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40th meeting of the Committee of the Whole

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

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

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

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

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

The meeting rose at 1 p.m.

FORTIETH MEETING

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

Chairman: Mr. ELIAS (Nigeria)

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

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

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

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

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

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

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

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

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

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

8. Although it did not underestimate the difficulties facing the Committee, his delegation was convinced that the points of difference could be removed with the help of the spirit of goodwill and co-operation that had characterized the Conference's work. It should be possible to find a juridical solution for even such controversial matters as the problem of *jus cogens* and the determination of nullity by an authority independent of the parties. That would prevent the work of the Conference from being jeopardized by those questions and thus ensure the success of what was perhaps the most important attempt at codification ever undertaken by the United Nations.

9. Mr. SØRENSEN (Denmark) said that an additional reason for the particular difficulties of that part of the codification of the law of treaties was that the use of notions drawn from national legal systems led to differences of opinion due to the differences in the content of those notions. Care should therefore be taken to define those notions as precisely as possible. That had not always been done in the draft. Thus, the procedure laid down in article 62 applied to all the grounds of invalidity and so placed them all on the same footing. But the grounds of invalidity dealt with in articles 48, 49 and 50 seemed to be more absolute than the others. The commentary to those articles used such expressions as " treaty *ipso facto* " void, " absolute nullity ", a treaty " void " rather than " voidable ", or again " void *ab initio* ". But if States must in any event adhere to the procedure laid down in article 62, it might well be asked what those terms corresponded to. It implied perhaps that the invalidity established in accordance with article 62 operated retroactively. But if that was so, what of article 65, which declared void *ab initio* any treaty the invalidity of which had been established, without any distinction as to the cause of invalidity? That certainly needed clarification, and any explanations the Expert Consultant might be able to give about the scope of the various notions would be most useful. Such an effort to clarify matters was indispensable if it was desired to reach an agreement.

10. Mr. BRIGGS (United States of America) said that he regarded article 39 as an important contribution to the codification and progressive development of the law of treaties. By adopting that article, the International Law Commission had unanimously recognized that the mere unilateral assertion by a State that a treaty was invalid or no longer binding on it did not establish the invalidity of the treaty and that a State could not claim to release itself unilaterally from its treaty obligations. As stated in paragraph (1) of the commentary, the validity and continuance in force of a treaty was the normal state of things which might be set aside only on the grounds and under the conditions provided for in the convention. Those conditions included not only substantive grounds for claiming or alleging invalidity or release but also those under article 42 and " notably " the procedures required under articles 62 and 63. The convention sought to safeguard the interests of the two parties and to obviate the acrid controversies which arose from arbitrary unilateral decisions.

11. There was therefore a close relationship between article 39 and the other articles of Part V. The Peruvian amendment (A/CONF.39/C.1/L.227) had the virtue of making that direct relationship clear, by making it impossible for a State which had asserted that a treaty was void to make an unfounded claim that it did not have to follow the procedures laid down in the convention. His delegation therefore supported that amendment and thought that the Australian amendment (A/CONF.39/C.1/L.245) would also help to give greater clarity to that principle, which was implicitly contained in article 39.

12. Further, his delegation thought that perhaps the second sentence of paragraph 1 of article 39 concerning the legal consequences of invalidity might be more appropriately transferred to article 65, which dealt with the same subject. As drafted, the sentence in question did not take into account the distinction that was made between the conditions laid down in articles 49, 50 and 61, which alone provided when a treaty was or became void, and those in other articles which provided grounds for invoking invalidity. The Swiss amendment, by eliminating any premature reference to void treaties, would enable the Committee to consider that important issue when it came to examine article 65. Accordingly, his delegation supported the principle of the Swiss amendment, but thought it would be desirable to include a reference to the close relationship between articles 39 and 62 along the lines proposed in the Australian and Peruvian amendments.

13. With reference to the procedures themselves, his delegation would merely place on record at that stage that it was essential to supplement them by workable and reliable provisions in order to settle any disputes respecting validity which might arise in connexion with the articles contained in Part V.

14. The issues involved in the invalidation of treaties were so grave as to necessitate some device for ensuring the impartial settlement of disputes. Devices which tended to gloss over those differences, such as optional protocols, were unacceptable to his delegation.

15. Finally, his delegation thought it would perhaps be better to defer any decision on article 39 until the Commission had considered the other articles. In particular, it was necessary to determine first of all whether a treaty was necessarily void when a ground for invalidity had been established and whether the consequences showed themselves invariably *ex tunc* rather than *ex nunc*.

16. Mr. BLIX (Sweden), commenting on some important features of article 39, said that the International Law Commission had been wise to make it clear in that article that Part V provided an exhaustive list of the grounds for invalidity, termination and suspension of treaties, thus strengthening the security of treaty relations between States. It might be difficult to subsume certain situations such as desuetude under the provisions of the articles, but it would be better for the list to be shortened if it was going to be altered. Fraud and corruption, for example, could come under the article on *jus cogens*.

17. The enumeration of the grounds of invalidity might act as a deterrent, since the parties would know beforehand that a treaty the conclusion of which was vitiated in one of the ways defined in the convention could be denounced in virtue of the provisions of the convention. Further, the exhaustive character of the list might offer some protection against denunciations on grounds not easily subsumed under the cases provided for in the

convention, even if some of the grounds listed might lend themselves to widely differing interpretations owing to their vagueness and to the absence of previous State and court practice.

18. The institution of a workable mechanism for authoritatively establishing the invalidity of a treaty would certainly play a decisive role in that respect. There would be few cases where the parties would agree that a treaty was invalid, and once the difference had arisen, they would find it difficult to agree on a method of establishing invalidity. His delegation therefore thought it necessary to improve article 62 by providing for a flexible but automatic method of establishing invalidity as required under article 39.

19. He would not at that stage discuss in detail the possibilities of improving article 62. However, since early times, when the principle *pacta sunt servanda* was virtually the only rule of treaty law, that law had developed and been refined to such an extent that the international community had to provide means for ensuring the application of the rules of treaty law when the subjects of law could not agree.

20. The Swedish delegation understood article 39 to mean that the only grounds recognized as invalidating a treaty were those specified in Part V, and that only treaties the invalidity of which had been established were void. Before invalidity was established, there was merely a claim of invalidity. Articles 43-47 corroborated that by providing that a particular ground could be "invoked". The same seemed true of articles 48-50. Coercion or the violation of *jus cogens* could be claimed as grounds for invalidity. The claim might or might not be justified. Once its justification was established, the treaty was void *ex tunc*.

21. Invalidity could be established by two principal methods, as laid down in article 62: by agreement between the parties and by seeking a solution through the means indicated in Article 33 of the United Nations Charter. It might be advisable to make it clear in article 39, as proposed in the amendments submitted by Australia (A/CONF.39/C.1/L.245) and Peru (A/CONF. 39/C.1/L.227), that invalidity was established by the methods provided for in article 62. That would not mean that a treaty claimed to be void was void only if so declared. Just as an entity might juridically constitute a State before being recognized as such by others or before being declared to be a State by an international organization through admission as a member State, so a treaty of which the invalidity was established at any given time would already be void in an abstract sense before the invalidity was established. But a party suspending the operation of a treaty which it claimed was void, but which had not yet been established as void, would incur responsibility for non-execution if the treaty was not subsequently established as void.

22. He pointed out that whereas article 39 used the words "a treaty the invalidity of which is established under the present articles", articles 43-47 referred to invalidity of consent, article 48 to the absence of legal effect and articles 49-50 to a treaty being void. The differing terminology might be due to the fact that in the case of multilateral treaties, the operation of articles 43-48 might entail, not the invalidity of the treaty itself, but only its invalidity with regard to a particular party. Perhaps article 39 should therefore be corrected to read: "The validity of a treaty or a treaty relation may be impeached ..." and "A treaty or treaty relation the invalidity of which is established ...". The question was certainly complicated and it was difficult to reach a decision on the point, as on article 39 as a whole, before discussing the other articles in Part V, with which it was closely connected. The Swedish delegation therefore thought it preferable to defer a vote on article 39.

23. Mr. GARCIA-ORTIZ (Ecuador) said that in the International Law Commission's draft convention the provisions in Part V and, in particular, those in article 39, related to the progressive development of international law. In his delegation's view, there was no reason to restrict the scope of article 39 by a reference to the procedure laid down in article 62, as in the Peruvian amendment (A/CONF.39/C.1/L.227). The question of the validity or the invalidity of a treaty related both to the form and to the substance and required that all the relevant rules should be taken into consideration. The wording of article 39, however, might be improved, as in the amendment of the Republic of Viet-Nam (A/CONF. 39/C.1/L.233) replacing the words "of the present articles" by the words "of the present Convention"; but that was the only part of that amendment which the Ecuadorian delegation could support. The Australian amendment (A/CONF.39/C.1/L.245) seemed unnecessary, since the term "draft articles" obviously included article 62. The Swiss amendment (A/CONF.39/C.1/ L.245) raised a question of substance and might well damage the most constructive part of the draft. The argument advanced by the Swiss representative seemed to assert that every treaty was valid, sacrosanct and permanent of itself, but a treaty was valid not by virtue of the mere fact that it fulfilled all the conditions of formal validity, but because it respected good faith and the other peremptory norms in force which governed the international community.

24. He would therefore vote in favour of draft article 39, which followed the line of the progressive development of international law and would not support any of the amendments, which should be put to the vote, since they all affected substance.

25. Mr. FUJISAKI (Japan) observed that in dealing with the law of treaties the emphasis should be on codification rather than on progressive development, since the codification would constitute the foundation upon which the treaty relations of the community of nations would be based. Caution should therefore be exercised in formulating the rules in Part V. If the provisions governing invalidity, termination and suspension of the operation of treaties lacked precision or might be open to arbitrary interpretation, it would defeat the whole purpose of the convention.

26. The Japanese delegation urged the need to devise some procedure to prevent abuses, a necessity repeatedly stressed in the International Law Commission's commentary. In order to obviate any confusion, the articles dealing with the causes of invalidity, termination and suspension of the operation of treaties should be closely tied to the articles laying down the procedures for

establishing invalidity, termination or suspension. He therefore supported the Australian amendment (A/CONF. 39/C.1/L.245).

27. Further, it was of the utmost importance to stipulate clearly that until all disputes were solved and invalidity, termination or suspension of the operation of a treaty was established in accordance with the procedures laid down in the convention, the treaty was valid and remained in force. The Japanese delegation thererefore supported the Peruvian amendment (A/CONF.39/C.1/L.227) in so far as it clarified that point.

28. A convention on the law of treaties, as a fundamental rule of the international community, must be based on the consensus of that community and he therefore hoped that the Committee of the Whole would spare no effort to study the provisions of Part V in detail before coming to any final conclusions.

29. Mr. DE BRESSON (France) said that his delegation fully appreciated the value and interest of a text which, alongside clauses more properly of a codifying character, embodied—more particularly in connexion with the invalidity of treaties—ideas that were often new.

30. That represented progress in the development of public international law, the desirability of which should be recognized, in so far as it put an end to the present uncertainty regarding certain methods of dissolving international agreements, and clarified situations which, it must be recognized, were sometimes solved in an unsatisfactory manner by present positive law.

31. Such an undertaking was as sublime in principle as it was difficult to carry out. He therefore welcomed the participation in that task of all States, on a footing of absolute equality, regardless of their juridical, political or social systems.

32. What mattered when evolving a system which would be binding on inter-State relations for many decades was to reason, not in terms of passing confrontations, but in terms of the long-range view that it behoved sovereign and equal States to take.

33. The objective was to obtain greater security in relations between States. Inter-State relations could only be based on law, the function of which was to enable those relations to depend on something other than a relationship of the forces confronting each other and to guarantee respect for the autonomy of the will of States, in other words their existence.

34. His delegation was ready to co-operate fully in order to ensure that the convention should be the outcome of unanimous agreement, but doubted whether, at the present stage of the Conference's work, consideration of the text of article 39 was timely. Clearly the purpose of that article was to introduce and cover the provisions of Part V as a whole. Consequently, it was extremely difficult to decide on the terms of the article before deciding on those of the articles related to it.

35. Paragraph 1 gave the impression of establishing a distinction between the impeachment of the validity of a treaty and the establishment of the invalidity of a treaty. If that was not what was intended, then the first sentence of the paragraph might appear, *a priori*, to be sufficient in itself. Obviously, if the validity of a treaty was impeached, it could only be with a view to proclaiming or declaring its invalidity.

36. The provision should confine itself to proclaiming the principle of such a possibility of impeachment and stipulating that it would be open only in the cases mentioned in the articles connected with it. Any further addition could clearly only lead to confusion.

37. But perhaps the purpose of including the two sentences was to indicate that there was a difference between the situations dealt with in articles 43 to 48 and those in articles 49, 50 and 61. If that was the case, the text should be made much more explicit and the effects of the formulation adopted should be clearly brought out. It did not seem to be the intention in any of the other provisions of Part V, including articles 42 and 62, to establish different régimes for the various cases of invalidity according to the grounds for them and in particular where the conditions for their application were concerned.

38. Accordingly, if article 39 was intended to introduce such differences, that should be made clear, either in paragraph 1 itself or preferably in the body of Part V or in each of the articles concerned. Further, it would be advisable to study carefully whether those distinctions were really useful, and if so, to specify the effects, in particular, on the relationship between articles 39 and 62.

39. Consideration of article 39 was bound up with that of the provisions concerning cases of invalidity and of article 62, which would enable the precise significance of such cases to be determined as and when they arose. It would be advisable to postpone the study of article 39 in accordance with a procedure that would enable that article to be considered in conjunction with the articles related to it. One such procedure could be the establishment of an *ad hoc* working group; the Committee of the Whole had already adopted a similar solution in connexion with article 2.

40. Mr. MARESCA (Italy) said he was convinced of the need to establish a procedure to be followed in the event of invalidity, as such a procedure might constitute a guarantee against any arbitrary decision and enable differences to be settled. Admittedly, article 62 provided for a procedure, but it did so only in very vague terms.

41. There were two very distinct elements in article 39: a statement of lack of validity and an assumption of invalidity *ab initio*. It would seem quite inappropriate to proclaim those two notions without mentioning the procedure to be followed. His delegation was therefore in favour of all amendments to establish such a procedure. The Swiss amendment (A/CONF.39/C.1/L.121) opened up the way, since it mentioned the word " invalidation ", which led to the following two assumptions: that of the declaration of an invalidity existing *ab initio* and that of the termination of the treaty owing to the emergence of a new fact the result of which would be to terminate the treaty. That amendment might well be adopted and developed. The Peruvian amendment (A/CONF.39/C.1/L.227) was of value since it established a link between articles 39 and 62. For the same reason, he supported the Australian amendment (A/CONF.39/C.1/L.245).

42. It would be advisable to postpone consideration of article 39 and to take a final decision only after all the articles in Part V had been examined.

43. Mr. MATINE-DAFTARY (Iran) said that he also attached great importance to Part V. His delegation regarded the wording of article 39 as somewhat restrictive. That article had, of course, to establish the presumption of the validity of a treaty and ensure the stability of treaty relations, but some situations could not be disregarded. Paragraph (5) of the commentary to article 39 stated that the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for in the draft articles were exhaustive of all such grounds, but in his opinion the scope of article 39 should be extremely wide and should not exclude other grounds such as *jus cogens*, and, above all, the provisions of the Charter of the United Nations, which always prevailed in the event of incompatibility with the provisions of a treaty. As worded, however, article 39 would not allow a State which had concluded a treaty of military alliance before becoming a State Member of the United Nations to withdraw from the treaty once it became a Member.

44. Consequently, he could not support the Swiss amendment (A/CONF.39/C.1/L.121), which would restrict the scope of article 39, and seemed to overlook the traditional distinction between absolute and relative nullity.

45. With regard to the amendments submitted by Peru (A/CONF.39/C.1/L.227) and Australia (A/CONF.39/C.1/L.245), he wished to point out that article 62 concerned a matter of form, whereas article 39 related to substance; those amendments tended to confuse the two. Moreover, article 62 was applicable in any case, even if not referred to in article 39. He also thought it more logical not to come to any decision on article 39 until the whole of Part V had been examined. It would be useful if the Expert Consultant would explain why the Commission had dealt with suspension of the operation of a treaty in a separate sentence in article 39, whereas in the following articles it was associated with the other grounds of invalidity.

46. As to the notions of " obsolescence " and " desuetude " mentioned in the commentary on article 39, he pointed out that it was a legal principle that a law never fell into desuetude unless it was repealed constitutionally. It was indisputable that a treaty came to an end through obsolescence without there being any need to terminate it; that would be true of a treaty dealing with a mode of transport which no longer existed.

47. Mr. CHAO (Singapore) said that his delegation would give careful consideration to any proposal to set up machinery for the settlement of disputes arising from the operation of Part V.

48. The presumption that a treaty was valid if concluded in accordance with Part II of the draft articles was implicit in article 39. That view was confirmed by paragraph (1) of the International Law Commission's commentary to the article, which stated that the Commission " considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things ". In order to dispel any possible doubt on the matter, however, his delegation suggested that a new paragraph be added at the beginning of the article: " Subject to paragraphs 2 and 3, a treaty concluded in accordance with Part II of the present Convention is presumed valid ". That was only a suggestion, but his delegation would like to be able to submit it as a formal amendment at that late stage. [2]

49. He also supported the suggestion that a decision be deferred on the final wording of article 39 until the whole of Part V had been examined.

50. He noted that the title of Part V mentioned only the " Invalidity, Termination and Suspension of the Operation of Treaties ", whereas part V dealt with denunciation as well. He would be grateful if the Expert Consultant would explain why the term had been omitted. Subject to the latter's reply, he suggested the addition of the word " denunciation " to the title.

51. His delegation supported the amendments by Australia (A/CONF.39/C.1/L.245) and Peru (A/CONF.39/C.1/L.227), which would improve the wording of the article and give greater prominence to article 62. It also agreed with the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.233) and suggested that the Committee of the Whole should take an immediate decision as to whether the words " the present Convention " should replace the words " the present articles " wherever they occurred in the draft. In other respects, he approved of the existing wording of article 39.

52. Mr. STREZOV (Bulgaria) said he was in favour of article 39. It contained two fundamental ideas which were to be found in the various provisions of Part V. The first was that the validity of a treaty could not be impeached without due reflection, but only on the basis of serious arguments drawn from the law expressed in the convention. The second idea was that if the invalidity of a treaty was established under the convention, that treaty was indeed void. His delegation would not find it necessary to wait until the other articles of Part V had been adopted before accepting the International Law Commission's text of article 39.

53. Mr. THIERFELDER (Federal Republic of Germany) said that in dealing with Part V of the draft articles, the Committee was leaving the sphere of the old and tested rules of treaty law derived from the principle *pacta sunt servanda* and entering a world of new problems. It was no longer a question of codifying the existing rules but of formulating new rules and opening the way for the further development of international law.

54. The system proposed by the International Law Commission came close to the rules governing the law of contract as codified in internal civil law. Though it seemed logical to move in that direction, since the structure of international life was taking a new shape under the auspices of the United Nations, the ideas put forward by the International Law Commission might perhaps be in advance of developments in the international world. In any case, it would be unwise to adopt the proposed provisions without setting up a system for settling disputes. In the case of disagreement between the parties, only an impartial body with capacity to take a final decision could ultimately establish the invalidity of a treaty. Moreover, the impeachment of the validity of a treaty might have

[2] This amendment was subsequently circulated as document A/CONF.39/C.1/L.270.

serious political repercussions and thereby create a dangerous situation. The reference in article 62 of the draft to Article 33 of the Charter of the United Nations was no solution, because that Article of the Charter was far from satisfactory. A system of settling disputes was indispensable in view of the new type of conflict which might result from Part V of the draft articles, and article 39 should be supplemented by a reference to article 62.

55. The establishment of a system for settling disputes did not exclude the possibility of seeking a solution through negotiation and conciliation, but the parties might be unable to reach agreement or might not have the right to settle their dispute by agreement. An agreement could not be used to decide whether a treaty conflicted with a peremptory norm of general international law, as provided in article 50.

56. Some sort of compulsory international jurisdiction should be set up which would intervene at least at a later stage in the settlement of the dispute. Further, he thought that terms such as "void" and "invalidity" should be clarified and brought together in a logical and comprehensible system. In the cases covered by articles 48, 49 and 50, it seemed that a treaty was void *ex lege* and *ab initio*, whereas in other cases a party had to cite an act which invalidated the treaty. The procedure prescribed in article 62, however, was the same in all cases: the party claiming that a treaty was invalid must send a formal notification of its claim to the other parties. What could happen if a party failed to notify the other parties in the cases mentioned in articles 48 and 49, and if, in the case mentioned in article 50, none of the parties regarded the treaty as conflicting with a peremptory norm of international law? The terminology of article 39, paragraph 1, should therefore be examined very closely.

57. Consequently, he proposed the postponement of a vote on article 39 until the other articles in Part V, including Section 4, had been adopted.

58. His delegation would vote in favour of the amendments submitted by Peru (A/CONF.39/C.1/L.227) and Australia (A/CONF.39/C.1/L.245). As regards the amendment proposed by Switzerland (A/CONF.39/C.1/L.121), he agreed with those who regarded the second sentence of paragraph 1 as unsatisfactory. Simply to delete it, however, might not be the best way of dealing with the matter. It was necessary for article 39 to state that the invalidity of a treaty had to be established. The text of the article should be revised in the light of the Swedish representative's remarks. It would doubtless be easier to draft it once the other articles in Part V had been discussed and approved.

59. Mr. BARROS (Chile) said that admittedly jurists were likely to be greatly tempted to introduce new notions into a convention on the law of treaties by carrying institutions of internal law over into international law. In general, internal law was a step ahead of international law on the path leading to justice. The jurist should not be chary of innovations binding States to respect the norms of justice, and indeed of equity, a result already achieved in internal law. The International Law Commission's efforts in that respect deserved the gratitude of the international community. Nevertheless, one must be realistic and not lose sight of the fact that the ambitions of the jurist could not be fulfilled without the approval of statesmen. In international life a leap forward could be just as dangerous as immobility. It had been said that nature did not proceed by leaps and bounds —an example to be followed by the law.

60. The provisions in Part V dealt with two classes of invalidity; in certain cases, invalidity seemed to take effect automatically, as the terms used in articles 48, 49 and 50 implied. In other cases defects in consent could be invoked, as in articles 45, 46 and 47. The notions of invalidity, susceptibility to invalidation and validity should therefore be strictly defined.

61. The provisions of article 62 dispelled some of the apprehensions aroused in the Chilean delegation by Part V of the draft and it hoped that the debate would later remove other doubts. His delegation therefore hoped that the Committee would accept the proposal to postpone the adoption of article 39. It would support amendments that would give to progressive development a solid and lasting foundation. It should not be possible in the future to invoke whatever text was adopted in order to justify unilateral acts likely to endanger the legal stability sought by the international community.

62. Sir Humphrey WALDOCK (Expert Consultant) observed that the questions raised by various delegations had not escaped the attention of the International Law Commission. The Commission was not inspired by any excessive enthusiasm for the progressive development of law but by the necessity to take into consideration the elements of State practice, the decisions of the courts and the general principles of law that had relevance in the law of treaties. How much of those elements should be incorporated in the draft was a matter for discussion. The Commission had felt itself in duty bound to identify them, to make its selection and to submit the results of its work to the present Conference.

63. With reference to the relation between article 39, paragraph 2, and the rule laid down in article 61, that any treaty became void and terminated if it conflicted with a new peremptory norm of general international law, he said that he did not think that the issue raised by the Indian representative was very likely to arise. The words " only as a result of the application of the terms of the treaty or of the present articles " should be read in their context, namely " a treaty may be terminated or denounced or withdrawn from ", and then it was clear that the application of " the terms of the treaty " and the application of " the present articles " were separate cases and that the two provisions were cumulative.

64. Several representatives had emphasized the link between article 39 and article 62 and rightly so. Article 39 covered all the grounds of invalidity mentioned in the ensuing articles, including article 62. That was the sense of the text of article 39, paragraphs 1 and 2. Moreover, in its commentary the International Law Commission stressed that the phrase " application of the present articles " used in those two paragraphs referred to the draft articles as a whole. That was, of course, why some delegations had stated that a reference to article 62 added nothing to the text of article 39.

65. In his opinion, the critical point was to determine the scope of article 62. Its terms were general and the intention was that the article should cover all the cases dealt

with in the present articles. It was correct therefore to read it together with article 39.

66. It was clear from the general debate that the difficulties regarding interpretation to which reference had been made arose from the slight difference in the terms used in the various articles. In some cases, the Commission had used the expression " a State may invoke ", whereas in articles 49 and 50 it had preferred to say " a treaty is void ". The difference took into account the fact that a large number of articles dealt with the matter of the consent of States, whereas articles 49 and 50 dealt not only with consent of States but also with a question of public order. In articles 49 and 50 the words " a treaty is void " meant that if the nullity was established, the effect of that nullity related to the treaty itself, not merely to the consent of the States concerned. At the beginning of the International Law Commission's work, the Special Rapporteur had suggested another type of wording for article 49, because he had thought that a State which was a victim of coercion might possibly not wish to void the treaty completely; but the Commission had come to the conclusion that in such cases the danger of continuous pressure was such that the only acceptable rule was that of public order. That was why the words " a treaty is void " had been retained.

67. The Danish representative's comment that the legal terms " void ", " null ", " invalid ", " voidable " did not necessarily have the same meaning in the different systems of internal law was correct. The Commission had considered that a treaty became void either for reasons of public order or as a result of a defect in consent. Although it had recognized that in many cases either one or both of the parties should be considered as having the choice of invoking the ground of invalidity for the purpose of avoiding it, the Commission had not contemplated the possibility that a treaty should become void only from the date on which its invalidity had been established. It had tried to resolve the difficulties raised by the use of the words " ground of invalidity " and " void " and had drafted specific provisions on the consequences of the invalidity of a treaty. In general, it might be said that the term " void " applied when the avoidance of a treaty was established for some reason of public order and the expression " ground of invalidity " when what was involved was a State's consent only.

68. Some representatives had complained that article 39 was not satisfactory because the articles that followed were not exhaustive of the grounds of termination by reason of their failure to mention cases of succession of States and outbreak of hostilities. A succession of States might well be a ground for the disappearance of a party rather than for terminating a treaty. However that might be, a general reservation had been included covering State succession. With regard to an outbreak of hostilities, the Commission had given in its commentary the reasons why that subject had been left aside. As to the reference to the suspension of the operation of a treaty in article 39, that was necessary since several of the substantive articles which followed contained provisions concerning it.

69. The CHAIRMAN suggested that the Committee postpone its decision on article 39.

It was so agreed. [3]

[3] For resumption of the discussion of article 39, see 76th meeting.

Article 40 (Obligations under other rules of international law) [4]

70. Mr. SAMAD (Pakistan) said that his delegation proposed (A/CONF.39/C.1/L.183) that the words " or under the Charter of the United Nations " should be added at the end of article 40, for the phrase " to which it is subject under any other rule of international law " was not sufficiently precise. He reminded the Committee that the legal principle of good faith, which was an integral part of the *pacta sunt servanda* rule, was mentioned in Article 2 (2) of the Charter of the United Nations. In his view, it would be advisable to insist in article 40 that Member States must fulfil all the obligations arising out of the Charter of the United Nations, even in the event of withdrawal from or denunciation of a treaty. A reference to the United Nations Charter would not be out of place in the draft convention; it was mentioned in article 26, which had already been adopted by the Committee, article 49 and article 70.

71. He would leave it to the Chairman to decide whether the addition he proposed (A/CONF.39/C.1/L.183) was an amendment of substance or a drafting matter.

72. Mr. HU (China) explained that his delegation's amendment (A/CONF.39/C.1/L.243) merely proposed to reverse the order of the words in article 40. It emphasized the primacy of the treaty provisions over those of the convention and brought the text of article 40 more into line with that of paragraph 2 of article 39.

73. He wondered whether the word " invalidity " should not be deleted in article 40. Article 39, paragraph 1, stated that " The validity of a treaty may be impeached only through the application of the present articles "; in other words, the invalidity of a treaty could be established only in virtue of the succeeding articles. Consequently, there was a link between articles 39 and 40, and care must be taken to avoid any contradiction between them owing to the use of the word " invalidity ". The Drafting Committee should consider that question.

74. Mr. BRIGGS (United States of America) supported article 40, for it contained a very important rule of international law that complemented, the provision of article 34 under which a rule set forth in a treaty might become binding upon a third State as a customary rule of international law. Article 40 also complemented the clause in the preamble to the Vienna Convention on Diplomatic Relations [5] and to the Vienna Convention on Consular Relations [6] which stated that the rules of customary international law " continue to govern matters not expressly regulated by the provisions of the present Convention ".

75. The amendment submitted by the United States delegation (A/CONF.39/C.1/L.262) was of a purely drafting character. It consisted in replacing the words " it is subject under any other rule of international law " by the words " it is otherwise subject under international law ". Article 40, as worded, might be interpreted as

[4] The following amendments had been submitted: Pakistan, A/CONF.39/C.1/L.183; China, A/CONF.39/C.1/L.243; United States of America, A/CONF.39/C.1/L.262.

[5] United Nations, *Treaty Series*, vol. 500, p. 95.

[6] United Nations Conference on Consular Relations, *Official Records*, p. 175.

referring solely to the rules of customary international law to the exclusion of obligations arising out of another treaty.

76. He requested that the amendment be referred to the Drafting Committee.

77. The CHAIRMAN suggested that the Committee should adopt article 40 and refer it to the Drafting Committee with the amendments submitted.

It was so agreed. [7]

The meeting rose at 5.45 p.m.

[7] For resumption of the discussion of article 40, see 78th meeting.

FORTY-FIRST MEETING

Saturday, 27 April 1968, at 11.5 a.m.

Chairman: Mr. ELIAS (Nigeria)

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

Article 41 (Separability of treaty provisions) [1]

1. Mr. CASTRÉN (Finland) explained that the purpose of the two amendments submitted by his delegation in document A/CONF.39/C.1/L.144 was to extend the application of the principle of the separability of treaty provisions. Although that principle was fairly new, it had nevertheless been accepted by several writers and in judicial practice, and its utility was undeniable. The first Finnish amendment would extend the application of the principle to cases in which a treaty was terminated because of a fundamental change of circumstances—a subject dealt with in article 59. The Finnish delegation wished to limit the undesirable consequences which could follow from the recognition of a change of circumstances as a ground for terminating treaties. It was true that the introduction of the principle of separability might encourage States to invoke that provision more often, but in fact the danger was not very great, and it seemed more important to facilitate a friendly settlement between States by the application of the principle, thus avoiding denunciation of the treaty as a whole. As paragraph 2 of article 41 allowed the principle of separability to be applied in the cases covered by article 57, which dealt with the consequences of breach of a treaty, there seemed no reason why the same rule could not be adopted for change of circumstances. It was possible that the article on the principle *rebus sic stantibus* might come within the scope of article 41, paragraph 3, but the relation between paragraphs 2 and 3 was not very clear. It would therefore be desirable for the Drafting Committee to study that question; it should examine the justification for the Finnish amendment and the possibility of finding a clearer and more precise formulation for article 41, paragraph 2 and 3.

2. The purpose of the second Finnish amendment was to delete the reference to article 50 in article 41, paragraph 5, so that the principle of separability could also apply when a treaty was incompatible with a norm of *jus cogens*. A treaty might contain only one or two secondary provisions which conflicted with *jus cogens*. Why make the whole treaty void when it would suffice to invalidate only the doubtful clauses, which were separable from the rest of the treaty? The International Law Commission recommended in its commentary that in such a case the treaty should be revised; that was a complicated procedure, because it required the consent of all the parties. *Jus cogens* was itself a new principle and some writers and governments seemed to be opposed to its introduction in the international sphere. It was therefore advisable to proceed cautiously, so that the principle could be accepted by all within appropriate limits. If the Finnish amendment to article 41, paragraph 5 was accepted, articles 50 and 67 should be supplemented, for instance as suggested by Professor Ulrich Scheuner in his study on *jus cogens*. [2]

3. The Finnish delegation reserved the right to submit amendments on those lines at a later stage.

4. Mr. DE LA GUARDIA (Argentina) said that the amendment submitted by his delegation (A/CONF.39/C.1/L.244) raised questions of drafting and of substance. The amendments to paragraphs 1 and 2, which related to drafting only, could be referred to the Drafting Committee. The proposal to delete paragraphs 3, 4 and 5 was a matter of substance.

5. Article 41 provided for the separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties. The International Law Commission had discussed the matter at length and had accepted the principle of separability when the ground for invalidity, termination or suspension of the operation of a treaty related to quite secondary provisions of the treaty. In other words, the Commission had tried to reconcile the traditional principle of the integrity of treaties with the possibility of eliminating certain secondary provisions. It should, however, be noted that the judicial decisions cited by the Commission related solely to the separability of the provisions of a treaty for purposes of interpretation and not the application of the principle of separability with respect to the invalidity or termination of treaties. Those were two quite different questions. In the second case, the principle of the integrity of treaties was attacked.

6. Paragraph 3 was not satisfactory, because it was very difficult to determine which clauses were separable from the remainder of the treaty and which were an essential basis of consent to the treaty. Moreover, some clauses which now appeared secondary might later be regarded as essential. The purpose of the amendment submitted by the Argentine delegation was to revert to the principle of the integrity of treaties. It was, in fact, a residuary rule, since it was for the parties to determine what rule they wished to apply in the treaty. The Argentine delegation

[1] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.144; Argentina, A/CONF.39/C.1/L.244; Hungary, A/CONF.39/C.1/L.246; India, A/CONF.39/C.1/L.253; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.257 and Corr.1; United States of America, A/CONF.39/C.1/L.260.

[2] See *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967).