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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.