United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.42

42nd meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

Copyright © United Nations

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.

article 50, were fundamental and overrode all considerations of convenience or stability of treaty relations.

7. The Committee could not, however, take a decision on the substance of article 41 until it had considered the articles on the grounds of invalidity, termination, withdrawal and suspension, as the representatives of Israel and France had already urged at the previous meeting.

8. Mr. WERSHOF (Canada) said that the debate had shown that the most important point of substance involved in article 41 was that of the desirability of increasing or decreasing the possibilities of separation of the provisions of a treaty declared to be invalid. The amendments submitted by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1) and Finland (A/CONF.39/C.1/L.144) would make it possible for a State to opt for separation in cases other than those admitted in the present text, while the amendment by Argentina (A/CONF.39/C.1/L.244) would make article 41 more restrictive.

9. In his delegation's view, the approach adopted by the International Law Commission, that treaties falling under the provisions of articles 48 and 49 should be completely void and consequently not open to separability, would not serve the interests of the aggrieved State which it was intended to protect. If a treaty entered into by a State in the circumstances envisaged in those articles was generally satisfactory to that State but contained a single provision obtained by coercion, there was no reason why the aggrieved State should be denied the option of claiming the benefit of the rest of the treaty.

10. With regard to cases falling under article 50, the argument for permitting separability was of a somewhat different kind. Two countries might conceivably conclude a lengthy, complex treaty dealing with several different problems; if only one of the many provisions in the treaty conflicted with a rule of *jus cogens*, it would be in the interest of the world order to permit the survival of the other provisions of the treaty if those provisions were in fact separable and did not offend the rule of *jus cogens*. Indeed, Article 103 of the United Nations Charter, on the conflict between obligations assumed under the Charter and obligations in other treaties, rendered inoperative only the conflicting provisions of those treaties and did not purport to nullify the entire treaty. Of course, if separability were to be permitted in the cases envisaged in articles 48, 49 and 50, it would be necessary to amend the present text of those articles, which made a treaty void if it conflicted with their provisions.

11. He therefore supported the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1), especially the deletion of paragraph 5 of article 41. He also supported the Finnish amendment (A/CONF.39/C.1/L.144) but hoped that voting on both those amendments would be postponed until the Committee had dealt with articles 48, 49 and 50.

12. Mr. MENDOZA (Philippines) said that article 41 specified two exceptions to the general rule of non-separability laid down in paragraph 2: the first was the case covered in article 57; the second was covered by the provisions of paragraph 3, which made it subject to the requirements set forth in paragraphs 3 (*a*) and 3 (*b*). Although the Commission did not explicitly say so in the commentary, it would appear from the text of the article that those requirements did not apply in the case covered by article 57. The purpose of the Hungarian amendment (A/CONF.39/C.1/L.246) was to make that case also subject to those requirements; the same result would be achieved by deleting the reference to article 57 in paragraph 2, as proposed by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1).

13. The Committee was called upon to decide two questions. The first was whether or not articles 46, 47, 48, 49, 50, 57, 58, 59 and 61 should contemplate the possibility of termination, withdrawal or suspension of only a part of the tainted treaty. Should that first question be settled in the affirmative, the second question would then arise, namely, whether the requirements set forth in paragraphs 3 (*a*) and 3 (*b*) should apply in all cases where only part of the treaty was terminated or suspended.

14. Both were questions of substance; once they were settled, the problems arising out of article 41 would become essentially matters of drafting. If both questions were answered in the affirmative, the problem of drafting could be settled simply by not mentioning any specific article as an exception to the general rule in article 41, and by deleting paragraphs 4 and 5.

15. If, however, the first question were decided in the negative with respect to some of the articles mentioned, he would suggest the same form for article 41 but that instead there should be an explicit statement in the appropriate articles that partial termination, withdrawal or suspension was not allowed. Alternatively, a provision on the lines of paragraph 5 could be retained.

16. If the second question were decided in the negative, the rule to that effect should be explicitly stated in article 41, more or less on the lines of the present paragraph 4.

17. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) stated the rule more clearly than the present text of article 41, although it departed from the style of the other articles. However, he had some reservations regarding the proposed amendment to paragraph 3, especially sub-paragraph (*a*). The factors specifically mentioned in paragraphs 3 (*a*) and 3 (*b*) of the United Kingdom amendment were not the only ones that were relevant. For example, the consideration suggested in the United States amendment (A/CONF.39/C.1/L.260) might also be a factor, but it would be implicitly excluded by the text proposed by the United Kingdom, although it was implicitly included by the International Law Commission's draft.

18. His delegation thought that the factors of separability were not capable of exhaustive enumeration. If an enumeration were attempted, it would result in the exclusion of a number of relevant considerations. He accordingly suggested that, if the United Kingdom amendment to paragraph 3 (*a*) were adopted, it should be combined with the United States amendment (A/CONF.39/C.1/L.262) so that the paragraph would then read:

"(*a*) The said clauses are separable from the remainder of the treaty with regard to their application, and particularly where:

(i) the ground relates solely to a particular article or group of articles; and

(ii) the remainder of the treaty is capable of being applied without that article or group of articles; and

(iii) continued performance of the remainder of the treaty would not be unjust."

19. He hoped that those suggestions would be considered by the Drafting Committee.

20. Mr. RATTRAY (Jamaica) said that his delegation fully subscribed to the basic principle of the integrity of treaties, embodied in article 41, and recognized that the principle of separability had its proper place in the draft. However, the merits of article 41 could not be assessed until the Committee had examined the articles on the various grounds of invalidity and termination.

21. He could not support the amendment by Finland (A/CONF.39/C.1/L.144) which would permit separability in the case covered by article 59. The provisions of that article made it clear that the International Law Commission had intended that the whole of the treaty should be terminated by a fundamental change of circumstances which radically transformed the scope of the treaty obligations. Since in accordance with paragraph 1 (*a*) of article 59, the provisions of that article only operated where the existence of the circumstances in question had constituted an essential basis of the consent given to the treaty, it was clear that the whole treaty would be affected by a change in those fundamental circumstances. Unless, therefore, the provisions of article 59 were amended, it would not be possible to introduce a reference to that article in article 41. Nor could he, for similar reasons, support the proposal by Finland to delete the reference to article 50.

22. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) made the draft clearer, especially in paragraphs 1, 2 and 3, but the proposal to delete paragraph 5 was a proposal of substance which he could not support at the present stage of the discussion. It would be more logical and expeditious to postpone the decision on article 41 until the substance of the various articles which followed it had been decided. Meanwhile, he would like to hear from the Expert Consultant why the International Law Commission had placed corruption under article 47 on the same footing as fraud rather than treating it as coercion.

23. Mr. STREZOV (Bulgaria) said that, since the unity and integrity of the provisions of a treaty was a fundamental rule, his delegation agreed with the International Law Commission that it would be useful, in certain cases, to allow for the principle of separability in the application of rules relating to cases of invalidity and grounds for terminating or suspending a treaty. In such cases, it should obviously be possible to eliminate part of the provisions of a treaty without appreciably disturbing the balance between the interests of the parties, or seriously altering the basis of the obligation to which consent had been given. The Bulgarian delegation considered that the Commission's article 41 fully conveyed that idea, and could therefore vote for it.

24. Although it could not support most of the other amendments, which tended to upset the balance of the article, it believed that the Hungarian amendment (A/CONF.39/C.1/L.246) introduced a useful clarification.

25. Representatives who had spoken against the text of the Commission's paragraph 5 had particularly mentioned the reference in that paragraph to article 50, on treaties conflicting with a peremptory norm of general international law. His delegation, however, considered that the principle on which paragraph 5 was based, and which derived logically from the very nature of rules of *jus cogens*, had its place in article 41: as the Commission rightly stated in paragraph (8) of the commentary " rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid ".

26. For those reasons, the Bulgarian delegation saw no reason for postponing the vote on article 41, since that article expressed a principle which could be stated independently of its application in specific cases.

27. Mr. EVRIGENIS (Greece) said that article 41 unquestionably fell, not within the category of codification but within that of progressive—and perhaps in the case in point one might say progressist—development of international law. Since the Committee was not confronted with a *lex lata*, the problem could be considered in terms of legislative policy. In the circumstances, the fundamental question was whether the principle of the integrity of a treaty was so sacrosanct that it must serve as a point of departure. In the choice between integrity and separability, integrity might at first sight be considered preferable, as a concept more congenial to the treaty-maker's mind and even having a certain moral flavour, but it led to the logical conclusion that it was better to destroy something totally than to preserve it partially, if that was possible.

28. His delegation could not share that view: the conflict was not so much between integrity and separability but rather between rigidity and elasticity. The question was whether international treaties should become inflexible instruments, liable to be destroyed totally by some localized malady, or flexible legal instruments, capable of surviving an amputation desired by the party entitled to invoke the flaw in the treaty.

29. The Greek delegation had no hesitation in opting for a solution which would lay down separability as a principle of the law of treaties. It was time to set aside the notion of international agreements as treaties of alliance, armistice or peace, in favour of a much broader concept of the role of treaties in a world compelled by the population explosion and modern technical progress to cooperate in every sphere. Separability must therefore be accepted, but only under certain conditions. The offending part of the treaty should be considered as separable only if the remainder could survive and there was reason for its survival. The principle of separability would promote the integrity of international treaties and would be in conformity with the rule *pacta sunt servanda* which contained implicitly the principle of *favor negotii* and required the maintenance, even in part, of treaties where such maintenance was possible and did not affect the essence of contractual consent.

30. In the light of those considerations, the Greek delegation could support the Finnish amendment (A/CONF.39/C.1/L.144), but considered that its first paragraph should also include a reference to article 58,

since supervening impossibility of performance might well have a partial effect on the treaty. On the other hand, it could not support the Argentine amendment (A/CONF.39/C.1/L.244), which would have the effect of nullifying the principle of separability. The United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) should be seriously considered, since it laid down the general principle of separability and made it subject to reasonable and well-balanced conditions; perhaps, however, the word " clauses " might be left in paragraphs 3, 4 and 5 and not be replaced by the phrase " article or group of articles ", since it was more flexible. The United States amendment (A/CONF.39/C.1/L.260) was similar in content to the United Kingdom amendment to paragraph 3 (*b*), and the two might be amalgamated. His delegation could support the Hungarian amendment (A/CONF.39/C.1/L.246). It also took the view that the oral proposals put forward during the debate, even if they had not been formally submitted as amendments, should be transmitted in writing by the delegations concerned to the Drafting Committee for its consideration.

31. Mr. MAKAREWICZ (Poland) said that his delegation supported the International Law Commission's draft of article 41, which provided adequate safeguards for the principle of separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties, and at the same time stressed the primary rule of the integrity of treaties by formulating exceptions to the basic principle.

32. The Polish delegation could not therefore support the Finnish proposal (A/CONF.39/C.1/L.144) that an exception to the principle of separability should not be made in the case of treaties conflicting with a peremptory norm. The Commission had convincingly proved in its commentary that that exception should be unconditional: rules of *jus cogens* were so fundamentally important that any conflict of a treaty with those rules was dangerous and inadvisable. Nor could his delegation support the Argentine amendment (A/CONF.39/C.1/L.244), which seemed to limit separability to cases of termination or suspension of the operation of a treaty in connexion with breaches of its provisions by the other party; that attitude did not reflect contemporary international law, since in many cases grounds for invalidating, terminating or suspending a treaty might relate to secondary provisions, which could be eliminated from the treaty without materially affecting the balance of interests of the parties.

33. On the other hand, the Polish delegation was in favour of the Hungarian amendment (A/CONF.39/C.1/L.246), which subjected separability in connexion with article 57 to the conditions laid down in article 41, paragraph 3. The United Kingdom amendment to paragraph 4 (A/CONF.39/C.1/L.257 and Corr.1) would have much the same effect as the Hungarian amendment, but the remainder of the United Kingdom amendment not to except from the principle of separability cases under articles 48, 49 and 50 of the draft convention was not acceptable for the reasons given by the International Law Commission in its commentary.

34. Mr. DADZIE (Ghana) said that, in his delegation's opinion, where the articles of a treaty differed so widely in their legal character as to make it possible for any part of the treaty to be considered as a unit and, consequently, as separable without fundamentally affecting the integrity of the treaty, the needs of justice would be better served if an offending clause or clauses could be given separate treatment. State practice and the decisions of judicial and arbitral tribunals testified to the frequency of the application of the principle of separability.

35. The United Kingdom amendments (A/CONF.39/C.1/L.257 and Corr.1) related both to drafting and to substance. Although his delegation could accept the drafting amendments to paragraphs 1 and 2, it preferred the International Law Commission's text of paragraph 3; however, the Drafting Committee might consider changing the introductory part of that paragraph to read: " If the ground relates solely to a particular clause or a particular group of clauses, it may only be invoked with respect to that clause or those clauses where: ... ".

36. The United Kingdom delegation's substantive proposals entailed the deletion of references to articles 48, 49 and 50 from paragraph 5, and there again, his delegation was in favour of retaining the Commission's text in its entirety. Repetition of the reference to article 57, in paragraph 4 of the United Kingdom amendment, was unnecessary, since the subject of that article, breach of a treaty, was different in kind from fraud and corruption, the subjects of articles 46 and 47. For similar reasons, his delegation could not support the Finnish amendment (A/CONF.39/C.1/L.144) to add a reference to article 59 at the end of paragraph 2.

37. His delegation was not in favour of the Argentine amendment (A/CONF.39/C.1/L.244) to replace the positive form of the article by a negative formulation, since that would affect the structural uniformity of the articles in Part V; moreover, the Argentine amendment restricted the scope of article 41 without increasing its clarity. Nor could his delegation agree to the Argentine proposal to delete paragraphs 3, 4 and 5. Similarly it could not support the Hungarian amendment (A/CONF.39/C.1/L.246), which merely repeated what was already expressed in the phrase " following paragraphs " in paragraph 2 of the Commission's draft. Finally, his delegation could not share the view that voting on article 41 should be postponed, for the article could stand or fall without affecting the rest of the draft.

38. Sir Humphrey WALDOCK (Expert Consultant) said that paragraphs 1 and 2 of the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) were practically identical with the corresponding provisions of the International Law Commission's text, and that the proposed paragraph 3 also seemed to be concerned with drafting changes. Nevertheless, he must point out that the proposal to substitute the phrase " article or group of articles" for "clauses" in sub-paragraph 3 (*a*), followed by a definition of " group of articles " in paragraph 5, had been considered by the International Law Commission, which had decided that the word " clauses " was broad enough to cover situations where treaties were divided into chapters, sections or groups of articles. The change proposed by the United Kingdom would tend to have a narrowing effect, for there might be cases where only clauses, or provisions of articles rather than whole

articles, would give rise to situations calling for separate treatment. Perhaps the word "provisions" could be used, but he doubted whether it was necessary to make the change.

39. The United Kingdom proposal for sub-paragraph 3 (*b*) would be acceptable if it really meant the same as the International Law Commission's text. The question was whether there might be cases where as a practical matter the remainder of the treaty might be capable of being applied without the clauses in question, but the provisions could not rightly be regarded as separable; that problem could be left to the Drafting Committee.

40. The real substance of the United Kingdom amendment lay in the reference to article 57. The Commission had quite deliberately referred to that clause as an excepted article in paragraph 2, and its reasons for doing so should probably have been stated in the commentary. It had been very anxious to make the provision on breach of a treaty as precise as possible, in view of the highly delicate nature of the question. Alleged breach was one technique for getting rid of a treaty, and the Commission had not wanted to make it easy to terminate a treaty in whole or in part on that ground. But in dealing with cases of breach, the right of the victim of a breach to suspend or terminate the treaty in whole or in part must be taken into account. The United Kingdom proposal to delete the reference to article 57 from paragraph 2 and the Hungarian proposal (A/CONF.39/C.1/L.246) to submit the article to the conditions set out in paragraph 3 would have the awkward result that, when a State committed a breach of one article, the other party might be precluded from suspending the operation even of that article, because it did not fall within the provisions of paragraph 3. The Commission had pondered the question, and had decided that breach must have its own régime; moreover, in seeking to narrow the scope of article 57 as far as possible, it had inserted the definition of breach as the violation of a provision essential to the accomplishment of the object or purpose of the treaty; obviously, the principle of separability could apply to very few such cases. It was important not to go too far in that delicate matter, and not to make the position of the victim of breach too difficult.

41. Finally, in answer to the Jamaican representative's question, he would point out that in cases both of fraud and of corruption, one of the States was a victim, whether or not the other State itself was innocent of any connivance in the acts of its representative. That was why the Commission had placed articles 46 and 47 on an equal footing.

42. Mr. KOVALEV (Union of Soviet Socialist Republics) said that he could not agree with the proposals to defer the vote on article 41. If any of the articles referred to in article 41 were later deleted, the Drafting Committee could deal with the situation. The procedural question whether a vote should be taken on article 41 and the amendments thereto should be put to the vote forthwith.

43. Mr. RUEGGER (Switzerland) said he supported the Soviet Union representative's procedural motion. He himself believed that no vote should be taken at the present stage, since to take a hasty decision while opinions were so much divided would be extremely dangerous. Article 41 referred to various other articles whose fate was as yet unknown.

44. Mr. SINCLAIR (United Kingdom) said he supported the Swiss representative's view. He would like to make it clear that the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr. 1) involved mainly drafting changes, but the proposal involving the deletion of paragraph 5 was a matter of substance. It would be premature for the Committee to take a decision until it had debated the articles referred to in that paragraph. He had no objection to the Soviet Union representative's procedural motion.

45. Mr. TAYLHARDAT (Venezuela) said that he too was in favour of deferring the vote, since amendments had been submitted to articles 46 and 47.

46. Mr. DE BRESSON (France) said he agreed that the vote on article 41 should be deferred for the time being, so that Part V of the draft could be discussed as a whole.

47. The CHAIRMAN put to the vote the Soviet Union motion that a vote be taken on article 41 and the amendments thereto forthwith.

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

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

In favour: Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Afghanistan, Algeria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador, Ghana, Guinea, Hungary, Iraq, Mongolia, Poland, Romania.

Against: Senegal, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Zambia, Australia, Austria, Belgium, Cambodia, Canada, Ceylon, Chile, China, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Honduras, Indonesia, Iran, Israel, Italy, Jamaica, Japan, Lebanon, Liberia, Liechtenstein, Malaysia, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam.

Abstaining: Sierra Leone, Uruguay, Argentina, Brazil, Central African Republic, Congo (Democratic Republic of), Cyprus, Dahomey, Ethiopia, Holy See, India, Ivory Coast, Kenya, Kuwait, Madagascar, Morocco, Nigeria, Pakistan, Peru, Saudi Arabia.

The motion for an immediate vote was rejected by 51 votes to 22, with 20 abstentions.

48. The CHAIRMAN said that the Committee's decision on article 41 would be taken after the remaining articles in Part V had been considered.[2]

Article 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

49. The CHAIRMAN said that the discussion and voting on article 42 would be deferred for the same reasons as in the case of article 41.

50. Mr. MALITI (United Republic of Tanzania) asked whether the Committee was establishing the principle that,

[2] For resumption of discussion, see 66th meeting.

if an article contained references to later articles, its discussion would necessarily be deferred.

51. The CHAIRMAN replied that his decision on article 42 had been taken because its situation was identical with that of article 41.

52. Mr. SINCLAIR (United Kingdom) asked whether the Committee might perhaps at least discuss article 42 without taking a decision on it. Amendments to article 42 had already been submitted, and if the debate were postponed, there might be more amendments which would complicate matters still further. He was not, however, making a formal proposal.

53. Mr. TAYLHARDAT (Venezuela) said that he could not accept the Chairman's ruling. The Committee's decision on article 41 would not necessarily affect the voting on article 42. He was in favour of starting the discussion on article 42 and deferring the vote only if the course of the discussion showed that to be necessary.

54. The CHAIRMAN said he would ask the Committee to vote on the motion that the discussion on article 42 be opened forthwith, the vote on the article and the amendments thereto to be deferred to a later stage.

The motion for immediate discussion was rejected by 15 votes to 7, with 60 abstentions.

55. Mr. VARGAS (Chile) said that the large number of abstentions showed that the alternatives put by the Chair had not been clear. The vote should have been taken only on the question whether the discussion on article 42 should be deferred. The vote should be taken again.

56. Mr. TAYLHARDAT (Venezuela) said he supported the Chilean representative's comments.

57. Mr. TABIBI (Afghanistan) said that, while he agreed that the Chairman's ruling had not been clear, the Committee had taken its decision and must abide by it. The Chilean representative's suggestion must be rejected.

58. Mr. MALITI (United Republic of Tanzania) and Mr. MWENDWA (Kenya) said they supported the Afghan representative's view.

59. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation had abstained from voting because the Chairman's decision, involving as it did two separate questions, had not been clear. The decision had, however, been taken and the question could not be reopened.

60. The CHAIRMAN said that there was a Swiss amendment (A/CONF.39/C.1/L.120) to the titles of Part V and of section 2 of Part V, to replace the word " invalidity " by the word " invalidation ". It was a drafting amendment that might be referred to the Drafting Committee.

61. Mr. ALCIVAR-CASTILLO (Ecuador) said he did not agree that the Swiss amendment was merely a matter of drafting; it involved a very considerable substantive change. He suggested that discussion of the Swiss amendment be deferred until the Committee had completed its consideration of Part V.

62. Mr. KOVALEV (Union of Soviet Socialist Republics) said he supported that suggestion.

It was so agreed.

The meeting rose at 12.55 p.m.

FORTY-THIRD MEETING

Monday, 29 April 1968, at 3.10 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 42 (Loss of a right to invoke a ground for invalidating, terminating withdrawing from or suspending the operation of a treaty) *(continued)*

1. Mr. ARMANDO ROJAS (Venezuela) requested that due note be taken of his delegation's official protest against the procedure followed by the Chairman in connexion with article 42 that had resulted in a vote in which sixty delegations had abstained. It would have been better to ask the Committee whether or not it wished to take up article 42.

Article 43 (Provisions of internal law regarding competence to conclude a treaty) [1]

2. The CHAIRMAN announced that the Philippine delegation had withdrawn its amendment (A/CONF.39/C.1/L.239).

3. Mr. SAMAD (Pakistan), introducing the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), said that the International Law Commission's text raised the question of how far the limitations of the internal law of a State might affect the validity under international law of the consent to a treaty given by an agent ostensibly authorized to express that consent.

4. The words " unless that violation of its internal law was manifest " constituted an exception to the general rule set out in article 43. According to paragraph (10) of the commentary, the majority of the members of the International Law Commission considered that the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties created too large a risk to the security of treaties. Some members seemed to have taken the view that it was undesirable to weaken that principle by admitting any exception to it. He thought that the application of the exception might give rise to practical difficulties since it would not be easy to determine cases of the manifest violation of the internal law of a State regarding competence to conclude a treaty. It was difficult to expect one contracting party to know in detail the constitutional provisions of another State regarding capacity to express its consent to be bound by a treaty.

5. The amendment related to a question of substance and its purpose was to promote the security of treaties.

6. Mr. CALLE Y CALLE (Peru) said that the amendment submitted by his delegation and that of the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.228 and Add.1) hardly called for an explanation.

[1] The following amendments had been submitted: Pakistan and Japan, A/CONF.39/C.1/L.184 and Add.1; Peru and the Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.228 and Add.1; Philippines, A/CONF.39/C.1/L.239; Venezuela, A/CONF.39/C.1/L.252; Australia, A/CONF.39/C.1/L.271/Rev.1; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.274; Iran, A/CONF.39/C.1/L.280.