the article.

53. The Committee had also adopted a Chilean amendment (A/CONF.39/C.1/L.341) to add a second paragraph to article 60, reading " The severance or absence of diplomatic relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not affect the situation in regard to diplomatic relations. " The Drafting Committee considered that that text, which was concerned rather with the law of diplomatic relations, did not belong to Section 3, entitled " Termination and suspension of the operation of treaties ", and had therefore transferred it to Part VI, which was entitled " Miscellaneous provisions " and submitted it in a slightly new form as article 69 *bis*. The article was worded as follows:

" *Article 69* bis

" The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations. "

54. Mr. EL DESSOUKI (United Arab Republic) said that article 69 *bis* was not acceptable to his delegation because there was no point in stating that the absence of diplomatic relations did not prevent the conclusion of treaties. That went beyond article 60, which was quite sufficient. Article 69 *bis* should not prejudice in any way the question of non-recognition. If it were put to the vote, he would vote against it.

55. Mr. al-RAWI (Iraq) said he agreed with the previous speaker. Article 69 *bis* was not necessary and he would vote against it. The article should not prejudice the principle of non-recognition. He accordingly reserved his position on article 69 *bis*. Article 60 was satisfactory.

56. Mr. HACENE (Algeria) said he too must express his delegation's reservations about article 69 *bis*. He fully supported the views of the representative of the United Arab Republic.

57. Mr. BISHOTA (United Republic of Tanzania) said he had strong reservations about the implications of the exception introduced into article 60. He agreed with the reasoning in paragraphs (3) and (4) of the Commission's commentary to the article.

58. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation had abstained in the vote on the Chilean amendment to article 60 (A/CONF.39/C.1/L.341) because it saw no need for it. He reserved his position on article 69 *bis*; the article was unnecessary and did not fit into Part VI.

59. Mr. NACHABE (Syria) said he accepted article 60, which adequately stated the implications of the effects of severance. Article 69 *bis*, however, went too far and was unacceptable.

60. Mr. HARRY (Australia) said that his delegation still had doubts about article 60 or whether the exception it stated was necessary. If the existence of consular relations were needed for the application of a treaty, severance might be regarded as a breach.

61. Mr. MWENDWA (Kenya) said he must express a reservation on article 69 *bis*, which did not belong to the law of treaties and was unnecessary.

62. Mr. YAPOBI (Ivory Coast) said that his delegation supported the new wording of article 60. It also supported article 69 *bis*, which was in conformity with the practice of his country to conclude treaties with countries with which it had no diplomatic relations.

Article 60 was approved.

[10] For earlier discussion of article 60, see 65th meeting.

63. The CHAIRMAN said that, as a number of delegations had expressed reservations about article 69 *bis*, he would put it to the vote.

Article 69 bis *was approved by 40 votes to 13, with 34 abstentions.*

Article 39 (Validity and continuance in force of treaties) *(resumed from the 76th meeting)*

64. The CHAIRMAN invited the Committee to resume its consideration of article 39. [11]

65. Mr. ALCIVAR-CASTILLO (Ecuador) said that the amendment by Switzerland (A/CONF.39/C.1/L.121) would completely upset the scheme already adopted by the Committee in approving the various articles in Section 2 of Part V. If the Swiss amendment were adopted, no treaty would be null and void *ab initio* and the only form of nullity applicable to treaties would be voidability or relative nullity. Since the Swiss amendment was the farthest removed from the text of article 39 and since it would involve reconsideration of the Committee's decisions on the various articles of Section 2 of Part V, he would urge that it be voted on first.

66. Mr. DE BRESSON (France) said that, at the 76th meeting, he had proposed that the second sentence of paragraph 1 of article 39 be transferred to paragraph 1 of article 65. The French proposal did not involve any change of substance in respect of the provisions of Part V. Its purpose was to remove any ambiguity that might result from the present arrangement and to bring articles 39 and 65 into line with the interpretation given to them by the International Law Commission and the Expert Consultant.

67. If, as he hoped, the Committee adopted his oral amendment, the text of the relevant draft articles would be made clearer and more coherent. Article 39 would set forth the cases of nullity; article 62 would deal with the implementation of the nullity provisions; article 65 would deal with the consequences of nullity.

68. The CHAIRMAN said he would first put to the vote the oral amendment by France, and then the written amendments by Singapore, Switzerland and the Republic of Viet-Nam.

The oral amendment by France, for the transfer of the second sentence of paragraph 1 to article 65, was adopted by 34 votes to 29, with 22 abstentions.

The amendment by Singapore (A/CONF.39/C.1/L.270), as orally amended at the 76th meeting, [12] *was rejected by 31 votes to 21, with 31 abstentions.*

The amendment by Switzerland (A/CONF.39/C.1/L.121) was rejected by 53 votes to 19, with 16 abstentions.

The amendment by the Republic of Viet-Nam (A/CONF. 39/C.1/L.233) was rejected by 43 votes to 3, with 33 abstentions.

69. Mr. WERSHOF (Canada) said he noted that the Peruvian amendment (A/CONF.39/C.1/L.227) purported to amend the second sentence of paragraph 1 of article 39, but the Committee had just adopted an oral French amendment to transfer that sentence to article 65.

70. The CHAIRMAN said that any amendment which might be adopted to the sentence in question would affect the sentence regardless of its placing.

71. Sir Francis VALLAT (United Kingdom) said that there was a further difficulty, which was that a proposal had now been made for a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.2). The Peruvian amendment would introduce a reference only to article 62 and its wording was therefore no longer acceptable.

72. The CHAIRMAN said he would put the Peruvian amendment to the vote.

The Peruvian amendment (A/CONF.39/C.1/L.227) was rejected by 39 votes to 14, with 29 abstentions.

73. Mr. CALLE Y CALLE (Peru) said that it had been an unwise decision to remove the second sentence of paragraph 1 from article 39 and transfer it to article 65. The sentence did not deal with the consequences of invalidity, which were the subject-matter of article 65. The purpose of the sentence was to make it clear that, for a treaty to be void, its invalidity must be established under the provisions of the future convention on the law of treaties. It was precisely in order to make that meaning clear that his delegation had proposed to specify expressly that all cases of nullity, absolute or relative, must be established in accordance with the orderly procedure laid down in the draft convention. The reference was, of course, to article 62 and any ancillary provisions thereto.

74. Mr. HARRY (Australia) recalled that the purpose of his amendment to article 39 (A/CONF.39/C.1/L.245) was to introduce in both paragraphs 1 and 2 specific references to article 62. The point was essentially one of drafting, since article 62 would in any case be covered by the words " the application of the articles of the present Convention ". With regard to the point raised by the United Kingdom representative, he said that the new article 62 *bis* would be covered by the expression " the present Convention ", which would replace the expression " the present articles " in accordance with the Committee's general decision on that point.

75. Mr. MYSLIL (Czechoslovakia) said that he had voted against the French amendment because he had thought that it would have upset the balance of the article. Since it believed that the transfer of the second sentence of paragraph 1 of article 39 from Part I to Part V was not desirable, his delegation reserved its position on whatever final text of article 39 ultimately emerged from the Drafting Committee, when it would take into consideration the final form of article 65.

76. Mr. ALCIVAR-CASTILLO (Ecuador) said that, in his delegation's view, the only decision taken by the Committee had been to transfer the second sentence of paragraph 1 from article 39 to article 65. The text of that sentence should remain unaltered, since the Committee had not adopted any amendment to it.

77. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 39, as amended, to the Drafting Committee,

[11] For earlier discussion of article 39, see 39th, 40th and 76th meetings.

[12] Para. 2.

together with the Australian amendment (A/CONF.39/C.1/L.245).

It was so agreed. [13]

Article 63 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) *(resumed from the 74th meeting)*

78. The CHAIRMAN invited the Committee to consider the Swiss amendment to article 63 (A/CONF.39/C.1/L.349 and Corr.1).

79. Mr. WERSHOF (Canada) said he must point out that at the 74th meeting the Committee had approved article 63 and referred it to the Drafting Committee, together with the amendment by Switzerland.

80. The CHAIRMAN said that the Swiss delegation had since agreed that its amendment should be put to the vote. He would therefore put it to the vote immediately.

The amendment by Switzerland (A/CONF.39/C.1/L.349 and Corr.1) was rejected by 43 votes to 11, with 33 abstentions.

Article 63 was approved and referred to the Drafting Committee. [14]

The meeting rose at 1 p.m.

[13] For resumption of the discussion of article 39, see 83rd meeting.

[14] For resumption of the discussion of article 63, see 83rd meeting.

EIGHTY-SECOND MEETING

Thursday, 23 May 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXT PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Committee to consider the texts of various articles proposed by the Drafting Committee.

Article 41 (Separability of treaty provisions) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 41 by the Drafting Committee, subject to a decision on the Finnish amendment (A/CONF.39/C.1/L.144) to delete the reference to article 50 in paragraph 5, which had been referred to it by the Committee of the Whole at its 66th meeting and which was a question of substance with which the Drafting Committee had considered that it was not competent to deal, read as follows:

"*Article 41*

" 1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

" 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 57.

" 3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

" (*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

" (*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole; and

" (*c*) continued performance of the remainder of the treaty would not be unjust.

" 4. In cases falling under articles 46 and 47, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

" 5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted."

3. In paragraph 1, the Drafting Committee had adopted two amendments which seemed to improve the wording. The first was the United Kingdom amendment (A/CONF.39/C.1/L.257) to insert the adverb " only " after the past participle " exercised ", instead of between the words " may " and " be "; that affected only the English version. The Drafting Committee had made a similar change in the position of the adverb " only " in paragraph 2 and in the first part of paragraph 3.

4. The second was an amendment by Argentina (A/CONF.39/C.1/L.244) to replace the words " *podrá ejercerse únicamente* " in paragraph 1 by the words " *no podrá ejercerse sino* "; it affected only the Spanish version. The Committee had made similar changes in paragraphs 2 and 3 of the article. Other changes of a drafting nature had also been made in the Spanish version of the article.

5. The Drafting Committee had made two changes in paragraph 3. In the first line of the English version, it had replaced the word " alone " by the word " solely " and inserted it after the word " relates " and, following the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1), had added at the beginning of sub-paragraph (*b*) the clause " it appears from the treaty or is otherwise established that ". The Drafting Committee had not made any change in sub-paragraph (*c*), which the Committee of the Whole had added to paragraph 3 by adopting a United States amendment (A/CONF.39/C.1/L.260).

6. In paragraph 4, again following the United Kingdom amendment, the Drafting Committee had transferred the expression " Subject to paragraph 3 " to another part of the sentence. If it had been left at the beginning of the sentence, as in the International Law Commission's text, it might have given the false impression that it governed the application of articles 46 and 47.

[1] For earlier discussion of article 41, see 41st, 42nd and 66th meetings.

7. Mr. CASTRÉN (Finland) said that his delegation had proposed (A/CONF.39/C.1/L.444) that the reference to article 50 in paragraph 5 be deleted so that the principle of separability should also apply in the case of nullity *ab initio* of a treaty conflicting with a rule of *jus cogens*. He did not propose to repeat the arguments in support of that amendment, but would request that it be put to the vote.

8. Sir Francis VALLAT (United Kingdom) said that his delegation would have preferred the vote on the amendment to be deferred to the second session of the Conference, in order to allow Governments time to consider the matter carefully. In its view, the reference to article 50 in article 41, paragraph 5, was not essential and even entailed a danger, since it would enable a party to use a relatively unimportant conflict of a treaty provision with a peremptory norm of international law as a pretext for repudiating the entire treaty. The arguments in favour of the Finnish amendment were based on reason and sound practical considerations. If the Committee was to vote on that amendment, his delegation hoped that it would not be rejected.

9. The CHAIRMAN said he would put to the vote the Finnish amendment (A/CONF.39/C.1/L.144) to delete the reference to article 50 in article 41, paragraph 5.

At the request of the Ghanaian representative, the vote was taken by roll-call. Cuba, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Denmark, Finland, France, Ireland, Italy, Japan, Mexico, Monaco, Netherlands, New Zealand, Norway, Peru, Philippines, Portugal, San Marino, South Africa, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Australia, Austria, Belgium, Canada, China.

Against: Cyprus, Czechoslovakia, Ecuador, Ghana, Guinea, Hungary, India, Indonesia, Iran, Iraq, Jamaica, Kenya, Kuwait, Liberia, Mali, Mongolia, Nigeria, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain, Syria, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Zambia, Algeria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Chile, Congo (Brazzaville).

Abstaining: Dominican Republic, Ethiopia, Federal Republic of Germany, Gabon, Greece, Guatemala, Israel, Lebanon, Liechtenstein, Malaysia, Nepal, Panama, Republic of Korea, Republic of Viet-Nam, Trinidad and Tobago, Brazil, Costa Rica.

The Finnish amendment was rejected by 39 votes to 27, with 17 abstentions.

10. The CHAIRMAN said he would now put to the vote article 41 as proposed by the Drafting Committee.

Article 41 was approved by 72 votes to none, with 11 abstentions.

Article 67 (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law)[2] *(resumed from the 75th meeting)*

11. The CHAIRMAN invited the Committee to resume its consideration of article 67 of the International Law Commission's draft. At its 75th meeting, it had decided to defer consideration of the two amendments by Finland (A/CONF.39/C.1/L.295) and Mexico (A/CONF.39/C.1/L.356) until it had taken a decision on article 41, and that it had just done. He would therefore ask the Committee to vote on the two amendments. Paragraph 1 of the Finnish amendment had been disposed of by the rejection of the Finnish amendment to article 41, paragraph 5.

12. Mr. BISHOTA (United Republic of Tanzania) said it seemed to him that, since the Committee had now rejected the Finnish amendment to article 41, paragraph 5, paragraph 2 of the Finnish amendment to article 67 automatically lapsed also.

13. Mr. HARRY (Australia) said that paragraph 2 of the Finnish amendment to article 67 raised the problem of the relationship of that article not only to article 50, but also to article 61, and since no notice had been given of the intention to discuss article 67 at the present meeting, his delegation was not in a position to discuss the problem adequately.

14. Mr. BARROS (Chile) requested that the meeting be suspended to enable delegations to study the amendments.

15. After a brief suspension, the CHAIRMAN announced that the Finnish delegation had withdrawn its amendment (A/CONF.39/C.1/L.295), so that the Committee was left with only the Mexican amendment (A/CONF.39/C.1/L.356) to consider.

16. Mr. SEPULVEDA AMOR (Mexico) said that his delegation also withdrew its amendment.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Committee approved article 67 as it stood.

It was so agreed.

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

Article 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)[3]

18. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 42 by the Drafting Committee read as follows:

"*Article 42*

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 inclusive or articles 57 and 59 if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(*b*) it must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation."

19. Since the Committee of the Whole had deleted the reference to article 58 in the first sentence, the Drafting

[2] For earlier discussion of article 67, see 75th meeting.

[3] For earlier discussion of article 42, see 42nd, 66th and 67th meetings.

Committee had replaced the word " to " by the word " and " before the figure 59, and had deleted the word " inclusive " after that figure. It had also made a few drafting changes in the Spanish version.

20. Mr. JAGOTA (India) said that his delegation wished to correct the vote it had cast at the 67th meeting, when a vote had been taken by roll-call on the eight-State amendment to delete sub-paragraph (*b*) of article 42 (A/CONF.39/C.1/L.251 and Add.1-3). By mistake, it had voted in favour of deleting the sub-paragraph, whereas in fact it had been in favour of its retention.

21. Mr. CARMONA (Venezuela) said that it was clear from the vote on the eight-State amendment to delete sub-paragraph (*b*) of article 42—where the number of votes in favour plus the number of abstentions had equalled the number of votes against—that there was considerable opposition to the text now before the Committee and that it represented the views of only about half the participating States. His delegation accordingly reserved the right to raise the matter again at the second session of the Conference and wished the statement he had just made to appear in the summary record of the meeting.

22. Mr. HARRY (Australia) suggested that the word " inclusive ", after the words " articles 43 to 47 ", be deleted. It did not appear after the words " articles 16 to 20 " in article 14, which the Committee of the Whole had already approved, and its presence in article 42 might lead to the assumption that the expression, which denoted a group of articles, had a different meaning in article 14.

23. Mr. YASSEEN, Chairman of the Drafting Committee, said the drafting matter raised by the Australian representative was one of those questions that could be settled when the definitive text of the convention was prepared.

Subject to that reservation, article 42 was approved.

Article 68 (Consequences of the suspension of the operation of a treaty) [4]

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 68 by the Drafting Committee read as follows:

"*Article 68*

" 1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

" (*a*) relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

" (*b*) does not otherwise affect the legal relations between the parties established by the treaty.

" 2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty."

25. The Drafting Committee had made only one change in article 68: in paragraph 2, it had replaced the expression " to render ... impossible " by " to obstruct ", so as to preclude any confusion with the impossibility of performance dealt with in article 58. Moreover, it had thought that the new wording reflected more faithfully the underlying idea of that article. It had not considered it necessary to adopt the Mexican amendment (A/CONF. 39/C.1/L.357), the intention of which was covered by the new wording.

Article 68 was approved.

Article 69 (Cases of State succession and State responsibility) [5]

26. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 69 by the Drafting Committee read as follows:

"*Article 69*

" The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

27. The Committee of the Whole had approved the idea expressed in two amendments, by Hungary and Poland (A/CONF.39/C.1/L.279) and Switzerland (A/CONF.39/C.1/L.359) respectively, to mention the case of hostilities in the text of article 69. The Drafting Committee had preferred the wording proposed by Hungary and Poland, and had therefore added at the end of the article the words " or from the outbreak of hostilities between States ".

28. In the French version, it had replaced the expression " *au sujet d'un traité* " by the expression " *à propos d'un traité* ", which some members had considered more elegant. In the English version, it had replaced the expression " are without prejudice to any question " by the expression " shall not prejudge any question ", which had seemed more suitable in the context and closer to the terms used in the other language versions. It had not made any other change in the International Law Commission's text.

Article 69 was approved.

Article 70 (Case of an aggressor State) [6]

29. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 70 by the Drafting Committee read as follows:

"*Article 70*

" The provisions of the present convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

30. In order to be consistent with article 69, the Drafting Committee had made article 70 begin with the words " The provisions of the present convention ". In the Spanish version it had placed the word " *originarse* " after the word " *pueda* ".

Article 70 was approved.

[4] For earlier discussion of article 68, see 75th meeting.

[5] For earlier discussion of article 69, see 76th meeting.

[6] For earlier discussion of article 70, see 76th meeting.

Article 71 (Depositaries of treaties) [7]

31. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 71 by the Drafting Committee read as follows:

"*Article 71*

" 1. The depositary of a treaty, which may be one or more States or an international organization or the chief administrative officer of such an organization, is designated by the negotiating States in the treaty or in some other manner.

" 2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force as between certain parties or that a difference has appeared between a State and a depositary shall not affect this obligation of the depositary."

32. The Committee of the Whole had approved the principle that one or more States might be designated as the depositary of a treaty, as proposed in the Bulgarian, Romanian and Swedish (A/CONF.39/C.1/L.236 and Add.1) and Finnish (A/CONF.39/C.1/L.248) amendments. The Drafting Committee had preferred the wording of the Finnish amendment and had incorporated it in the text of paragraph 1. It had also added in paragraph 1 the words " or the chief administrative officer of such an organization ", in accordance with the decision of the Committee of the Whole. The verb of the main clause in paragraph 1 had been put in the present tense in order to make it quite clear that there was no obligation to designate a depositary.

33. In paragraph 2, the Drafting Committee had added a second sentence based on the amendments by the Byelorussian SSR (A/CONF.39/C.1/L.364) and Mongolia (A/CONF.39/C.1/L.368) which had been concerned not with article 71, but with article 72, and which the Committee of the Whole had approved. The Drafting Committee had been of the opinion that the idea expressed in those amendments related more to the principle that the depositary was under an obligation to act impartially in the performance of his functions. Since that principle had already been stated in paragraph 2 of article 71, the Drafting Committee had added to that paragraph, in a shortened form, the idea expressed in those two amendments.

34. Mr. RATTRAY (Jamaica) said he noted that the designation of a depositary was not compulsory under the terms of article 71. Unfortunately, the wording of the article was clumsy; in fact he doubted whether the English text of paragraph 1 was grammatically correct. The International Law Commission's text was almost preferable, despite the difficulties it had raised.

35. Mr. HARRY (Australia) said that although he was satisfied with article 71 as far as its substance was concerned, he, too, had doubts about its wording. In paragraph 2, the clause " or that a difference has appeared between a State and a depositary " was very obscure when divorced from its previous context in article 72, where it had been clear that the difference had concerned the performance of the functions of the depositary. The words " In particular " at the beginning of the second sentence in paragraph 2 should be deleted, as the sentence did not relate to a particular case in relation to what preceded it. He hoped that the entire article would be carefully revised at the earliest opportunity.

36. Mr. DADZIE (Ghana) asked whether the Drafting Committee had considered using the expression " may be designated " in paragraph 1, and if so, why it had abandoned the idea.

37. Mr. YASSEEN, Chairman of the Drafting Committee, said he agreed that the text of article 71 might appear to be clumsy, but the Drafting Committee's task of incorporating several amendments in the article had not been an easy one. Above all, the Drafting Committee had tried to ensure that the wording fully reflected the intention of the Committee of the Whole.

38. His reply to the Ghanaian representative's question was that the Drafting Committee had felt that it could render the meaning inherent in the word " may " by using the present tense, in other words, by substituting the word " is " for the words " shall be " in the English version.

39. Mr. ROSENNE (Israel) said that, as he understood it, paragraph 1 stated the rule that it was the responsibility of the negotiating States to designate the depositary of a treaty. If that was the meaning of the paragraph, the drafting difficulties could undoubtedly be overcome by making the words " The negotiating States " the subject of the sentence.

40. Mr. MARESCA (Italy) said that the first text proposed for paragraph 2 by the Drafting Committee (A/CONF.39/C.1/12) had been a noticeable improvement on the International Law Commission's text because the words " contracting States " had been used and not " parties ". According to sub-paragraphs (*f*) and (*g*) of article 2, there was a difference between a contracting State and a party. A treaty might not have entered into force for a contracting State, whereas it must have entered into force for a party. Consequently, the correction (A/CONF.39/C.1/12/Corr.1) did not accord with the definitions contained in article 2.

41. The CHAIRMAN suggested that the Drafting Committee be asked to re-examine the text of article 71 at the present session, in the light of the comments of the Committee.

42. Mr. MWENDWA (Kenya) said he thought it would be better to use the expression " certain of the parties " instead of " certain parties " in paragraph 2. He supported the Chairman's suggestion.

43. Mr. YASSEEN, Chairman of the Drafting Committee, said he agreed that the formulation of paragraph 1 was not perfect, but the paragraph did state comprehensively the rule that the depositary was designated by the negotiating States.

44. Replying to the Italian representative's comments, he said it was clear from the amendments that the question concerned certain States for which the treaty had not entered into force in their relations with certain other parties, for reasons connected, for example, with the problem of recognition: but those States were parties to the treaty vis-à-vis the remainder of the States. The

[7] For earlier discussion of article 71, see 77th and 78th meetings.

Drafting Committee could accept the Chairman's suggestion that article 71 be re-examined.

Article 71 was referred back to the Drafting Committee.

Article 72 (Functions of depositaries) [8]

45. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 72 by the Drafting Committee read as follows:

"*Article 72*

" 1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

" (*a*) preparing the original text for signature in the languages specified;

"(*b*) keeping the custody of the original text of the treaty and of any full powers delivered to it;

" (*c*) preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

" (*d*) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

" (*e*) examining whether the signature, or any instrument, communication or notification relating to the treaty is in due and proper form, and if need be, bringing the matter to the attention of the State in question;

"(*f*) informing the parties and the States entitled to become parties to the treaty of acts, communications and notifications relating to the treaty;

"(*g*) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty have been received or deposited;

" (*h*) registering the treaty with the Secretariat of the United Nations;

" (*i*) performing the functions specified in the other provisions of the present Convention.

" 2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the organization concerned."

46. The Committee of the Whole had made many amendments to article 72 and the Drafting Committee, in turn, had made a few drafting changes, consequent upon the incorporation of the amendments. The Committee of the Whole had included in paragraph 1 the new sub-paragraph proposed in the United States amendment (A/CONF.39/C.1/L.369). The new sub-paragraph, which had become sub-paragraph (*a*), added to the functions of the depositary that of " preparing the original text for signature in the languages specified ".

47. The Drafting Committee wished to point out that that provision, which it had left unchanged in the text of article 72, was liable to create serious difficulties. In the first place, the word " preparing " might be interpreted as conferring on the depositary a certain responsibility for the actual drafting of the treaty and for the exact agreement of the authentic texts in all the languages. In the second place, the preparation of the original text for signature was in many cases the responsibility, not of the depositary, but of the State or international organization which had assumed the functions of secretary of the conference or meeting which had prepared the treaty. The Drafting Committee therefore asked the Committee of the Whole to consider whether paragraph 1, sub-paragraph (*a*), should not be deleted. Such deletion would in no way prevent a depositary from performing the functions in question because the opening sentence of paragraph 1 stated that " The functions of a depositary ... comprise *in particular* ".

48. In sub-paragraph (*b*), the Committee of the Whole had deleted the words " if entrusted to it " and had approved the addition of the following words " and of full powers, instruments of ratification, accession, acceptance or approval and notifications communicated to it "; the Drafting Committee had simplified that addition by expressly mentioning the full powers in sub-paragraph (*b*) and adding in sub-paragraph (*d*), before the words " any instruments ", the phrase " receiving and keeping custody of ". It had thought that the word "instrument" was sufficiently broad to justify dispensing with a list which would make the text unnecessarily heavy.

49. Also in sub-paragraph (*b*), the Committee of the Whole had approved an express reference to amendments to treaties, as requested by Finland (A/CONF.39/C.1/L.249) and Mexico (A/CONF.39/C.1/L.373). The Drafting Committee had thought that such reference was unnecessary, since either the amendment would be incorporated in the treaty, in which case it was covered by sub-paragraph (*b*), or it would be a separate instrument and was thus covered by sub-paragraph (*d*).

50. The Drafting Committee had incorporated the amendments by Mongolia (A/CONF.39/C.1/L.368) and the Byelorussian SSR (A/CONF.39/C.1/L.364).

51. Mr. BINDSCHEDLER (Switzerland) said he also considered that sub-paragraph (*a*) was unrealistic and might create difficulties. He suggested that it be deleted.

52. Mr. KEARNEY (United States of America) said that his delegation did not regard the sub-paragraph as important and could therefore agree to its deletion.

53. Mr. WERSHOF (Canada) said that sub-paragraph (*e*) of the Drafting Committee's text resulted from the amendment to sub-paragraph (*d*) of the International Law Commission's draft. The difference between sub-paragraph (*d*) and the new sub-paragraph (*e*) was that the latter omitted any express mention of reservation and replaced the words " is in conformity with the provisions of the treaty and of the present articles " by " is in due and proper form ". At the seventy-seventh meeting, he had asked the Expert Consultant to confirm his delegation's understanding of the International Law Commission's intention that, when a reservation was clearly prohibited by sub-paragraphs (*a*) or (*b*) of article 16 of the Convention, the depositary had the right and duty to bring that matter to the attention of the

[8] For earlier discussion of article 72, see 77th and 78th meetings.

reserving State. The Expert Consultant had confirmed that such was the meaning that should be attributed to the International Law Commission's text. He now wished to ask the representative of the Secretary-General whether that was indeed the practice of the Secretary-General. The reason he asked that question was that his delegation did not approve the new wording of that sub-paragraph and might ask the Committee of the Whole to reconsider its decision at the second session.

54. The CHAIRMAN said that, if there were no objection, he would take it that the Committee approved the Drafting Committee's text for article 72, subject to the deletion of sub-paragraph (*a*).

It was so agreed.

Article 73 (Notifications and communications) [9]

55. Mr. YASSEEN, Chairman of the Drafting Committee, said that neither the Committee of the Whole nor the Drafting Committee had made any change in article 73 of the International Law Commission's text, which read as follows:

"*Article 73*

" Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

" (*a*) if there is no depositary, be transmitted directly to the States for which it is intended, or if there is a depositary, to the latter;

" (*b*) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

" (*c*) if transmitted to a depositary, be considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1 (*e*)."

Article 73 was approved.

Article 74 (Correction of errors in texts or in certified copies of treaties) [10]

56. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had simply incorporated in article 74 the amendments adopted by the Committee of the Whole, so that the text now read as follows:

"*Article 74*

" 1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

" (*a*) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

" (*b*) by executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

" (*c*) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

" 2. Where the treaty is one for which there is a depositary, the latter:

" (*a*) shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection may be raised;

" (*b*) if on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

" (*c*) if an objection has been raised to the proposed correction, shall communicate the objection to the signatory States and to the contracting States.

" 3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more language and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

" 4. (*a*) The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

" (*b*) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

" 5. Where an error is discovered in a certified copy of a treaty, the depositary shall execure a *procès-verbal* specifying the rectification and communicate a copy to the signatory States and to the contracting States."

Article 74 was approved.

Article 75 (Registration and publication of treaties) [11]

57. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 75 by the Drafting Committee read as follows:

"*Article 75*

" 1. Treaties shall, after their entry into force, be transmitted to the United Nations Secretariat for registration or filing and recording, as the case may be, and for publication.

" 2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the paragraph above."

58. The Committee of the Whole had approved a new text for article 75, divided into two paragraphs. In paragraph 1, the Drafting Committee had merely made a few drafting changes. It had replaced the expression " Treaties shall, after their conclusion " by " Treaties shall, after their entry into force ", since treaties were in fact registered when they entered into force. It had also inserted the words " as the case may be ", because a treaty could not be transmitted at the same time for registration and for filing and recording. In paragraph 2, it had shortened and simplified the wording by deleting the list of juridical persons who might be designated as depositaries. The list was cumbersone because the

[9] For earlier discussion of article 73, see 78th meeting.

[10] For earlier discussion of article 74, see 78th meeting.

[11] For earlier discussion of article 75, see 79th meeting.

Committee of the Whole had added to it the expressions " one or more States " and " chief administrative officer ", and in any case was superfluous, because it already appeared clearly in article 71.

59. Mr. KHLESTOV (Union of Soviet Socialist Republics) said there was an error in the Russian version of article 75. In paragraph 1, the words " registration, filing and recording " should read " registration or filing and recording ". He had also noted a number of translation errors in other articles, which should be corrected by the secretariat.

60. Mr. BISHOTA (United Republic of Tanzania) asked the Chairman of the Drafting Committee whether his Committee had studied the question raised at the seventy-ninth meeting by the representative of Jamaica, namely, whether there was any contradiction between article 75, paragraph 2, and article 72, paragraph 1. Article 72, paragraph 1, allowed for the possibility of an exception concerning the functions of the depositary, in the clause " unless otherwise provided in the treaty or agreed by the contracting States ". It was therefore possible that the functions listed would not necessarily be attributed to the depositary.

61. Mr. YASSEEN, Chairman of the Drafting Committee, said that, under the United Nations Charter, States were required to register their treaties with the United Nations Secretariat. The intention in article 75 had simply been to stress that the depositary, by the very fact of being designated as depositary, was authorized to register treaties with the United Nations. There was therefore no incompatibility between article 75 and article 72.

Article 75 was approved.

The meeting rose at 5 p.m.

EIGHTY-THIRD MEETING

Friday, 24 May 1968, at 10.55 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXTS PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN invited the Committee to resume its consideration of article 71, which at the previous meeting had been referred back to the Drafting Committee. After that, there remained only to consider the texts proposed by the Drafting Committee for article 39 and articles 61 to 65.

Article 71 (Depositaries of treaties) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text now proposed for article 71 by the Drafting Committee read as follows:

"*Article 71*

" 1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

" 2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

3. The Drafting Committee had considered the suggestions by Canada regarding paragraph 1 and by Chile regarding the whole article, together with the comments of a number of delegations, and had now submitted a new text for the article which it believed to be clearer and better drafted than the earlier text. It had been unable to accept the Australian suggestion that the words " In particular " at the beginning of the second sentence of paragraph 2 be deleted, because that might give the impression that the two applications of the principle stated in the sentence were the only ones; by retaining those words, the Drafting Committee was emphasizing that they were only two among many.

4. Mr. JAGOTA (India) said he appreciated the reasons for replacing the expression " contracting States " in the second sentence of paragraph 2 by the expression " certain of the parties ". Unfortunately, that replacement was not satisfactory either, because under paragraph 1 (*g*) of article 2, the use of the term " party " implied that the treaty must be in force with respect to some parties. The difficulty might be avoided by replacing the expression " certain of the parties " by the expression " certain States ".

5. The CHAIRMAN said that the Indian representative's comment would be noted. If there were no objection, he would take it that the Committee approved article 71.

Article 71 was approved.

Article 39 (Validity and continuance in force of treaties) [2]

6. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 39 by the Drafting Committee read as follows:

"*Article 39*

" 1. The validity of a treaty or the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

" 2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

7. At its eighty-first meeting, the Committee of the Whole had adopted a French oral amendment to transfer the second sentence of paragraph 1 of article 39 to article 65. In the remaining sentence of the paragraph

[1] For earlier discussion of article 71, see 77th, 78th and 82nd meetings.

[2] For earlier discussion of article 39, see 39th, 40th, 76th and 81st meetings.

the Drafting Committee had inserted, after the words " the validity of a treaty ", the words " or the consent of a State to be bound by a treaty ", in order to cover the case in which the treaty itself was not tainted but the consent of a party was alone vitiated. In the case of a multilateral treaty, it was possible for the consent given by a State to be alone vitiated; that State could not then consider itself a party to the treaty, but the treaty nevertheless subsisted.

8. Mr. BRIGGS (United States of America) asked that the language services be requested to bring the French and English versions of paragraph 2 into line. The English version contained the words " by a party " which did not appear in the French version. In article 51, there was no such discrepancy between the English and French versions; the words " a party " were used there only with reference to withdrawal, not to termination.

9. Mr. EVRIGENIS (Greece) said that the wording of paragraph 1 should be amended so as to make it clear that it was the validity of the consent that could be impeached, not the consent itself.

10. The CHAIRMAN said that, if there were no objection, he would consider that the Committee approved article 39, subject to those comments.

Article 39 was approved.

Article 61 (Emergence of a new peremptory norm of general international law) [3]

11. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 61 by the Drafting Committee read as follows:

"*Article 61*

" If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

12. The Drafting Committee had added a footnote in its report explaining that it had taken no decision on the Finnish amendment (A/CONF.39/C.1/L.294) because it considered that it raised a question of substance which it was for the Committee of the Whole to settle. The Drafting Committee had deleted from the International Law Commission's draft the words " of the kind referred to in article 50 " because article 50 defined a peremptory norm of general international law " for the purposes of the present convention ". It had also replaced the verb " is established " by the verb " emerges ", which seemed a better reflection of the process whereby a peremptory norm of general international law was created.

13. Mr. CASTRÉN (Finland) said that he could not agree with the statement by the Drafting Committee in its footnote 1. The Finnish amendment did not raise any question of substance. It merely sought to clarify the text and bring it into line with the statement in paragraph (3) of the International Law Commission's commentary to the article. However, since the Drafting Committee had proposed a shorter text, his delegation was preparad to withdraw its amendment.

Article 61 was approved.

[3] For earlier discussion of article 61, see 66th meeting.

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) [4]

14. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 62 by the Drafting Committee read as follows:

"*Article 62*

" 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

" 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

" 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

" 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

" 5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

15. The Drafting Committee had simply incorporated the amendment by France to the first sentence of paragraph 1 (A/CONF.39/C.1/L.342) which had been adopted by the Committee of the Whole at its eightieth meeting.

16. The CHAIRMAN said that, if there were no objection, he would take it that the Committee approved article 62.

Article 62 was approved.

17. Mr. SINCLAIR (United Kingdom) said he wished to make it clear that the fact that article 62 had been adopted without a vote did not minimize in any way the strength of the opposition to the text of the article as it stood. The attitude of the United Kingdom delegation to article 62 would depend on the clarification of the important point of principle that, pending the solution of any dispute, a treaty must be presumed to be fully valid and effective. His delegation's position on article 62 would also depend on the solution adopted in respect of the proposal for a new article 62 *bis*.

Article 63 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [5]

[4] For earlier discussion of article 62, see 68th to 74th and 80th meetings.

[5] For earlier discussion of article 63, see 74th and 81st meetings.

18. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not made any change in the text of article 63.

Article 63 was approved.

Article 64 (Revocation of notifications and instruments provided for in articles 62 and 63) [6]

19. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not made any change in the text of article 64.

Article 64 was approved.

Article 65 (Consequences of the invalidity of a treaty) [7]

20. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 65 proposed by the Drafting Committee read as follows:

"*Article 65*

" 1. A treaty the invalidity of which is established under articles 43 to 50 and 61, and in accordance with the procedures laid down in article 62, is void. The provisions of a void treaty have no legal force.

" 2. If acts have nevertheless been performed in reliance on such a treaty:

" (*a*) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

" (*b*) acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

" 3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, coercion or act of corruption is imputable.

" 4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty."

21. As he had mentioned earlier in the meeting, at its eighty-first meeting the Committee of the Whole had adopted a French oral amendment to transfer the second sentence of paragraph 1 of article 39 to paragraph 1 of article 65. By a majority vote, however, the Drafting Committee had decided to reword the sentence on the lines of the French amendment (A/CONF./39/C.1/L.363) to read: "A treaty the invalidity of which is established under articles 43 to 50 and 61, and in accordance with the procedures laid down in article 62, is void." That rewording was intended to make the text clearer without affecting the substance.

22. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation was not satisfied with article 65 as proposed by the Drafting Committee. At the meeting of the Drafting Committee, it had objected both to any mention of specific articles in the first sentence of paragraph 1, and to a decision of the Drafting Committee being taken by a majority vote.

23. In paragraph (4) of its commentary to article 39, the International Law Commission had explained clearly the meaning of the reference to " the present articles ". It had pointed out that the expression " refers not merely to the article dealing with the ground of invalidity or termination relevant in the case but also to other articles governing the conditions for putting that article into effect ", and had then given examples of articles which had a bearing on the matter. The Committee should follow that principle and replace the first sentence by a sentence using the same terms as the second sentence of paragraph 1 of the International Law Commission's text of article 39.

24. Mr. OWUSU (Ghana) said that the Committee of the Whole had merely decided to transfer the second sentence of paragraph 1 of article 39 to article 65, but the Drafting Committee had now made a change in the text which would confine the section on invalidity to articles 43 to 50 and article 61. He saw no valid reason for that limitation.

25. He relied on the reasoning of the International Law Commission in paragraph (4) of its commentary to article 39, where it gave specific examples of articles, other than articles 43 to 50 and 61, which were relevant in the matter: " for example, article 4 (treaties which are constituent instruments of international organizations), article 41 (separability of treaty provisions), article 42 (loss of a right to invoke a ground for invalidating, etc.) and, notably, articles 62 (procedure to be followed) and 63 (instruments to be used) ". The question of invalidity could arise not only in regard to the conclusion of a treaty, but also in regard to its implementation or its consequences. The scope of the provision in the first sentence of paragraph 1 could not be limited in the manner proposed and he therefore requested a separate vote on that sentence.

26. Mr. ALCIVAR-CASTILLO (Ecuador) said he strongly supported the Ghanaian representative's proposal. Technical reasons had been adduced in support of the French oral amendment to transfer the second sentence of paragraph 1 of article 39 to article 65, but the transfer was now having unsatisfactory consequences from the technical point of view. In its original position in the opening article of the section, the sentence had reflected the general idea that a treaty was void if its invalidity was established under the provisions of the various articles which followed article 39; but it had now been moved to article 65, the purpose of which was quite different since it dealt with the consequences of invalidity. The original arrangement by the International Law Commission had been a logical one and had been consistent with the universally accepted principle that a void instrument could have no effect in law.

27. Mr. DE BRESSON (France) said he regretted the way his delegation's amendment to article 65 had been criticized. That amendment was different from the Peruvian amendment to article 39 (A/CONF.39/C.1/L.227) which was to introduce in the second sentence of article 39, paragraph 1, the phrase " as a result of the application of the procedure laid down in article 62 "; the use of that phrase could have been construed as making a substantive condition of the procedural provisions of article 62. The purpose of the French written amendment (A/CONF.39/C.1/L.363) was to introduce a reference to article 62 into the sentence. It had not met

[6] For earlier discussion of article 64, see 74th meeting.

[7] For earlier discussion of article 65, see 74th meeting.

with any criticism in the Committee of the Whole and had been referred without opposition to the Drafting Committee. The sentence now appeared in a slightly different form only as a result of subsequent developments, including his delegation's proposal at the seventy-sixth meeting to transfer it from article 39 to article 65. That proposal had merely been intended to reflect more clearly the meaning given to the sentence by the International Law Commission itself, by the Expert Consultant, and in fact by all delegations; there had been no intention to affect in any way the scheme of nullities set forth in the draft articles.

28. The sole purpose of the various proposals made by France in regard to articles 39, 62 and 65 had been to express more clearly the scheme embodied in the draft articles. As far as substance was concerned, the question of invalidity—absolute or relative—depended on the provisions of the relevant substantive articles. As far as procedure was concerned, article 62 laid down the rules that must be followed to establish invalidity, whether absolute or relative. The French proposals did not prejudge in any way the decision with regard to the divergencies that had arisen on the concept of absolute and relative invalidity; they would, he hoped, be settled at the second session of the Conference.

29. It was not correct to say that the introduction of a reference to articles 43 to 50 and article 61 would exclude other articles of the draft. For example, articles 41 and 42, which had been mentioned in that connexion, contained express references to the substantive articles in question. No interpretation could therefore lead to the conclusion that there was any intention to exclude those provisions. He therefore urged the Committee to adopt article 65 as it had emerged from the Drafting Committee.

30. Mr. JAGOTA (India) said that article 65, as it had emerged from the Drafting Committee, did not tally with the decision of the Committee of the Whole at its eighty-first meeting, which was merely, in accordance with the oral amendment proposed by France at the seventy-sixth meeting, to transfer the second sentence of paragraph 1 of article 39 to article 65. That meant that the sentence was transferred with its wording unchanged. The Indian delegation could not therefore accept the changes which had now been made in the wording and supported the Ghanaian proposal that the first sentence of paragraph 1 be put to the vote separately.

31. Mr. FERNANDO (Philippines) said that many of the difficulties which had arisen could perhaps be removed by replacing the reference to articles by a reference to the " present Convention ".

32. He supported the Ghanaian proposal for a separate vote on paragraph 1.

33. Mr. DE BRESSON (France) said he must point out that a specific reference to article 62 was contained in the French amendment (A/CONF.39/C.1/L.363) which had been submitted in writing. The purpose of the French amendment was clearly explained in paragraphs 66 and 67 of the summary record of the eighty-first meeting.

34. Mr. MWENDWA (Kenya) said that, like many other articles, article 65 had been referred to the Drafting Committee without a vote. The Drafting Committee was of course not bound to incorporate all the amendments referred to it. He had attended the meeting of the Drafting Committee at which article 65 had been discussed and had asked whether the other members considered that the Commission's draft article covered the point of the French amendment; no one had suggested that the Commission's text did not cover that point. No cogent arguments had been advanced in favour of referring specifically to certain articles in Part V, and his delegation saw no need for such a reference.

35. Mr. HARRY (Australia) said that in his delegation's opinion what the Drafting Committee had done had been fully in accordance with the instructions of the Committee of the Whole. The transfer of the second sentence of article 39, paragraph 1, to another section of Part V made it necessary to specify the articles which related to invalidity, but not the other articles of Part V, which related to such matters as termination and suspension. The Drafting Committee had also been right to add a reference to the procedures laid down in article 62.

36. Mr. KOUTIKOV (Bulgaria) said that his delegation could not accept the limitations introduced in paragraph 1; it no longer corresponded to the second sentence of paragraph 1 of article 39, which had been much more general. The Committee of the Whole had merely instructed the Drafting Committee to transfer the provision from one article to another.

37. Mr. BINDSCHEDLER (Switzerland) said he supported the views expressed by the French and Australian representatives. He suggested that the second sentence of paragraph 1 be deleted as being entirely redundant.

38. Mr. SINCLAIR (United Kingdom) said it was quite clear, from the procedural point of view, that the Committee had decided to delete the second sentence of article 39, paragraph 1, on the understanding that the point would be covered in article 65, paragraph 1. The Drafting Committee had, however, been obliged to take into account the amendments referred to it in connexion with article 65, paragraph 1.

39. From the substantive point of view, his delegation considered that the Drafting Committee had considerably clarified article 65, paragraph 1. When the question whether the list of articles was exhaustive had been discussed in the Drafting Committee, no one had been able to indicate any other article relating to substantive grounds for invalidity. The reference to procedural safeguards was also useful.

40. Mr. IPSARIDES (Cyprus) said that, during the debate on article 39, his delegation had opposed the transfer of the second sentence of paragraph 1 to another section because the disappearance of the sentence made the introductory clause less comprehensive. The fact that the Drafting Committee had made that general provision unnecessarily specific only strengthened his delegation's opposition.

41. Mr. MYSLIL (Czechoslovakia) said that the proposal to transfer the second sentence of article 39, paragraph 1, had only been adopted by a very small majority. His delegation had opposed the proposal on the grounds that the balance of article 39 would thereby be disturbed; now that the Drafting Committee had introduced a

change which limited the scope of the principle itself, his delegation would be obliged to vote against the change. The Committee had obviously intended the Drafting Committee merely to transfer the relevant provision from article 39 to article 65. Moreover, the text of article 39, paragraph 1, as approved at the present meeting, referred both to the validity of a treaty and to the consent of a State to be bound by a treaty, whereas the Drafting Committee's text of article 65, paragraph 1, made no mention of consent.

42. Mr. WERSHOF (Canada) said that, as there were two separate points objected to in the first sentence, he wished to move that the vote on the first sentence be taken in two parts. The first would be as to whether the Committee wished to retain in that sentence a mention of the specific articles 43 to 50 and 61; if that vote were lost, then it would be understood that the Committee wished to say simply " the invalidity of which is established under the present articles ". The second would be as to whether the Committee wished to retain the phrase " in accordance with the procedures laid down in article 62 ". If it was reasonable to grant the request of the representative of Ghana for a separate vote on the first sentence, then it was just as reasonable to divide that separate vote into two parts, because some delegations might not like to mention articles 43 to 50 and 61, but might think it proper and useful to mention the procedures laid down in article 62.

43. Mr. MARESCA (Italy) said that his delegation supported the Drafting Committee's text. It was an improvement on the International Law Commission's draft in that it clarified the underlying principles of Part V as a whole. The reference to the procedures laid down in article 62 was essential, since its omission might imply that invalidity could be declared unilaterally.

44. Mr. BARROS (Chile) said he supported the Canadian motion. To proceed otherwise would be tantamount to reopening the discussion on article 39 which the Committee had just adopted.

45. Mr. DE BRESSON (France) said that there were two points in the first sentence of paragraph 1; one was concerned with substance, the other with procedure. It would therefore be judicious to have two votes, one on the point of substance and the other on the point of procedure, as proposed by Canada.

46. Mr. OWUSU (Ghana) said that the simplest procedure would be to vote first on his delegation's proposal, which was to replace the Drafting Committee's text for the first sentence of article 65, paragraph 1, by the International Law Commission's text of the second sentence of article 39, paragraph 1.

47. Mr. BLIX (Sweden) said that three alternatives for the first sentence in paragraph 1 had been discussed in the Drafting Committee; they were, first, the Ghanaian proposal, secondly, the text proposed by the Drafting Committee, and thirdly, the text "A treaty the invalidity of which is established under the present convention and in accordance with the procedures laid down in article 62 is void ". His delegation had voted for and now supported the Drafting Committee's text. The first part of the third alternative had not been discussed by the Committee of the Whole but the second part had, since it was based on a French amendment (A/CONF.39/C.1/L.363) which had been submitted to the Committee of the Whole and considered by it and referred to the Drafting Committee without any opposition. While, therefore, there might be differences of opinion as to whether it was right for the Drafting Committee to mention articles 43 to 50 and 61, which was a point of substance, there could be no doubt that it was entirely proper for it to insist on including the phrase " in accordance with the procedures laid down in article 62 ", which was a point of procedure. In the opinion of the Swedish delegation, it would be reasonable to allow the Committee the option to delete the first part of the sentence and retain the second, which was what the Canadian proposal amounted to, but he would like to simplify that proposal by asking for a vote on the replacement of the words " under articles 43 to 50 and 61 " by the words " by the present Convention ". In that case, the Ghanaian proposal, being furthest removed from the existing text, would be voted on first and the Swedish proposal second.

48. The CHAIRMAN said that the applicable rule of procedure was rule 40—Division of proposals and amendments.

49. Mr. OWUSU (Ghana) said that he thought the relevant rule was rule 42—Voting on proposals.

50. Mr. JAGOTA (India) said that he supported the Ghanaian representative's view that the relevant rule was 42.

51. The CHAIRMAN said he had decided that the applicable rule was rule 41—Voting on amendments, and under that rule he now invited the Committee to vote on the Ghanaian proposal.

The Ghanaian proposal was adopted by 48 votes to 31, with 8 abstentions.

52. Mr. WERSHOF (Canada) said he agreed that it would not now be logical to vote on the Canadian proposal but he wished to call attention to the fact that, for the first time during the nine weeks of the Conference, a request for a separate vote had been opposed.

53. The CHAIRMAN said he would now put the Drafting Committee's text for article 65, as amended by Ghana, to the vote.

Article 65, as thus amended, was approved by 63 votes to 2, with 20 abstentions.

54. The CHAIRMAN said that the Committee had now concluded its consideration of the International Law Commission's draft. He would invite the representative of the Secretary-General to reply to a question which had been asked the previous day.

55. Mr. STAVROPOULOS (Representative of the Secretary-General) said that the representative of Canada had asked a question about the Secretary-General's practice as depositary in regard to the receipt of signatures and instruments of ratification, accession, etc., which were subject to reservations.

56. His answer to that question was that the Secretary-General had been instructed by the General Assembly not to attempt to decide whether a reservation was incompatible with the object and purpose of a treaty or

not. Such action would now be prohibited under article 16, paragraph (*c*). That was a matter which was left exclusively for the States concerned and on which the Secretary-General did not exercise any judgment. However, when a treaty expressly prohibited all reservations, or when it authorized specified reservations but not a particular reservation, it was the Secretary-General's practice not to receive the signature or the instrument which was subject to such a reservation. That duty was clearly imposed on the depositary by the treaty itself. The Secretary-General immediately brought the matter to the attention of the State in question and did his utmost to assist it in attaining its objective by means compatible with the treaty. The wording of article 72 as drafted by the Drafting Committee and adopted by the Committee of the Whole both permitted and required continuance of that practice.

57. The CHAIRMAN said that the Committee could hardly adopt the draft report in the absence of the Rapporteur, who had had to leave Vienna, so that it would be better to leave it over till the second session. He suggested that any comments be submitted to the Secretariat by 1 September 1968, and the Rapporteur could then decide whether and to what extent they should be incorporated.

It was so agreed.

Arrangements for the second session of the Conference

58. Mr. OGUNDERE (Nigeria), introducing his delegation's draft resolution (A/CONF.39/C.1/L.378) on arrangements for the second session of the Conference, said that under operative paragraph 2, concerning documentation for the second session, the Secretariat would be asked to prepare a draft of final clauses to be circulated before 31 December 1968.

59. Mr. BARROS (Chile) said he supported the draft resolution but questioned whether it was appropriate to invite the attention of participating States to the desirability of sending as far as possible the same representatives to the second session as had attended the first.

60. Mr. ALCIVAR-CASTILLO (Ecuador) said he supported the draft resolution on the understanding that the date of the conference had been discussed with the committee on the co-ordination of conferences.

61. Mr. STAVROPOULOS (Representative of the Secretary-General) said that the date had been agreed with the appropriate authorities and with the Committee on Conferences.

The Nigerian resolution was adopted.

Conclusion of the Committee's work

62. Mr. DE BRESSON (France), speaking on behalf of the western European countries, Australia, New Zealand, Canada and the United States; Mr. CARMONA (Venezuela), on behalf of the Latin American States; Mr. JAGOTA (India), on behalf of the Asian States; Mr. HARASZTI (Hungary), on behalf of the socialist States; and Mr. OWUSU (Ghana), on behalf of the African States, paid tributes to the Chairman and officers of the Conference and to the Secretariat, and expressed their thanks to the Austrian Government.

63. Mr. VEROSTA (Austria) joined in the tributes paid to the Chairman, the officers and the Secretariat, and said that his Government was gratified that the third codification conference should have been held at Vienna.

64. The CHAIRMAN, thanking the representatives for their kind words and the Austrian Government for its hospitality, said that the Conference had laid a solid foundation for the work of the second session.

The meeting rose at 1.15 p.m.