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41st meeting of the Committee of the Whole

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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

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.

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

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

was not proposing the deletion of the exception in paragraph 2, namely, the reference to article 57, since it was a presumption accepted by many writers. If paragraph 3, containing the exception, was deleted, paragraphs 4 and 5 would become unnecessary as their subject-matter would be covered by the general rule and it was therefore proposed that those paragraphs should also be deleted.

7. At its 25th meeting, the Committee had approved the principle of the integrity of treaties with respect to reservations, by rejecting the contrary principle asserted in certain amendments to article 17, paragraph 4 (b). That was the principle upheld in the Argentine amendment.

8. The Argentine delegation had not taken part in the discussion on article 39, which had also dealt generally with Part V of the draft articles. It wished, however, to express its concern about the tendency—which was fairly marked in some articles—to stress the progressive development of international law rather than the codification of existing international law.

9. Mr. HARASZTI (Hungary) introduced his delegation's amendment (A/CONF.39/C.1/L.246), the purpose of which was to specify that if a treaty was breached, the State which suffered from that breach could only terminate part of the treaty subject to the conditions laid down in article 41, paragraph 3, that was to say if the clauses were separable from the remainder of the treaty and if their acceptance was not an essential basis of the consent of the parties to the treaty as a whole. It was clearly impossible to denounce part of a treaty unless the conditions set out in article 41, paragraph 3 were fulfilled, but since article 57 contained no reference to article 41, it seemed advisable to insert in paragraph 2 of article 41 the words "subject to paragraph 3 of the present article". That amendment could be considered by the Drafting Committee.

10. Mr. JAGOTA (India) said he thought his delegation's amendment (A/CONF.39/C.1/L.253) could be considered only after the Committee had taken a decision on the Indian amendment to article 50, paragraph 2 (A/CONF.39/C.1/L.254). If that amendment was adopted, article 41 would have to be changed. He therefore suggested that consideration of his amendment to article 41 be deferred.

11. Mr. GORDON-SMITH (United Kingdom) said that his delegation supported the principle of the separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties, and that it approved the general approach adopted by the International Law Commission on the matter indicated in paragraph (2) of the commentary. The United Kingdom delegation considered that the article could be improved, however, and had accordingly submitted a redraft (A/CONF.39/C.1/L.257 and Corr.1) for consideration.

12. The United Kingdom delegation was in agreement with paragraph 1 of the draft, but it understood that articles 51, 53, 54 and 55 were subsumed under the rule proposed in that paragraph. Those articles dealt with cases of termination, withdrawal from or suspension of the operation of a treaty in conformity with a provision of the treaty or by agreement of the parties. His delegation therefore assumed that the rule in paragraph 1 applied to the cases dealt with in those articles and that paragraph 2 did not apply to them.

13. With regard to paragraph 2, it seemed reasonable to establish a general rule of non-separability of treaty provisions and then to provide for exceptions to that rule. Paragraph 2 established paragraphs 3 to 5, and also article 57, as exceptions. The effect of the unqualified reference to article 57 was that in cases where that article allowed a party to terminate the treaty or suspend its operation "in whole or in part" on the ground of a material breach, that party had an unrestricted option as to whether or not to separate. In the view of his delegation, however, the right to suspend or terminate part only of a treaty in such a case should be subject to the conditions set out in paragraph 3. For that reason, the United Kingdom amendment omitted the reference to article 57 at the end of paragraph 2 and included in paragraph 4 a reference to article 57 as well as to articles 41 and 47.

14. The main criticism of paragraph 3 was that the criterion in sub-paragraph (b) might be difficult to apply in practice, for example where the particular clauses were an essential basis of the consent of some of the other parties but not all of them. It contained a very large subjective element, for it was impossible for a party to judge accurately what another party considered to be an essential basis of its consent. It appeared that the criterion could be made more objective and that was what his delegation had tried to do in sub-paragraph 3 (c) of its redraft. In any case, it thought the criterion should be applied by an impartial body rather than by the governments concerned.

15. With regard to paragraph 4, the redraft sought to clarify the relationship between that paragraph and paragraph 3. In the case of the Commission's paragraph 5, it did not seem right to exclude separation in cases falling under articles 48, 49 and 50, particularly the last mentioned. It was possible to conceive of a case in which a comparatively unimportant part of a treaty was in conflict with a rule of *jus cogens*. In any case, paragraph 5 did not mention article 61 and consequently did not prevent separation where a new rule of *jus cogens* developed in the future. It seemed illogical to prevent separation in the case of an existing rule, but not in that of a future rule of *jus cogens*. Paragraph 5 had therefore been omitted from the United Kingdom amendment, and replaced by a definition of the expression "group of articles" which was used in it. It was arguable whether the definition was really necessary; the Drafting Committee could consider that point.

16. Article 41 was an important article directly connected with the large group of articles on invalidity and termination of treaties which followed; it might therefore be necessary to modify it in the light of the decisions taken by the Committee on those articles. The major part of the United Kingdom amendment related to drafting and could be referred to the Drafting Committee. The proposals to vary the application of the paragraphs of article 41 to the following articles raised questions of substance, but they could nevertheless be considered by the Drafting Committee, if the Committee of the Whole decided not to take an immediate decision on article 41. The Committee of the Whole would no doubt have considered the later articles by the time the Drafting Committee considered article 41. However, his delegation would have no objection to the Committee's taking an im-

mediate decision on the principle of its proposals on questions of substance, the remainder of its proposals being referred in any case to the Drafting Committee.

17. Mr. KEARNEY (United States of America) said that the purpose of the amendment submitted by his delegation (A/CONF.39/C.1/L.260) was to add a new sub-paragraph expressing an idea that was undoubtedly implicit in article 41 as drafted. The need for the amendment arose from the possibility of an unduly narrow interpretation of the word "separable" in paragraph 3 (a) and of the words "an essential basis" in paragraph 3 (b). It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties.

18. The United States delegation was not opposed to the International Law Commission's decision to extend the application of the principle of separability, since it was a means of maintaining treaty relations while at the same time permitting the termination of parts of a treaty which ought not to remain in force. His delegation merely doubted whether article 41, as drafted, achieved the objective stated in paragraph (2) of the Commission's commentary, in particular in the fourth, fifth and sixth sentences.

19. It could be seen from paragraph (5) of the commentary that the question whether the invalidated section of the treaty was an "essential basis" of the other parties' consent to be bound was left without any very precise guidelines. What was not brought out clearly in paragraphs 3 (a) and (b) was a rule covering "the balance of the interests of the parties under the treaty", referred to in paragraph (2) of the commentary; in other words a provision concerned with the parties' interests after part of the treaty had been invalidated. For it should go without saying that that balance would not be reflected by the terms of the treaty or even the preparatory work. After some years of application, certain treaty provisions might gain or lose importance in a way not foreseen during negotiation.

20. The United States proposal to add a sub-paragraph (c) to paragraph 3 was designed to achieve more clearly the International Law Commission's stated objective and to ensure that the rule of separability laid down in article 41 would not create the very kind of international friction which the Commission sought to avoid.

21. His delegation did not think an amendment designed to avoid injustice could be controversial, but if there was any objection it could be put to the vote. Otherwise it could be referred to the Drafting Committee.

22. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) contained useful suggestions which should be examined. The amendments submitted by Hungary (A/CONF.39/C.1/L.246) and Finland (A/CONF.39/C.1/L.144) deserved support.

23. Mr. ROSENNE (Israel) said that the question of separability of the provisions of a treaty should be approached with the greatest caution. Certain aspects of the principle of separability had already been referred to elsewhere, for example, in connexion with the assumption of treaty obligations and the interpretation of treaties. But the problem raised by article 41 was different, and

might have more serious political implications. The principle *pacta sunt servanda* must be taken into consideration. It seemed difficult to accept the proposition that a treaty could contain secondary provisions. The major principle must be the integrity and indivisibility of treaties. The separability of the provisions of a treaty could be considered only in exceptional cases.

24. The present text of article 41 was an improvement on the 1963 draft, but paragraph 3 (b) introduced a subjective element which could not be established through the application of the rules on interpretation already discussed. His delegation could accept that part of the Argentine amendment (A/CONF.39/C.1/L.244) which related to paragraphs 1 and 2, and the idea contained in the United States amendment (A/CONF.39/C.1/L.260). Those amendments could be examined by the Drafting Committee.

25. With regard to the amendments relating to the application of the notion of separability to the different grounds of invalidity, termination, withdrawal and suspension, namely, the Finnish amendment (A/CONF.39/C.1/L.144), the third part of the Argentine amendment (A/CONF.39/C.1/L.244) and the Indian amendment (A/CONF.39/C.1/L.253), it seemed preferable to consider them in connexion with the substantive articles dealing with those grounds.

26. The implications of the Hungarian amendment (A/CONF.39/C.1/L.246) would only be clear when the text of article 57 had been finally settled. With regard to that article, his delegation thought that the convention should be confined to stating the law of treaties and not deal with the question of remedies. The provisions on separability and breach should deal solely with the mutual relations of the parties as a matter of treaty law, and not as a matter of State responsibility.

27. His delegation could not yet take a final position on the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1), but in general his remarks applied to that amendment as well.

28. Mr. TALALAEV (Union of Soviet Socialist Republics) observed that article 41 was of the same general nature as articles 39 and 40. The text proposed by the International Law Commission corresponded in a general way to the principles stated in Part V of the draft. Article 41 made the application of the principle of the separability of treaty provisions conditional on a number of elements, first of all the nature and object of a treaty. A treaty was separable if certain of its clauses were separable from the remainder of the treaty with regard to their application. The other elements were the consent of States and the validity of the treaty; for a provision might be so important that if it became void, the remainder of the treaty could not be regarded as valid. That was the idea which the Commission had applied in paragraph 3, 4 and 5. The notion of the separability of treaties should not apply in the cases referred to in articles 48, 49 and 50, in other words, in cases in which a treaty was void *ab initio*. That idea was expressed in article 41. It was an essential idea and must certainly be stated.

29. In view of that principle, the amendments submitted by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1), Finland (A/CONF.39/C.1/L.144) and Argentina (A/CONF.39/C.1/L.244) were unacceptable, for they

frustrated the principle established by article 41. There could be no question of separability of agreements concluded as a result of coercion or the use of force. That also applied to the agreements contemplated in article 50; they were void *ab initio* because they conflicted with a peremptory norm of general international law. The amendments he had mentioned should not be referred to the Drafting Committee. The United Kingdom amendment also gave rise to some doubts, inasmuch as the notion of separability was replaced, in paragraph 5, by the notion of inter-connexion between various provisions.

30. The Hungarian amendment (A/CONF.39/C.1/L.246) improved the text and could be considered by the Drafting Committee.

31. The United States amendment (A/CONF.39/C.1/L.260), which was substantive, was unnecessary because it did not relate to the principle of separability. It introduced a new element, the concept of justice, which only complicated matters.

32. Mr. ARMANDO ROJAS (Venezuela) said that his delegation was in favour of the Argentine amendment (A/CONF.39/C.1/L.244) deleting paragraphs 3, 4 and 5 although his delegation's real difficulty was with paragraph 4, because it did not think that separability could be permitted in cases of fraud or corruption. If the Argentine amendment was not adopted, his delegation would suggest that the Committee should defer consideration of those three paragraphs, in particular paragraph 4, and should not take a decision on them until it had examined the whole of Part V. That would also enable the Committee to avoid prejudging the fate of the Venezuelan amendments to articles 46 and 47 (A/CONF.39/C.1/L.259 and L. 261).

33. Mr. HARRY (Australia) said that article 41 raised the question whether preference should be given to the integrity of treaties or to the continuity of treaty relations. The Australian delegation had already stressed the importance of the integrity of treaties in connexion with articles 17 and 37 and it accordingly sympathized with the Argentine amendment (A/CONF.39/C.1/L.244).

34. The wording of article 41 was not entirely clear, and the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) to change the position of the word "only" would improve it. With regard to the deletion of the words "or in article 57" in paragraph 2, his delegation believed that the conditions laid down in paragraph 3 should also apply to the case of material breach dealt with in article 57. It was in favour of the new wording of paragraph 3 proposed by the United Kingdom in its amendment, and of the addition suggested by the United States (A/CONF.39/C.1/L.260).

35. With regard to paragraph 5, the Australian delegation's final position would, of course, depend on the wording ultimately adopted for articles 48, 49, and 50, but it could say at once that at first sight it saw no great difference in principle between article 48 and article 47, for example, that was to say between coercion and corruption, so far as separability was concerned. On the other hand, it recognized that the case covered by article 49 had special features, as the Expert Consultant had explained.

36. The Australian delegation proposed that the Committee should defer final consideration of article 41 until

it had decided what was to be done with articles 48, 49 and 50.

37. Mr. SECARIN (Romania) said that the question of separability of the provisions of multilateral treaties had been recognized since the nineteenth century, and certain treaties concluded at the beginning of the twentieth century contained clauses relating to the separability of their provisions.

38. In drafting article 41, the International Law Commission had shown great concern for moderation and balance, taking into account both the present requirements of international law and the basic principles governing the law of treaties, such as the freedom of the will of the parties and the stability and integrity of treaties.

39. Paragraph 2 called for two comments. First, the reason why the Commission had included article 57 was that a material breach of a treaty by one of the parties constituted a separate case in law. A material breach entitled the other party to invoke it to terminate the treaty or to suspend its operation in whole or in part, without being obliged to ascertain whether other conditions were fulfilled, as in the situations contemplated in paragraph 3; the injured party itself decided the scope to be given to the effect of the other party's improper conduct. Secondly, the provisions of paragraph 2 could not apply to situations such as that contemplated in article 59 (fundamental change of circumstances). Under the system adopted by the International Law Commission, a fundamental change of circumstances could not, in principle, be invoked with respect to particular provisions of a treaty and, accordingly, could only give legal sanction to the separability of its provisions under the conditions set out in paragraph 3.

40. Paragraph 3 reflected the International Law Commission's concern to preserve the stability and integrity of treaties by recognizing separability in so far as the ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty related only to secondary provisions not involving the basis of the obligations on which the agreement of the parties had been reached.

41. Paragraph 5 formulated a reservation to the principle of separability, namely, compliance with the norms of *jus cogens* set out in articles 48, 49 and 50; that reservation was very well justified in the commentary.

42. The condition set out in paragraph 3 (a) met the concern expressed in some quarters that separability should not be accepted when continued performance of the remainder of the treaty would lead to injustice.

43. The Romanian delegation regarded article 41 as one of the key articles in the draft. It was in favour of retaining the article as it stood.

44. Mr. RUEGGER (Switzerland) said he shared the doubts that had been expressed about certain parts of article 41. He approved of the Argentine proposal to delete paragraph 3 (A/CONF.39/C.1/L.244), as it would be extremely hard in practice to decide whether certain clauses were separable. The task would be too difficult even for an impartial judicial or arbitral body. Moreover, if paragraph 3 was retained, it was to be feared that States might multiply separate agreements in order to safeguard, at least partly, the stability of law. The wording of

paragraph 3 proposed by the United Kingdom delegation (A/CONF.39/C.1/L.257 and Corr.1) was a definite improvement on the International Law Commission's text. Sub-paragraph (c), in particular, contained a substantial safeguard clause. In his opinion, however, the word "essential" should be deleted from that sub-paragraph, as it would be difficult to determine whether the basis was essential or not. His delegation would therefore vote in favour of the United Kingdom amendment and also of the United States amendment (A/CONF.39/C.1/L.260).

45. The discussion had shown that article 41 could usefully be studied in greater detail.

46. Mr. DE BRESSON (France) said that his delegation was not opposed to the principle of the separability of treaty provisions or, generally speaking, to the conditions adopted by the International Law Commission for its application.

47. The amendments by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1), the United States (A/CONF.39/C.1/L.160) and Hungary (A/CONF.39/C.1/L.246) seemed worth considering in so far as they helped to clarify the wording of the text, to remove a certain rigidity and to take more account of the intention and interests of the parties. However, a feature of those amendments, like those of Argentina (A/CONF.39/C.1/L.244), India (A/CONF.39/C.1/L.253) and Finland (A/CONF.39/C.1/L.144) and the Commission's text itself, was that they referred to substantive articles not yet considered by the Committee. Hence it would be better for the Committee not to take a decision on article 41 and the amendments thereto until it had considered those substantive articles.

48. Mr. EEK (Sweden) said he would like the Expert Consultant to clarify the relationship between sub-paragraph 3 (b) of article 41 and sub-paragraph 3 (b) of article 57 concerning the material breach of a treaty. According to sub-paragraph 3 (b) of article 41 a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty might be invoked with respect to certain particular clauses where the acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole. Consequently, the material breach, as defined in sub-paragraph 3 (b) of article 57, did not permit of separability. In other words, if a State A suffered from a material breach of a particular clause of a treaty by a State B, it appeared that according to article 41 State A was not entitled to suspend with respect to State B only the application of the clause violated by State B.

49. If that interpretation was correct, the rule did not seem satisfactory. The text of paragraphs 3 (c) and 4 of the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) might remedy the situation.

50. Mr. MARESCA (Italy) thought that, in the interests of the structure of the convention and the harmony of international relations, the principle of the integrity of treaties should not be taken too far by applying it to treaty "crises" such as invalidity, termination, suspension. International agreements could not be regarded as forming an integral whole: they very often included parts which were quite different from each other. Hence the principle of separability could not be systematized

on dogmatic, general and rigid lines. Some flexibility was required and consequently the Italian delegation could not support the Argentine proposal to delete paragraphs 3, 4 and 5 (A/CONF.39/C.1/L.244). On the other hand, the Argentine proposals relating to paragraphs 1 and 2 should be considered by the Drafting Committee.

51. As to the Finnish amendment (A/CONF.39/C.1/L.144), his delegation would be unable to take a position until articles 50, 57 and 59 had been put into final form.

52. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) certainly made the Commission's text clearer. He agreed with the United Kingdom delegation that paragraph 5 of the Commission's text should be deleted, for it was contrary to the principle that specific cases must be taken into account.

53. Article 41 referred to numerous other articles, and it would be premature to take a decision on it before considering the articles to which it referred.

54. Mr. KEBRETH (Ethiopia) said that, subject to minor drafting changes, article 41 of the International Law Commission's draft was well conceived; it was based on common sense and practical needs. It did sometimes happen that a treaty made no provision for separability, which meant that it was outside the scope of article 41, paragraph 1, and that a party nevertheless decided to invoke a ground for invalidity or termination in regard to particular clauses of a treaty. It might further be pointed out, for example, that commercial treaties more often than not contained quite separate provisions which had been grouped in a single agreement only for the sake of convenience. His delegation was glad, therefore, that the Commission had provided for separability, and it approved of the criteria set out in article 41, paragraph 3. Paragraph 4 of the Commission's text fitted in with the general philosophical scheme of the draft convention and paragraph 5 reflected the essential policy considerations of modern international society.

55. His delegation was unable to accept the Argentine amendment (A/CONF.39/C.1/L.244) for the reasons he had just given.

56. The Hungarian amendment (A/CONF.39/C.1/L.246) made the application of article 57 subject to the criteria stated in article 41, paragraph 3 (a) and (b). Consequently, it was not purely a drafting amendment.

57. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) improved the Commission's text in many respects, but his delegation was not in favour of it, because it omitted paragraph 5 of the Commission's text, which dealt with an important matter. The reference in paragraphs 4 and 5 to articles not yet considered by the Committee should not be deleted.

58. The United States amendment (A/CONF.39/C.1/L.260) was liable to cause some misunderstanding in the application of the criteria stated in paragraph 3 (a) and (b); for the other party might claim that continued performance of the remainder of the treaty would be unjust, even if the particular clauses were merely secondary.

59. The Ethiopian delegation was in favour of the Finnish proposal (A/CONF.39/C.1/L.144) to add a reference to article 59 at the end of paragraph 2, but it did not approve of the proposal to delete the reference

to article 50, for the reasons given at the beginning of his statement.

60. Mr. SUY (Belgium) said he wished to make a few comments on Part V—the most important part of the draft—and in particular on article 50, concerning *jus cogens*.

61. First, the rule stated in that article was certainly correct and a part of positive international law. With rare exceptions, all the writers accepted it without reservation.

62. The question arose what constituted *jus cogens*. The definition given in article 50 was purely formal and provided no information about the real content of the notion. He agreed with the Commission's formulation because in his opinion the Conference was not called upon to try to enumerate everything that was *jus cogens*; it ought not to codify *jus cogens*.

63. Another problem was whether *jus cogens* referred to a body of legal rules or whether it was rather something similar to the notion of public order in internal law: in other words, the underlying sociological, economic and other foundations of any legal order, which varied with time and place. In his opinion, what distinguished *jus cogens* in international law from the notion of public order was that it clearly referred to norms—legal rules common to the whole international legal order. Clearly, that did not preclude the existence of peremptory rules in a more limited geographical framework, for instance, in an organized regional community.

64. With regard to the expression “peremptory norm”, he said that a norm could be peremptory without being *jus cogens*, and that the expression should therefore be used with caution. German legal terminology was more precise, since it distinguished between norms which were *gebietend* (binding) and norms which were *zwingend* (compulsory), only the latter being rules of *jus cogens*.

65. Article 50 constituted an exception to the principle *pacta sunt servanda*. Hence, it should not be lightly invoked, and should be interpreted very strictly. In other articles constituting exceptions to that principle, such as article 59, concerning a fundamental change of circumstances, the International Law Commission had used very cautious wording and been careful to set out in detail the conditions under which those articles could be invoked; unfortunately, those precautions had not been taken in article 50.

66. Whatever the content of the concept of *jus cogens*, States should not be able to invoke it unilaterally and without any control in order to repudiate obligations which had become irksome, or even to impeach the validity of treaties to which they were not parties. He personally considered that provision should be made for some form of control by the community of States, which in the last instance should be exercised by a court or an arbitral tribunal; it should relate to facts rather than grounds and could constitute one of the elements of the procedure outlined in article 62.

The meeting rose at 1.5 p.m.

FORTY-SECOND MEETING

Monday, 29 April 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

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

Article 41 (Separability of treaty provisions) (continued)

1. The CHAIRMAN invited the Committee to continue its consideration of article 41 of the International Law Commission's draft.¹

2. Mr. MULIMBA (Zambia) said that he could not support the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) to delete paragraph 5; his delegation attached great importance to the exclusion of separability in the case of treaties concluded in the circumstances specified in articles 48, 49 and 50. Any such treaty was void *ab initio* in its entirety, and separability was therefore out of the question. Paragraph 5 of article 41 was the application of the rule contained in the second sentence of paragraph 1 of article 39.

3. His delegation favoured the idea contained in the United States amendment (A/CONF.39/C.1/L.260).

4. Mr. MOUDILENO (Congo, Brazzaville) said he had grave misgivings about the introduction of the principle of separability, because it ran counter to the *pacta sunt servanda* principle, which applied to a treaty in its entirety. There were also serious practical difficulties in the way of the application of the principle of separability. Article 41 seemed to be based on the assumption that it was possible in any treaty to separate some of the clauses from the remainder. In fact, it was difficult to see how some of the clauses of a treaty could be amputated without undermining its whole structure; in many treaties, the various clauses were interconnected, and it would not be logical to separate some of them from the others. But despite those misgivings, his delegation would not go so far as to oppose article 41.

5. Mr. MARTINEZ CARO (Spain) said the International Law Commission was to be commended for having achieved a balance between the principle of the integrity of the application of a treaty, embodied in paragraphs 1 and 2 of article 41, and the recognition of the possibility of severing some of the clauses when the grounds of invalidity or termination affected only part of the treaty. The requirements laid down in paragraph 3 for the application of the principle of separability were adequate, but his delegation supported the principle contained in the United States amendment (A/CONF.39/C.1/L.260), subject to drafting changes. The principles of justice, equity and good faith ran through the whole of the law of treaties and it would not be out of place to stress them in the present context.

6. His delegation could not support the United Kingdom amendment to delete paragraph 5. The requirement of free consent of the States parties to a treaty, sanctioned by articles 48 and 49, and the rule that the treaty was subject to the principle of *jus cogens*, laid down in

¹ For the list of the amendments submitted, see 41st meeting, footnote 1.