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factory, for it raised two questions: to what existing treaties was the convention to apply, and when had the principle in the Charter condemning the use of force become general international law? The first question would have to be decided in the final articles of the convention on the law of treaties. As for the second, the fourteen-State amendment could be interpreted as meaning that the principle stated in Article 2, paragraph 4, of the Charter antedated the Charter itself. It was difficult for the United States delegation to support an amendment which could be so interpreted and which was insufficiently precise to settle the issues it raised.

53. The Peruvian amendment (A/CONF.39/C.1/L.230) was not one of substance and could be considered after the other amendments had been disposed of, when the drafting of the article came to be examined.

54. With regard to the amendment submitted by Japan and the Republic of Viet-Nam (A/CONF.39/C.1/L.298 and Add.1), his delegation supported the first requirement, that the threat or use of force must have been reported to a competent organ of the United Nations, but thought it impossible to apply the second, namely, that the organ had failed to take the necessary action.

55. Mr. TABIBI (Afghanistan), speaking on behalf of the sponsors of the nineteen-State amendment (A/CONF. 39/C.1/L.67/Rev.1/Corr.1), said he wished to thank the many delegations which had supported it; they represented the majority of the participants in the Conference.

56. Some delegations, while recognizing that the text of article 49 was elastic enough to cover economic and political pressure as a ground for invalidity, had argued that the notion of economic and political pressure was vague and that the Committee should adhere to the International Law Commission's text. But if that notion was vague, the same was true of the notion of military pressure. The sponsors of the amendment were not seeking to introduce a new element into article 49, but merely to make the text more precise by wording which would be acceptable to the majority of States throughout the world; they were proposing the insertion of a reference to economic and political pressure, which in some cases was stronger than the threat or use of armed force.

57. The representatives of Australia and the United Kingdom had stated that Article 2, paragraph 4, of the United Nations Charter could only mean armed force and that, consequently, only armed force could be recognized in the context of article 49. But a reading of the text of the article and of the commentary was enough to show that the International Law Commission had had in mind not only Article 2, paragraph 4, but also all the other provisions of the Charter. In paragraph (3) of its commentary it had recorded the view of those members who had been in favour of an express reference to economic pressure, but it had concluded that the scope of the acts covered should be determined by interpretation.

58. The United Kingdom representative had relied on the seventh paragraph of the Preamble to the Charter, but had not referred to the eighth paragraph, which mentioned economic advancement, or to Article 1, paragraph 3. He had also cited Chapter VII of the Charter, in particular Articles 41 and 42, but had not mentioned the measures not involving the use of armed force which could be taken on the decision of the Security Council; those were precisely the measures which a State might use to procure the conclusion of a treaty and which were referred to in the amendment.

59. The Australian representative should not forget that great changes had taken place in the world since the adoption of the Charter, that the Charter itself had been amended several times, and that since the adoption of the " uniting for peace " resolution the interpretation of the peace-keeping role of the Charter had developed considerably.

60. At the San Francisco Conference, the Brazilian proposal to include an express reference to economic pressure had been rejected, but not because the Conference had refused to recognize economic pressure; if that had been so, the Charter would not have mentioned the economic and political measures referred to in Article 41. Furthermore, the importance of economic problems was recognized in the preamble and in many articles of the Charter, particularly in Chapters IX and X.

61. The sponsors of the nineteen-State amendment considered that the fourteen-State amendment (A/CONF. 39/C.1/L.289 and Add.1) was not, in principle, incompatible with their own, or with the Commission's text, and they would vote in favour of it.

62. With regard to proposals for conciliation, the sponsors of the nineteen-State amendment were willing to accept any reasonable suggestions. They did not wish to take advantage of their majority to impose their point of view on the minority, but they did ask it to try to understand their position and not to demand that they sacrifice their interests because the minority was powerful.

63. Mr. RIPHAGEN (Netherlands) said that informal consultations might help to solve the problem of article 49 in a manner acceptable to the whole Committee. The Netherlands delegation therefore proposed that article 49 and the amendments thereto be not put to the vote at that stage, but that informal consultations be held between representatives of the various groups with a view to reaching agreement on a resolution to accompany article 49, which would facilitate its adoption; the results of the consultations would be reported to the Committee not later than Monday evening, 6 May.

*It was so agreed.*[5]

The meeting rose at 6 p.m.

[5] For the resumption of the discussion on article 49, see 57th meeting.

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## FIFTY-SECOND MEETING

*Saturday, 4 May 1968, at 10.30 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 50* (Treaties conflicting with a peremptory norm of general international law *(jus cogens)*)

1. The CHAIRMAN invited the Committee to con-

sider article 50 of the International Law Commission's draft.[1]

2. Mr. JAGOTA (India) said that the purpose of the Indian amendment (A/CONF.39/C.1/L.254) was to incorporate the substance of article 61 in article 50 as a new paragraph 2. It would entail some consequential changes in articles 67 and 41, but would bring all the provisions on *jus cogens* together. However, as the Commission had arrived at the present placing of the articles with good reason, he would now withdraw the amendment, as well as the various consequential amendments (A/CONF.39/C.1/L.255, L.256, L.253), but hoped his delegation's suggestion would be considered in the Drafting Committee.

3. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the norms of *jus cogens* were those from which no derogation was permitted and which could only be modified by a subsequent norm of general international law having the same character. Treaties that conflicted with such norms were unlawful and must be regarded as void *ab initio*. The principle was recognized by the Commission and by many eminent jurists, such as those who had met at a conference on international law held in Greece in April 1966. However, there could be disagreement as to the nature of those norms, though everyone would admit that they included such principles as non-aggression and non-interference in the internal affairs of States, sovereign equality, national self-determination and other basic principles of contemporary international law and Articles 1 and 2 of the United Nations Charter.

4. The purpose of the amendment submitted jointly by Romania and the Soviet Union (A/CONF.39/C.1/L.258/Corr.1) was to clarify the wording of article 50, which must certainly be retained as it was one of the most important in the whole draft.

5. Mr. SUÁREZ (Mexico), introducing his delegation's amendment (A/CONF.39/C.1/L.266), said that it was more one of form than of substance and his delegation would support the International Law Commission's article 50.

6. It was not easy to formulate with all due precision a rule on the subject of *jus cogens*. The text as it stood involved a *petitio principii* when it stated that States were precluded from validly concluding a treaty in breach of a norm " from which no derogation is permitted ", in other words a norm that the parties could not modify by treaty. That remark was not intended as a criticism of the Commission; perhaps it was not possible to arrive at a better wording. Although no criterion was laid down in article 50 for the determination of the substantive norms which possessed the character of *jus cogens*—the matter being left to State practice and to the case law of international courts—the character of those norms was beyond doubt.

7. In municipal law, individuals could not contract out of legislative provisions which were a matter of public policy. In international law, the earliest writers, including the great Spanish forerunners and Grotius, had been deeply imbued with the principles of the then prevailing natural law. They had therefore postulated the existence of principles that were derived from reason, principles which were of absolute and permanent validity and from which human compacts could not derogate. Without attempting to formulate a strict definition suitable for inclusion in a treaty, he would suggest that the rules of *jus cogens* were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development.

8. There had always been principles of *jus cogens*. Although few in number at the time when inter-State obligations were equally few, they had been increasing since and would continue to increase with the expansion of human, economic, social and political relations. The norms of *jus cogens* were variable in content and new ones were bound to emerge in the future, for which provision was made in article 61. Others might cease in due course to have the character of *jus cogens*, as had happened in Europe in regard to the doctrine of religious unity and the law of the feudal system.

9. In view of the varying character of the rules of *jus cogens* it was essential to stress that the provisions of articles 50 and 61 did not have retroactive effect. The emergence of a new rule of *jus cogens* would preclude the conclusion in the future of any treaty in conflict with it; the effects already derived from earlier treaties, however, were not affected, in accordance with the general principle of non-retroactivity recognized in article 24, which the Committee had already approved. In that connexion, the provisions of article 67, paragraph 2 (*b*), were also relevant.

10. The purpose of the Mexican amendment (A/CONF.39/C.1/L.266) was simply to introduce into article 50 an express provision embodying the non-retroactivity rule, which had been recognized by the International Law Commission. He would not press for a vote on it, but would merely ask that it be referred to the Drafting Committee.

11. Mr. CASTRÉN (Finland) said that article 50 correctly stated an important principle, which must be retained in the draft. The Commission had formulated the article with great care and had rightly refrained from trying to list the different rules of international law which could be qualified as *jus cogens*.

12. If the article could be rendered more precise, he would certainly be the first to accept any such improvement. For instance, it should be emphasized in article 50 that *jus cogens* was concerned with fundamental rules which were universally recognized by the international community. But it was even more important to provide for a means for the impartial settlement of disputes about the conformity of the provisions of a treaty with *jus cogens*. The Belgian representative's suggestion about referring such problems to a committee of enquiry deserved careful examination. Alternatively, some arbitral or judicial procedure might be considered.

13. The Finnish amendment (A/CONF.39/C.1/L.293) sought to extend the application of the principle of the separability of treaty provisions to the cases covered

[1] The following amendments had been submitted: India (A/CONF.39/C.1/L.254); Romania and Union of Soviet Socialist Republics (A/CONF.39/C.1/L.258/Corr.1); Mexico (A/CONF.39/C.1/L.266); Finland (A/CONF.39/C.1/L.293); United States of America (A/CONF.39/C.1/L.302); Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add. 1 and 2); United Kingdom of Great Britain and Northern Ireland (A/CONF.39/C.1/L.312).

by article 50, for reasons of flexibility. Thus, if an important treaty dealing with, say, human rights or the treatment of prisoners of war contained only a few provisions incompatible with *jus cogens* which were separable from the remainder of the treaty, it would be preferable, instead of the whole treaty falling to the ground, as would be the case under the present provisions of article 50, simply for those particular provisions to be regarded as void.

14. He entirely agreed that the principle of the integrity of a treaty should prevail in the cases regulated by articles 48 and 49, but the case dealt with in article 50 was different. A treaty concluded under pressure would fall under the provisions of articles 48 and 49 and become a total nullity, but he considered that the principle of separability should apply in the case of article 50, despite the criticism levelled against his delegation's proposal concerning article 41. Article 50 started from the hypothesis that the partners had freely concluded the treaty but had violated some peremptory norm of *jus cogens* which harmed the interests of the international community, of a third State, or of individuals.

15. Mr. SWEENEY (United States of America) said that a State could not seek release from a treaty by suddenly adopting a unilateral idea of *jus cogens* in its international rules, and could not pretend to assert against other States its own opinion of the higher morality embodied in *jus cogens*.

16. The United States amendment (A/CONF.39/C.1/L.302) accepted the principle of *jus cogens* and its inclusion in the convention. The amendment did not seek to change the conception of *jus cogens* adopted by the Commission, and maintained the very fundamental proposition of the Commission that *jus cogens* included rules from which no derogation was permitted; it did not seek to go beyond the Commission's text. In its commentary, the Commission had given examples of what was covered by *jus cogens*, such as treaties contemplating or conniving at aggressive war, genocide, piracy or the slave trade, but had decided against the inclusion of examples in the article itself, and his delegation abided by that decision.

17. The amendment tried to make the text more explicit by stating that individual States and groups of States should have a voice in formulating *jus cogens*, and that regard must be had in determining what *jus cogens* was to the will expressed in the national and regional legal systems of the world. A rule of international law was only *jus cogens* if it was universal in character and endorsed by the international community as a whole. Unless that point were made explicit, the Commission's text would be open to abuse.

18. Mr. EVRIGENIS (Greece) said that article 50 enunciated a principle which was of the essence of the legal order and which indicated the boundaries that could not be violated by the contractual will. There was universal recognition of the existence of a *jus cogens* corresponding to a given stage in the development of international law, but there were still some doubts about its content. Two methods of definition seemed to be possible; either a casuistical definition or a general and abstract definition. The first method was hardly practicable, for it would entail sifting a theoretically unlimited number of rules which, moreover, were customary rules. Certain rules of positive international law were however universally recognized as rules of *jus cogens*, for instance the rules on the prohibition of the threat or use of force, and they were mentioned as illustrations in the International Law Commission's commentary. But it would be inexpedient to list them, since an enumeration of the rules would doom *jus cogens* to ossification.

19. The Commission had followed the other method, that of a general and abstract definition. The concept of *jus cogens* as set out in article 50 consisted of three elements: the rule in question must be a rule of general international law, it must be one from which no derogation was permitted and it must be a rule which could be modified only by a subsequent norm having the same character. In his view the third element led to a vicious circle, for the fact that a rule of *jus cogens* could be modified only by a rule " having the same character " could not be one of the conditions governing the " character " of the rule. On the other hand, the two remaining elements in the definition seemed to express the essence of the concept. In particular, prohibition of derogation from the rule was the indispensable, if not the sole, element of the concept of *jus cogens* in municipal law. National *jus cogens* prevailed over the contractual will of individuals, whilst international *jus cogens* defined the boundaries of the contractual will of States. Viewed from that angle, the question was merely one facet of the problem of the hierarchy of the rules of international law. A *jus cogens* rule in the meaning of article 50 in principle prevailed over a treaty. But there was an exception: the treaty would prevail if it was a general multilateral treaty. The essential element of international *jus cogens* therefore lay in the universality of its acceptance by the international community. Peremptory international law was expressed in rules from which by general consent no derogation was permitted. Although that aspect was mentioned in article 50, it was necessary that more stress should be laid upon it.

20. The amendment which his delegation had submitted jointly with those of Spain and Finland would have precisely that effect. Once adopted, article 50 would be a touchstone for testing the validity of treaties. Accordingly, the rules to which it referred must be acceptable as law to the international community as constituting an international public order, and they must be put into operation by means of procedures to be set out in article 62 of the draft.

21. Mr. YASSEEN (Iraq) said that the contents of article 50 were an essential element in any convention on the law of treaties. The article expressed a reality by setting forth the consequences in the realm of treaty law of the existence of rules of *jus cogens*. The existence of such rules was beyond dispute. No jurist would deny that a treaty which violated such rules as prohibition of the slave-trade was null and void. Article 50, however, did not purport to deal with the whole broad problem of the rule of *jus cogens*: its sole purpose was to set forth the effect of those rules on treaties.

22. One effect was to limit the scope of the contractual autonomy of States; that limitation had some analogy with that which domestic law imposed on private persons, with respect to freedom of contract, in the interests of

public policy. The most important effect, however, was that the existence of *jus cogens* rules created a hierarchy of international legal norms. It could be said that some rules of international law were more binding than others, or that some were more imperative than others; so that a lesser norm could not derogate from a greater norm.

23. Treaties were the conventional methods of creating international legal norms; but States could not, by treaty, override those higher norms which were essential to the life of the international community and were deeply rooted in the conscience of mankind. A treaty which violated any such " peremptory norm " was rightly declared by article 50 to be null and void. State practice made it possible to identify those peremptory norms. However, not all rules from which no derogation was possible had the character of *jus cogens*. If a number of States agreed in a treaty to preclude the parties from contracting out of certain clauses, the violation of that prohibition in a later treaty did not make the offending treaty void: it simply involved the responsibility of the State committing the breach.

24. During the discussion on earlier articles, misgivings had been expressed because the international community did not have the necessary institutions for the prompt and clear-cut settlement of any disputes that might arise from the provisions of those articles. The same objection had now been made to article 50. It was true that the international community, especially in respect of its institutions, was not as developed as the domestic legal order: there was no court with jurisdiction for the settlement of all inter-State disputes, though in theory it would be an admirable institution, and no compulsory arbitration; the general opinion was against it. However, the international legal order had functioned so far with the existing means for the pacific settlement of disputes, which of course included the option to resort to the International Court of Justice and to arbitration.

25. It was accordingly dangerous to subordinate the development of the substantive rules of the international legal order to the development of its institutions. If the absence of institutional machinery were to be invoked as a ground for not formulating substantive rules which were already part of contemporary international law, the development of the international legal order as a whole would be placed in jeopardy.

26. He was not suggesting that the present Conference should refrain from considering institutional problems relating to the settlement of disputes. His delegation was fully prepared to join in the search for adequate solutions to such problems as those dealt with in article 62, but that search should not be allowed to impede the formulation of substantive rules. The development of substantive law had often paved the way for institutional development.

27. For those reasons, his delegation supported the retention of article 50; amendments of a drafting character should be referred to the Drafting Committee.

28. Mr. MWENDWA (Kenya) said that, by including in the draft a provision on *jus cogens*, the International Law Commission had at one and the same time recognized a clearly existing fact and made a positive contribution to the codification and progressive development of international law.

29. The fact that in the domestic law of most, if not all States, contracts concluded for certain purposes were void, was an adequate justification for including article 50. Moreover, the term " impossibility of performance " hitherto used in the law of treaties left a gap which the concept of " *jus cogens* " would fill. The law of treaties had been clear on objective impossibility, as in the case of the extradition of a person who had died, and also on practical impossibility, as in cases of *force majeure*, but not on legal impossibility. Express provision for *jus cogens* in the convention on the law of treaties would clarify that area of international law. At a time when the international community was developing mutual co-operation, understanding and inter-dependence, the will of the contracting States alone could not be made the sole criterion for determining what could lawfully be contracted upon by States.

30. Article 50 would strengthen the weaker aspects of traditional international law, which had to a large extent been founded on the concept of sovereignty pure and simple. The concept of *jus cogens* would help to stabilize fundamental norms of existing international law and thus to maintain legal security in the international community. His delegation therefore strongly supported article 50 in the direct, simple and brief form in which it had been drafted by the International Law Commission.

31. Although it was neither feasible nor desirable to attempt an enumeration of the rules of *jus cogens*, the existence of certain of those rules was readily acknowledged by all. No one would dispute that a treaty contemplating the use of force contrary to the Charter should be void. In its Advisory Opinion in the *Reservations to the Convention on Genocide* case, the International Court of Justice itself had referred to principles which were recognized by all nations " as binding on States, even without any conventional obligation ".[2] The suggestion that the body of law " concerning the protection of human rights may be considered to belong to the *jus cogens* " had also been made in the dissenting opinion of Judge Tanaka in the *South West Africa, Second Phase* case.[3] The wise decision of the International Law Commission to refrain from giving examples in article 50 would make for free development of the law by inter-State practice and interpretation by competent international bodies.

32. The fear had been expressed that the inclusion of the rule in article 50 might encourage States to seek release from treaty obligations, and also that a rule which lent itself to subjective evaluation might impair treaty stability. However, the benefits to be derived by the international community from the rule would justify taking those risks.

33. He agreed with the representative of Iraq that the issue should not be confused with that of machinery for the settlement of disputes. In domestic law, the examination of such procedural questions was not a prerequisite for enacting substantive legislation.

34. Mr. ALVARES TABIO (Cuba) said that article 50 represented an important contribution to the progressive development of international law and his delegation

[2] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[3] *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 296.

strongly supported it. Despite the difficulty of identifying rules of *jus cogens*, no one could today dispute the peremptory character of certain norms, which had the effect of overriding any other rules that came into conflict with them. That result obtained even where the lesser rule was embodied in a treaty, as it was not permissible to contract out of a peremptory norm of general international law. Although it was not easy to agree on an enumeration of the rules of *jus cogens*, they did undoubtedly include the Purposes and Principles of the United Nations set forth in Articles 1 and 2 of the Charter and in its Preamble, not only by virtue of the content of those provisions but also by virtue of Article 103, which specified that Charter obligations prevailed over " obligations under any other international agreement ".

35. Difficulties of implementation had been invoked as a ground for not formulating the rule in article 50 without first establishing safeguards against abuse. That argument could be disregarded, since an abuse was possible in regard to any rule of substantive law.

36. The essential difference between *jus cogens* rules and other rules of international law lay not in their source but in their content and effects. It was true that many *jus cogens* rules had their origin in the United Nations Charter or in other general multilateral treaties, but some of them still rested on customary international law. The text of article 50 reflected the dynamic character of the rules of *jus cogens*, in that it did not embody an enumeration of those rules.

37. His delegation could not accept the Mexican amendment (A/CONF.39/C.1/L.266). A treaty which conflicted with an existing rule of *jus cogens* was void *ab initio*; that point did not need any further elaboration. If, however, the purpose of the amendment was to provide that nullity should not operate *ex tunc*, it should be categorically rejected. A decision which found a treaty to be null and void because it conflicted with a rule of *jus cogens* was purely declaratory; the void treaty was a nullity from the start and the decision would merely acknowledge that fact. Nor could his delegation accept the proposition that article 50 should not affect treaties already concluded before its provisions entered into force. No breach of the principle of non-retroactivity was involved where a legal norm was applied to existing questions or matters, even if they had originated earlier.

38. His delegation opposed the United States amendment (A/CONF.39/C.1/L.302), which would subordinate the rules of *jus cogens* of international law to " national and regional legal systems ". That approach would enable a State to thwart any rule of *jus cogens* by invoking its domestic legislation.

39. His delegation also opposed the Greek amendment (A/CONF.39/C.1/L.306 and Add.1), which would introduce new elements liable to lead to complications, and the Finnish amendment (A/CONF.39/C.1/L.293), which would implicitly delete paragraph 5 of article 41, on which the Committee had not yet taken a decision. In any event, the International Law Commission had advisedly precluded separability in the case of a treaty which violated a rule of *jus cogens*.

40. The Indian amendment (A/CONF.39/C.1/L.254) would improve the text by placing the provisions of article 61 in their proper context but, at the present stage of the discussion, it might give rise to difficulties.

41. The useful drafting improvements in the amendment by Romania and the USSR (A/CONF.39/C.1/L.258) should be referred to the Drafting Committee.

42. Mr. FATTAL (Lebanon) said that, for the first time in history, almost all jurists and almost all States were agreed in recognizing the existence of a number of fundamental norms of international law from which no derogation was permitted, and on which the organization of international society was based. The norms of *jus cogens* had a long history but had crystallized only after the Second World War. In spite of ideological difficulties, a shared philosophy of values was now emerging, and the trend had been sharply accelerated by the growth of international organizations.

43. *Jus cogens* was a body of general peremptory norms from which no derogation was permitted. The norms generally regarded as being part of *jus cogens* fell into two groups: the first, based on morality, comprised the most important rules of humanitarian law, such as the prohibition of slavery or genocide, and the wartime treatment of prisoners and wounded and of the civil population; the second group comprised the most important rules of international constitutional law, in particular, those listed in Article 2 of the United Nations Charter. Unlike certain delegations, his delegation excluded from that category the principle of good faith; it did not answer the definition in article 50 and could not be modified by a new peremptory rule of general international law.

44. It was curious that neither the International Law Commission nor jurists in general had managed to find a modern equivalent for the Latin term *jus cogens*. That only showed how imprecise were the norms it covered. The International Law Commission had chosen an obscure term in order to denote an obscure notion. Recognition of the existence of *jus cogens* was the first step towards the establishment of an embryonic universal " public order ". He had not been convinced by the arguments against the use of that term, which he preferred to the term *jus cogens*.

45. Several delegations considered that *jus cogens* was dangerous, owing to the lack of an appropriate tribunal with jurisdiction to settle any disputes to which it might give rise. It was argued that an article such as article 50 would give States a pretext for evading their obligations unilaterally by alleging some violation of a peremptory norm. That was nothing new; any norm of international law could be used for such a pretext. The International Law Commission had not been able to avoid the difficulty. The article 62 it proposed was the most disappointing in the draft. Its reference to Article 33 of the Charter was not reassuring. The problem could not be solved so long as certain States continued to reject a compulsory jurisdiction for the settlement of disputes.

46. The Conference might be on the wrong track. It was making a great effort to develop the principles of international law and at the same time an equal effort to prevent positive law from coming into being. Legal technique was dangerously incomplete if it had no corresponding jurisdictional function. It was no use curbing the autonomy of the contractual will of a State if it was then left free to decide the legality or illegality of its legal instruments unilaterally and subjectively; that was either short-sightedness or juridical demagogy.

47. Article 62 should provide for an organic procedure for the settlement of disputes arising out of Part V of the draft. Legal policy, like all policy, meant a choice of the lesser evil. His delegation would therefore vote for article 50 as it stood, unless a more satisfactory definition of *jus cogens* could be found. On the other hand, it strongly urged that article 62 should be amended and that the vote on article 50 should be combined with that on article 62, which was the keystone of the whole edifice.

48. Mr. OGUNDERE (Nigeria) said that the idea of minimum concepts which could not be derogated from by parties *inter se* had developed from the norm of the law of nature, later known in the Digests as *jus publicum*, in contrast to *jus dispositivum* from which the parties might derogate by agreement *inter se*. *Jus publicum* was rooted in municipal law and in its later developed form became known as " public policy ", or *ordre public*. The concept of *jus ad bellum*, generally recognized in international relations before the First World War, had necessarily restricted the growth of the idea of *jus cogens* in international law at a time when international morality was something unknown. The Covenant of the League of Nations had, however, signalled a change of direction. In the period between the two world wars, jurists had recognized that the international legal order, like any municipal legal order, must contain rules of *jus cogens* if a stable world order was to be established. International morality had become accepted as a vital element of international law, and eminent jurists had affirmed the principle of the existence of *jus cogens*, based on the universal recognition of an enduring international public policy deriving from the principle of a peremptory norm of general international law. In more recent times, the General Treaty for the Renunciation of War, of 1928, generally known as the Briand-Kellogg Pact, and the Charter of the United Nations had established beyond doubt that rules of *jus cogens* were recognized as part of international law.

49. The Nigerian delegation held that *jus cogens* was an evolutionary, not a revolutionary, juridical concept and therefore agreed with the remarks of the International Law Commission in paragraph (4) of its commentary to article 50. The rule was best stated as the International Law Commission had stated it, because, as Sir Gerald Fitzmaurice had written in his commentary to article 17 of the 1958 draft, "*jus cogens* rules involve not only legal rules but considerations of morals and international good order ".[4] Some States had expressed concern about the acceptance of *jus cogens* in article 50, but the International Law Commission had provided a remedy in article 62, by laying down rules for the invalidation of a treaty on the ground that it was contrary to the rules of *jus cogens* as well as on other grounds.

50. The Nigerian delegation would have to vote against the Finnish amendment (A/CONF.39/C.1/L.293) and preferred the Commission's text to the Mexican amendment (A/CONF.39/C.1/L.266). With regard to the latter, the Commission had made it quite clear in paragraph (6) of its commentary that the provision was non-retroactive. The amendment by Romania and the USSR (A/CONF.39/C.1/L.258) seemed to be of a purely drafting nature and could therefore be referred to the Drafting Committee. The United States amendment (A/CONF.39/C.1/L.302) raised another difficulty, since it linked *jus cogens* in international law with municipal and regional legal systems; the Nigerian delegation accordingly could not support it. The Greek amendment (A/CONF.39/C.1/L.306) was substantially of a drafting nature and should be referred to the Drafting Committee; if, however, it were put to the vote, the Nigerian delegation would vote against it, as it preferred the International Law Commission's text.

51. Mr. MEGUID (United Arab Republic) said it was impossible to deny the importance of the rules of *jus cogens* in international law. As previous speakers had acknowledged, they did exist and they must be respected.

52. The International Law Commission's text was well-conceived, clear and well-balanced, but might be improved. The amendments submitted jointly by the delegations of the USSR and Romania (A/CONF.39/C.1/L.258/Corr.1) and by Greece and Finland (A/CONF.39/C.1/L.306 and Add.1) were of a drafting nature. The Indian amendment (A/CONF.39/C.1/L.254) raised no problem and might also be considered a drafting amendment. Those by Mexico, Finland and the United States of America (A/CONF.39/C.1/L.266, L.293 and L.302) raised points of substance but retained the principle. His delegation would support the Commission's text; the drafting amendments should be referred to the Drafting Committee.

53. Mr. BARROS (Chile) said that, although *jus cogens* was a rule whose importance no one denied, it was also a fairly recent notion both in doctrine and in international jurisprudence. Indeed, a member of the International Law Commission had admitted that it was in the Commission itself that he had learnt of the existence of the term, and then only in 1962. Undoubtedly, however, the idea had existed from very ancient times, without being precisely defined, that there was a body of norms placing obligations on States which took precedence over treaty obligations. The various schools of thought did not agree on the origin of those norms; some held that it lay in natural law, others that it came from the will of States as expressed in treaties or in custom.

54. The content of *jus cogens* had not been defined and was not easily definable. The Chilean delegation shared the view expressed in 1963 by Mr. Yasseen in the International Law Commission that peremptory norms did exist but were hard to identify and apply.[5] That threw some light on the difficulties inherent in norms of *jus cogens*.

55. Further difficulties arose over the effects of *jus cogens*. The International Law Commission's draft of article 50 stated that a treaty was void if it conflicted with a peremptory norm of general international law from which no derogation was permitted. That immediately raised difficulties of interpretation. Recent cases showed that the principle could be invoked, and had been invoked, with slight variations, for ideological reasons or merely for reasons of foreign policy. Thirty years previously, the world had suffered from what had begun as an invocation of *jus cogens* and had subsequently turned out to be a use of force in the interests of a personalist policy. Sir Hersch Lauterpacht had issued a warning

[4] *Yearbook of the International Law Commission, 1958*, vol. II, p. 41.

[5] *Yearbook of the International Law Commission, 1963*, vol. I, p. 63.

that the possibility of invoking the invalidity of immoral treaties was a constant invitation to unilateral evasion of an irksome obligation. It was true that Lauterpacht seemed to have changed his view of *jus cogens* after the horrors of the Second World War, but it was certain that he had continued to hold that the problems deriving from the incompatibility of the terms of a treaty with the principles of international law should be brought before an international tribunal.

56. More recently, Schwarzenberger had drawn attention to the perils of *jus cogens* and of the formulation of article 50. In a well-known article [6] he had written that " apparent ' progressiveness ' can readily be made to serve sectional interests not apparent at first sight ". And he had gone on to warn that the " public action " of article 50 would enable any State to invoke the invalidity of a treaty and would " provide splendid opportunities for the expression of moral indignation by third parties on matters which, otherwise, would clearly not be their business ".

57. But it was not just in the theoretical writings of jurists that anxiety had been displayed over the scope of *jus cogens*. In the International Law Commission itself, in 1963, there had been an interesting debate on the question of the inclusion of *jus cogens* in the draft convention on the law of treaties. Mr. Tunkin had said that the text of the article should mention " unequal treaties ", even though the case was already covered in general terms, " since unequal treaties were contrary to rules of international law having the character of *jus cogens* .[7] Mr. Jiménez de Aréchaga had disagreed and had added that " from the point of view of international relations, the introduction of the concept of unequal treaties would be fraught with danger. In Latin America, for example, many States would be able to claim that their various frontier treaties had resulted in a manifest inequality of obligations " .[8] Mr. Bartoš and Mr. Yasseen had claimed that even *rebus sic stantibus* was a rule of *jus cogens*, but Mr. Tunkin had disagreed. That debate had shown how widely opinions differed over the scope of the article, even within the International Law Commission which had drafted it.

58. Article 50 as at present worded seemed to go round and round. It began by saying that a treaty was void if it conflicted with a peremptory norm of general international law from which no derogation was permitted, but it then went on to say that the norm from which no derogation was permitted could itself be modified by a subsequent norm of general international law having the same character. That sounded like a contradiction in terms. The only help given by the commentary was an indication that what it meant was that those peremptory norms from which no derogation was permitted might be modified by general multilateral treaties. If article 50 in its present form were debated in parliament, it would undoubtedly meet with the objection that it seemed to state that a treaty which violated *jus cogens*, a norm from which no derogation was permitted, was void unless it was a general multilateral treaty which conflicted with a norm of *jus cogens*. That was what he had meant by saying that the article seemed to go round and round.

59. It might be argued that that was merely a matter of drafting, and he wished that were the case, but there were more serious matters. Throughout its debates, the Committee had been careful to try to find language which would make the rules adopted as specific as possible, in order to prevent any threat to the stability of treaties from creeping in through any looseness of wording. And yet now, after all that precaution, it seemed to wish to include a rule that could be invoked for every sort of purpose —for offensive treaties, which were merely another way of looking at defensive treaties, for supra-national economic treaties, for *rebus sic stantibus*, and so on— and to give the effect of absolute nullity to violations of rules of *jus cogens* which were indeterminate and ill-defined.

60. Much had been made of the overwhelming majority in the International Law Commission in favour of the rule and also of governments' reactions to it. But those reactions were only to be expected. If the Committee were asked to vote on democracy, it would vote unanimously in favour of it, but it would be found later that there were all sorts of different interpretations of individual votes. Something of the same sort was doubtless true of the reaction, or lack of reaction, of most governments to article 50.

61. The Chilean delegation did not deny absolutely the existence of *jus cogens*; in the case of slavery or piracy, it would be inconceivable to revert to primitive forms which were rejected by the conscience of the international community. But it must be made clear that representatives of governments were in duty bound to analyse article 50 carefully, to improve its wording and, above all, to define with the utmost precision a ground of absolute nullity which was open to so many different interpretations. Nor must the Committee forget that it was essential to hedge the rule about with the most stringent procedural safeguards, since *jus cogens* could be invoked not only by the parties to a treaty but—what was far more dangerous—by any State.

62. The Chilean delegation would support any attempt to reformulate article 50 so that it combined the higher juridical interests of the community of States with the international stability to which the Conference aspired.

The meeting rose at 1.5 p.m.

[6] "International *jus cogens*", *Texas Law Review*, March 1965, p. 477.

[7] *Yearbook of the International Law Commission, 1963*, vol. I, p. 69, para. 28.

[8] *Loc. cit.*, p. 71, para. 47.

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## FIFTY-THIRD MEETING

*Monday, 6 May 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 50* (Treaties conflicting with a peremptory norm of general international law (*jus cogens*) *(continued)* [1]

1. Mr. MIRAS (Turkey) pointed out that the notion of the peremptory rule of general international law, called

[1] For the list of the amendments submitted, see 52nd meeting, footnote 1.