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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.

7. Article 43 was based on the doctrine according to which international law left it to the internal law of each State to determine the organs by which the will of a State to be bound by a treaty should be formed and expressed. International law should take account only of the external manifestation of that will.

8. It was natural, therefore, for States which had participated in the negotiations to assume that each had complied with the provisions of its constitution and that there was no need to verify in each case the competence and constitutional regularity of the powers of each representative ostensibly authorized to express its consent to be bound by the treaty.

9. One exception to that rule was, however, admitted, namely when the other State had known that the representative of the State in question had no authority to bind his State owing to a violation of that State's constitutional provisions and that accordingly its consent was vitiated. Article 43 clearly recognized the exceptional possibility for a State to invoke a violation of its internal law as vitiating its content if the violation had been manifest, but it took no account of the degree of importance of the provision of internal law that had been violated. The expression " internal law " implied not only fundamental constitutional rules but also minor legal and even administrative provisions. It would be advisable to indicate that consent to be bound by a treaty could be considered as vitiated only if there had been violation of a constitutional provision of fundamental importance.

10. Mr. CARMONA (Venezuela), introducing his delegation's amendment (A/CONF.39/C.1/L.252), said that article 43, which dealt with the serious question of the relationship between internal law and international law, had given rise to very divergent views in the International Law Commission. Some members had been in favour of giving priority to internal law, while others had advocated a mixed system based on the pre-eminence of international law, except in the special case where the violation of internal law had been manifest. The compromise solution adopted by the Commission was acceptable, although there was always a certain difficulty in determining cases where violation had been manifest. The internal law should be precise, clear and indisputable and accessible to all, so that the other States would have no reason to question its meaning or to institute research in order to find out whether it was in force. That was true in the case of written constitutions which were always available to all States. The United Nations published a collection of laws and constitutional provisions in its Legislative Series; consequently, it was easy to verify whether the condition required by article 43 was fulfilled.

11. Many countries, however, including his own, could not recognize the primacy of any category of international obligations over constitutional rules. The Supreme Court of Venezuela had delivered a judgement on 29 April 1965 proclaiming the predominance of the Venezuelan Constitution over treaties. In those circumstances, although the solution adopted by the International Law Commission was correct in substance, it might prove very difficult to accept as far as form was concerned. There would seem to be no doubt that a large number of legislative organs would refuse to accept that treaties should take precedence over constitutional provisions. The question was more political than technical. For that reason, his delegation had proposed an affirmative wording for article 43 which did not in any way affect the principle of that article but allowed constitutional requirements to be taken into account.

12. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.271/Rev.1), said he doubted whether it was really desirable to include an article drafted in the terms of article 43. The Committee of the Whole had not specified, when article 6 had been adopted, what it understood by the expression "appropriate full powers ". In his delegation's view, it was clear that the expression was intended at least to mean full powers signed by the Head of State, Head of the Government or Minister for Foreign Affairs. It might be extremely difficult for a State to inquire into the regularity of those full powers and to study the internal law and constitution of another State. For that reason, he supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), but had doubts as to the usefulness of the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1).

13. With regard to the amendment submitted by Venezuela (A/CONF.39/C.1/L.252), he was in favour of the International Law Commission's text, which stated the rule in negative form, for the reasons explained in paragraph (12) of the commentary.

14. If the Committee decided to retain article 43, it should be made clear that the term " manifest " meant " objectively evident ", as stressed by the International Law Commission in paragraph (11) of the commentary. It was also essential to include a time-limit to prevent unreasonable delay. The suggestion in the Australian amendment was that the time-limit should be one year, but two years would be acceptable.

15. Mr. SINCLAIR (United Kingdom), introducing his delegation's amendment (A/CONF.39/C.1/L.274), said that although his delegation was in favour of the doctrine that international law was concerned only with the external manifestation of a State's consent to be bound by a treaty and that violations of a provision of internal law regarding competence to conclude treaties might not be invoked as invalidating consent to be bound, it recognized that the present text of article 43 represented a delicate compromise between opposing tendencies within the International Law Commission.

16. In its written comments the United Kingdom Government had expressed itself as being in general agreement with the article, but had pointed out that the proviso " unless that violation of its internal law was manifest " needed some clarification. [2]

17. The United Kingdom amendment took into account what was said in paragraph (11) of the International Law Commission's commentary, where the Commission had emphasized the significance it attached to the expression " when the violation of internal law... would be objectively evident to any State dealing with the matter normally and in good faith " by putting it in italics.

18. The United Kingdom delegation could not support the Venezuelan amendment (A/CONF.39/C.1/L.252).

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 344, comment on article 31.

It could support the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), but considered that the Committee would be ill-advised to upset the very delicate compromise achieved by the Commission. The Australian amendment (A/CONF.39/C.1/L.271/Rev.1) added useful clarification by requiring that the violation must be invoked within a specified time-limit.

19. He had some hesitation about the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), since it might add another element of uncertainty to the text, but it would perhaps have the advantage of narrowing the scope of the exception by excluding manifest violations of internal law which were not of fundamental importance. To the extent that the amendment really had such a purpose, the United Kingdom delegation could support it, but he must make it clear that if the Committee accepted the amendment, the need for some kind of impartial and objective machinery for settling disputes concerning the interpretation and application of that article and of other articles in Part V would become more and more obvious.

20. Mr. MATINE-DAFTARY (Iran) reminded the Committee that during the debate on article 6, to which his delegation and the delegation of Mali had submitted an amendment (A/CONF.39/C.1/L.64 and Add.1) which had not been adopted, he had announced his intention of reverting to the subject during the debate on article 43, which was the counterpart of article 6. The result of the vote on article 6 had impaired his freedom to submit an amendment which would adequately respect internal law. For that reason he was not fully satisfied with his delegation's amendment to article 43 (A/CONF.39/C.1/L.280). The International Law Commission had accepted the principle that internal law should not be violated by the conclusion of treaties, but the formulation it had proposed was not broad enough. The word " manifest " was too vague. Nor did the other amendments submitted throw further light on that term. The addition of the words " of fundamental importance " was not adequate, since the phrase was subjective.

21. The Iranian amendment provided a precise criterion, that of authorization by the Head of State. It had been objected that constitutions differed from country to country and that consequently, no formulation could be found which would take all internal laws into account. But the great majority of constitutions conferred on the Head of State powers for the conclusion of treaties. It was, moreover, the constant practice in international law, since all bilateral or restricted multilateral treaties began with an allusion to the full powers vested in the plenipotentiaries by the Head of State. Authorization by the Head of State, who was the gardian of the constitution, was deemed to be consonant with internal law. He did not insist upon the exact wording of his amendment as it stood, and it was only the principle which should be put to the vote. If the Committee did not approve any amendment of that sort, the Iranian deletation would not be able to vote for the International Law Commission's text.

22. Mr. SUAREZ (Mexico) observed that, under article 43, the fact that a State's consent had been expressed by its representative in violation of its internal law could not be invoked by that State as invalidating its consent to be bound by a treaty; but neither that article nor any other covered cases where a treaty had been concluded in violation of the constitutional laws of the State. The commentary seemed to imply, however, that article 43 referred to both those situations.

23. In some States, including Mexico, internal law upheld the principle that the constitution prevailed over laws and treaties and expressly ruled that only treaties concluded in conformity with the constitution had binding force. Some of those States, including Mexico, made provision for control by the judicial authorities over the other organs of the State in order to deprive unconstitutional laws, treaties or acts of legal effect.

24. Although the executive and the legislative authorities acted with the greatest caution and in all good faith to avoid infringing constitutional rules, it often happened that the supreme court of a country decided that laws were unconstitutional. Admittedly, it less frequently pronounced a treaty unconstitutional, but it could happen that a State might invoke the unconstitutionality of a treaty, not as a pretext to evade performing a contractual obligation, but because it must comply with the decision of a supreme court which had judged the provisions of that treaty unconstitutional.

25. The Mexican delegation considered that article 43 should be examined together with articles 58 and 61, which, with article 59, made up a system of legal rules.

26. Article 58 established the principle that a party might invoke an impossibility of performing a treaty as a ground for terminating it, but limited that impossibility to the permanent disappearance or destruction of an object indispensable for the execution of the treaty. His delegation considered that the article was incomplete. It was a principle universally accepted in internal law that *force majeure* excused a debtor from discharging an obligation, or at least allowed him to defer doing so. That principle should also apply in international law. *Force majeure* meant not only the material impossibility of performing an obligation, but also the legal impossibility.

27. In article 61 the International Law Commission was certainly contemplating the theory of legal impossibility of performance in a special case, namely when a new peremptory norm of general international law supervened after the conclusion of a treaty and made it legally impossible to perform it.

28. The Mexican delegation considered that those principles should also apply in cases where the supreme court of a country declared a treaty unconstitutional. It was indisputable that a State would in such a case find it legally impossible to fulfil its obligations. In order to solve that problem it would be sufficient to add to article 58 a provision that *force majeure* justified the failure to perform a treaty or the suspension of its performance.

29. The Mexican delegation reserved the right to submit a formal amendment to that effect when the Committee came to consider article 58.

30. Mr. DIOP (Senegal) said he accepted the idea of the invalidity of treaties, which was the subject of Part V, Section 2, of the draft convention, since it would protect developing States, which were unfortunately potential and obvious victims. He wished to make it clear, however,

that the idea should only be adopted if the grounds for invalidity were clearly defined and if an impartial tribunal could officially declare a treaty invalid. Unless those conditions were fulfilled, the proposed codification would do more harm than good and make international relations more insecure.

31. In his opinion, the violation of internal law with regard to competence to conclude treaties, material error, fraud, corruption and coercion could be accepted as grounds for invalidity. In the absence of all the necessary criteria, however, the same could not be said of the violation of a peremptory norm of international law. His delegation reserved the right to express its views on *jus cogens* when the Committee examined articles 50 and 61.

32. For the time being, he wished to point out that Part V, and in particular Section 2, would only be acceptable if recourse could be had to a court or arbitral tribunal offering all the necessary safeguards. The alternative of relying on article 62, which dealt with the procedure to be followed in the case of the invalidity of a treaty, was unsatisfactory. That article was inadequate, even though it referred to Article 33 of the Charter of the United Nations. In the event of a dispute, once conciliation or arbitration was exhausted—and without being unduly pessimistic, one could say that that was likely to be the case quite often—it was essential for the parties concerned to be able to resort to an authority responsible for declaring the law. When speaking of a court of law, it was natural to think in terms of the International Court of Justice. Despite the respect due to that august institution, in view of the recent decision in the *South-West Africa* case, his delegation would have to formulate the most explicit reservations with regard to any solution which entrusted final jurisdiction to such a court in the matters under consideration. Whatever body was responsible for officially declaring treaties invalid must be absolutely impartial.

33. With regard to the various amendments submitted to article 43, he did not think that the Australian amendment (A/CONF.39/C.1/L.271/Rev.1) should be rejected out of hand. The suggestion to fix a time-limit deserved careful consideration. On the other hand, he could not accept the amendment by Pakistan and Japan (A/CONF. 39/C.1/L.184 and Add.1), which would delete the words " unless that violation of its internal law was manifest ". As to the Venezuelan amendment (A/CONF.39/C.1/ L.252), he preferred the negative formulation employed by the International Law Commission because it emphasized the exceptional character of the cases in which the ground for invalidity in question could be invoked.

34. Mr. BLIX (Sweden) said he could not accept the Mexican representative's argument about legal impossibility, because it was contrary to the recently-adopted rule that a State could not invoke its internal law to justify the non-performance of a treaty.

35. The rule stated in article 43 should be viewed not against a background of constitutional or international doctrine but in the light of the practice of States. The invoking of a manifest violation of a provision of internal law regarding competence to conclude treaties would hardly be in accordance with the practice of States and might cause government serious difficulties. In that respect, the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) would certainly bring the article closer to reality.

36. If article 43 really expressed a rule of customary law, States might, before concluding a treaty, be expected to satisfy themselves that their treaty partners were not manifestly violating their internal law. But that was certainly not the case. States placed their confidence in the other government, provided that it was effectively exercising power. In so doing, they applied the rule of international law that a State could not invoke its internal law to establish the invalidity of a treaty.

37. Moreover, how could a State know the internal law of another State? The best method would be to ask the government of the other State, but the latter, by showing its readiness to conclude the treaty, had already indicated. that it considered itself competent to do so. An alternative would be to seek the opinion of lawyers of the country with which the State intended to conclude a treaty. If the lawyers decided that the projected treaty or the manner of its conclusion conflicted with the internal law, it would seem difficult for one government to point out to another that in virtue of certain provisions of its internal law it was not empowered to conclude the treaty. A rule requiring such interference in the internal politics of other States did not seem feasible.

38. It could be argued that manifest violation only existed if discoverable by simply reading the internal law of the foreign State. But it must be remembered that the internal law was difficult to interpret and that merely reading the texts of constitutions in certain international publications was not enough; practice had to be taken into account as well. To limit cases in which the violation of internal law could be invoked to manifest violation was a step in the right direction, and the United Kingdom amendment (A/CONF.39/C.1/L.274) would improve the article further in that respect.

39. The application of article 43 would also raise practical difficulties. It was generally acknowledged, in both theory and practice, that *de facto* governments, in other words governments effectively exercising power but disregarding constitutional rules, could bind their States by treaty. It was, however, precisely those governments which were most likely to enter into treaties in manifest violation of the constitutional rules on the conclusion of treaties.

40. His delegation would vote for the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) deleting the final sentence of article 43. If that amendment was adopted, the whole of article 43 could simply be deleted, since the commentary to article 39 indicated that the grounds of invalidity enumerated in Part V of the draft articles were exhaustive. The deletion of article 43 would mean that a manifest violation of the provisions of internal law regarding the conclusion of treaties would no longer be a ground for invalidity. That would be a practical solution to the problem. It was a technical question and might be referred to the Drafting Committee after the Committee of the Whole had voted on the amendment submitted by Pakistan and Japan.

41. If that amendment was not adopted, his delegation would vote in favour of the United Kingdom amendment (A/CONF.39/C.1/L.274) which improved the

wording of article 43 by defining the expression " manifest violation ". It would also vote for the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which introduced the notion of the fundamental importance of manifest violation. On the other hand, in view of article 42, his delegation failed to see the utility of the Australian amendment (A/CONF.39/C.1/L.271/Rev.1). With regard to the Venezuelan amendment (A/CONF.39/C.1/L.252), the wording proposed might turn the exception into a rule.

42. Lastly, he agreed with the representative of Senegal that the provision in article 43 necessitated the establishment of a body authorized to decide whether a violation was manifest or not. His delegation thought that the Committee could vote at once on article 43 as proposed by the International Law Commission.

43. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that article 43 dealt with an extremely complicated problem, namely the importance of internal law in determining the validity of international agreements, There could be not the slightest doubt that it was internal law which determined the organ empowered to express the will of a State when concluding a treaty and the conditions under which that will was to be expressed. The only question was how to identify the cases in which an agreement was concluded in violation of internal law.

44. In some countries, Norway and Belgium in particular, the State could not be bound by a treaty without parliamentary authorization. The constitutional rules of States should be respected. Article 43 of the United Nations Charter, indeed, contained a provision specifying that agreements between the Security Council and the Members of the United Nations " shall be subject to ratification by the signatory states in accordance with their respective constitutional processes ". Unfortunately, the provisions of internal law were often vague and complicated. The International Law Commission had therefore been right to base article 43 on the principle that the violation of a provision of internal law concerning competence to conclude treaties did not affect the validity of the treaty.

45. In his own view, the negative form in which article 43 was couched stressed the exceptional nature of cases in which the violation of a provision of internal law might be invoked as a ground for invalidity. He could not therefore support the amendment submitted by Venezuela (A/CONF.39/C.1/L.252). It was in order to strengthen the exceptional nature of the case that his delegation had associated itself with the Peruvian delegation in submitting the amendment (A/CONF.39/C.1/L.228 and Add.1) to insert the words " of fundamental importance " in the concluding phrase in the article.

46. Mr. FUJISAKI (Japan) said that, as a sponsor of the joint amendment in document A/CONF.39/C.1/184 and Add.1, he fully supported the explanation given by the representative of Pakistan. At the 29th meeting, when considering article 23 the subject-matter of which was the principle *pacta sunt servanda*, the Committee had decided by 55 votes to none to stipulate at an appropriate place in the convention that " no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty " (A/CONF.39/C.1/L.181). If that principle was applied to such a case as that contemplated in article 43, a party to a treaty could not invoke a violation of its own internal law for the purpose of invalidating its consent to be bound by that treaty. That was why he was proposing the deletion of the proviso " unless that violation of its internal law was manifest " at the end of the article.

47. Mr. ALVAREZ TABIO (Cuba) observed that article 43 took into account the fact that the consent of a State to be bound by a treaty was expressed by a representative invested with the will of the competent organs or acting in virtue of the functions inherent in his mission. It was internal law that defined and attributed the competences of the various organs of a State. If certain constitutional laws imposed restrictions on competence to bind a State or denied that competence in particular cases, it was evident that those norms must be scrupulously observed by the representative of the State and by the other States. Consequently, the last phrase in article 43 should be retained. The deletion proposed by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) would open the way to merely evading the problem without solving it. The text proposed by the International Law Commission was correct and should not be amended. The Cuban delegation would therefore vote for draft article 43.

48. Mr. CHEA DEN (Cambodia) said that although he considered that draft article 43 was acceptable, he supported the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1). The International Law Commission had considered that where there was a conflict between internal law and international law, international law should prevail. The Committee of the Whole had taken the same position, since if the internal law or the constitution of every country was taken into consideration, the result would be inextricable conflicts and controversies. The amendment submitted by Pakistan and Japan to delete the last phrase in article 43 would be one way of avoiding such difficulties.

49. Mr. JACOVIDES (Cyprus) said he approved of the basic principle embodied in article 43, namely that the violation of a provision of internal law regarding competence to enter into treaties did not affect the validity of a consent given in due form by a state organ or by an agent competent to give that consent. He considered that that principle should not be weakened by exceptions. In its present form, article 43 established a distinction between a manifest violation and a non-manifest violation of internal law, a distinction which presented difficulties both from the point of view of legal theory and practice. His delegation would therefore vote in favour of the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) to delete the last phrase in the article.

50. If the Committee did not adopt that amendment, his delegation would vote for the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which made it clear that a manifest violation must be of fundamental importance. It would also vote for the United Kingdom amendment (A/CONF.39/C.1/L.274), which specified what was meant by " manifest violation ", and the Australian amendment (A/CONF.

39/C.1/L.271/Rev.1), which set a time-limit for a State desiring to invoke a violation of its internal law as invalidating its consent. The object of all those amendments was to restrict the scope of the exception to the principle on which article 43 was based. The Cypriot delegation could not, therefore, support the amendment submitted by Venezuela (A/CONF.39/C.1/L.252).

51. Mr. RUIZ VARELA (Colombia) observed that the provisions in Part V contained elements of the progressive development of international law and should be considered very carefully, because to adopt them in an imprecise form might seriously undermine the stability of international relations based on treaties.

52. The Colombian delegation held that articles 43, 60, 61 and paragraph 3 of article 62 were debatable, but it would confine its comments for the moment to article 43. The meaning of " manifest violation of internal law " should be specified, because otherwise States might consider a violation of any constitutional, legal or even administrative internal rule relating to the competence of the State to conclude treaties as invalidating their consent to be bound by an international treaty. His delegation considered that article 43 dealt with a manifest violation of internal constitutional law relating to the competence of a State to conclude treaties and that it was only in that case that a defect in consent might be invoked. If that was the meaning of the article, he could vote for it, because it respected internal constitutional law in so far as it regulated the manner in which international obligations were assumed. It was not intended to permit States to invoke their constitutional law as a pretext for evading the scrupulous performance of obligations under treaties duly concluded and in force, but, on the contrary, to strengthen the regular performance of treaties; for it was logical that States should act in such a way as to avoid violating the constitutional norms of the other contracting States.

53. He supported the Venezuelan amendment (A/CONF. 39/C.1/L.252), which gave a positive form to the International Law Commission's text, and the amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which, by specifying that the violation of internal law must be of fundamental importance, undoubtedly referred to constitutional law, and accordingly, made the Commission's text even stricter from the legal point of view.

54. Mr. DE BRESSON (France) said he regarded the principle laid down in article 43, that a State could not invoke a violation of its internal law as invalidating its consent to be bound by a treaty, as the height of wisdom. The principle was in conformity with the spirit of article 6 and the following articles, which subjected the validity of the expression of the consent of States to formal safeguards the existence of which the other contracting parties could easily verify. It was impossible to go further and to require the parties to verify the substantive validity under internal law of the powers of the negotiators presenting them.

55. Furthermore, it appeared that if there was a violation of internal law, that state of affairs was a fault for which only the State whose internal law had been disregarded could be blamed. That State, therefore, could hardly take advantage of the situation, more or less arbitrarily, to the detriment of the innocent party. Any weakening of that principle could only engender instability in treaty relations between States. The French delegation therefore supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) to delete the last phrase in article 43. The words " unless that violation of its internal law was manifest " introduced an exception which might in fact undermine the rule stated in article 43.

56. Mr. DONS (Norway) said that his delegation could not accept the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1), for Norwegian constitutional law and the Constitution itself were based upon the presumption that international law left it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty should be formed and expressed. From that point of view, internal laws limiting the power of state organs to enter into treaties were to be considered as part of international law, if it was desired to consider as void, or at least voidable, consent to a treaty given on the international plane in violation of a constitutional limitation.

57. If the last part of article 43 were deleted, the article would be based on views opposed to the rules of international law and would be in contradiction to the Norwegian Constitution as at present interpreted.

58. The rule proposed by the International Law Commission was more flexible and therefore more acceptable. Nevertheless, his delegation would abstain in the vote on article 43, as the adoption of that article would require a revision of the Constitution or at least a reconsideration of the prevailing interpretation of Norwegian constitutional law. His delegation would vote against the United Kingdom amendment (A/CONF.39/C.1/L.274) as the proposed addition reduced still further the possibility of invoking a violation of constitutional law.

59. Mr. MARESCA (Italy) said that the amendment submitted by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) was attractive since it offered an easy solution to the extremely complex problem raised in article 43. Unfortunately, that problem did not admit of an easy solution. International law could hardly ignore internal law, and constitutional rules were of international importance.

60. Under the Italian constitution, for example, certain essential conditions must be met before the State could assume obligations on the international plane. For certain treaties, the Head of State could not express the State's consent without the authorization of Parliament. Every constitution contained provisions concerning the conclusion of treaties, and it would therefore be difficult for the Committee to affirm that violation of a provision of internal law could not be considered as a ground for invalidity.

61. The formula proposed by the International Law Commission struck a balance between the conflicting requirements of international law and internal law. It implied, on the one hand, the presumption that the State had expressed valid consent from the constitutional point of view, and made it clear, on the other, that a State could invoke a violation of its internal law as vitiating its consent only where such violation had been manifest.

62. If it decided to delete the final phrase of article 43, the Committee would revert to the stage of international law when Heads of State had enjoyed absolute power. For that reason, his delegation would have to vote against the amendment by Pakistan and Japan and in favour of the International Law Commission's text, although it was not perfect and could be improved. The United Kingdom amendment (A/CONF.39/C.1/L.274) raised certain difficulties, but it deserved to be adopted, since it helped to clarify the idea of "manifest violation". The same applied to the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), which introduced the idea of a time-limit into international law in which there was no period of limitation. Nevertheless, the International Law Commission's text offered the best solution to the problem.

63. Mr. MIRAS (Turkey) thought that the problem of imperfect ratifications raised in article 43 would be solved if treaties contained a provision similar to the one in Article 110 of the United Nations Charter which provided for ratification of that instrument by the signatory States in accordance with their respective constitutional processes. In the absence of such a provision, a treaty the ratification of which was not in accordance with the internal law of a State might be invoked or not against the ratifying State according as one accepted the theory of the primacy of international law over internal law or the converse. The former ensured the stability of treaties, while the latter ensured security in the conclusion of treaties.

64. Article 43 recognized the principle of the primacy of international law in the ratification of treaties except in the case of a manifest violation of internal law. That rule corresponded to the generally accepted idea that an international treaty entered into by a Head of State in disregard of constitutional provisions did not commit the State when those rules were sufficiently well known.

65. Although he approved of article 43, he feared that the formula "unless that violation of its internal law was manifest" would raise practical difficulties. If that exception to the general rule according primacy to international law was not expressed in clearer and more precise terms, it might open the way to certain abuses. The Drafting Committee should therefore revise the wording in the light of the various amendments proposed.

66. Mr. TALALAEV (Union of Soviet Socialist Republics) said that although the question dealt with in article 43 was a very complex one, it formed but one aspect of the general and still more complex problem of the links between internal law and international law. He merely wished to draw attention to the rule that it was impossible for States to invoke the provisions of their internal law as an excuse for not carrying out a treaty. The discussion of article 23 had given prominence to that rule and his delegation had expressed its support for the amendment to article 23 submitted by Pakistan (A/CONF.39/C.1/L.181), in which it was expressly laid down. With regard to article 43, however, it should be noted that a treaty was the result of an agreement between States and was therefore the expression of the will of those States. Relations between State organs in the process of the formation and manifestation of the will of States on the international plane were a matter for internal law and were therefore an internal affair for the State concerned, in which no interference could be tolerated. In certain circumstances, however, the process of the formation and external manifestation of that will might contain such an important flaw that the will expressed could not be considered as the real will of the State in question. But it was not the manifest nature of the violation which should be brought into relief, as had been mistakenly done in the United Kingdom amendment, for a violation could be manifest and at the same time insignificant. On the other hand, his delegation supported the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which provided that the violation should be not only manifest but also of fundamental importance, before the validity of a treaty could be contested. During the discussion in the International Law Commission, the question had been raised whether a rule should not be formulated stating that a treaty was invalid if entered into by a Head of Government without the agreement of the people when the treaty affected the very existence of the State in question. In short, the principle involved was that of self-determination. Finally, the International Law Commission had adopted the rule in article 43, which was in line with contemporary international law. His delegation could not support the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), since it was not always possible to observe a time-limit in order to invoke the fact mentioned in article 43. Neither was it in favour of the amendment proposed by Iran (A/CONF. 39/C.1/L.280), as the question dealt with in article 43 was one of competence and not of powers.

67. Mr. TENA IBARRA (Spain) said that he was in favour of article 43, so far as substance was concerned, because it gave greater importance to the practical issues at stake than to the dispute over doctrine, in which the supporters of the primacy of international law were ranged against the supporters of internal law. He merely wished to state, where that dispute was concerned, that his country favoured the primacy of international law.

68. In fact, articles 43 and 44 were linked with article 6, in that they constituted actual exceptions to the principle embodied in that article. It was certain that a State could not avail itself of a notorious violation of internal law in order to obtain international advantages. His delegation was not in favour of the amendment by Pakistan and Japan (A/CONF.39/C.1/ L.184 and Add.1), which, by deleting the exception provided at the and of article 43, would encourage interference that was still more dangerous than that presupposed by the requirement to examine the existing law of each State on the conclusion of treaties.

69. On the other hand, he considered that the United Kingdom amendment (A/CONF.39/C.1/L.274) judiciously introduced the element of good faith. His delegation also supported the Venezuelan amendment (A/CONF.39/C.1/L.252), since in its judgement it was preferable to use affirmative phrasing rather than the negative form adopted by the International Law Commission.

70. It had no objection of substance to the Peruvian amendment (A/CONF.39/C.1/L.228 and Add.1). The fact that the violation must be an important one was

implicit in the context of article 43, but there was no harm in mentioning it expressly. Lastly, his delegation wished to stress that, although the hypothesis at the end of article 43 was entirely exceptional, it would be better to retain that exception in the draft.

71. Mr. YASSEEN (Iraq) said that the International Law Commission's text was a successful compromise between the internationalist theory which asserted the supremacy of international law and the constitutionalist theory which recognized the supremacy of constitutional rules by virtue of international law. The constitutionalist theory, which had been fashionable at one time, had had to give way for such practical reasons as the increasing number of treaties and the complexity of treaty relations between States.

72. The Commission had introduced article 43 with a statement of the principles of the internationalist theory, but in the second part of the article it gave a reasonable place to the constitutionalist theory in order to avoid sacrificing vital interests in certain situations. Though there could be no question of international law admitting the general supremacy of internal law in all spheres, that supremacy might be justified in some particular cases. Thus Article 110 of the United Nations Charter referred to the " respective constitutional processes " of States. That reference found further justification in the limits set by article 43, for it related neither to the whole of internal constitutional law nor even to the whole of the law of treaties in internal law, but only to the provisions concerning competence to conclude treaties. From the point of view of international law, it was for internal law to determine the rules for a State's competence to conclude treaties. Further, article 43 did not deal with violations of all kinds, but was concerned solely with manifest violation. The reasonable limits set by the International Law Commission solved difficulties which certainly existed without creating new ones. If a State which had not complied with its internal law had committed a fault, a State which concluded a treaty in full knowledge of a manifest violation of constitutional provisions of the other State was not acting in good faith, which was also a serious fault in international law.

73. It was essential to give internal law, by virtue of international law, the place assigned to it by the Commission. The Iraqi delegation could not accept article 43 unless it contained an exception relating to manifest violation.

74. His delegation could not support the amendment by Peru and the Ukrainian SSR, the result of which would be to reduce still further the place assigned to internal law by international law. Nor did it support the United Kingdom amendment, inasmuch as it infringed the role of the interpreter. In any event, the interpreter of a legal situation of that kind was obliged to take into account good faith and the objective nature of the violation, but an explicit reference would not be desirable in the text of article 43. His delegation did not support the Australian amendment either, as a certain flexibility was needed and the question should preferably be left to the wisdom of States and those responsible for interpretation.

75. Mr. RUEGGER (Switzerland) said he could not accept the compromise reached within the International Law Commission and therefore supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1). It was inconsistent with the stability of law to hold that a State must examine in detail the constitution of States with which it was negotiating. That was true even if such an analysis was limited to the basic rules, as it was not possible to know where to draw the line in complying with the requirement to make such an examination. The exception referred to in article 43 might become a source of endless complications and disputes. It would not only be unjustified in law but contrary to the *comitas gentium*. It was normal and necessary to examine the full powers of the representative of another contracting State, but plenipotentiaries could not be obliged to furnish proofs of their State's capacity to enter into contracts. A State might, of course, undertake commitments *ultra vires*; but that fell outside the scope of the law of treaties and came within the sphere of the international responsibility of the State assuming the obligation.

76. If the amendment by Pakistan and Japan was rejected, the Swiss delegation would support the United Kingdom amendment (A/CONF.39/C.1/L.274) because it provided for the necessary flexibility and gave fewer opportunities of evading the general rule. His delegation would then accept the establishment of machinery for adjudication, and the principle of a time-limit proposed in the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), but that time-limit should not be set rigidly; what was needed was a reasonable time-limit left to the discretion of the body responsible for the adjudication.

77. The Swiss delegation considered that the Iranian amendment (A/CONF.39/C.1/L.280) was out of place in article 43 and should rather be submitted to the plenary Conference in connexion with some other article in the draft. It was opposed to the joint amendment by Peru and the Ukrainian SSR and the Venezuelan amendment. It supported the United Kingdom amendment simply as a second best, as it hoped very much that the amendment by Pakistan and Japan would be adopted.

78. Mr. EVRIGENIS (Greece) said he approved of article 43 as drafted by the International Law Commission, since it achieved a harmonious balance between the interests involved.

79. The United Kingdom amendment (A/CONF.39/C.1/L.274) had the merit of defining the notion of manifest violation and his delegation supported it. It also agreed with the idea of the time-limit in the Australian amendment (A/CONF.39/C.1/L.271/Rev.1), but had doubts about the starting point chosen, namely the occurrence of the violation. Such an event was sometimes difficult to identify; it might continue for some time, or again it might occur at a preliminary stage in negotiations, so that the time-limit might expire before the signing of the treaty. If the principle embodied in the amendment was adopted, the Greek delegation would propose that the time-limit be calculated from the adoption of the treaty.

80. Mr. MAKAREWICZ (Poland) said he fully supported the principle that the non-observance of provisions of the internal law of a State regarding competence to conclude treaties did not affect the validity of a consent

given in due form by an organ or agent of that State competent under international law to give such consent. Without that principle, there would be great risk and uncertainty, particularly since some countries did not even have written rules regarding the conclusion of treaties.

81. Nevertheless, taking into account the need for some flexibility in international relations, an exception could be admitted without compromising the principle, provided that the exception was strictly limited. His delegation therefore supported the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which required the violation to be not only manifest but also of fundamental importance.

82. The United Kingdom amendment (A/CONF.39/C.1/L.274) seemed to have a similar purpose, but it was inadvisable to refer to good faith in only one article of the draft because it could be inferred *a contrario* that the principle of good faith did not apply to the other articles. That point had been raised during the discussion on article 15.

83. The Polish delegation could not support the Iranian amendment (A/CONF.39/C.1/L.280), because it subordinated the possibility of invoking a violation of internal law to the official status of the individual who authorized a person to express the consent of the State, and it suggested that a Head of State could never act in contravention of the constitution of the State. The International Law Commission had pointed out in paragraph (10) of its commentary that it had admitted an exception having in mind past cases where a Head of State had concluded a treaty in contravention of an unequivocal provision of the constitution.

84. Mr. TEYMOUR (United Arab Republic) said he favoured the retention of article 43 as drafted by the International Law Commission, because, as the representative of Iraq had pointed out, it was the outcome of lengthy discussions between the supporters of two opposing legal doctrines.

85. Article 43 provided the necessary safeguards for developing countries and countries lacking internal legislation on the conclusion of treaties. His delegation could not support the amendment submitted by Pakistan and Japan, which would radically alter the meaning of the article. It was not opposed to the idea of a time-limit for invoking a violation, as proposed in the Australian amendment, provided that it was a reasonable one.

86. Mr. AMADO (Brazil) said that it was essential to use precise language. It might well be asked what a manifest violation was. The notion was so obscure that it would be necessary to consider the establishment of some body to provide a reply to that question. Violation came about as a result of tortuous and secretive intrigues; it seldom displayed itself openly. He was therefore against making an exception of manifest violation, which was the result of a compromise in the Commission which he could not accept; accordingly, he supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1).

87. Mr. MATINE-DAFTARY (Iran) announced that after hearing the various speakers, particularly the Swiss representative, he was withdrawing his amendment (A/CONF.39/C.1/L.280), but intended to revert to the matter at the second session in plenary. The Iranian delegation would abstain on the International Law Commission's text.

88. Mr. CARMONA (Venezuela) said that his delegation was withdrawing its amendment (A/CONF.39/C.1/L.252) and would vote for the International Law Commission's text.

89. The CHAIRMAN put the amendments before the Committee to the vote.

The amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) was rejected by 56 votes to 25, with 7 abstentions.

The Australian amendment (A/CONF.39/C.1/L.271/Rev.1) was rejected by 44 votes to 20, with 27 abstentions.

The amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1) was adopted by 45 votes to 15, with 30 abstentions.

The United Kingdom amendment (A/CONF.39/C.1/L.274) was adopted by 41 votes to 13, with 39 abstentions.

90. The CHAIRMAN said that article 43 would be referred to the Drafting Committee together with the joint amendment submitted by Peru and the Ukrainian SSR and the amendment submitted by the United Kingdom. [3]

91. Mr. BADEN-SEMPER (Trinidad and Tobago), explaining his delegation's vote for the United Kingdom amendment, said he hoped that the Drafting Committee would also consider whether the word "manifest" should be retained or deleted.

The meeting rose at 6.5 p.m.

[3] For resumption of discussion, see 78th meeting.

FORTY-FOURTH MEETING

Tuesday, 30 April 1968, at 11.00 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 44 (Specific restrictions on authority to express the consent of the State)

1. The CHAIRMAN invited the Committee to consider article 44 of the International Law Commission's draft. [1]

2. Mr. SEPULVEDA AMOR (Mexico) said that the Mexican amendment (A/CONF.39/C.1/L.265) was based on the suggestion by the Secretary-General in his comments on article 44 (A/6827/Add.1) that, in the circumstances of modern multilateral conventions, the full powers of a representative could hardly ever be brought to the

[1] The following amendments had been submitted: Mexico (A/CONF.39/C.1/L.265); Japan (A/CONF.39/C.1/L.269); Ukrainian SSR (A/CONF.39/C.1/L.287); Spain (A/CONF.39/C.1/L.288).