United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.54

54th 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)*

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)*.[1]

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

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

by two States by agreement *inter se*, which gave that norm the character of *jus cogens*. For that reason the Swedish delegation agreed with the idea behind the amendment proposed by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

4. His delegation felt that it would be desirable to give a closer definition of the peremptory norms referred to in article 50 in order to make the article more acceptable to the majority of countries. That seemed to be the purpose also of the United States amendment (A/CONF.39/C.1/L.302), which the Swedish delegation viewed with interest. It might be useful to attach the international notion of peremptory norms to the notions of *jus cogens* belonging to national and regional legal systems. It must be noted, however, that all types of action which the international community might have to outlaw absolutely would not find their equivalent in the internal law of States. But a reference to the fundamental principles of law recognized in the main political, economic and social systems of the world might at least help to clarify the norms of general international law which were recognized by the present-day international community as norms from which no derogation was permitted. The United States amendment, the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to that amendment and the amendment by Greece, Finland and Spain deserved consideration.

5. The second problem presented by article 50 was the presence and applicability of a peremptory norm in a specific situation. If a peremptory norm was defined as a norm recognized as absolutely binding in accordance with the principles of law and justice of all the peoples of the contemporary world, the denial of the existence and applicability of such a norm in a specific situation might as such be enough to deprive that norm of its peremptory character. That would however lead to anarchy rather than to the unity for which everyone hoped. It was essential, therefore, to provide for some method of solving differences either by third party or by community participation. The participation of a third party in the settlement of a dispute must be looked upon not as a curb on the sovereignty of States, but as useful guidance for the exercise of sovereign rights within the world community in accordance with the principles of law it held in common.

6. Mr. KEMPFF MERCADO (Bolivia) said that his delegation supported article 50 as drafted by the International Law Commission. It had closely studied the amendments submitted to that article, but found that none of them improved the text, which stated clearly and categorically the peremptory character of the norms of *jus cogens* from which no derogation was permitted. The Bolivian delegation would therefore vote for article 50 of the Commission's draft without change.

7. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that there was ample evidence of the existence of peremptory norms in contemporary international law. Since those norms existed and governed relations between States, it was only proper that a clause on the connexion between treaties and *jus cogens* should be included in the convention on the law of treaties.

8. Many speakers had pointed out that the main difficulty in that respect was the absence of criteria for the definition of the norms of international law which had the character of *jus cogens*. It was to meet that difficulty that some amendments had been submitted, that by the United States (A/CONF.39/C.1/L.302) in particular. The Byelorussian delegation considered that the norms of international law could not, as in that amendment, be made contingent on national law. Moreover, the amendment did not specify what regional legal systems were meant. Some of those systems had no connexion with international law; there were some, indeed, which dealt only with relations in civil law. There might be, in the relations between States of a given geographical region, apart from the generally recognized norms of international law, norms which were peculiar to that group of States, but those norms could not be in contradiction with the fundamental principles of international law laid down in the United Nations Charter. The United States amendment, which gave only second place to the principles of the United Nations Charter, was therefore unacceptable.

9. It was in the United Nations Charter that the Conference should seek simple and clear criteria to distinguish between ordinary norms and peremptory norms. The task would be easy if the Conference, in considering article 50, were guided by the need to confer upon mankind all the benefits which would result from an obligation upon all States to make their treaties comply with the principles and norms of *jus cogens*. Among the principles of *jus cogens* in the Charter there might be cited the maintenance of peace among peoples, the struggle against colonial domination and the sovereignty of States. The Byelorussian delegation agreed that it would be unwise to attempt to list all the principles of *jus cogens*, for that would be impossible in practice and moreover unnecessary, since the Conference's task was not to codify the norms of *jus cogens* but to codify the law of treaties.

10. With regard to the Finnish amendment (A/CONF.39/C.1/L.293), the Byelorussian delegation could not accept separability for treaties which were void *ab initio* because they were incompatible with peremptory norms. Moreover, article 41, paragraph 5 specified that separability was not permitted in cases falling under article 50.

11. The Byelorussian delegation was in favour of article 50 of the draft, though, admittedly, the wording should be improved. That was the purpose of the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which his delegation supported.

12. Mr. JAGOTA (India) said he was glad that the principle laid down in article 50 was generally recognized. The text of the article was a masterpiece of precision and simplicity and his delegation supported it unreservedly.

13. The history of *jus cogens* and the controversy to which it had given rise had already been described to the Committee. He himself wished to sum up the principal legal propositions arising from article 50 and related articles and from the excellent commentary of the International Law Commission.

14. A treaty was void if it conflicted with a peremptory norm of general international law. The notion of a peremptory norm did not apply to every principle of general international law. It was the particular nature of the subject-matter with which a norm dealt that might give

it the character of *jus cogens*. States could not derogate from a peremptory norm, but that did not mean that any prohibitory provision of a treaty could be regarded as such. The notion of a peremptory norm admitted of some flexibility, since an existing peremptory norm could be modified by a new norm having the same character. If they conflicted, the latter would prevail, and, as stated in paragraph (4) of the commentary and implied in article 61, a treaty containing the new rule would not be caught by article 50.

15. The effects of existing or new peremptory norms were stated in article 67 and were not retroactive. In the first, the treaty was void *ab initio*; in the second, it became void and terminated with the emergence of the new norm. Article 50 laid down a substantive rule. The nullity of a treaty was not automatic, however; it had to be established, which excluded the arbitrary determination of nullity by a State. Consequently, there was no risk of the article causing confusion or instability. However it was ultimately worded, it could be invoked and applied like any other rule, in accordance with article 62.

16. A comparison between article 50 of the draft and Article 103 of the United Nations Charter showed that whereas the latter stipulated that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail, article 50 referred in the abstract to the fundamental principle that treaty obligations conflicting with a peremptory norm were void. It had been asserted that Article 103 of the Charter would prevail regardless of the contents of articles 49 and 50 of the draft convention. The Indian delegation disagreed. Article 103 of the Charter would operate to the same effect as the convention, and would in fact constitute a source of *jus cogens*.

17. The Commission had rightly refrained from giving examples of *jus cogens*. To have done so might have given the impression that any possible case not listed did not come within *jus cogens*, and therefore, further study would have been necessary.

18. The International Law Commission's purpose had clearly been to delimit the notion of *jus cogens* in articles 50 and 61 and to indicate its legal effects in article 67. His delegation unreservedly supported those articles as drafted by the International Law Commission. Not all the consequences of *jus cogens* were indicated in article 50, which emphasized only one: that in the absence of a world government, and despite the fact that States thereby enjoyed absolute sovereignty, their treaty-making capacity would nevertheless be limited in so far as any treaty conflicting with *jus cogens* was void. There was a similar and well-established principle in the internal law of most countries, and certainly in India, that any contract the object of which was unlawful or any law which was unconstitutional was void.

19. With regard to the amendments to article 50, his delegation regarded that submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) as a drafting amendment, and it should be referred to the Drafting Committee. It preferred the existing text of article 50, however. The idea embodied in the Mexican amendment (A/CONF.39/C.1/L.266) was already implied in the existing text of article 50 if the latter was read in conjunction with article 67. It could be left to the Drafting Committee to decide whether that idea should be made clearer.

20. The Indian delegation was not in favour of the Finnish amendment (A/CONF.39/C.1/L.293) on separability for the reasons given by the International Law Commission in paragraph (8) of its commentary to article 41.

21. With regard to the United States amendment (A/CONF.39/C.1/L.302), he was glad that the United States had accepted article 50 in principle. The drafting changes proposed in that amendment could be referred to the Drafting Committee, although the existing text of article 50 was preferable. However, if the amendment raised a point of substance, as the Polish representative had suggested, his delegation could not support it and would vote against it. Finally, it could not support either the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to the United States amendment or the amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

22. Mr. DE LA GUARDIA (Argentina) said that the existence of *jus cogens* was disputed by writers. Nevertheless, he was prepared to admit that a general international law from which States could not derogate did in fact exist; to recognize the existence of international norms of *jus cogens* was merely to acknowledge reality. The inclusion of the idea as it was set forth in article 50 of the draft convention was fully in accord with the progressive development of international law.

23. For that very reason, although the principle was indisputable, its formulation raised some difficulty, for it was by no means easy to define peremptory norms precisely. To enumerate them would be dangerous, since the *jus cogens* character of some types of rule was controversial. In that respect, his delegation viewed with interest the wording proposed by the United States (A/CONF.39/C.1/L.302) and Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2).

24. Another difficulty concerning article 50 was the time factor. The International Law Commission, in paragraph (6) of its commentary to the article, said that article 50 concerned cases where a treaty was void at the time of its conclusion and that there was no question of its having retroactive effects. The Argentine delegation therefore supported the insertion of the words " at the time of its conclusion " proposed by the United States, since they represented the views of the International Law Commission, but the idea was not reflected in the existing text of the article. Another point was that article 50 would also have retroactive effect if applied to situations which had arisen before the convention came into force, thus introducing legal uncertainty. For that reason the Argentine delegation supported the Mexican amendment (A/CONF.39/C.1/L.266), which specified that article 50 should not have retroactive effect. That did not mean however that his delegation accepted that other articles of the draft, in particular article 49, did have retroactive effect.

25. His delegation could not support the Finnish amendment (A/CONF.39/C.1/L.293), since the Argentine delegation had expressed its opposition to separability in connexion with article 41. It did not consider that the

amendment submitted by Romania and the Soviet Union (A/CONF.39/C.1/L.258 and Corr.1) made any real contribution to the definition of *jus cogens*.

26. Mr. DE BRESSON (France) observed that article 50 had the formidable reputation of being one of the most difficult provisions in the International Law Commission's draft. That was probably because the clause in question had often been represented as providing the setting for an inevitable confrontation between the upholders of different political, social or economic systems. But that attitude was mistaken and regrettable. The only problem with which the jurists participating in the Conference should have to cope was that of establishing in all objectivity and good faith rules which would contribute to the security and harmony of contemporary and future international society. Such a question should not be studied in the light of the situation obtaining at a time when nations had not enjoyed equality. What mattered now was to conceive, with the lucidity required by any future projection, principles that were calculated to ensure under the best conditions the permanency of the relations that had been established or would be established by States that were independent and equal at present, within the scope of their respective sovereignties and for the purpose of preserving their national interests. But where the preservation of their interests was concerned, all nations were at the same time in the position of petitioner and defender. Consequently, to remain balanced, any future juridical system should preserve States from the temptation to contract out of legitimate obligations and from the risk of being deprived of rights no less legitimate. The Conference's task was therefore to assess whether article 50 met that objective.

27. The problem was extremely important because article 50 was intended to deduce the consequences, in a system of positive law, from the existence of a supreme law which in no circumstances could be violated by the will of States. Accordingly, that provision would have the effect of limiting the principle according to which international organization proceeded from the autonomy of the will of the States, because treaties concluded by the latter, within the context of their sovereignty, might henceforth be declared null and void. His country could hardly formulate an objection to such an attempt, but it was a difficult undertaking.

28. The problem, which was on the ill-defined borderline between morality and law, was that of knowing which principles it was proposed to recognize as having such serious effects as to render international agreements void, irrespective of the will of the States which had concluded them. Such a choice was not easy, for although the idea that juridical principles existed which were distinct from treaty law had a very long history, it was another matter to determine which principle should acquire the character of *jus cogens*. The difficulty was still further aggravated by the fact that it was a question not only of referring to existing principles, but—and that was the stipulation laid down in article 61—of recognizing that future rules might be incorporated in *jus cogens*. In view of the wide scope of the question, it was essential that it should receive a clear and precise solution in the convention. It was unthinkable to admit the present and future existence of a supreme law and to attribute to it effects so serious as to lead to the nullity *ab initio* of international agreements, without defining the substance of that rule of positive law, the conditions of its development and the arrangements for its application. In the absence of such precautions, no one could foretell the extent of the confusion that might result in the international community, to the detriment of the weakest, for whom the law remained the best safeguard.

29. It must be stated that article 50 of the International Law Commission's draft did not meet those requirements. The Commission had given too simple a reply to a question of obvious complexity and in reality had evaded the problem facing it. The article as it stood gave no indication how a rule of law could be recognized as having the character of *jus cogens*, on the content of which divergent, even conflicting interpretations had been advanced during the discussion. Moreover—and that linked up with the remarks already made by his delegation in connexion with articles 48 and 49—considerable uncertainty existed concerning the conditions under which the nullity of a treaty alleged to be in conflict with a rule of *jus cogens* would be established. Also, no provision had been made for any jurisdictional control over the application of such a new and imprecise notion. Moreover, assuming that such a shortcoming could be overcome by recasting article 62, which was what his delegation would wish, that would by no means suffice to obviate the necessity of stating what constituted *jus cogens*, for the role of the international judge was to apply and explain the law and not to create it.

30. Finally, by retaining too general a wording, there was a danger that article 50 would create serious internal problems for many countries. At the constitutional level, States would ask themselves how far they could consent to a grave alienation of their sovereignty without any clear idea of the rules under which that limitation had been introduced. Further, where national jurisdictions were concerned, certain States like France, which incorporated treaty law directly into internal law, would have reason to fear that the fact that those jurisdictions would have to assess the validity of treaties in relation to a supreme, undefined law, would lead to the utmost confusion.

31. Accordingly, article 50 in its present form presented serious defects which should be remedied by inserting, if not a satisfactory definition of *jus cogens*, at least a method of defining that notion. Several delegations had made an effort in that direction, which showed that such a step was necessary and no doubt feasible.

32. His delegation considered that principles that were peculiar to a particular system adopted by States, or which related to the play of forces maintaining equilibrium in the world, should be excluded from *jus cogens*. Those principles were still too controversial. The substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person.

33. The amendment purporting to define *jus cogens* as " a peremptory rule of general international law which is recognized in common by the national and regional legal systems of the world " (A/CONF.39/C.1/L.302) deserved to be adopted, for it had the merit of determining the

objective criterion whereby such a rule was " recognized " as having the character of *jus cogens*.

34. His delegation thought that on those three points, which in its judgement were fundamental, namely the definition or method of definition, the development and the control of the application of *jus cogens*, the Conference might arrive at a satisfactory solution. But it must allow itself the time and necessary means—the time, by abstaining from taking premature decisions on *jus cogens* and the means by appointing a working group to study the problem in depth and work out solutions. He appealed urgently to the members of the Conference to believe that the serious concern expressed by his delegation to prevent the too hasty adoption of ideas which, though magnanimous in themselves, were liable to jeopardize the security of international relations, had not been prompted by any consideration of self-interest, but had been dictated solely by its regard for the interests of all. His delegation earnestly hoped that the Conference would apply itself to a task that, carried out with the necessary clarity and objectivity, would represent a contribution to the ideals of humanity which in the long run could be safeguarded solely by a universal, just and respected international law.

35. Mr. ROSENNE (Israel) said he wished to indicate his delegation's views on the relationship between the substantive articles dealing with the grounds for invalidity and for termination of a treaty and the procedure for their application. On that issue the position of the Israel delegation remained as stated at the 974th meeting of the Sixth Committee [2] and subsequently in its Government's comments (A/CONF.39/6). In its view, the International Law Commission had been right not to go beyond Article 33 of the Charter and to refrain from embarking on the question of the settlement of any disputes which might arise. It would be contrary to the settlement procedures established by the United Nations Charter to require the compulsory application of certain predetermined procedures for the settlement of disputes arising from the interpretation or application of provisions of the convention. The Israel delegation agreed with representatives who had said that the development of normative rules of modern international law was not contingent upon the simultaneous development of its procedural rules.

36. With regard to article 50, the Israel delegation considered that, as the International Law Commission had noted in its commentary, there were today certain rules from which States were not in any way competent to derogate by a treaty arrangement and which could be changed only by another rule of the same character. It should be noted that there was no amendment before the Conference to delete article 50 and that the doubts which had been expressed were limited to its proper formulation. It might be deduced from that that the very notion of *jus cogens* was an accepted element of contemporary positive international law.

37. In articles 41, 50, 61 and 67, the Commission had limited itself to indicating the major points of contact between the notion of *jus cogens* and the general law of treaties. It had not tried to determine what was meant by a rule of *jus cogens*, since that was not necessary in the present context. In the Israel delegation's opinion, the Commission had been right; furthermore, the delegation had taken note of Sir Humphrey Waldock's statement at the 969th meeting of the Sixth Committee of the General Assembly.[3] If the Conference considered that further examination of the notion of *jus cogens* at the intergovernmental level was necessary, it could draw the attention of the General Assembly to the matter by an appropriate resolution. The Israel delegation doubted, however, whether the International Law Commission should be asked to examine the matter further.

38. The invalidity of treaties with which article 50 dealt was different in kind from all the types of invalidity previously discussed. The consent there was real and the relations of the parties to the treaty *inter se* were not in issue. It was the object of the consent that was illegal. It was not a case of possible invalidation, but of a real invalidity. The invalidity was, therefore, objective and, leaving aside any question of State responsibility, it could be asserted by any State or any international organization aware of the invalid treaty. That seemed inherent in the very nature of *jus cogens*. The comment had been made that cases of the existence of treaties which were in conflict with *jus cogens* would very rarely be made public; thus it did not seem that article 50 and the related articles posed a serious threat to international treaty relationships. On the contrary, the inclusion of the article would be a step forward in strengthening the role of law as a means of ensuring international security, and its omission would rise give to misunderstanding.

39. In its amendments to article 50 (A/CONF.39/C.1/L.254) and to articles 41, 61 and 67 (A/CONF.39/C.1/L.253, L.255 and L.256) the Indian delegation had drawn attention to a very important point. The Drafting Committee should consider the possibility of grouping all the articles on *jus cogens* together in a single chapter. The Israel delegation could not support the Mexican amendment (A/CONF.39/C.1/L.266) for the reasons explained by the representatives of Uruguay and India. That proposal seemed to touch upon certain aspects of intertemporal law which could not be dealt with solely in connexion with article 50. The Finnish amendment (A/CONF.39/C.1/L.293) was also unacceptable. On that matter the Israel delegation accepted the view of the International Law Commission stated in paragraph (8) of its commentary to article 41.

40. The proposals in 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) to clarify further the nature of the concept of *jus cogens* were worth further consideration, and the Israel delegation was prepared to support them in principle. A better wording should, however, be found. The expression " principal legal systems of the world " which was found in various constitutional texts of the United Nations, might, for instance, be used. The United States amendment seemed unduly restrictive since it could be interpreted as omitting the evolution of the rules of *jus cogens*. The terms of the United Kingdom's sub amendment (A/CONF.39/C.1/L.312) were too rigid and there might be some doubt whether it was really

[2] *Official Records of the General Assembly, Twenty-second session, Sixth Committee*, 974th meeting.

[3] *Ibid.*, 969th meeting.

necessary to lay down the modalities for the establishment of international law applicable only to the peremptory norms to which article 50 related or to specify the manner in which such norms came into being. The essential point was the universal degree of recognition, not the form in which the recognition was expressed. Since the question of revising article 50 had been raised, the Israel delegation hoped that, if that was done, the lapidary conciseness of the original text would be preserved.

41. Mr. MARESCA (Italy) said his delegation had given attention to the question raised in article 50 and considered whether the notion in the article had always existed in the international legal system and further whether it was merely a matter of codifying it or whether something new had been introduced by the International Law Commission. Some twenty years previously, several States had met at Geneva to draw up four Conventions on the protection of victims of war. Under those Conventions the human person was to be respected in all circumstances. No State could evade the responsibility it incurred by a serious breach of the rules in those Conventions. They were norms of international law of an absolutely peremptory character. In 1961, the Convention on Diplomatic Relations, drawn up at Vienna, stated rules derived from Roman law. In 1963, the rules of consular law had been drawn up and they too were of an absolute character. There was no doubt, therefore, that peremptory rules of international law did exist. That was confirmed by the rules of internal law. It had been said that the law could do anything. That was not true. In Italy, for example, the Constitutional Court very often rejected laws which conflicted with the principles of the Italian Constitution. There were bounds which the law itself could not transgress.

42. The evolution of international law was strictly bound up with a hierarchic conception of its sources and rules. In the early nineteen-thirties, the conception of international law had been purely conventional. The sole source of law had been agreement. Some jurists had held, however, that there was something beyond purely conventional rules, that there were also general rules and that there were sources of the first degree and of the second degree. Agreement was a source of the second degree, whereas custom was a source of the first degree. Agreement was limited by custom. The hierarchy of sources led to the hierarchy of content. Among the customary rules there were some which had a deeper juridical content, a content from which no derogation was possible. What rules had that absolute character? They were those which protected the human person and those which ensured the maintenance of peace and the existence and equality of States. That was an example of *jus naturalis*, that was to say, the law which had its first source in mankind's awareness of the law. The positivists had believed that they had driven a wide breach into natural law. The doctrine of positivism had, however, led to the terrible experiences of the two world wars. It was not surprising, therefore, that the conscience of mankind demanded something else. The International Law Commission should be congratulated on its courage in placing article 50 in the convention.

43. The rules in that article were peremptory rules; their source lay in custom, the first source of the rules from which no derogation was permissible. Accordingly, agreements which conflicted with those rules were void. The article could, of course, be improved. A more exact definition should be given in conformity with logic but also taking into account practical ideas. All requisite procedural safeguards should also be provided in order to obviate arbitrary action.

44. Amendments to that effect had been submitted. The idea expressed in the United States amendment (A/CONF.39/C.1/L.302), that the national and regional systems should be taken into consideration, was ingenious and valid. The amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) also deserved attention. The Drafting Committee should bear in mind the amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1). The Italian delegation was prepared to accept the Finnish amendment (A/CONF.39/C.1/L.293). The suggestion made in the Indian amendment (A/CONF.39/C.1/L.254) would arise when article 67 was examined. With regard to the Mexican amendment (A/CONF.39/C.1/L.266), it was difficult to understand how *jus cogens*, which had always existed, could not have a retroactive effect. The United Kingdom sub amendment (A/CONF.39/C.1/L.312) was interesting, since it was based on the idea that law was in constant evolution.

45. The Committee was called upon to solve a fundamental issue. It should not take an over-hasty decision. It would therefore be better, in the Italian delegation's opinion, not to vote on the amendments at that stage. If the Committee decided to set up a small working party to reconcile the different points of view, the Italian delegation would be prepared to take part in it.

46. Mrs. BOKOR-SZEGÖ (Hungary) said the Hungarian delegation fully supported article 50, which faithfully reflected the evolution of contemporary international law. The principle contained in the article was not based on the theory of natural law but on the reality of the relations between States. The source of rules having a peremptory character, like all the other rules of international law, lay in the will of States. They were a necessity dictated by the complexity of international relations and by the interdependence of the subjects of international law. That necessity, based upon the realities of inter-State life, decisively determined the will of the States which recognized those rules, for without them there would be no stability, not even relative stability, in their relations. The International Law Commission had therefore performed its task well in drafting article 50 and should be commended for it.

47. The Hungarian delegation could not support the United States amendment to article 50 (A/CONF.39/C.1/L.302), since it was not the internal or regional law of States but their co-ordinated will manifesting itself on the international plane that could become the source of a peremptory norm of international law. She was not in favour of the United Kingdom sub amendment (A/CONF.39/C.1/L.312) either, as she agreed with the International Law Commission that it was inappropriate to give a list, whether selective or not, of peremptory rules. The existence of peremptory rules did not depend on whether they were or were not listed in the convention or in additional protocols. Since there could be no doubt that peremptory norms of international law existed, the inevitable consequence was that any treaty conflicting

with those norms was void. Consequently, the validity of the rule stated in article 50 was not open to question. The Hungarian delegation could not support the Finnish amendment (A/CONF.39/C.1/L.293) either. As the International Law Commission had stressed in paragraph (6) of its commentary to article 50, when a treaty conflicted with a peremptory norm of general international law, it was wholly void and article 41 on the separability of treaties could not be invoked.

48. The Mexican amendment (A/CONF.39/C.1/L.266) was not a drafting amendment, since it affected the substance of article 50, and was so vaguely worded that it might jeopardize the efficacy of the article. The Hungarian delegation would therefore vote against it.

49. It could not support the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) since it did not make the International Law Commission's text any clearer. On the other hand, it supported the amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which gave a closer definition of the notion of *jus cogens* as set out in draft article 50.

50. Mr. SMALL (New Zealand) said that his delegation fully endorsed the principle that there were peremptory rules of international law which could prevail over treaties and render them void; but he agreed entirely with the view of those who had expressed concern over the risk of political misuse of article 50 in the future, and there was a question whether it was wise to keep the article. It was hazardous to give norms on whose content no agreement had been reached the possibility of attaching the sanction of absolute nullity to any treaty conflicting with them. A number of governments had made a wide range of questionable and uncertain statements in recent years about the content of *jus cogens*; and his delegation doubted whether those statements gave any adequate basis for assuming that the article would be used with moderation. It had been said that article 50 added nothing to the existing position. That might be true in logic, and might perhaps be true in law, but to put the matter in that way was to state only a part—and the lesser part—of the whole truth, for what article 50 was changing was the existing factual situation and the future political situation by giving States for the first time a handy capsule formula on the subject.

51. States would be tempted to invoke article 50 in justification of the termination of treaties that were detrimental to an important public interest, which could always be put plausibly in terms of some supposedly peremptory norm. He would prefer article 50 to be worded much less strongly. Further, if article 50 was taken together with article 61 and 67, the impression was that the unusual cases of treaties conflicting with *jus cogens* were a routine ground for the invalidation of treaties. But the case of a treaty conflicting with *jus cogens* was highly exceptional, and the content of *jus cogens* was still exceedingly speculative.

52. His delegation therefore considered that the article should make it quite clear that treaties conflicting with *jus cogens* were exceptional and should provide special safeguards for cases in which the article was invoked. If the article was retained as it stood, his delegation would support moves to clarify it and to make it explicit that the norms referred to in it were only those which were agreed upon by the generality of States as having a peremptory character. To vote on the article before the Committee knew whether an adequate procedure concerning its use would be provided later in the convention would be premature.

53. The vote on the article should be deferred so that the article could be viewed in the light of the later provisions in the convention.

54. The New Zealand delegation would then be prepared to support the United States amendment (A/CONF.39/C.1/L.302) but its position on the acceptability of articles 50 and 61 must remain reserved.

55. Mr. BOLINTINEANU (Romania) said that the notion of *jus cogens* reflected the manifest political and legal realities of the day. It could never be sufficiently emphasized that in the contemporary world, normal relations, based on confidence and mutual respect, could not develop between States without strict observance of the fundamental principles of international law. Those principles were intended to defend the values forming the common heritage of all peoples, for example peace and international security, for they represented the keystone of coexistence and co-operation between States. On that basis alone could a new system of relations between States develop. Moreover, those principles, which were also set forth in the United Nations Charter, were not only binding by virtue of their object and purpose but were also a part of *jus cogens* and ranked foremost among the peremptory rules of contemporary international law.

56. By prescribing in article 50 of its draft that any treaty conflicting with a peremptory norm of general international law was void, the International Law Commission had accepted the implications of the existence of *jus cogens* and made a valuable contribution to the progressive development of international law.

57. The Romanian delegation fully approved of the method followed by the International Law Commission in article 50. As the text was to be incorporated in a convention, the Commission had had to resort to general notions and not specific examples, for it would not be possible in the text of a convention to draw up a list of the peremptory norms of general international law. His delegation thought that it would be useless to adopt criteria other than those selected by the International Law Commission, since the formula it had used brought out the fundamental nature of the norms and indicated that the principles and rules in question were important for the stability and legal security of the international community.

58. In order to establish the peremptory character of a norm—for example, that of the principles to which reference had been made—one could take as a starting point the fact that the rule had been repeatedly affirmed in documents such as the United Nations Charter and other international documents which had stressed, sometimes explicitly, its fundamental importance. Consequently the Romanian delegation did not consider that there was any sound basis for the argument that it would be difficult to establish objectively the content of *jus cogens* and that there was a risk that that content would be determined arbitrarily by each State. Such arguments might ultimately lead to denial of its existence.

59. His delegation did not think that the method followed by the International Law Commission in demonstrating the existence of *jus cogens* could impair the stability of treaties by undermining the scope of the principle *pacta sunt servanda*, since the utility of the rule was not to be judged by reference to the possibility of a ground of invalidity being invoked in bad faith. He also thought that the relationship between the principle *pacta sunt servanda* and the norms of *jus cogens* was one of co-ordination and not opposition, since the application of the principle presupposed the existence of properly concluded treaties, namely treaties in conformity with *jus cogens*. *Jus cogens* and the performance of treaties in good faith thus merged in a logical and harmonious system.

60. A provision that a treaty conflicting with *jus cogens* was void seemed to have above all a preventive function. It warned States that any treaty they concluded must conform to the fundamental principles of international law and other peremptory rules of that law; and those principles were of fundamental significance for the legal security of the international community. The conclusion of treaties conforming with *jus cogens* could therefore ensure the effective and permanent stability of relations between States.

61. The contention that the adoption of article 50, the aim of which was to promote the rule of law in international affairs, would in practice facilitate all kinds of abuse seemed unfounded. The interdependence of the interests of States tended to strengthen good faith in their relations. That in itself was a safeguard against any arbitrary application of the rule stated in article 50. Such reasoning would throw doubt on any rule of international law, since the means of settling international disputes would be considered to be inadequate.

62. The Romanian delegation disagreed with those who wished to subordinate the adoption of article 50 to the establishment of a procedure for settling disputes concerning the operation of Part V of the draft articles.

63. It favoured the International Law Commission's wording, but wished to make the slight drafting change contained in the amendment it had submitted jointly with the USSR (A/CONF.39/C.1/L.258 and Corr.1), which introduced into the text an expression which would eliminate any possibility of interpreting the rule as signifying that there were peremptory norms from which derogation was permitted. The amendment was also designed to avoid any repetition in the text of article 50.

64. Mr. KOUTIKOV (Bulgaria) said he thought the participants had come to the Conference with very definite ideas on matters of principle, particularly on the topic dealt with in article 50, and one could hardly expect to be able to persuade them to change their minds. The Bulgarian delegation would therefore confine itself to explaining its Government's views on article 50.

65. In examining the article, the Bulgarian Government had proceeded on the assumption that every legal order that was to any degree developed presupposed the existence of a stable and coherent body of norms as its essential basis. Some of those elements were so important that any interference with them would seriously impair the operation of the associated legal system. If those rules were to be violated systematically, the whole body of norms would disintegrate and the legal order perhaps crumble away.

66. The Bulgarian Government had already identified without difficulty a series of principles and norms forming part of *jus cogens* and as the Bulgarian representative had told the Sixth Committee at the twenty-second session of the General Assembly: " Examples of generally recognized rules admitting of no derogation were to be found, first of all, embodied in the United Nations Charter as fundamental guiding principles of the Organization. Those principles were well known and were generally recognized as the basic tenets for the conduct of States in their international relations." [4]

67. The Bulgarian Government had never doubted the existence of those rules of *jus cogens*, since the realities of international life were there to prove it. It was not incumbent upon the Conference either to confirm or to invalidate that evidence expressly in the convention.

68. His delegation thought that it should be the task of the Conference to establish a text stating the legal consequences of the existence of *jus cogens* in the special field of treaty law. On that assumption, it was easy to discern all the merits of the wording of article 50, which simply reflected the general view that the fundamental rules of *jus cogens* were so important for the stability of the international legal order that a treaty was void if it violated them. The reasoning of the authors of the article seemed the only possible logical reasoning, because if it was assumed that a derogation from such a rule would upset the established legal order, how could a treaty be held valid if it contained a derogation that had given rise to a conflict between it and the peremptory rule? In such a case no sanction other than nullity *ab initio* could attach to the treaty.

69. Article 50 simply proclaimed a principle dictated by legal logic. The reaction of States to a derogation from any of the unchallengeable rules of *jus cogens* clearly proved that the principle laid down in article 50 was a reality of contemporary international life.

70. His delegation was surprised that other delegations had hesitated to accept the principle stated in article 50 purely because its scope could not yet be defined. No major principle governing international life had ever before had to wait until all its possible practical applications had been catalogued in detail before it was proclaimed a principle. One could formulate a principle having in mind only the outline of its application, pending definition of the concrete limits within which it could operate. In the case of article 50, the principle already existed in practice; it merely had to be incorporated in the text of the convention. That was exactly what the International Law Commission proposed. It had thus invited the Conference to take cognizance of the principle, and the Bulgarian delegation had decided to accept that invitation.

71. The wording of article 50 could nevertheless be improved; that was the aim of the amendment submitted by Romania and the Soviet Union (A/CONF.39/C.1/L.258 and Corr.1), which was designed to clarify the existing text of the article. The Bulgarian delegation was prepared to support that amendment. On the other hand, his delegation could not support the Mexican

[4] *Ibid.*, 979th meeting.

amendment (A/CONF.39/C.1/L.266), which was too rigid and did not specify from when onwards the provision contained in article 50 would not have retroactive effect. The difficulties that amendment might raise were, moreover, indicated in paragraph (6) of the commentary.

72. His delegation understood the desire for precision underlying the Finnish amendment (A/CONF.39/C.1/L.293), but it doubted whether in the case envisaged in that amendment specific provisions could be separated from the body of a treaty. Usually, when such provisions conflicted with norms as important as those of *jus cogens*, the whole treaty was vitiated, as a result of the homogeneity of the text of a convention, and was liable to the sanction of nullity.

73. He was opposed to the United States amendment (A/CONF.39/C.1/L.302), which presupposed that the world's national and regional legal systems were all well established and clearly defined. Nor could he support the joint amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), which, by inserting the words " recognized by the international community as a norm ", postulated the existence of a coherent and well-demarcated international community capable of giving a ruling as an organized entity.

74. The Bulgarian delegation could not support the United Kingdom sub-amendment (A/CONF.39/C.1/L.312), which introduced an innovation into the convention, namely the definition of peremptory norms of international law by protocols to the convention. It was not clear whether it was intended to create such norms by means of a protocol to the convention or merely to record existing norms. In the latter case, the norm to be recorded would already have appeared in the form of a concrete provision, which would no longer need definition as the amendment required. He would vote in favour of the text of the article, bearing in mind the drafting amendment submitted by Romania and the Soviet Union (A/CONF.39/C.1/L.258 and Corr.1).

75. Mr. KEBRETH (Ethiopia) said that in affirming that certain laws or principles partook of the character of *jus cogens*, care should be taken to avoid any proliferation of rules having the character of *jus cogens*, and not to erect any insuperable barriers to the recognition of new peremptory norms. Those two situations were undesirable, but the difficulties created by article 50 should not be taken as the basis for asserting that a provision on *jus cogens* should not be inserted in the convention; for without such a provision, the entire structure of the convention might collapse. So far, a large number of very different rules had been invoked as having the character of *jus cogens* and it was not for the Committee to indicate which rules had the character of *jus cogens*.

76. His delegation understood the reasons that had decided the International Law Commission not to give any examples in article 50 itself. Those examples presented certain drawbacks, in particular owing to the fact that each had its distinctive nuance which did not generally appear in the others. It was not the task of the International Law Commission to deal with those rules in detail in the context of the convention, nor was it for the Conference to do so. It was important, however, to elucidate certain aspects of those rules. Several representatives had stressed the need to establish, within the framework of article 50, in particular, a system for the settlement of disputes. The International Court of Justice had appeared to be the institution most suited to fulfil that role. Such a body would provide a safeguard against abuse by certain States which might be tempted to invoke article 50 wrongfully. But the word " abuse " had perhaps been used too often during the discussions. The existence of a feature inherent in the very nature of the rules of *jus cogens* seemed to have been ignored. A State that by concluding a treaty had derogated from a rule of *jus cogens*, would hesitate before invoking article 50 since it would experience difficulty in explaining to the international community its reasons for concluding the treaty. The question of retroactivity raised a different kind of problem, as did article 61, which moreover scarcely seemed to raise any difficulty owing to the fact that its effects and application had a less peremptory character. In his view, it would be preferable to keep articles 50 and 61 separate and to leave them in the place assigned to them by the Commission.

77. Further, the fear had been expressed that a third State might claim the right to intervene in a treaty derogating from a peremptory norm if, in the performance of the treaty, its interests had been materially affected, or if it considered that it could invoke that right as an injured member of the international community. It was interesting to recall in that connexion that Sir Hersch Lauterpacht's draft had provided for the invalidity of a treaty if its performance had been illegal. The case in question was that of a third State which accused other States of being parties to a treaty which, according to that State, derogated from a rule of *jus cogens*. In such a case, would the States parties to the treaty and the third State be willing to submit the question to the International Court of Justice or a similar institution? It was probable that those States would not follow that procedure in a matter that involved what they considered to be their vital interests. He thought that the procedure to be followed was the one laid down in article 62, which had his delegation's full support. In his view, the question of the intervention of a third State did not enter into the context of the convention on the law of treaties, but if that question assumed extremely grave proportions, Article 33 of the Charter and article 62, paragraph 3 of the draft convention should be applied.

78. His delegation agreed with the members of the International Law Commission that the questions of the development of law and the establishment of an organ for the settlement of disputes should be separate. That did not mean that one of those questions was more important than the other, but that with regard to the law of treaties, the Conference should concern itself primarily with the problem of the progressive development of international law.

79. He had not yet formed a definitive opinion on the amendments by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) and Mexico (A/CONF.39/C.1/L.266).

80. He thought that the United States amendment (A/CONF.39/C.1/L.302), the purpose of which, according to its sponsors, was to explain what was implied in the International Law Commission's text, was a useful attempt to indicate the source of *jus cogens*. If that

was the object of the amendment, he was not sure that the expression " recognized in common by the national and regional legal systems of the world " was complete. What place did multilateral conventions occupy, or the Charter of the United Nations and the resolutions and declarations of international organizations, which reflected the deep convictions of the international community and which sometimes had the character of peremptory norms?

81. Perhaps the United States amendment was more especially concerned with the emergence of new peremptory norms that was referred to in article 61 of the draft.

The meeting rose at 6.10 p.m.

FIFTY-FIFTH MEETING

Tuesday, 7 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. DE CASTRO (Spain) said that the existence of peremptory rules of international law might seem so obvious that even to mention them would be superfluous. But the International Law Commission had been right to include article 50 in the draft convention, in view of the insistence of a minority on either denying the existence of *jus cogens* altogether, or severely restricting its scope. During the present Conference, one distinguished speaker had been heard to express the view that the draft convention contained only one peremptory rule, which was that set out in article 23; according to that criterion, all the provisions of Part V had only a secondary value, and treaties concluded by force, fraud or corruption could conceivably be regarded as valid. It was because of the possibility of such an unacceptable conclusion, contrary to all moral law, that it was essential to include a provision stating the existence of norms which all States, large, medium and small, must fully respect.

2. With regard to the amendments before the Committee, his delegation could not support the Mexican amendment (A/CONF.39/C.1/L.266), because the result of the addition of the proposed second paragraph was by no means clear. The question of retroactivity was already dealt with satisfactorily in articles 24, 61 and 67. In view of its ambiguity, the amendment seemed unacceptable.

3. The amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) was intended to clarify the International Law Commission's text and could be referred to the Drafting Committee.

4. The United States amendment (A/CONF.39/C.1/L.302) had the merit of recognizing the existence of *jus cogens* and was a praiseworthy attempt to define the rule. But the delimitation it proposed was a temporal one, and might be construed as implying the deletion of article 61 and sub-paragraph 2(*b*) of article 67; that solution seemed to be inadmissible, for the reasons set out in the commentary to article 61. A more original element of the United States amendment was the attempt to reduce *jus cogens* to peremptory rules recognized in common by the national and regional legal systems of the world. The proposal seemed to be designed to bring the provision down from the nebulous realm of theory to the level of the man in the street, or more particularly, in the legal department of the Ministry of Foreign Affairs. But, if the United States amendment were adopted, it would mean that Ministry officials would need to be familiar with all the national and regional systems in the world in order to be able to decide whether a rule was recognized in common by all those systems, quite apart from needing to ascertain what national laws were to be regarded as constituting systems, and to decide what rules of national law were to be regarded as components of a system which might be described as international. That would impose a heavy burden on national legal advisers, if the problem were approached from the positive standpoint; but if it were approached from the negative standpoint, it would all be very simple, because it would be enough just to assert that a national system did not recognize the peremptory norm in order to be able to deny the existence of *jus cogens*.

5. In other words, the possibility of a veto by one national system would be introduced, and the United States amendment would represent a retrograde step in international law. Since the days of Francisco Suarez, it had been accepted that, although mankind was divided into peoples and nations, it nevertheless possessed an essential unity, which was the basis of the international community, and that the rules governing the community of all nations and peoples were those which really constituted international law. The effect of the United States amendment would be to revive the ultra-nationalist idea of what might be described as external State law, incompatible with the concept of real international law. His delegation could not, therefore, vote for that proposal.

6. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to the United States amendment also had the advantage of recognizing the existence of *jus cogens* and, in addition, was designed to remove one of the main objections to the Commission's text of article 50. Unfortunately, however, he was not convinced of the possibility of applying the machinery proposed by the United Kingdom, for two reasons. From the theoretical point of view, it was not clear how the existence of a rule of *jus cogens* could depend on any declaration by a group of States. The current Conference, for example, could establish binding rules which might be peremptory *inter se*, but not in respect of third States; *jus cogens*, however, was universal peremptory law, as recognized by the international community, binding by its very nature. From the practical point of view, moreover, it seemed unnecessary to await a definition of a *jus cogens* rule by means of protocols, for that implied that the conditions of the applicability of peremptory norms were subject to the convening of a conference and the drafting and entry into force of a protocol. The door would thus be opened to the possibility of indefinitely maintaining in force a clause which conflicted with a rule of *jus cogens*. The Spanish delegation therefore could not vote for the United Kingdom sub-amendment.

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