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39th meeting of the Committee of the Whole

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with national law, the representative of the Ministry of Foreign Affairs of the country concerned would object and request that the treaty be amended.

58. The Commission had submitted article 38 to the Conference for approval because without that article certain existing practices remained unprovided for.

59. Mr. BADEN-SEMPER (Trinidad and Tobago) said he supported the deletion of article 38.

60. The CHAIRMAN put to the vote the amendments submitted by Finland (A/CONF.39/C.1/L.143), Japan (A/CONF.39/C.1/L.200), Venezuela (A/CONF.39/C.1/L.206) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220), all of which would delete article 38.

At the request of the Chilean representative the vote was taken by roll-call.

Italy, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Japan, Kuwait, Lebanon, Liechtenstein, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Saudi Arabia, South Africa, Spain, Sweden, Syria, Trinidad and Tobago, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Algeria, Australia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dominican Republic, Federal Republic of Gernamy, Finland, Greece, Guinea, Hungary, Israel.

Against: Italy, Kenya, Mali, San Marino, Sierra Leone, Switzerland, Argentina, Austria, Bolivia, Cambodia, Denmark, Ecuador, India, Indonesia, Iraq.

Abstaining: Ivory Coast, Liberia, Madagascar, Malaysia, Monaco, Morocco, Nigeria, Pakistan, Romania, Senegal, Singapore, Thailand, Tunisia, Zambia, Afghanistan, Belgium, Central African Republic, Congo (Democratic Republic of), Dahomey, Ethiopia, France, Gabon, Ghana, Guatemala, Holy See, Iran.

The amendments deleting article 38 were adopted by 53 votes to 15, with 26 abstentions.

The meeting rose at 12.50 p.m.

THIRTY-NINTH MEETING

Friday, 26 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

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

Article 39 (Validity and continuance in force of treaties)

1. The CHAIRMAN invited the Committee to consider Part V of the International Law Commission's draft, beginning with article 39.[1] He announced that the Chinese delegation had withdrawn its amendment to that article (A/CONF.39/C.1/L.242).

2. Mr. RUEGGER (Switzerland) said that the Swiss amendment (A/CONF.39/C.1/L.121) to modify the first sentence of paragraph 1 of article 39 and delete the second sentence must be regarded as substantive, not formal. The substitution of the term " invalidation " for " invalidity " raised a point of principle: the use of the word " invalidation " established the necessary guarantees for the security of treaties. A treaty must be presumed valid until the procedure for its invalidation had been completed. In the modern world, treaties *contra bonos mores* were practically unknown, because public opinion would nearly always prevent their conclusion; but in order to render impossible unilateral claims based on alleged invalidity, it was essential to provide reliable machinery for impartial ascertainment of the real reasons of invalidity. Unless that were done, the principle *pacta sunt servanda* would be jeopardized. The overwhelming majority of treaties were concluded in good faith, so it was wrong to take the presumption of invalidity as a starting point.

3. Invalidation was a procedure which must be carried out through one or more impartial organs. In discussing article 39, it was impossible not to trespass on the important area covered by article 62 which, however, at present provided a quite inadequate framework. No official position could be taken on article 39 until the Committee had agreed on the content of article 62, which certainly needed improvement. The Swiss delegation was particularly anxious that the procedure set out in article 62 should be surrounded with all possible guarantees, with arbitration as a last resort. The value of conciliation must not be underestimated, for it had the great advantage of leaving no scars, whereas arbitration was more of a surgical process. Switzerland had promoted the conclusion of many bilateral agreements concerned with the settlement of disputes through conciliation preceding arbitral awards or court judgments, but conciliation in itself could not provide all the necessary guarantees. In view of the close link between articles 39 and 62, his delegation regretted that it could not vote on article 39 until the ultimate content of article 62 was decided.

4. In its draft of article 39, the International Law Commission had resolutely crossed the frontier dividing codification from the development of international law. That frontier had already been crossed successfully when the 1958 Conference on the Law of the Sea had provided an entirely novel agreement, the Convention on the Continental Shelf.[2] The procedure whereby that result had been achieved should help the current Conference to adopt new methods of work. It would be remembered that the Convention on the Continental Shelf had been considered by a separate committee of the Conference on the Law of the Sea. Unfortunately, in establishing the machinery for the current Conference, the Sixth Committee of the General Assembly had failed to take

[1] The following amendments had been submitted: Switzerland, A/CONF.39/C.1/L.121; Peru, A/CONF.39/C.1/L.227; Republic of Viet-Nam, A/CONF.39/C.1/L.233; China, A/CONF.39/C.1/L.242; Australia, A/CONF.39/C.1/L.245. An amendment was subsequently submitted by Singapore (A/CONF.39/C.1/L.270).

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

into account the cogent arguments in favour of setting up two committees of the whole. It might nevertheless still be possible to entrust the preliminary work on Part V of the draft to a special working group. The Drafting Committee was overburdened with a number of complex problems, and could be said to be already performing the functions of a working group. He hoped that suggestion would be given serious consideration.

5. Mr. ALVARADO GARRIDO (Peru) said that his delegation's amendment to the second sentence of paragraph 1 (A/CONF.39/C.1/L.227) was not, strictly speaking, a substantive amendment; it was merely intended to clarify the International Law Commission's purpose by stressing the link between articles 39 and 62. Article 39 had to be read together with all the articles on validity and termination, particularly with the procedural provisions governing the application of the article, which contained, according to paragraph (1) of the commentary to article 62, "procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted ".

6. The second sentence of paragraph 1 of article 39 did not, however, fully reflect the commentary, according to which the term " the present articles " referred not merely to the particular article dealing with the particular ground of invalidity in any given case, but to all the provisions relating to that important legal consequence, especially article 62, which laid down the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty. The comprehensive nature of article 62 was borne out by the statement in paragraph (1) of the commentary to that article that some of the grounds upon which treaties might be considered invalid or terminated or suspended, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real dangers for the security of treaties. Since article 39 was a general provision, it should be worded precisely and unequivocally; that was the reason for the Peruvian amendment.

7. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that the main purpose of his delegation's amendment (A/CONF.39/C.1/L.233) was to stress that the rule, when determining the validity or invalidity of a treaty, should be to refer to the provisions of the convention. The remainder of the amendment related only to drafting.

8. Mr. HARRY (Australia) said that the thirty-eight articles already sent to the Drafting Committee set out a useful code of rules for the healthy functioning of contractual relations in international society in the treaty-making process. Of course, the convention must provide for normal processes of termination and suspension; many treaties had a purpose limited to a prescribed time-span, although others were designed to be perpetual. Provisions for termination, withdrawal, or suspension were as much part of the normal functioning of a treaty system as, for example, entry into force, but his delegation still needed to be convinced that some of the draft articles in Part V were necessary, at least in their existing form.

9. The Australian delegation hoped, in particular, that delegations which advocated the inclusion of various grounds of invalidity were not doing so merely on theoretical grounds. Although the International Law Commission must have borne in mind the precedents and lessons of the past, there seemed to be relatively little material to draw upon as a basis for the provisions of Part V. Indeed, Sir Hersch Lauterpacht had stated, in connexion with *jus cogens*, that there were no instances of a treaty being declared void on the grounds of the illegality of its object. It would be helpful if the Committee could be told of any actual instances, even if no cases had been decided, which illustrated those novel grounds of invalidity, for only then would it be in a position to judge whether the convention should provide for what could only be regarded as revolutionary rather than progressive—that was to say, steady, step by step—development of international law.

10. Of course, the Committee should not be concerned exclusively, or even primarily, with the past: it was attended by representatives of sovereign States, equal before the law, and its deliberations had shown that those States did not lack negotiating skill. Although the mistakes of the past must, of course, be taken into account, the primary task was to produce a balanced convention to govern future treaty relations. Australia's approach to article 39 and to the whole of Part V was based on the need to ensure that the States with which it made agreements carried out their obligations and that agreements could not be terminated except as provided for in the treaty, by the consent of all the parties, or on serious, clearly established and generally accepted grounds.

11. For example, Australia had been able to conclude a number of important trade agreements, entailing advantageous bargains with the industrial States which constituted its principal market. It certainly expected that the law of treaties would not include an unduly long and vague series of grounds on which such agreements might be invalidated if the other parties found it inconvenient or difficult to carry out their side of the bargain. Thus, if countries like Australia, which depended for their livelihood on a narrow range of primary products succeeded in persuading the industrial nations to limit the subsidies to their less efficient producers and to pay equitable and remunerative prices to efficient producers, they naturally wanted their agreements with those countries to endure.

12. The treaties in question should, of course, provide for the necessary flexibility and for emergency exceptions, but the machinery must be precise and reliable. Multilateral treaties might in future provide guarantees for the primary-producing countries, as well as a system of preferences for the manufactures and semi-manufactures of the developing countries, as a valuable aid to their industrial development. The various grounds for invalidity, termination or suspension of treaties must therefore be examined very carefully, and adequate and to some extent automatic machinery for the settlement of disputes should be provided for in Part V. The smaller countries should be able to rely on the support of courts and arbitral procedures to enforce their rights against the powerful States with which they had to trade.

13. In view of the indissoluble link between the question of settlement machinery and the substantive grounds for invalidity, the Australian delegation had submitted its amendment (A/CONF.39/C.1/L.245), solely with a

view to making explicit the International Law Commission's evident intention that the validity of a treaty might be impeached only by resort to the procedures set out in article 62. That intention seemed to be clear from paragraph (4) of the commentary to article 39, and from paragraph (1) of the commentary to article 62.

14. Since, however, article 62 would not be considered for some time and since its final text was still in the balance, the Australian delegation considered that it would be premature at that stage to take a decision on the final form of article 39. It therefore suggested that its amendment be left in abeyance until a decision was reached on article 62.

15. Mr. JAGOTA (India) said that article 39 appeared to distinguish between the articles relating to the invalidity of treaties on the one hand and those relating to the termination, denunciation, suspension of or withdrawal from treaties on the other. Paragraph 1 stated that the validity of a treaty might be impeached only through the application of the present articles, and that when invalidity was established the treaty was void. Paragraph 2 stated that a treaty " may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles ". Thus in the case of termination, denunciation or withdrawal, parties might follow either the terms of a treaty or those of the present articles and so had a choice in the matter. The choice seemed to imply that the terms of the treaty might derogate from the principles embodied in Part V of the draft. It would be interesting to hear from the Expert Consultant whether that had been the Commission's intention and if so, what was the basis of the distinction. The commentary to article 39 did not explain the point.

16. He had raised the point so as to eliminate any controversy on the subject matter of article 61, which referred to the emergence of a new peremptory norm of international law and was an extension of article 50, relating to *jus cogens*. As indicated in the commentary, it was in order to emphasize that a new peremptory norm would make an existing treaty void and would be a mode of termination that article 61 had not been included in article 50. Another reason why article 61 had been made a separate article was to emphasize that whereas a treaty would become void as a whole under article 50, a treaty which would become void under article 61 might not necessarily be terminated as a whole, and that was indicated in article 67. It would appear to follow that, since article 50 related to the validity of a treaty, the parties to a treaty could not derogate from the principle, in view of article 39, paragraph 1, but the parties to a treaty might be free to derogate from the principle in article 61 because the article related to termination and paragraph 2 of article 39 therefore applied.

17. It could be argued that article 39, paragraph 1, was not applicable only in the context of Section 2 of Part V and that the validity of a treaty might be challenged on any grounds under the relevant provisions of those articles, including article 61; the latter, however, did not relate to invalidity but to termination and therefore fell within the scope of article 39, paragraph 2. In order to avoid controversy, his delegation had moved an amendment (A/CONF.39/C.1/L.254) to incorporate article 61 in article 50 and to make consequential changes in other articles.

18. On a drafting point, it should be noted that article 40 combined the questions of invalidity, termination, and so on, of a treaty arising " as a result of the application of the present articles or of the terms of the treaty ". The two points of that phrase were transposed in paragraph 2 of article 39, probably advisedly because, according to article 39, invalidity was to be established by reference to the present articles only, whereas termination might result from applying the present articles or the terms of the treaty. It did not appear to be the Commission's intention that even the invalidity of a treaty might be established in accordance with its terms. The language would probably be made clearer by adding the words " as the case may be " after the words " or of the terms of the treaty " in article 39, paragraph 2.

19. The International Law Commission's present draft text of article 39, paragraph 1, emphasized the presumption in favour of the validity of a treaty, mentioned the law with reference to which its validity could be impeached, and indicated the consequences of the establishment of invalidity, namely, that such a treaty was void. Those elements were not specified in the proposed amendments to article 39. Accordingly, he could not support the Swiss or Australian amendments. Nor did he agree to the wording of the Peruvian amendment. In general, he favoured the Commission's draft.

20. Mr. ALVAREZ TABIO (Cuba) said he was opposed to the Swiss amendment (A/CONF.39/C.1/L.121), which would involve a radical departure from the whole system of invalidation and termination in Part V of the draft.

21. The International Law Commission's commentary to the draft articles in Section 2 of Part V clearly demonstrated the Commission's intention to regard all the grounds of invalidity set forth therein, with the possible exception of the case envisaged in article 61, as grounds of absolute nullity or voidness *ab initio* rather than of mere voidability; that approach was, of course, without prejudice to the specific effects of each particular ground of invalidity. In its provisions on the consequences of invalidity, the Commission had therefore not drawn any distinction between cases of nullity or voidness *ab initio* and cases in which consent could be invalidated at the behest of one of the parties. That approach was also illustrated by the provision in article 65, paragraph 1, which stated that " The provisions of a void treaty have no legal force ". That provision reflected, with reference to the consequences of invalidity, the idea contained in the second sentence of paragraph 1 of article 39.

22. If that approach were now to be replaced by that adopted in the Swiss amendment (A/CONF.39/C.1/L.121), all cases of invalidity would be treated as cases of " invalidation ". A treaty, consent to which had been procured by coercion or fraud, would not be void *ab initio*, but would only be annulled when invalidity was formally established. The consequences of invalidity would operate only as from that date and not retroactively. Situations created as a result of conduct in bad faith by one of the parties would thus be recognized as having legal effects.

23. The concept of voidability or " relative " nullity was applicable only in cases where the invalidity of the

treaty resulted from acts performed in good faith. Cases of voidness *ab initio*, or " absolute " nullity, resulted from conduct which deserved no legal protection whatsoever. A treaty that was merely voidable was one which originated as a valid treaty but became void subsequently. It was appropriate in that case that the decision which invalidated the treaty should operate only for the future. Where a treaty was void *ab initio*, on the other hand, the decision which recognized that defect was purely declaratory of the fact that the treaty had been void from the start; it therefore operated retroactively.

24. For the same reasons, he could not support the Peruvian amendment (A/CONF.39/C.1/L.227), which would weaken the provisions of article 39 and lead to the amendment of article 65. The present text of the second sentence of paragraph 2 of article 39 stressed the fact that invalidity was determined by the substantive provisions of the draft articles on the subject, while the amendment by Peru would subordinate invalidity to the operation of the procedural provisions of the draft. The Peruvian amendment, like the Swiss amendment (A/CONF.39/C.1/L.121), would mean that, until invalidity had been established by means of the procedure specified in article 62, a treaty which was void would continue to have legal effects. The Peruvian amendment in itself would not cause much harm if article 65 were maintained as it now stood, but like the Swiss amendment it would, if adopted, open the door to a radical transformation of the whole approach of Part V to the question of grounds of invalidity.

25. For the same reasons, his delegation considered that the Australian amendment (A/CONF.39/C.1/L.245) would not improve the text of article 39. It supported the retention of article 39 as it stood.

26. Mr. SINCLAIR (United Kingdom) said that, among the series of articles in Part V were several which were of crucial and overriding importance. Upon the decisions the Committee would take with respect to some of those articles would depend the success or failure of the Conference. Success would not be represented by the adoption of articles or amendments by a specified majority; it would rather be represented by a major effort of conciliation with the aim of producing texts which would command the broadest possible acceptance. He was conscious that all delegations were aware of their responsibilities in considering and eventually deciding on those issues. For it would be tragic if the efforts of delegations to produce a worthy convention were to be rendered nugatory by divisions on the content of some of the draft articles in Part V.

27. His delegation supported the Swiss amendment in so far as it sought to delete the second sentence in paragraph 1 of article 39. The Commission had been careful to draw a distinction between those articles which were alleged to constitute a ground of nullity *ab initio* and those which constituted a ground of voidability or invalidation. Articles 43 to 47 referred expressly to invalidating consent to be bound. In paragraph (4) of the commentary to article 46, the Commission had declared that " the effect of fraud is not to render the treaty *ipso facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent ".

28. The second sentence of paragraph 1 of article 39 might misrepresent the Commission's intention as expressed in the text of later articles in Part V and in the commentaries to them by asserting that a treaty, the invalidity of which was established under the present articles, was void. He understood the Commission to have intended to stipulate that only certain grounds of invalidity rendered a treaty void *ab initio*, but the majority of the grounds set out in Part V simply rendered it voidable at the instance of the party affected. There was an essential distinction which must be preserved between the idea of nullity *ab initio* and that of voidability. Perhaps the problem raised by the Swiss amendment could only be solved after all the articles in Part V had been considered. In any event, it would be possible to specify clearly in article 65 the distinction between treaties void *ab initio* and treaties voidable at the instance of the party affected.

29. He supported the Australian amendment (A/CONF.39/C.1/L.245) to insert the words " including article 62 " in paragraph 1 of article 39. That article in its present form was quite unsatisfactory and must contain the essential procedural safeguards, for the application of Part V must be strengthened. He interpreted the Australian proposal as referring not to the existing inadequate safeguards in article 62 but rather to the more demanding safeguards which should eventually be incorporated in the convention. It was in that sense that he supported the Australian amendment.

30. The first sentence in paragraph (5) of the commentary to article 39 stated that the phrases " only through the application of the present articles " and " only as a result of the application of the present articles " were intended to indicate that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles were exhaustive, apart from any special cases provided for in the treaty itself. There might be some cause to doubt the correctness of that statement because, for example, the articles did not seek to regulate the effect of the outbreak of hostilities on treaties, yet it was well known that that could constitute a sufficient ground for terminating or suspending the operation of a treaty obligation. It might be desirable to make suitable reference to that point in article 69. But it was clear that, as stated in paragraph 29 of the Commission's final report,[3] the topic had not been covered in the draft articles. There was therefore a question whether the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles were exhaustive. Perhaps what the Commission had intended to convey was that the grounds were exhaustive to the extent that the draft articles and the commentary read as a whole did not specifically exclude them.

31. He supported the suggestion by the representatives of Switzerland and Australia that a decision on article 39 be postponed until the rest of the articles in Part V had been examined. He was also in favour of the suggestion that a working group should be set up to consider those articles.

32. Mr. PINTO (Ceylon) said that article 39 purported to render the draft articles exhaustive as to the rights and procedure whereby a treaty could be held invalid, termi-

[3] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 9.

nated, denounced, withdrawn from or suspended. The creation of a new and exclusive régime governing so vital a matter could be undertaken only after the most careful thought.

33. The articles comprised in Part V were the most ambitious yet attempted to develop and codify international law; articles 50 and 61, which together provided for the voidance of treaties in conflict with a peremptory norm of international law, were particularly significant. His delegation supported without qualification the principle of *jus cogens* and a provision on that principle would be a milestone in the development of the codification of law. He hoped that, by a common effort, provisions on the subject defining more expressly the real content of the concept would be inserted in the draft.

34. While in the realm of private law it might be relatively simple to hold void an agreement for an illicit purpose which conflicted with a peremptory norm of domestic law or public policy, in the international sphere the concept of a peremptory norm might need further elucidation. Among peremptory norms could be cited such fundamental rules as those prohibiting genocide or slavery. Such norms were not only to be found in international law; they might also exist in custom. They were contained in the United Nations Charter and were to be found among the principles relating to friendly relations and co-operation among States, such as sovereign equality and non-intervention, now being formulated by the Sixth Committee of the General Assembly. The work of the United Nations on aggression might also yield a number of peremptory norms. If it proved impossible to define the peremptory norm, it would be advisable to establish in the convention some machinery for determining speedily, objectively and definitively whether peremptory norms existed in a particular case, particularly for the purposes of article 61.

35. Article 62 did not seem to come to grips with the problem of the prompt and effective determination of issues in a given case, and the Committee ought to consider including an appropriate declaratory mechanism for referring disputes to the International Court of Justice, perhaps to be dealt with by summary procedures. Another possibility would be reference to an arbitral tribunal empowered to make final and binding decisions. Should such a provision fail to gain support, an optional protocol might be acceptable.

36. He supported the suggestion that the decision on article 39 should be deferred until the other articles in Part V had been considered.

37. He commended the Australian amendment for the emphasis it placed on the reference to article 62 and the mechanism for the settlement of disputes.

38. Mr. SMALL (New Zealand) said that in the International Law Commission's discussions on article 39, grave concern had been expressed at the impact which the articles in Part V might have on the stability of treaties. It was that concern which had led the Commission to place at the very beginning of Part V a provision laying down the presumption that a treaty was valid until some grounds of invalidity had been established. The provision had been embodied in the opening article of Part V in order to offset the fact that the subsequent articles contained some destructive provisions. Later, the Commission had decided that a statement in the form of a presumption was too weak and had changed it to a more peremptory statement that any party wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with the provisions of the draft articles and, in particular " in accordance with the orderly procedure " which ultimately became article 62.

39. He had referred to the drafting history of article 39 because article 39 had been clearly intended as a bulwark for the stability of treaties. As such, it had a twofold purpose: first, to ensure that only those grounds set forth in Part V might be alleged as grounds of invalidity; second, to state that a party wishing to rely on such grounds could not do so entirely of its own volition, but must follow what the Commission itself described as the " orderly procedure " of article 62. On that second point, the commentary made it clear that, on all occasions when recourse was had to the substantive articles on invalidity, voidance, termination or suspension, a State could proceed only by recourse to article 62.

40. The text of article 39, in the view of his delegation, was in accordance with that comment. In view of the importance on the matter, however, his delegation felt that the procedural requirement must be stated more explicitly and therefore strongly supported the amendments submitted by Switzerland (A/CONF.39/C.1/L.121), Australia (A/CONF.39/C.1/L.245) and to some extent Peru (A/CONF.39/C.1/L.227). Those amendments should be considered together by a working group.

41. His delegation utterly rejected the notion that, if a State asserted that a treaty was void *ab initio*, it could act upon its view without recourse to article 62.

42. In view of the direct relationship between article 39 and the provisions of article 62, it was not possible to say whether article 39 would be acceptable to his delegation until the final form of article 62 was known, and in particular what judicial or arbitral settlement provisions would be included in it. As it now stood, article 62 did not provide sufficient safeguards. For those reasons he reserved his delegation's position regarding not so much the detailed wording of article 39 as its general accuracy in the context of article 62 and Part V as a whole, and supported the suggestion that a decision on article 39 should be suspended until the central issue to which article 62 gave rise had been dealt with.

43. With regard to Part V as a whole, some of its provisions were potentially unsettling to treaty relations. Any rules that might be adopted at the present Conference would inevitably be governed by the laws of space and time, and it was not easy to foresee the effect which some of those rules might have in the future, however attractive they might at present appear. The Committee should make every effort to build as safely and as moderately as possible for the future.

44. Mr. MYSLIL (Czechoslovakia) said that the provisions of Part V marked the limits of the *pacta sunt servanda* rule, a rule which could not apply to invalid treaties. The International Law Commission had succeeded in maintaining a balance between the legitimate concern of the international community to reflect social change in treaty relations and the interest of that community in the stability of treaty relations. Neither of

those two elements should be neglected; treaty relations should neither be undermined contrary to international law nor preserved in defiance of justice.

45. It had been a remarkable achievement for the Commission to have been able to offer an exhaustive enumeration of the grounds of invalidity and termination. It had also succeeded in providing an adequate formulation of the various grounds in the individual articles. That codification would be of the utmost importance for future treaty relations; without it States would have great difficulty when trying to ascertain what customary rules remained outside the scope of the convention.

46. Paragraph 1 of article 39 stated that, in the future, the validity of a treaty could be impeached only through the application of the articles which followed and for no other reasons. Paragraph 2 stated the same rule with respect to termination, denunciation and withdrawal, where the terms of the treaty might also apply. The intention had been to replace the rules of customary law by rules of treaty law and thereby prevent a recourse to customary law in the future, except perhaps with regard to the effect of hostilities on treaties; on that last point, he agreed with the United Kingdom representative on the need to cover that question. The article was also intended to give recognition to the need for legal stability and to stress the exceptional character of that part of the draft vis-à-vis the *pacta sunt servanda* principle.

47. For article 39 to have any meaning, it was essential that all the grounds of invalidity, termination, denunciation, withdrawal and suspension should be set forth in the convention on the law of treaties. Should any of the grounds, such as error or fraud, listed in Part V be removed, the article would become useless because it would be possible to impeach a treaty by invoking rules that would remain part of customary law. For those reasons, his delegation supported the retention of article 39 as it stood, but agreed that it might be difficult to adopt it until it was known that all the articles specifying grounds of invalidity, termination, denunciation and withdrawal would be included in Part V.

48. He could not accept the Peruvian amendment (A/CONF.39/C.1/L.227), which appeared to ignore the substantive law and concentrated on procedure, or the Australian amendment (A/CONF.39/C.1/L.245) which similarly placed all the emphasis on procedural elements. He also opposed the amendment by Switzerland (A/CONF.39/C.1/L.121), which would reduce the provisions of paragraph 1 to an obligation to request the invalidation of the treaty, even for an innocent party to a treaty that was void *ab initio*.

49. He saw no reason to delete the second sentence of paragraph 1, which made for a balanced statement of the subject-matter of the article. Indeed, the whole draft of Part V maintained the proper balance between considerations of substance and of procedure, a balance which should not be upset. His delegation did not underestimate the procedural aspects of the matter and attached great importance to article 62, but felt that it would also be a mistake to over-emphasize questions of procedure and to make them the central issue of the Committee's discussions.

50. Mr. TALALAEV (Union of Soviet Socialist Republics) said he supported article 39 as drafted by the International Law Commission. Its provisions adequately reflected existing rules of international law, and introduced some innovations which represented progressive development.

51. The concern which had been expressed by some representatives with regard to the effect of the provisions of article 39 was not justified. Those provisions would strengthen the stability of treaty relations and the application of the *pacta sunt servanda rule*.

52. As stated by the International Law Commission in its commentary, the validity of treaties must be regarded as the normal situation. Article 39 therefore set forth the presumption that treaties were valid and stated that invalidity must be established. It further stated that invalidity must be established under the provisions of the draft articles. A treaty was therefore valid unless it was established, under some provision of the draft articles, that it was invalid. The article thus provided a safeguard for the stability of treaty relations.

53. Article 39 limited the possibility of invalidating or terminating a treaty within the framework of the draft articles. The enumeration of grounds of invalidity and termination contained in Part V was exhaustive, a particularly important point, because it ruled out any arbitrary attempt to terminate a treaty or to declare it invalid.

54. The present text of article 39 constituted a remarkable advance by comparison with the earlier texts which had been discussed by the Commission ever since 1959. The fourth Special Rapporteur, Sir Humphrey Waldock, had approached the problem of the validity of treaties basically from the standpoint of essential validity, in other words, from the standpoints of the rules relating to substance rather than of those concerning formal validity and temporal validity, on which previous Special Rapporteurs had laid more stress. Article 39 established a clear link between the validity of a treaty and its binding force. It thus represented the other facet of the *pacta sunt servanda* rule, which proclaimed the binding force of valid treaties. The *pacta sunt servanda* rule applied to all treaties which fulfilled the conditions set forth in Part V, namely, all valid treaties.

55. For those reasons, his delegation considered that the two concepts of validity and binding force should not be separated and it therefore opposed any changes to the present text of article 39. In particular, the amendment by Switzerland (A/CONF.39/C.1/L.121) was totally unacceptable, since it would undermine the whole system of the International Law Commission's draft. It would have the effect of excluding from the draft the concept of voidness or absolute nullity and of treating all instances of invalidity as cases or relative nullity or voidability. The International Law Commission had drawn a clear distinction between the grounds of voidness or absolute nullity set forth in articles 48, 49 and 50, which made a treaty void *ab initio*, and the grounds of invalidation set forth in other articles. If, as suggested in the amendment by Switzerland, all those cases were to be placed on the same footing, a treaty obtained by means of coercion, or the violation of such *jus cogens* rules as those relating to respect for the sovereignty of States, would be treated as being merely voidable. A treaty concluded in such circumstances was null and void *ab initio* and it was unthinkable that it should be dealt with in the same manner

as a treaty consent to which was vitiated because of an error or some *ultra vires* action by the representative of a State.

56. It was true that treaties which were void because they had been obtained by coercion or because they were in conflict with a rule of *jus cogens* were rare, but they did exist and it was necessary to prevent such treaties from being concluded in the future. For those reasons, he strongly opposed the Swiss amendment and urged the Committee to abide by the clear-cut distinction which the International Law Commission had appropriately established between treaties which were null and void *ab initio* and treaties which were merely voidable.

57. He could not agree with the United Kingdom representative's statement that the second sentence of paragraph 1 was in contradiction with other provisions of Part V. Article 39 dealt with all cases of invalidity, and that meant both voidness *ab initio* and voidability. The withdrawal of the amendment in document A/CONF.39/C.1/L.242 to add at the end of paragraph 1 the words " *ab initio* " clearly showed that article 39 dealt with all cases of invalidity and not only with those of voidness or absolute nullity.

58. The Australian amendment (A/CONF.39/C.1/L.245) would not be an improvement. The words " the present articles " covered article 62 and it would serve no useful purpose to make a specific reference to that article.

59. It was still too early to express a definite view on the suggestion to set up a working party to deal with Part V, but if the Committee got into difficulties in its discussions, it might consider it.

The meeting rose at 1 p.m.

FORTIETH MEETING

Friday, 26 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

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

Article 39 (Validity and continuance in force of treaties) *(continued)* [1]

1. Mr. MIRAS (Turkey) observed that the draft introduced into international law by means of a convention several instances of the invalidity of treaties taken from the private law of contract. Some of those rules would appear to lend themselves to such a transfer, provided that due caution was exercised. They should, however, be defined more precisely and the determination of such cases of invalidity should be left above all to an impartial authority, as they were in internal law. On the other hand, other rules in Part V were not suited to such a change of context, owing to the structural differences between municipal and international law.

2. In the case under consideration, namely article 39, the first essential was to provide machinery for impartial judgement in cases of invalidity. That was not a procedural matter, but an element lying at the very heart of the problem of invalidity. The Swiss amendment (A/CONF.39/C.1/L.121) brought out the need for the intervention of an impartial authority and the Turkish delegation gave it its full support. Progressive codification which introduced rules of civil law into international law should not make provision for automatic invalidity, but rather for judicial invalidation, for no one could be judge in his own cause.

3. The Turkish delegation's attitude towards the other amendments was based on the observations he had made. His delegation also supported the proposal to postpone the vote on article 39.

4. Mr. IPSARIDES (Cyprus) said that, subject to the reservations expressed by the Indian delegation at the previous meeting, his delegation was on the whole in favour of both the substance and the wording of article 39, in view of the explanations given in the commentary.

5. The amendments to article 39 were partly due to the controversial nature of the substantive articles in Part V, to which article 39 was the introduction. At that point he wished to explain his objections to the amendments. With regard to the Swiss amendment (A/CONF.39/C.1/L.121), his delegation's main consideration was that the use of the word " invalidation " might well impair the balance and uniformity of the terms used throughout the convention, in particular in Part V, and that might give rise to juridical misconceptions. Further, the amendment restricted the scope of paragraph 1 to a simple request for invalidation, or, in other words, to the purely procedural aspect of Part V; that deprived the article of its introductory nature, whereas the International Law Commission's text stated both the possibility of impeaching the validity of a treaty only through the application of the articles in the convention and the legal effect of such impeachment, namely that the treaty was void. The Peruvian amendment (A/CONF.39/C.1/L.127) too, although of a drafting nature, restricted the question of invalidity to the procedural aspects by removing any allusion to the substantive grounds of invalidity. The Cypriot delegation could not support the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.233) either, as that amendment virtually removed from the second sentence in paragraph 1 all reference to the legal effect of a successful impeachment of validity. The other drafting changes proposed in that amendment were justified, and the Drafting Committee might consider them, provided that it took care to preserve the uniformity of the terms used.

6. The Australian amendment (A/CONF.39/C.1/L.245) might be a source of confusion, since the addition of a reference to article 62 alone placed undue emphasis on the procedure for invalidation at the expense of the grounds for invalidity. The other changes proposed in that amendment were of a drafting nature and might be referred to the Drafting Committee.

7. His delegation approved of draft article 39 in principle, but thought it might perhaps be necessary to defer the vote on the article until after the debate on the substantive matters raised in Part V.

[1] For the list of the amendments submitted, see 39th meeting, footnote 1.