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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 overemphasized 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.