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## 36th meeting of the Committee of the Whole

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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.

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## 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.

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## 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.