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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.

7. His delegation had become a co-sponsor of the amendment by Greece and Finland (A/CONF.39/C.1/L.306 and Add.1 and 2) because it was designed to meet the objections of various delegations to the rather vague wording of article 50. The term " general international law " might, for instance, be held to refer only to geographical scope. The sponsors had therefore specified that the peremptory norms in question were the norms recognized by the international community as those from which no derogation was permitted. The Spanish delegation hoped that that wording would reconcile certain differences of opinion; if, however, the amendment were not accepted, it would vote for the International Law Commission's text.

8. Mr. SAMAD (Pakistan) said that the International Law Commission was to be congratulated on including in its draft convention articles 50 and 61 on *jus cogens*, which represented a substantial advance on Article 103 of the United Nations Charter.

9. The Pakistan delegation endorsed the underlying principle of article 50, that the will of the contracting parties was no longer the sole criterion for determining what could be lawfully contracted. The concept that legal force could be accorded only to treaties fully conforming with the basic principles of contemporary international law would, if properly applied, promote the rule of law in international relations. The Commission had rightly refrained from listing all the norms of international law which had the character of *jus cogens*, and had left the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals. The Pakistan delegation took the view that the application of articles 50 and 61 must be made subject to independent adjudication, along with certain other provisions of Part V of the draft convention. It supported the Commission's texts of both articles; since the rules were patently non-retroactive, no amendments to either article were necessary or desirable.

10. Mr. HARRY (Australia) said that the issue raised by the International Law Commission's text of article 50 was not, as some representatives had suggested, whether States participating in the Conference accepted *jus cogens* as an abstract doctrine or whether there were or should be certain peremptory norms of general international law which should prevail over any treaty provisions which conflicted with them. The Conference had been convened, not to speculate on the logical necessities of an ideal system of law in an ideal international society, but to draft in precise language the rules which might govern for decades the essential validity of written agreements between sovereign States. At that stage in its work, it had to decide on the precise circumstances in which a treaty might be or might become invalid, and must examine the Commission's draft from the point of view of States wishing to enter into agreements and to develop, through treaties, friendly relations with other States to their mutual interest. The courts which construed treaties, gave advisory opinions on them, or delivered judgements about them, needed sure criteria for the conditions under which a treaty should be regarded as void or invalid.

11. The preceding articles in Part V contained a number of grounds of invalidity, some of which seemed unnecessary and others of which had elements of obscurity; but all had at least the merit of relative clarity. Article 50 fell into a different category. It said " A treaty is void if it conflicts with a peremptory norm of general international law ", but left unanswered the question which norms possessed that peremptory character, and provided neither definition nor explanation of the term. The Romanian and USSR amendment (A/CONF.39/C.1/L.258 and Corr.1), that the norms were those from which no derogation was permitted, did not help at all.

12. In studying the International Law Commission's proceedings with regard to article 50, the Australian delegation had naturally gone beyond the deliberations of the Commission and of the Sixth Committee of the General Assembly, had studied the works of jurists and had sought for decisions of courts recognizing, applying or defining the alleged rule. It wished to emphasize the statement by Lauterpacht, in his 1953 report on the law of treaties, that " there are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object ". [2] As recently as 1961, Lord McNair had stated " no international tribunal has been directly compelled to pass upon the question of the effect of conflicts or incompatibility of these kinds upon the validity of a treaty ", [3] no cases had been heard of since, and none had been cited in the Committee. Lord McNair had gone on to suggest that it was " easier to illustrate these rules than to define them ". [4] Individual members of the Commission had referred to slavery, piracy, genocide and unlawful use of force and crimes under international law, but the Commission as a whole had decided not to include illustrative examples in the article, and had singled out in the commentary only the law of the Charter concerning the prohibition of the use of force; it had also recommended that it should be left to State practice to work out the full content of the rule.

13. In the absence of any comprehensive list or any clear definition, even by illustration, of what norms of general international law would have the character of *jus cogens*, the Australian Government concluded that it would be wrong to include the article in the present terms, in a convention on the law of treaties. It had not proposed the deletion of article 50, because it had hoped that the content of the article might become clearer during the deliberations of the Conference, and that amendments might be introduced which would add such necessary elements as a precise criterion for establishing whether a rule of international law had acquired a peremptory character.

14. The Australian Government had also expected that the Conference would attempt to develop in the draft convention an adequate system for the settlement of disputes arising in relation to treaties; such machinery would not, of course, be designed to establish new rules of international law, or even to attach the character of *jus cogens* to existing rules, but it would at least enable a court or arbitrator to give an objective decision on whether international law recognized a peremptory character as attaching to some already recognized rule of international law.

15. The results of the discussion had been disappointing and a clear definition of *jus cogens* was still lacking. No one knew by what process the doctrine came to apply to parti-

[2] *Yearbook of the International Law Commission, 1953*, vol. II, p. 155, para. 5 of comment on article 15.

[3] McNair, *The Law of Treaties*, p. 214.

[4] *Ibid.*, p. 215.

cular rules of general international law. There was no list of rules from which States could not derogate by treaty. It was a " dynamic field " and the International Law Commission had said that peremptory norms should not be regarded as immutable since they could be modified by a subsequent rule having the same character. One thing only was clear in article 50 and that was that conflict with a rule of *jus cogens* would render a treaty void *ab initio*.

16. Article 50 would be a development of international law. The international public order existed mainly by virtue of the Charter of the United Nations, and the primacy of the obligations of the Charter, so far as the great majority of nations was concerned, was established by Article 103. That key article had not been sufficiently recognized by the Commission. It meant that, even in the present convention, obligations inconsistent with the Charter could not be effectively accepted. The position of Article 103 was technically safeguarded in article 26 of the present articles, while articles 49 and 70 also referred to the Charter. Article 70 stressed the " super-cogens " character of the Charter. There were certain rules, like the prohibition of piracy, which should perhaps be given a peremptory character and, as the international community developed a more nearly perfect legal order, other norms of international law might be recognized as possessing a peremptory character, but the conditions for establishing that a rule fell within *jus cogens* should be defined.

17. The United States amendment (A/CONF.39/C.1/L.302) went some way towards providing a reasonable definition, not of the class of norms which should be regarded as imperative, but of essential conditions which would have to exist before it could be held by any court that an existing rule of international law had been recognized as having a peremptory character. It was not entirely clear what was meant by " regional legal systems " or what was envisaged in the recognition " in common " by national and regional systems. Perhaps one point from the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306) might be incorporated by the United States delegation in its amendment, which could be re-drafted to read " A treaty is void if, at the time of its conclusion, it conflicts with a peremptory rule of general international law which is recognized by all the principal legal systems of the world as a rule from which no derogation is permitted ". That would make it clear that a rule was a norm of *jus cogens* only if there was general agreement in the international community on the point. Absolute unanimity might not be necessary but the substantial concurrence of all the principal legal systems was necessary. As with customary rules, peremptory rules were not a matter of majority voting.

18. The United Kingdom amendment (A/CONF.39/C.1/L.312) would determine absolutely those rules of general international law which had been recognized by all the principal legal systems as rules from which no derogation was permitted. The amendment deserved careful consideration, even though it involved some difficulties. It was not a question of drafting new rules or codifying existing ones, because new rules could only be developed by the regular procedures laid down by international law itself. He understood the United Kingdom proposal to be to add, in protocols to the convention, a list of rules recognized by all the principal legal systems as possessing a peremptory character.

19. In view of the particular difficulties or article 50, time should be given for discussing it in a formal or informal working group, or to work on it between the present session of the Conference and the next.

20. Mr. AMADO (Brazil) said that at the stage of development now reached by international law, no one could deny the truth of Lord McNair's dictum " It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract. In every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements ".[5] Thus, when the question of including a provision on *jus cogens* had arisen in the International Law Commission, an extraordinary concordance of views had emerged among members of widely differing personality and legal background. The idea of including such a provision had first arisen when the Commission was considering preparing a code, rather than a convention, on the law of treaties; even at that early stage, however, the difficulty of ensuring the pre-eminence of certain principles had been recognized.

21. International law had developed rapidly in the past thirty or forty years, during which the practice first of the League of Nations and then of the United Nations had given it a degree of form and structure. Nevertheless, it was still at a stage open to development. Thus, in drafting article 50, the International Law Commission had for the first time proposed a rule in which no individual interest of two or more States was involved and which was concerned with the over-all interests of the international community. The individual and reciprocal rights and duties of contracting parties were subjected to the supreme and unanimously recognized interests of the international community.

22. It should be borne in mind, however, that all legal rules emerged from the practice of States. That was why his delegation had remained silent during the discussion of the nineteen-State amendment to article 49 (A/CONF.39/C.1/L.67/Rev.1 Corr.1), which went beyond the fundamental basis of State practice and the jurisprudence of international tribunals. International law was by definition formed by States, and no noble aspirations or sentiments, love of progress or anxiety for the well-being of the peoples of the world could be embodied in international instruments without the collective assent of the international community. Individuals could be swayed by sentiments, but States could not; in accusing a State of imperialism, it should be remembered that the first duty of any State was to protect its own interests and to solve the problems of its own population. Any contrary assertion was tantamount to interference in the domestic affairs of that State.

23. The world community was undoubtedly progressing towards the institutionalization of international law. The community was able to formulate rules, but in international law there were as yet no means of enforcement parallel to those of national law. The Committee was faced with a dilemma. Was it to adopt the pessimistic attitude of the Australian delegation, or the inflexible

[5] *Ibid.*, pp. 213 and 214.

approach of the United Kingdom delegation? Should it delete the noble and bold innovation proposed by the Commission in article 50 as a counterpart to the great principle *pacta sunt servanda*? In the opinion of the Brazilian delegation, that course was unthinkable. Some of the amendments before the Committee might introduce valuable elements into the Commission's draft, particularly those which gave greater force to the principle that the article was not retroactive, a principle which his delegation regarded as essential. An assembly of honest, cultured, patriotic yet internationally minded jurists, who must accept the principle of the predominance of the universal over the particular, should bend their collective efforts to ensure that the rule of *jus cogens* was not sacrificed. There could be no doubt that *jus cogens* was not just a principle or an aspiration, but a reality confronting all States in contemporary international law.

24. Mr. SMEJKAL (Czechoslovakia) said that article 50 contained one of the most important rules of international law. The disagreement over it centred on how *jus cogens* could be defined so as to protect the stability of contractual relations. His delegation would support a more precise formulation of article 50 if that could strengthen the international legal order but, after careful study of the Commission's documents and other sources, had come to the conclusion that a more precise formulation was not possible. It had not been attempted by the Commission on the grounds that it would be difficult to elaborate an exhaustive list of rules of *jus cogens*. The task of the Conference was to codify the law of treaties and not other rules of international law, some of which had the character of *jus cogens*. Those rules also governed non-contractual relations between States and belonged to an entirely different sphere to that being examined at the Conference.

25. The Commission had given in its commentary a number of examples of *jus cogens* which ought to be confirmed. Clearly a State could not conclude a valid treaty designed to exterminate a nation or ethnic group, or to destroy the territorial sovereignty and political independence of a State, or to promote the slave trade or piracy; nor could it conclude a treaty contrary to the principles in Articles 1 and 2 of the United Nations Charter or other rules of the Charter, or to rules outside the Charter from which, in the interests of the international community, States might not derogate. The content of *jus cogens* would be defined progressively by the practice of States and international jurisprudence. Rules of *jus cogens* were indispensable for the protection of public order, the community of States and the maintenance of the standards of public morality, and as the representative of Iraq had said, in order to acquire the character of *jus cogens*, a rule of international law must not only be accepted by a large number of States, it must also be regarded as indispensable for international life and be deeply rooted in the international conscience.

26. Unless *jus cogens* was respected the international legal order would be threatened, as would be the whole system of peaceful co-operation between States. It was therefore difficult to understand the negative position adopted by some States which frequently insisted on the need for a better organized system of international law. There was undoubtedly some risk of abuse with a general formula of *jus cogens*, but if treaties which conflicted with it were considered as valid and if the principle were not incorporated in the convention, an important safeguard would have been neglected.

27. His delegation was among those which had emphasized the importance of *jus cogens* for the international legal order, coexistence and peaceful co-operation between States. It paid tribute to the Commission's achievement in article 50 and was ready to vote in favour of constructive proposals, but could not support the amendments by Mexico (A/CONF.39/C.1/L.266), the United States of America (A/CONF.39/C.1/L.302) and the United Kingdom (A/CONF.39/C.1/L.312).

28. Mr. FUJISAKI (Japan) said that, as international intercourse increased, the need for peremptory norms became greater. His delegation believed that the idea of placing a peremptory norm of international law above ordinary treaties was a sound one. But the problem was how to define it. The International Law Commission had admitted that difficulty in its commentary.

29. It was particularly desirable in the case of article 50 to have a clear definition of the terms used and a precise delimitation of the scope of the article. From that point of view, he welcomed the United States amendment (A/CONF.39/C.1/L.302) and the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) as attempts to improve the wording.

30. But whatever the outcome of those attempts, his delegation was convinced that it was most important to provide for the adjudication of disputes arising under article 50 by the highest judicial organ, namely the International Court of Justice, for the question of conflicts between a treaty and a peremptory norm of international law was pre-eminently of a juridical nature, and it concerned the general interest of the whole community of nations. It could not properly be left to *ad hoc* procedures decided between the parties to a dispute. His delegation firmly believed that no State should be entitled to have recourse to article 50 without accepting the compulsory jurisdiction of the Court. It would therefore be difficult for his delegation to take a firm position on the article until a decision had been reached about procedures for resolving disputes. He would therefore suggest that the vote on article 50 should be deferred.

31. Mr. FLEISCHHAUER (Federal Republic of Germany) noted that only a few speakers had denied the existence of certain rules of *jus cogens* in international law and said that his delegation was equally of the opinion that such rules existed in international law. The growing interdependence of States had brought about an international public order which had led to the establishment of certain fundamental rules as peremptory norms from which no derogation was permitted. An example of such a rule was the prohibition of the use of force, laid down in Article 2 (4) of the Charter. The existence of an international *jus cogens* had been affirmed by a number of German scholars, and the Constitutional Court of the Federal Republic, in a recent decision concerning an international treaty, had declared that there were rules of international law from which even treaties could not derogate.

32. The question was whether the notion of peremptory norm used in article 50 needed some definition. Some speakers had considered that the International Law Commission's text, which contained no definition, should be retained but, since the notion was new and there was

no authoritative enumeration elsewhere of the rules of *jus cogens* and no agreement on their content, it was imperative in his delegation's view to have some definition; otherwise it would be like having a penal code which provided for the punishment of crimes without saying what acts constituted crimes. Unless some definition were provided, article 50 would be open to arbitrary interpretation and that could seriously impair the sanctity of treaties.

33. The method of casuistic enumeration of principles would be the clearest way to define *jus cogens* but would present the greatest technical difficulties. In any event, it was not for the Conference to seek a definition, which moreover would need revision from time to time. The United Kingdom amendment (A/CONF.39/C.1/L.312) was an interesting attempt to avoid the difficulty and arrive at a written enumeration of peremptory rules; it would make for clarity and deserved careful study. Another possible way of providing a definition would be to state in article 50 what requirements a norm had to meet in order to become a peremptory norm in international law. According to Article 38 of the Statute of the International Court of Justice, general international law comprised international custom as evidence of a general practice accepted as law and the general principles of law recognized by the community of nations. In order to become a peremptory norm of international law binding on all States, a rule required general recognition that went beyond the criteria developed by doctrine and practice. It must reflect international practice accepted as law and must also have uniform validity within the various legal systems.

34. Both the Greek amendment (A/CONF.39/C.1/L.306 and Add.1 and 2) co-sponsored by Finland and Spain and the United States amendment (A/CONF.39/C.1/L.302) went some way towards providing a definition of that kind but the former did not go far enough; it simply required that the rule should have the usual recognition of the international community; it did not require that it should be accepted by all legal systems. The United States amendment came closer to what his delegation had in mind, though its drafting needed improvement.

35. Another important question was how to secure the practical application of article 50 and how to prevent its being abused. He agreed with those delegations which considered it necessary to provide in article 62 for some kind of compulsory machinery, not necessarily limited to the International Court of Justice, with a mandatory conciliation procedure prior to the judicial stage leading at least to compulsory adjudication by an arbitral tribunal.

36. He could not support the proposal by the representative of Iraq to proceed with the material rule in article 50, irrespective of the outcome of the discussion on procedural guarantees. There was no reason why the provision of some kind of machinery should entail unduly complicated institutional arrangements. Certainly, without a procedural guarantee, the way would be open for misinterpretation and abuse which might threaten the principle of *pacta sunt servanda* and deprive the article of its protective function. Whatever definition was inserted in article 50, it could never be clear enough to forestall arbitrary interpretation by parties intending to release themselves from perfectly valid treaties. Without an adequate procedural guarantee, an economically or politically strong State might persuade a weaker partner to admit that in their bilateral relations certain principles of *jus cogens* should not apply. Even if no force was involved it seemed unthinkable that two States should be able to decide by agreement whether or not a norm of *jus cogens* was to apply between them. Thus compulsory guarantees were necessary if the notion of *jus cogens* was to be effectively implemented through article 50 and the legitimate rights and interests of States protected against possible abuse. He hoped, therefore, that the vote on article 50 could be postponed until the procedural question had been settled.

37. Mr. PINTO (Ceylon) said that, when commenting on article 39, he had expressed full support for the principle of *jus cogens* and had urged that it be written into an article of the convention which would then become a milestone in the progressive development of international law. Article 50 would give legal expression to a moral principle and for the first time States would recognize that there were certain rules of law of such importance that they could not be derogated from by agreement and would therefore accept voluntarily a fetter on their sovereignty in the external sphere.

38. But such a provision would only be a beginning and he had no illusions as to the actual utility of article 50 in its present form. For example, it would not prevent States from conspiring by treaty to achieve evil ends, for example, to promote the slave trade, decimate populations or commit aggression. To declare such treaties void would not greatly affect their performance and, if one of the parties wished to release itself from obligations, it would undoubtedly do so without claiming nullity on the ground of conflict with a peremptory norm. The provision might, however, encourage a successor government of a State party to an illicit agreement to refuse performance by such other legal means as were open to it and restore the *status quo*.

39. Article 50 was not likely to be applied often and recourse to conflict with *jus cogens* as a ground for nullity would be rare, so that international tribunals would not be flooded with claims of invalidity. Most treaties contained machinery for termination that was easier to apply and there were other better developed principles, such as *rebus sic stantibus* or the rules of succession to treaties, under which relief could be sought with a greater expectation of a reasonable solution. However, the likelihood of abuse did exist, so that some effort was needed to elaborate the article in such a way as to convey more explicitly the content of *jus cogens*. Perhaps article 50 should be studied further by the General Assembly or by the Commission. But as between postponing article 50 for further study—entailing long delay—and the adoption of the article in its present form while detailed study was proceeding, he would prefer the latter course. In any event it would be desirable to establish appropriate machinery for the prompt, objective and final determination of disputes that might arise over the interpretation or application of the article.

40. He was prepared to vote in favour of the Romanian and Soviet Union amendment (A/CONF.39/C.1/L.258 and Corr.1). The United States amendment had the drawback of failing to recognize the evolutionary aspect of *jus cogens*. He could not support the Finnish amendment (A/CONF.39/C.1/L.293) because, in his opinion, a treaty voided under article 50 should be totally void and

if the parties wished to salvage any part of it, they should be required to do so in an independent agreement. He could not support the Mexican amendment (A/CONF. 39/C.1/L.266) for the reasons given by the representatives of Uruguay and India.

41. Mr. GARCIA-ORTIZ (Ecuador) said that article 50 was undoubtedly the most progressive of the whole draft.

42. In paragraph (2) of its commentary to the article, the International Law Commission had stated that " there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* ". In paragraph (1), however, it had observed " that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens* ". So although no precise definition was possible or perhaps even desirable, the nature of the rules of *jus cogens* was well known and it was possible to give examples, as the Commission itself had done in the commentary.

43. Article 50 raised the problem whether an international legal order existed. The answer was undoubtedly in the affirmative. That order was based on the necessities of the life of the international society and perhaps on the concept of *jus communicationis* propounded by Vitoria. The international legal order did not proceed exclusively from the will of the States. Inter-State society had its own demands in the interests of its continued progress, independently of the will of the States which formed it. The subject-matter of the rules of *jus cogens* reflected the legal achievements of mankind which together formed a rational body of law, in a sense comparable to *jus naturalis*. There was, however, a fundamental difference between the two, in that *jus naturalis* was the point of departure, whereas the rational and universal rules of law were the point of arrival. Every legal order must respect those legal achievements of mankind, which placed certain negative limitations on its provisions. The limits which a positive legal order could thus not exceed rested on empirical bases derived from the prevailing conditions in the inter-State society; they were also evolutionary in character, in regard both to the rights conferred and to the grounds on which they were based.

44. His delegation therefore supported article 50, which specified two objective criteria for identifying a rule as having the character of *jus cogens*: first, the fact that no derogation was permitted; secondly, the fact that the rule could be modified only by a subsequent rule of *jus cogens*. The subsequent rule must always be progressive and not retrogressive; it would be readily recognizable because it would tend to foster and improve the international legal order. But at the same time, his delegation wished to suggest the insertion of an additional paragraph to read: " The norms of *jus cogens* contained in the Charter of the United Nations render void not only future but existing treaties which conflict with those norms, or which proceed from acts which conflict with those norms ". Since that suggestion merely incorporated a passage from the commentary to article 61, his delegation had not submitted it in the form of an amendment, but would ask that it be referred to the Drafting Committee and placed on record for the purpose of the interpretation of article 50.

45. His delegation could not support the amendments by Mexico (A/CONF.39/C.1/L.266), Finland (A/CONF.39/C.1/L.293) and Greece, Finland and Spain (A/CONF. 39/C.1/L.306 and Add.1 and 2). The amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which did not involve any change of substance, should be referred to the Drafting Committee. His delegation opposed the amendments by the United States (A/CONF.39/C.1/L.302) and the United Kingdom (A/CONF.39/C.1/L.312), which undermined the very character of the concept of *jus cogens* by placing it in a subordinate position. No rule of the convention or additional protocol thereto could take precedence over peremptory norms such as those embodied in the provisions of the United Nations Charter.

46. Mr. DEVADDER (Belgium) said that article 50 did not contain any criterion for identifying the rules of *jus cogens* but merely stated the consequences to be derived from the fact that a rule of general international law had that character. Since those consequences were serious, it was essential that it should be possible to determine the content of *jus cogens* on the basis of the text of the article.

47. There could be no question of trying to enumerate the rules of *jus cogens*, but article 50 should state certain objective criteria for determining which of the rules had the character of peremptory norms of general international law within the meaning of its provisions. The fact that a rule was recognized by the various legal systems of the world as being peremptory would constitute a valid criterion for deeming it to be a rule of *jus cogens*. Even if a criterion for determining the actual content of the concept of *jus cogens* were included in article 50, there would still remain the problem of determining in each specific case whether, and to what extent, a rule of *jus cogens* was applicable. For that purpose, it was essential that the issue should be decided by adjudication or arbitration, and the court or arbitral tribunal would need to find in the convention on the law of treaties objective elements on which to base its decisions. It was unthinkable that the law should be laid down by arbitrators and judges; their task was to apply the law and not to make it. States should not be left in doubt as to the content of *jus cogens* and have to wait years for a body of case-law to emerge. A State might have to decide its attitude to a proposed treaty which was liable to be affected by any change that might subsequently be acknowledged in the scope of the rules of *jus cogens*. The resulting uncertainty might well prevent the conclusion of an agreement which would be of benefit to all the States concerned but which governments would hesitate to ratify out of fear that the agreement might later be rendered void.

48. The United States amendment (A/CONF.39/C.1/L.302) could provide elements for determining the content of the *jus cogens* rule, subject to drafting improvements, such as the incorporation of the Australian suggestion.

49. Mr. YAPOBI (Ivory Coast) said that the provisions of article 50 raised the question whether *jus cogens* was a myth or a reality, but the statements by the representatives of Iraq and Lebanon had shown that the concept had been recognized from the earliest times. It had been acknowledged in a somewhat primitive form at first, but with the development of inter-State relations it had become more precise and had taken root in the conscience of mankind. Since the end of the Second World

War, the existence of rules of *jus cogens* had been undisputed.

50. There was no difficulty in identifying the source of *jus cogens* rules; they were a by-product of the evolution of the inter-State society. When the conduct of States was determined exclusively by considerations of self-interest, international relations had been governed by a sort of jungle law where the decisive factor was force, with its corollaries of duplicity and deceit. There was no room in that system for ethical rules. The increase in the number of independent States, the emergence of new powerful nations, the devastation of two world wars and the appearance and proliferation of nuclear weapons which endangered the very survival of mankind, had inspired a new solidarity of nations, based on the interdependence of States, international co-operation, peaceful co-existence, and assistance by the wealthier to the less-favoured nations. It was those developments which had led to the setting up of the United Nations and its family of organizations. The recognition of *jus cogens* by international law was only one result of that process, which was making international relations more human in character by basing them on the equality of men and that of States. The adoption of the *jus cogens* concept would constitute an international recognition of the inescapable necessity of introducing the element of morality into inter-State relations. For those reasons, his delegation commended the International Law Commission for its draft article 50.

51. The drafting amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) was logical and useful in that it stated more precisely the principle involved. He could not support the Mexican amendment (A/CONF.39/C.1/L.266), which appeared to repeat the contents of one of the provisions of article 67; in any event, he could not accept the idea that the immediate application of a new legal norm to a pre-existing situation constituted in any way a breach of the principle of non-retroactivity. He also could not accept the amendment by Finland (A/CONF.39/C.1/L.293), which made provision for separability. Since a treaty which came into conflict with a *jus cogens* rule was null and void, separability was out of the question; the whole of the treaty must disappear.

52. He opposed the remaining amendments, in particular the proposition that the determination of the rules of *jus cogens* in international law should depend on the internal law of States, as suggested in the United States amendment (A/CONF.39/C.1/L.302). He also rejected the United Kingdom amendment (A/CONF.39/C.1/L.312) for the enumeration of the rules of *jus cogens* in the convention on the law of treaties and protocols thereto. In view of their variable and evolutionary character, the rules of *jus cogens* should be determined by custom, State practice and court decisions.

53. He strongly supported the retention of the concept of *jus cogens*, as introducing into international law the essential concept of morality on which the fundamental principle of good faith was also based.

The meeting rose at 1 p.m.

FIFTY-SIXTH MEETING

Tuesday, 7 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. BISHOTA (United Republic of Tanzania) said his delegation fully supported the principle of *jus cogens* stated in article 50. The article was a simple and clear declaration, which meant that man was capable of feeling love, compassion and respect for his fellow men. It was a statement of fact, not merely a declaration of intent. The article was therefore useful, and indeed necessary, and the Conference should unanimously adopt the principle stated in it.

2. The text of the article, particularly the words " and which can be modified only by a subsequent norm of general international law having the same character ", was not, however, entirely satisfactory. In the first place, those words added nothing to the basic principle stated in the article and were therefore unnecessary. Besides, they might have serious consequences—a fear which seemed particularly well-founded in the light of the International Law Commission's explanation of the reasons why those words had been included in the text of article 50. In paragraph (4) of its commentary the Commission said that " it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments ". His delegation took the view that a rule of *jus cogens* could not be modified. New norms of *jus cogens* would, of course, emerge in the future, but they could only be added to the earlier norms and could never derogate from those already in existence. It was hard to see how " future developments " could modify the condemnation of the crime of genocide, the slave trade or the use of force. The Commission had explained that such modification would most probably be effected through a general multilateral treaty; thus, in order to escape the rigorous provisions of article 50, States would only need to call their treaties " general multilateral treaties ". Moreover, as the object of a treaty was generally to give formal recognition to State practice, what the Commission proposed as the means of modifying a rule of *jus cogens* was not only a " general multilateral treaty ", but also the practice of States. The words in question were therefore dangerous and should be deleted. The word " modified " had already been adversely criticized during the debate as providing a licence for breaching treaties; it was for that reason that article 38 had been deleted. If a vote was taken on article 50, the Tanzanian delegation would ask for a separate vote on the words in question.

3. The Tanzanian delegation supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which made the text more precise,

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