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## **53rd meeting of the Committee of the Whole**

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

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<sup>6</sup> 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*.”<sup>7</sup> 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”.<sup>8</sup> 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.

#### 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)<sup>1</sup>

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

<sup>6</sup> “International *jus cogens*”, *Texas Law Review*, March 1965, p. 477.

<sup>7</sup> *Yearbook of the International Law Commission*, 1963, vol. 1, p. 69, para. 28.

<sup>8</sup> *Loc. cit.*, p. 71, para. 47.

<sup>1</sup> For the list of the amendments submitted, see 52nd meeting, footnote 1.

*jus cogens* in the draft, and the terms used in articles 50 and 61 codifying that notion, were entirely new. They formed part of the cases of invalidity contained in Part V which the International Law Commission had borrowed from the private law of contract. Thus the International Law Commission had transposed from civil law to the law of treaties all the grounds of invalidity existing in the law of contract, except cases in which the contract was burdensome (*lésion*).

2. Such borrowings might add to and promote the development of international law, but on two conditions. First, the rule must lend itself to such transposition, and second, it was essential to take certain precautions.

3. The similarity of settings was an essential condition which assumed particular importance when transferring rules of internal law to international law. An international treaty was a complicated act that differed basically from the simple contract in private law.

4. The commentary to articles 50 and 61 was not sufficiently explicit concerning the existence of *jus cogens* in international law. It asserted that, although opinions were divided in doctrine, the view which denied the existence of *jus cogens* in international law had become increasingly difficult to sustain, that the law of the Charter concerning the prohibition of the use of force presupposed the existence of *jus cogens*, that the emergence of rules having the character of *jus cogens* was relatively recent and that there was as yet no criterion by which to identify a general rule of international law as having the character of *jus cogens*.

5. Basing itself on those premises, the International Law Commission had decided to include articles on *jus cogens* and to leave it to State practice and the jurisprudence of international tribunals to determine the "full content of this rule".

6. The foregoing remarks showed that the Conference was dealing, not with a well-established rule, but with a new rule by means of which an attempt was being made to introduce into international law, through a treaty, the notion of "public policy"—*ordre public*. The intention was to establish a hierarchy of juridical norms. Such a hierarchy presupposed a hierarchy of sources in law; but the sources of international law were sovereign and equal States. Unlike internal law, international law had no legislator who imposed his orders. Treaty rules came into being through the consent of States, to which, moreover, the contents of the rule must be known. What could be done in the present state of international law was to establish through a convention the priority of certain specific rules, as first the Covenant of the League of Nations and then the United Nations Charter had done.

7. But such treaty priority differed from the notion of public policy under internal law, for only a legislator having no need for the consent of subjects of law could decree that a rule was of the character of public policy and that its violation would entail nullity. Moreover, the notion of legality in internal law was closely linked to the existence of a court. But the procedure provided for in article 62 contained a reference to Article 33 of the Charter, which was one of the weak points of that instrument, as it merely enumerated methods of settling disputes, without establishing any obligation to use them. The element of assessment was not a question of simple

procedure but an essential element in any ground of invalidity.

8. Accordingly, by introducing into international law a rule borrowed from civil law without adapting it to the particular conditions of the international setting and by cutting out the safeguards it had in internal law, the International Law Commission had submitted a text that opened the door to all kinds of abuse. Consequently, his delegation regretted that it was unable to support the retention of articles 50, 61 and 62, which, as drafted, were calculated to undermine the stability of treaties and create confusion in the international sphere.

9. Mr. COLE (Sierra Leone) said that he strongly supported the rule laid down in article 50 of the draft. He was pleased to see that the Committee did not have before it any proposal for the deletion of that very important rule, which represented a logical step in the progressive development of international law. It provided a golden opportunity to condemn imperialism, slavery, forced labour and all practices that violated the principle of the equality of all human beings and of the sovereign equality of States, by affirming the peremptory character of the rules of international law concerning fundamental human rights, the principle of self-determination and all the inviolable principles of the Charter, embodied, in particular, in Articles 2, 33, 51 and 103.

10. It had been objected that article 50 might lend itself to abuse, since it left everybody free to admit or deny the imperative character of any particular rule of international law, in default of the institution of the compulsory jurisdiction of the International Court of Justice or of any other tribunal. All rules of international law could give rise to abuse. But that was not a sufficient reason for renouncing codification and the progressive development of international law; the establishment of a compulsory machinery for the settlement of disputes was not necessarily either the best solution or in any case an absolute condition for the adoption of the rules laid down in the draft. Few States had accepted the procedure for the compulsory settlement of disputes provided for in the Optional Protocols to the Vienna Conventions of 1961 and 1963. That showed that the eagerness of certain delegations to make the compulsory settlement of disputes a condition for including certain rules in the convention was perhaps only a pretext.

11. In view of the circumstances and in particular of the profound shock received by the international community as a result of the judgement of the International Court of Justice in the South West Africa case, from which it had not yet recovered, it seemed useless, at the present stage, to press for the inclusion in the convention of a system for the compulsory settlement of disputes. That would indeed be the ideal solution, but in the present circumstances it would be totally unrealistic. The delegation and Government of Sierra Leone believed that States should settle their disputes by peaceful means. That was the positive and logical corollary to the prohibition of the threat or use of force. Provision should be made for a system that would make for an objective, prompt and just settlement of a dispute, based on the consent of the parties, and adapted to the circumstances and nature of the case, always bearing in mind the obligation of good faith that was incumbent on all States in their treaty relations.

Those requirements were amply met in article 62 of the draft.

12. With reference to the amendments, he supported the Mexican proposal (A/CONF.39/C.1/L.266), which expressly confirmed that article 50, as was clearly indicated in the commentary, should not have retroactive effect. He also supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which improved the text. On the other hand, he was not in favour of the Finnish amendment (A/CONF.39/C.1/L.293), as he considered that the violation of a peremptory rule of international law was such a serious matter that it should lead to the invalidation of the whole of the treaty; it was open to the parties concerned to conclude a new agreement. He would vote on the other amendments in the light of the comments which he had made.

13. Mr. DADZIE (Ghana) said that *jus cogens* was an essential and inherently dynamic ingredient of international law. The debate should prove that such was the general opinion.

14. The rules governing relationships between States did not spring from the fertile imaginations of professors, legislators or government officials. To be accepted and respected, they had to be based on the philosophical and ethical conceptions of the society for which they were intended and keep pace with its constant evolution.

15. Although the notion of *jus cogens* had appeared only recently in the writings of the publicists, *jus cogens* itself had existed in international law since the time of the most primitive societies. The international law of past eras might not have prohibited aggressive wars, genocide or slavery, but neither had it sanctioned every act of international banditry.

16. In the twentieth century, some of humanity's most bitter experiences had led it to recognize the peremptory character of an ever-increasing number of rules, such as the principles of self-determination and the sovereign equality of States, and the prohibition of genocide and slavery and its bastard son, racial discrimination.

17. His delegation thought the rule in article 50 eminently desirable and approved it unreservedly. Some had claimed, however, that article 50 might give rise to abuse and undermine the stability of treaty relations between States because it failed to define and enumerate peremptory norms.

18. With regard to definition, he endorsed what the Iraqi representative had said at the 967th meeting of the Sixth Committee: "That was a theoretical point of general international law and had no place in a draft on the law of treaties".<sup>3</sup> As to the enumeration of the rules constituting *jus cogens*, his delegation considered it unnecessary, for the indisputable reasons set forth in paragraph (3) of the commentary to article 50.

19. Interpretations might vary, of course, but the peremptory nature of a rule would normally be obvious. The rule would therefore be recognized as such by a sufficient majority for it to be accepted and respected. Moreover, the customary rules of international law, which had been established by a few, usually the most powerful, States, whose ideas they reflected, had nevertheless been recognized by new States. Likewise, it was sufficient if *jus*

*cogens* represented the preponderant will of the community of States. Unanimity of interpretation was unnecessary.

20. His delegation was therefore strongly opposed to anything likely to weaken article 50; its attitude towards the amendments would be based on his statement.

21. Mr. RATSIMBAZAFY (Madagascar) said he was aware of the far-reaching nature and complexity of the problem involved in the notion of *jus cogens*. He had no doubt that once the notion was established and recognized as such, it would become increasingly important in the law and life of the international community. His delegation had been struck, however, by the vagueness of the notion, despite its proponents' endeavours to clarify it, particularly at the Lagonissi Conference, held in April 1966 under the auspices of the Carnegie Endowment.

22. Peremptory norms or superior rules of law prohibiting certain acts rebuked by the conscience of mankind could, of course, be found in contemporary international law, particularly in the principles laid down in the United Nations Charter. Some jurists attempted to define those rules according to their effects. In his delegation's opinion their peremptory character depended on their content, but no criteria yet existed for determining that content with precision.

23. Another criticism which might be levelled against the theorists of *jus cogens* was the absence of any jurisdiction or sanction, because article 62 referred only to the means indicated in Article 33 of the Charter, which relied on the goodwill of the parties.

24. The notion of *jus cogens* was not without some danger, in so far as it implied the superiority of certain provisions of the Charter over others, and also because such a theory seemed to involve some kind of arbitrary "growth" of international law, which could only be based on subjective and unilateral interpretation. The nullity of international instruments would thus to some extent be left to the goodwill of the parties. The notion of *jus cogens* might therefore seriously undermine the traditional principle of the rule *pacta sunt servanda*.

25. There could be no question of denying the existence of *jus cogens* in such a highly organized structure as contemporary society, in which good faith was the rule. But the rules reflecting that notion, their scope and the competent jurisdiction in the event of disputes, ought to be defined more clearly. Any amendment to that end would have the support of the Malagasy delegation.

26. Mr. RUIZ VARELA (Colombia) said that the existence of certain general principles of international law was recognized by doctrine, positive law and the practice of States, and that those principles, which had a firm moral basis in what had been the *jus gentium* of the Romans, had become the rules of the universal legal conscience of civilized countries. However, divergent interpretations arose in any attempt to enumerate those principles. With regard to the peremptory rules of international law or *jus cogens*, the Colombian delegation believed that in principle the entire world recognized the existence of a public international order consisting of rules from which States could not derogate. The question arose, however, who would define that brief code of peremptory rules and decide whether a new rule of that kind had emerged.

<sup>3</sup> See document A/CONF.39/5, under article 50.

27. Should that task be entrusted to an independent body, to enable the provisions concerning *jus cogens* to become effective? If so, the International Court of Justice would offer the best safeguards against an arbitrary decision. At all events, the procedure prescribed in article 62 seemed inadequate.

28. With regard to the amendments submitted, his delegation was opposed to combining articles 50 and 61 into one article, as proposed in the Indian amendment (A/CONF.39/C.1/L.254), for they dealt with two quite separate situations. It regretted that it could not support the Finnish amendment (A/CONF.39/C.1/L.293) either, because it regarded separability as inapplicable to a treaty which was void *ab initio* in virtue of article 50.

29. On the other hand, it supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which gave greater prominence to the character and legal nature of peremptory rules. It also supported the Mexican amendment (A/CONF.39/C.1/L.266), which it did not consider superfluous although the non-retroactivity of articles 50 and 61 was already affirmed in the International Law Commission's commentary and emphasized by article 67.

30. His delegation favoured the amendments submitted by the United States (A/CONF.39/C.1/L.302) and by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), which clarified the notion of a peremptory norm by requiring it to be generally recognized as such.

31. Lastly, the United States amendment justifiably deleted the concluding portion of article 50, since the idea it contained was already expressed in article 61.

32. Mr. NAHLIK (Poland) said he thought article 50 showed contemporary international law to be more orderly and better balanced than "traditional" international law. His delegation was glad to find that the participants in the Conference seemed to agree that rules of *jus cogens* existed in international law. The objections of the Turkish representative in that respect seemed largely based on a misunderstanding. The hierarchy of rules in contemporary international law, which article 50 expressed, had nothing to do with any civil law concepts and was a logical outcome of the modern development of international law. He quoted several authorities who had acknowledged at recent international conferences that the existence of peremptory rules in international law could no longer be doubted. That had been the conclusion reached, for instance, at the Lagonissi Conference of 1966 on *jus cogens*, which he had attended.

33. The notion of *jus cogens* was not so new as had sometimes been claimed. The existence of some superior rules had indeed been recognized in the past by the law of nations and they had only disappeared with nineteenth-century positivism. They had reappeared in the twentieth century but on an entirely different basis, less controversial than before. The realities of international life expressed in the conscience and will of States constituted their basis in contemporary international law.

34. The form or source of such rules was not of essential importance in determining their peremptory character. Some were conventional and some customary. Some first emerged as custom and were later codified in multi-lateral conventions. Some, on the other hand, first appeared in conventions and only passed later into customary law,

a process recognized by article 34 of the International Law Commission's draft.

35. To say that peremptory rules existed was one thing; to enumerate them was another. Some of the principles of the United Nations Charter, particularly those in Article 2, undoubtedly formed part of *jus cogens*. By giving those principles greater legal value than any other commitments of Member States, Article 103 of the Charter laid down the principle of a hierarchy of rules in the international legal order. The freedom of the high seas, the prohibition of slavery and genocide and some of the rules of land warfare were also among those superior rules from which it was inconceivable that any group of States could lawfully derogate. He shared, however, the view already expressed by a few other speakers that it would be inappropriate to insert examples in a general codification.

36. With regard to the relationship between articles 50 and 62, his delegation would explain its point of view when the latter article was discussed.

37. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) clarified the text of article 50 by establishing a link between its two parts and by making its latter part explain the words "peremptory norm of general international law". Since it was a drafting amendment, it could be referred to the Drafting Committee.

38. The Mexican amendment (A/CONF.39/C.1/L.266) might complicate matters instead of elucidating them, since it dealt with a subject which concerned article 67 rather than article 50.

39. His delegation was opposed to the Finnish amendment (A/CONF.39/C.1/L.293) for the reasons it had already given at the 42nd meeting<sup>3</sup> in connexion with a similar amendment (A/CONF.39/C.1/L.244) concerning article 41.

40. The amendment submitted by Spain, Finland and Greece (A/CONF.39/C.1/L.306 and Add.1 and 2) was somewhat equivocal. The proposed addition might seem tautological in that no norm of international law could be considered to be "general" unless recognized by States constituting the international community. But the statement by the Greek representative suggested that the purpose of the amendment was to require some special form of recognition by the international community. In that case, the amendment would create more difficulties than it would solve.

41. The Polish delegation could not accept the United States amendment (A/CONF.39/C.1/L.302). Despite the explanations of its sponsor, what counted was the text of the amendment. The reference to "national and regional legal systems" would make it extremely difficult in practice to determine the contents of many peremptory norms. Moreover, the amendment seemed to be based on the notion of the supremacy of the national over the international legal order and of the regional international over the general international legal order, a controversial issue on which the Conference would do well not to adopt any position.

42. Mr. VEROSTA (Austria) said that the draft articles implicitly distinguished between three kinds of rules of

<sup>3</sup> Para. 32.

international law: rules and obligations based on treaties, rules of general international law based on custom or on multilateral treaties from which derogation was permitted, and peremptory rules of general international law from which no derogation was permitted, and which could be modified only by subsequent norms having the same character.

43. The question arose whether the recognition of that superior category of norms of international law in article 50, with its consequences in articles 61 and 67, were a matter of the codification of existing international law or of the progressive development of international law. Paragraph (1) of the commentary on article 50 showed that the International Law Commission had initially hesitated somewhat on that point, but encouraged by the fact that only one Government had questioned the existence of rules of *jus cogens*, it had finally ventured to submit articles 50, 61 and 67 as belonging to the codification of international law.

44. Most of the representatives who had so far spoken in the debate on *jus cogens* had expressed themselves in favour of the principle underlying article 50. The Austrian delegation had noted with great interest the attitude of the United States, a permanent member of the Security Council. His delegation hoped that the discussion would result in general agreement on the matter.

45. In paragraphs (2) and (3) of the commentary, the Commission had listed a number of negative criteria concerning rules of *jus cogens*: first, there was no simple criterion for identifying such a norm; second, the majority of the rules of international law did not have that character; third, a provision in a treaty was not *jus cogens* merely because the parties had stipulated that no derogation from that provision would be permitted; fourth, it was not the form of a rule but the particular nature of the subject matter with which it dealt that might give it the character of *jus cogens*; and fifth, peremptory norms of international law were not immutable. Of those five criteria, the fourth, concerning subject matter, was particularly important.

46. The nullity contemplated in article 50 applied not only to a treaty conflicting with a norm of *jus cogens* but also to any act or action conflicting with a peremptory norm of general international law and to an eventual recognition of such an illicit act by one or several States. The fact that article 50 would have that consequence once it had been adopted showed the importance of the rule it laid down.

47. While accepting article 50, despite its general character and lack of precision, the Austrian delegation considered that its unilateral application might endanger the stability of international treaty relations, which the draft articles as a whole sought to safeguard, in particular through article 23. It was to be hoped that the adoption of a suitable procedure might mitigate that danger. His delegation therefore reserved the right to speak on the matter again at a later stage in the discussion.

48. Mr. JIMENEZ DE ARECHAGA (Uruguay) said he strongly supported article 50, for he believed that that ground of nullity should be included in the convention. In supporting the principle, care must be taken not to exaggerate its scope, either in a positive direction, by making of it a mystique that would breathe fresh life into international law, or in a negative direction, by seeing in it an element of

the destruction of treaties and of anarchy. In the Uruguayan delegation's view, article 50 was simple and would have relatively limited effects. The international community recognized certain principles which chimed with its essential interests and its fundamental moral ideas, such as the prohibition of the use of force and aggression, genocide, racial discrimination and the systematic violation of human rights. It was not enough to condemn the violation of those principles; it was necessary to lay down the preventive sanction of absolute nullity in respect of the preparatory act, namely the treaty whereby two States came to an agreement to carry out together acts constituting a violation of one of those principles. It was in the nature of things that, in practice, that type of treaty, a flagrant challenge to the international conscience, would be infrequent and that instances of treaties that would be null and void as the result of the application of that rule would be rare. Nevertheless, there should be a precise criterion for identifying the rules of *jus cogens*, since each time it was proclaimed that a given principle was a rule of *jus cogens*, the scope of one of the basic principles of international law—the rule that what States had agreed upon constituted the law for the parties (*pacta sunt servanda*) — was diminished.

49. His view of the Indian amendment (A/CONF.39/C.1/L.254), which amounted to combining articles 50 and 61, was that the International Law Commission had been right to keep the two articles separate. The emergence of a new rule of *jus cogens* was closer to grounds for the termination of a treaty by derogation than to grounds of nullity, from the point of view both of the effects in time and of the question of separability. It did not avoid acts or situations which had been performed or established at a time when they had been in conformity with international law: *tempus regit actum*. Contrary to the opinion of the Finnish delegation (A/CONF.39/C.1/L.293), it was understandable that the effect of a conflict with an existing rule of *jus cogens* should be the nullity of the treaty as a whole, whereas the emergence of a new rule of *jus cogens* could affect only a part of a treaty.

50. The Mexican amendment (A/CONF.39/C.1/L.266) should be considered together with article 67, as it was more relevant to the idea expressed in the first sentence of paragraph 2(b) of that article. The effectiveness *ratione temporis* of rules of *jus cogens* in force depended on the date when they were accepted as such; the Mexican amendment might undermine that principle.

51. The United States amendment (A/CONF.39/C.1/L.302) was composed of two parts. The first specified that the conflict must exist at the time of the conclusion of the treaty if the rule was to operate; that idea was implicit in the draft, but might well be made more explicit. The second part contained the idea that a peremptory rule of general international law was universal and accepted by the international community as a whole; that was true, but the idea was not, perhaps, expressed as well as it might have been; the proposed wording was both too flexible and too rigid. A rule accepted by national systems of law might become a general principle established in domestic law without necessarily being part of *jus cogens*. For example, the principle that every injury must be redressed did not preclude the conclusion of international agreements restricting liability. Again the reference to regional systems was not very happy. For example, if a

regional international organization embarked upon a policy of aggression, that would not mean that the rule prohibiting the use of force ceased to be a rule of *jus cogens*.

52. The amendment by Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) introduced the element of general recognition by the international community which was lacking in the United States amendment and should therefore be considered.

53. Mr. SINCLAIR (United Kingdom), introducing the United Kingdom sub amendment (A/CONF.39/C.1/L.312) to the United States amendment, said that his delegation agreed that in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out. That conception was fundamental in developed internal systems of law, but in those systems it was not difficult to ascertain which rules had a peremptory character and which had not. He would not dispute that international law now contained certain peremptory norms, in the sense in which that term was used in article 50, but international society and international law had not yet developed to a stage where it was possible to be reasonably confident as to where the border-line between peremptory norms and other rules of international law lay. The International Law Commission's proposals concerning the content of article 50 had given rise to a wide divergence of opinions. Some eminent international jurists denied the very existence, in current international law, of norms of the kind described in article 50. The question of knowing how peremptory norms were created and how they could be subsequently modified was also very obscure and gave rise to a great deal of controversy. His delegation viewed with concern the uncertainty to which article 50 would give rise, in the absence of a sufficiently clear indication of the means of identifying the peremptory norms in question. Article 50 did not provide a definition of peremptory norms, but instead laid down the legal sanctions for their violation.

54. In paragraph (3) of its commentary, the International Law Commission recommended that it should be left to State practice and the jurisprudence of international tribunals to work out the full content of the rule. The adoption of such a course would be equivalent to providing in a penal code that crimes should be punished without specifying which acts constituted crimes. In the absence of a tribunal having jurisdiction or of a procedure for defining which rules of international law had the character of peremptory norms, the application of the rule in article 50 would be at the mercy of unilateral assertions and counter-assertions made by the States concerned.

55. If the article were retained, that difficulty might be overcome in three ways. The first would be to include in the article an exhaustive list of the rules or principles of contemporary international law which constituted *jus cogens*. The Commission appeared to have considered that that solution would raise too many difficulties, but his delegation did not consider that it should be rejected out of hand.

56. The second course would be to include in the article a list of peremptory norms which did not purport to be

exhaustive. That course would at least have the advantage of giving some indication of the scope of the rule contained in the article; the fuller the list, the more the area for potential dispute would be reduced. The Commission had considered establishing such a list, but had rejected the idea, for two reasons which were explained in paragraph (3) of its commentary. Perhaps the force of the first objection, that the enumeration of certain cases would lead to misunderstanding as to the position concerning other cases had been overrated. In any event it would not be such a disadvantage if the onus of proof were in some degree weighted against the State that alleged the existence of a peremptory norm not mentioned in the article. The other reason advanced by the International Law Commission, namely that the establishment of a list would necessitate a prolonged study of questions which fell outside the scope of the articles, was not a very sound one, for it was difficult to maintain that the definition of the scope of article 50 fell outside the scope of the draft articles.

57. If the Conference decided that it would be desirable to establish a list of peremptory norms, whether exhaustive or not, it might request the International Law Commission to undertake the task as a matter of urgency: that would be to impose on it an obviously very difficult burden, but it should not be assumed that the Commission could not succeed.

58. The third course would be to write into article 50 some means or test whereby peremptory norms could be identified. The United States amendment proceeded in that direction. It had the advantage of stressing the notion of general international law by stating that peremptory norms must be recognized by the various national and regional legal systems of the world. It was his understanding that the reference in the amendment to national and regional legal systems was a reference, not to domestic legal systems, but rather to the fact that there must be universal recognition by States or groups of States that a rule of international law had the character of a peremptory rule. In view of the importance of that new conception of peremptory norms, from which no derogation was permitted, the amendment was valuable. However, it did not provide for a sufficiently clear and easily applicable means of identifying peremptory norms. The United Kingdom proposal, which was a sub-amendment to the United States amendment, might also be considered in relation to other amendments to article 50, such as those of Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

59. The United Kingdom sub-amendment recognized that Part V of the Commission's draft enunciated at least one peremptory rule: that was obviously the rule set forth in article 49, concerning the threat or use of force. Bearing in mind the debate which had taken place on article 49, and the views expressed by his delegation in that debate, the United Kingdom sub-amendment was based on the proposition that the peremptory rule set forth in article 49 would render void any treaty procured by the threat or use of force in the meaning of Article 2 (4) of the United Nations Charter, read in the context of the Charter as a whole.

60. Further, the United Kingdom sub-amendment proposed that peremptory norms should be defined in pro-

to the convention, which would be negotiated after the conclusion of the convention. In other words, his delegation believed that peremptory norms, representing the higher international morality and the international public order of the future, should themselves be codified. It was unsatisfactory to leave it solely to the ambivalent processes whereby customary international law gradually emerged to determine the existence of those higher rules. That was particularly so since there were serious difficulties in securing universal compulsory adjudication of all international disputes by a permanent international judicial organ. In any event, the problems which would arise in connexion with the application of article 50 would not be entirely solved even if all the questions concerning the interpretation and application of the present convention were referred to the International Court of Justice at the instance of a party to a dispute. Such a procedure would facilitate the solution of those problems—and for that reason, his delegation strongly supported the inclusion of a provision to that effect in the convention. But in the case of article 50, it would be placing too heavy a burden on the Court to request it to determine whether a particular rule of international law had the character of a peremptory rule and when it had achieved that character. It would be like asking a court to establish the content of a penal code.

61. The Conference would be failing in its duty if it did not prescribe some clear-cut mechanism whereby the existence and content of peremptory rules of general international law could be properly identified and defined. The dangers of article 50 as it stood would not be very much greater for old established and developed States than for others. Treaties concluded between, or applying as between, newly independent States might also be placed in jeopardy by the operation of that article. Incidentally, paragraph 1(a) of article 67 might be construed in the case of a boundary treaty as meaning that the boundary established under the treaty must be eliminated.

62. It was true that paragraph (6) of the commentary on article 50 described the rule in that article as non-retroactive. The Commission, however, appeared to have regarded article 50 as a codifying article rather than a measure of progressive development, and consequently, as applying to an existing treaty which offended against a peremptory norm in existence at the time of its conclusion. That interpretation was supported by paragraph (7) of the commentary to article 49 which stated that “there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law”.

63. The temporal application of article 50 was a very important matter. Like article 49, article 50 dealt with law in the process of evolution. In the case of article 49, there was no doubt that the prohibition of the threat or use of force was firmly established; the only doubt concerned the date on which that rule was established. In the case of article 50, views differed as to whether a rule of international law constituted a peremptory rule from which no derogation was permitted, and there were even more serious difficulties in determining the date on which a new peremptory norm might be said to have been recognized by the international community. Those difficulties could be overcome by the mechanism envisaged in the

United Kingdom sub-amendment. In the absence of such a mechanism, States would have absolutely no means of knowing whether their treaty relations with other States were likely to be disrupted by allegations that a particular treaty was contrary to a peremptory rule.

64. He would not express any views on the various rules that had been referred to in the debate as having the character of *jus cogens*, but would merely draw attention to the difficulties involved in defining *jus cogens*: what might be *jus cogens* for one State would not necessarily be *jus cogens* for another.

65. In conclusion, his delegation considered article 50 unacceptable in its present form but was prepared to participate in consultations with a view to formulating an article which would meet the major preoccupations he had just mentioned. It did not deny the existence of *jus cogens*, but hoped that the Conference would establish a means whereby its content could be determined. Its attitude towards the article would depend on the outcome of those consultations. It would suggest therefore that the vote on that article and the amendments thereto should be postponed until consultations had taken place.

66. Mr. JACOVIDES (Cyprus) said the principle stated in article 50 was of fundamental importance and, if adopted by the Conference, would be a landmark in the law of treaties. As early as October 1963, the Cypriot delegation had whole-heartedly supported the International Law Commission's proposed text in the Sixth Committee of the General Assembly and had since had the opportunity of repeating its support on several occasions.

67. As early as the middle of the eighteenth century, eminent writers like Wolff and Vattel had drawn a distinction between “necessary law”, which nations could not alter by agreement, and “voluntary law”, created by the will of the parties. In more recent times, the Covenant of the League of Nations and the Charter of the United Nations had reinforced the notion that beside *jus dispositivum* there was a *jus cogens* which rested upon the conscience of mankind and existed in order to protect the higher interests of the international community as a whole. The smaller States had an even greater interest than the larger ones in the adoption of that rule of international public order which placed checks upon the freedom to conclude treaties and safeguarded small States against the dangers to which they might be exposed by “unequal and inequitable” treaties. The notion of *jus cogens* was not merely theoretical; it had a very real practical value.

68. The principle in article 50 corresponded to the rule in internal law that an agreement contrary to public policy was null and void and could not confer any right upon the parties to it. In recognizing the existence of a corresponding rule in public international law the International Law Commission had made a very great contribution both to the codification and to the progressive development of international law. The Commission's records, the commentary accompanying the text, the debates in the Sixth Committee of the General Assembly, particularly at the eighteenth and twenty-second sessions, the comments by Governments, the proceedings of learned societies and the debate at the present Conference showed that, despite certain reservations, the principle met with general approval, even if not complete unanimity. The time had come to adopt it formally.



69. There was more difference of opinion about which specific rules of international law should be recognized as having overriding force, as laid down in article 50. The prohibition of the threat and use of force and other criminal acts such as the slave trade, piracy and genocide had been cited; it had also been said that article 50 would apply to treaties violating human rights or the right to self-determination, and to "unequal and inequitable" treaties. There was also the principle of the pacific settlement of international disputes, of non-intervention in the domestic affairs of a State and of the sovereign equality of all States. Any treaty violating any of those principles should be void, and void in its entirety.

70. Leaving the content of *jus cogens* to be worked out in State practice and jurisprudence had the merit of giving the greatest possible flexibility to a notion one of whose characteristics was that it was dynamic and living. On the other hand, it opened the door both to unduly broad interpretations which might lead to abuses and to unduly narrow interpretations which would rob the principle of any real meaning. Of the two reasons given by the International Law Commission in the commentary for its decision not to include any example of a peremptory norm, the first was not very convincing, for the Commission might have been able to give some examples in order to put the significance of the principle in concrete form. The second reason presented a much more serious difficulty; reduced to its simplest terms, the problem was to define illegality in international law. In view of the divergent theories and interests involved, it was indeed a formidable task and touched upon other areas of international law. But was there any body which could take up the Commission's work at the point at which it had left off? The Sixth Committee of the General Assembly or the Conference itself, whether directly or through a committee or a special working group, would come up against the same difficulties as the International Law Commission, but would at least have the advantage of being able to take a decision, since they were composed of representatives of States. There might have been a case for such an approach, but the lack of success in defining aggression and the setbacks experienced by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States were hardly encouraging. In the present imperfect state of international society it would be plainly unrealistic to tie the principle in article 50 to adjudication by the International Court of Justice. The Cypriot delegation would revert to that point in connexion with article 62. A satisfactory solution must be found to the general problem, which did not relate solely to article 50. He agreed with the representative of Iraq that the evolution of the norms of international law should not be made to depend upon the existence of a procedure or machinery for enforcement.

71. The Cypriot delegation was in favour of the adoption of the text of article 50 as it stood. It was perfectly willing to contemplate defining its scope, but was afraid that that might prove impossible. The principle stated in article 50 should be adopted independently of questions of procedure.

72. Amendments to improve the drafting, such as that by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), might be referred to the Drafting Committee. Contrary to what had been stated by certain speakers,

however, the amendment by Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) was not wholly concerned with drafting. If the idea was to stress the fact that a peremptory norm must be generally binding upon all members of the international community, that idea was already contained in the present text of the article in the reference to "general international law". The addition of the words "recognized by the international community" introduced a subjective criterion which distorted the nature of the rule. To make the criterion objective, the words "binding upon" would have to be substituted for "recognized by". In its present form the amendment substantially altered article 50 in the same direction as the more explicit amendment by the United States (A/CONF.39/C.1/L.302). That should be borne in mind if those amendments were referred to the Drafting Committee.

73. The Finnish amendment (A/CONF.39/C.1/L.293) was not acceptable, since the violation of a peremptory norm was such a serious matter that the sanction of nullity should extend to the entire treaty.

74. The idea expressed in the Mexican amendment (A/CONF.39/C.1/L.266) was already contained in the text, as was made clear in paragraph (6) of the commentary.

75. He reserved the right to give his views on the United Kingdom sub-amendment which had just been introduced.

The meeting rose at 1.5 p.m.

#### FIFTY-FOURTH MEETING

Monday, 6 May 1968, at 3.25 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 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*) (continued).<sup>1</sup>

1. Mr. EEK (Sweden) said his delegation was in favour of including an article on *jus cogens* in the convention on the law of treaties.

2. The article gave rise to two problems: first, the definition of a peremptory norm of international law. The International Law Commission did not offer any definition of *jus cogens* in article 50. In paragraph (2) of its commentary to the article it observed that there was no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* and that it was not the form of a general rule of international law but the particular nature of the subject matter with which it dealt that might give it the character of *jus cogens*.

3. The Swedish delegation considered, however, that it was rather the fact that a particular norm was held by the international community to be of such importance that it could not tolerate any derogation from it, even if only

<sup>1</sup> For the list of the amendments submitted, see 52nd meeting, footnote 1.