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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.

and it was in favour of the addition of the words " at the time of its conclusion " proposed in the United States amendment (A/CONF.39/C.1/L.302). On the other hand, it could not accept the phrase " which is recognized in common by the national and regional legal systems of the world " in the United States amendment. The expression " regional legal systems " was being used for the first time and the United States delegation had not explained it. The effect of the expression " national legal systems " would be to wreck the principle of *jus cogens*, for it was well known that there were national systems whose basic principles were entirely contrary to what was believed to be the whole basis of *jus cogens*, namely, human dignity.

4. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) had nothing to do with the United States amendment to which it referred. It was really a request for the deletion of article 50, in that it sought to make the article a mere *pactum de contrahendo* whose content was to be defined in future protocols. That was particularly the case because the draft convention did not " set forth " any " peremptory rules ", contrary to what the United Kingdom sub-amendment suggested. In effect, therefore, the United Kingdom's proposal was contrary to what had been generally accepted, namely, that certain rules of modern international law had the character of *jus cogens*. The amendment would thus be a retrograde step and the Tanzanian delegation could not vote for it.

5. The United Kingdom representative had suggested that the Committee should refer article 50 back to the International Law Commission. The Tanzanian delegation could not support that suggestion, or suggestions that a vote on the article should be postponed so that negotiations could take place. There were not really any serious differences of opinion in the Committee and there was no reason why it should not vote at the end of the discussion.

6. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that article 50 reflected the historical development of international law. In the past, that law had had the character of *jus dispositivum*. Today it was assuming an increasingly peremptory character. In the report of the Sixth Committee to the General Assembly at its eighteenth session,[2] it was stated that the majority of representatives had agreed on the existence of rules of *jus cogens*, to which they attached great importance for the progressive development of international law. Among the peremptory norms were the universally recognized principles of international law prohibiting, *inter alia*, the use of force, unlawful war and colonialism.

7. It was with those considerations in mind that the Ukrainian delegation had examined the proposed amendments to article 50. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) improved the original text and could be considered by the Drafting Committee. The Mexican amendment (A/CONF.39/C.1/L.266) raised a complex problem—that of the retroactivity of rules of *jus cogens*—and solved it negatively; the original text of the article was preferable. The Finnish amendment (A/CONF.39/C.1/L.293) raised the question of the separability of the provisions of a treaty when only some of them were in conflict with a rule of *jus cogens*. The position taken on that question by the International Law Commission was the correct one: it had considered that the breach of a peremptory norm of international law was an act so serious that it made the whole treaty void.

8. The United States amendment (A/CONF.39/C.1/L.302) reduced the scope of *jus cogens*, since article 50 would not apply to treaties concluded in the past. It was well known, however, that the colonialists had often imposed treaties which conflicted with peremptory norms of international law. Further, the expression " recognized in common by the national and regional legal systems of the world " was contradictory, for if a norm was part of general international law, it had no need to be confirmed by national or regional systems. The Ukrainian delegation would therefore vote against that amendment.

9. Mr. MULIMBA (Zambia) said that in the debate on article 49, his delegation had spoken of the need to recognize the existence of peremptory norms in order to safeguard the interests of the international community as a whole. It would therefore support article 50, which met that need.

10. It would find difficulty, however, in supporting that part of the United States amendment (A/CONF.39/C.1/L.302) which would subject *jus cogens* to " the national and regional legal systems of the world ", because those terms were implicit in the text of the draft article and were therefore unnecessary. On the other hand, his delegation approved of the addition of the words " at the time of its conclusion " proposed in the same amendment, and would support the suggestion that they be incorporated in the amendment by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2). The Mexican amendment (A/CONF.39/C.1/L.266) would then become unnecessary.

11. The Finnish amendment (A/CONF.39/C.1/L.293), whose purpose was to apply the separability rule to treaties which article 50 stipulated to be void, was unacceptable. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) would clarify the wording of article 50.

12. A number of delegations had expressed the fear that article 50 would lead to abuses by leaving States free to ascribe or to deny the character of *jus cogens* to any rule of international law. The establishment of an impartial and independent system of settling disputes had been suggested as a means of strengthening article 62 and securing acceptance for articles 50 and 61. His delegation would consider any such proposal with interest.

13. In conclusion, he agreed with Professor Verdross that the criterion for rules of *jus cogens* was that they served the interests of the whole international community, not the needs of individual States.

14. Mr. MENDOZA (Philippines) said that to recognize the principle of *jus cogens* was to affirm that the community of nations could agree on the existence of certain basic rules from which no nation could derogate. That suggested that States were ready to surrender part of their traditional sovereign right to conclude whatever treaties they pleased.

15. The *jus cogens* principle would strengthen the expanding concept of international law; it represented a formula-

[2] *Official Records of the General Assembly, Eighteenth Session, Annexes*, agenda item 69, document A/5601.

tion of the positive concept of law in the international community.

16. Draft article 50 had met with some criticism. The Philippine delegation thought that it was satisfactory and that it stated a workable rule; for it required the norm to be peremptory, to be a norm not only on international law but also of general international law, and to be not only a peremptory norm of general international law, but also a norm from which no derogation was permitted. The word " general " was probably intended to emphasize the acceptance of the norm by the entire community of nations.

17. As expressed, the idea should not cause any fear of the emergence of too many norms having the status of *jus cogens*, for the rule itself recognized that there would still be general rules of international law which were not peremptory and from which derogation would be allowed. Owing to the diversity of norms, moral concepts and different nations' interests, it was obviously difficult to determine the objective content of the notion of *jus cogens*. It seemed, however, that the affirmation of the existence of *jus cogens* and its recognition provided a good basis for overcoming those difficulties.

18. It might be desirable to specify which rules partook of the nature of *jus cogens*, but the solution proposed in the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) did not seem satisfactory. The International Law Commission had rightly said in paragraph (3) of the commentary that the best course would be " to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals ".

19. His delegation understood why the United States, Romania and the USSR, and Finland had submitted amendments. It was not sure, however, that the reference to " national and regional legal systems " in the United States amendment (A/CONF.39/C.1/L.302) might not unduly limit the scope of the notion of *jus cogens*. Those amendments could nevertheless be considered by the Drafting Committee.

20. The debate had shown nearly unanimous acceptance of the concept of *jus cogens*. His delegation therefore disagreed with those who said it was as elusive as the " flying saucer ". There had, indeed, been very real and flagrant violations of *jus cogens*—piracy, slavery, the unlawful use of force, and genocide. He believed that the good faith and conscience of men and of nations would make it easier to determine eventually the objective content of *jus cogens*.

21. Mr. ROBERTSON (Canada) said that in the Sixth Committee of the General Assembly, at the twenty-second session, the Canadian representative had expressed his delegation's approval of the principle stated in articles 50 and 61, both of which dealt with *jus cogens*. He had also stated that in the absence of any provision for the adjudication of differences relating to the application of those articles in particular cases, the Conference would have either to attempt to define criteria for applying *jus cogens* or consider carefully the implications of failure to do so.[3] Those considerations were still valid.

22. Although his delegation believed that rules of *jus cogens* did exist in international law, it nevertheless shared the view of the International Law Commission that " there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* ". The concept was new in international law. It was true that aggressive wars, acts of genocide and violations of fundamental human rights appeared to be in conflict with the peremptory norms of general international law. But was it possible to go further? In that respect, the United States amendment (A/CONF.39/C.1/L.302) was a marked improvement on the Commission's text. If the article was not to be abused and if its application was to be reconciled with the principle *pacta sunt servanda*, two conditions must be met. First, in so far as that was possible in the text of the article, a standard must be established against which allegations of a departure from a norm of *jus cogens* could be measured. The United States amendment, by referring to the " national and regional legal systems of the world ", did at least suggest such a standard in broad terms. In that respect it was arguable whether the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) went any further than the Commission's text.

23. The second essential condition was that there should be a mechanism to determine the validity of an allegation that a treaty or a clause of a treaty was in conflict with a rule of *jus cogens*. It would be unacceptable for a party to a treaty or a third party to take such a decision itself. Consequently, it was essential to include somewhere in the draft articles, if not in article 50 itself, a provision for compulsory and impartial adjudication.

24. His delegation shared the view that if a treaty was in conflict with a norm of *jus cogens*, it should be void and not merely voidable. But since the application of article 50 would undoubtedly raise difficult problems, it would be in the general interest if, where the conflict was limited and separability was possible, only the offending clauses, and not the whole treaty, were to be declared void. The Canadian delegation therefore supported the Finnish amendment (A/CONF.39/C.1/L.293).

25. Mr. RUEGGER (Switzerland) said he was sorry that his delegation, although it had taken an active part in the work of the previous codifying conferences, had not been asked to give its views, even on a consultative basis, before the debate in the Sixth Committee of the General Assembly. He hoped that appropriate steps would be taken in due course to enable the Swiss delegation henceforth to submit its written comments to the Sixth Committee.

26. In his opinion, the meaning of the expression *jus cogens* and its introduction into international law called for more thorough study than it had so far been given, and the question should be treated with great caution. The expression " international public order ", the use of which had been advocated by the Lebanese representative, seemed preferable. It was close to the terms used by Lord McNair in his work on the law of treaties. Despite the diversity of doctrines, the conclusions reached on the essential points were very similar or even identical. The examples of the best settled rules

[3] *Official Records of the General Assembly, Twenty-second Session, Sixth Committee*, 976th meeting, para. 4.

of *jus cogens* given by the International Law Commission in paragraph (3) of its commentary were striking. The rules set out in the Geneva Conventions and the ILO Conventions might be added to them. Any infraction of those rules was in conflict with international law. Without there being any need to establish a hierarchy or to refer to *jus cogens*, any agreement in conflict with those main principles should, be considered unlawful, since it constituted an attack on the heritage of all mankind. Against such a violation, every member of the community could, and should protest. Obviously no arbitration body, or tribunal, could give its protection to a particular agreement that was immoral or in conflict with those principles, whether *jus cogens* was referred to or not. It seemed that during the discussion the members of the Committee had been more concerned with terms than with the substance of the problem.

27. It followed from what he had said that the Swiss delegation could not accept the International Law Commission's text. It much preferred the text proposed in the United States amendment (A/CONF.39/C.1/L.302) which, although not entirely satisfactory because it too stressed the idea of *jus cogens*, nevertheless had the merit of providing certain safeguards; above all it contained a discreet allusion to that basic instrument, the Statute of the International Court of Justice, and in particular to Articles 9 and 38 of that Statute. The United States amendment also did not beg the question to the same extent as the International Law Commission's text might be said to do.

28. The amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) was a praiseworthy attempt to improve the text, but it did not remedy the defects that made that text unacceptable to the Swiss delegation.

29. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) deserved very careful study. It had great advantages in regard to method and was designed to preserve the stability of law. If the Conference was to outline a sort of world constitution, it must at least apply the principles governing the enactment and revision of national constitutions. A bill could not be submitted to a parliament without stating its exact content. The United Kingdom sub-amendment proposed, for the establishment of rules of international law, a method which was clearly necessary; it consisted in applying to the only competent authority, namely, States. Meanwhile, the international community had nothing to lose because, once again, existing rules protected the human person and prohibited unilateral recourse to armed force, and they did not need to be confirmed by a new convention.

30. He could not agree with the view that a distinction must be made between the question of the normative law to be developed and that of the organ responsible for applying it. It was no use trusting blindly in the future and hoping for the subsequent emergence—which was possible, of course, but not certain—of the necessary institutions.

31. To sum up, the Swiss delegation thought it was absolutely essential to study the question further. One of the solutions proposed by the United Kingdom—to refer it back to the International Law Commission for study before the second session of the Conference—was possible, but would cause very great difficulties. Another solution would be to set up immediately, within the Conference, a special body which could continue its work after the end of the present session. It was important to make an effort to reach agreement, and it would be preferable not to vote on article 50 at that stage.

32. Mr. REY (Monaco) said that his country had a Mediterranean tradition imbued with respect for human values, which obliged it to concern itself with law, but also to be on its guard against the dangers of imprecision and arbitrariness. Monaco welcomed the introduction of *jus cogens* into positive international law, but was anxious about the use that might be made of it. The idea that there was a natural law, an international public order or *jus cogens*—whatever it might be called—had undoubtedly emerged from the debate; but when it came to giving a reasonably precise definition of the concept, opinions differed.

33. Article 50 admirably reflected those doubts and obscurities, but it had the fault of stating the consequences and imposing a sanction as serious as the nullity of a treaty, without indicating by whom, on what ground or by what process the peremptory norms were established by virtue of which a treaty would be voided. That was a gap in the law which ought to be filled. Although *jus cogens* was so universal and compelling, it should not be impossible to delimit it and give examples. Besides the gap in the law, there was also an absence of judicial authority, for article 62 did not say who would determine that a treaty was incompatible with *jus cogens*. It was not in the interest of any State, weak or strong, old or new, aligned or non-aligned, that international law should be threatened by such a retrograde step.

34. The representative of Iraq had probably been right in saying that the overriding principles should be included in the future convention. But article 50 jeopardized the very application of the principle it sought to establish. One way of avoiding the present uncertainty had been proposed; if it was not taken, Monaco would be unable to support article 50.

35. Mr. DONS (Norway) observed that international law was a set of rules established step by step, which were recognized by all as the prerequisite for friendly relations between nations and peoples. Those relations were based on mutual respect for the interests of the parties. On the other hand, it had been universally recognized that, provided the parties were in a position to make their decisions freely, they could include in a treaty any provisions they pleased, so long as they did not infringe the rights of other States. However, as a result of the progressive development of international law and the introduction of humanitarian principles into national and international relations, it had become necessary to limit the freedom of States to derogate from certain fundamental principles designed to safeguard the interests of all. It had become necessary to establish, as it were, a set of higher rules that could not be violated, even by a treaty freely entered into by both parties.

36. The first foundations of such an international constitutional edifice already existed, but they were not yet complete and hasty action must be avoided. In fact, although the International Law Commission had been bold enough to introduce the new concept of *jus cogens*

into the draft, article 50 suffered from defects which were mainly due to the fact that the Commission had tried to do too much too quickly.

37. The article gave no guidance on some important questions, namely, what were the existing rules of *jus cogens* and how did such rules come into being? The Commission's text stated the effects of those rules but did not define them, so that serious disputes might arise between States; and it provided no effective means of settling such disputes. Consequently, it would seriously impair the stability and security of international treaty relations.

38. His delegation was not opposed to the statement of a rule regarding the legal impossibility of performing a treaty which conflicted with a peremptory norm of general international law. But it considered that *jus cogens* should be defined.

39. The discussion on article 49 had shown the danger of leaving that concept undefined. Some delegations had proposed that the rule of *jus cogens* stated in the Charter regarding the threat or use of force, should be extended to cover economic or political pressure, simply by inserting a provision to that effect in the draft convention, by a two-thirds majority vote; but the Conference was not competent to interpret the Charter. If it was so easy to create or modify a rule of *jus cogens*, it was all the more important not to agree to the adoption of that concept in the draft without a proper definition. Some delegations had argued that since the concept of aggression had been recognized without being defined, it should also be possible to dispense with a definition of *jus cogens*; but it should be remembered that, as aggression was more a political than a legal concept, its interpretation was a matter for the Security Council, whereas the establishment of a similar body responsible for interpreting the legal concept of *jus cogens* had not even been planned.

40. Article 50 left open the question whether *jus cogens* could be invoked only by the parties to a treaty or also by other States, or even by private persons. His delegation did not think that either article 62 in its present form, or the United Nations Charter to which it referred, provided sufficient procedural safeguards to ensure the effective settlement of disputes arising out of the application of article 50. The only means of ensuring that that article would not be a source of serious discord was to provide for compulsory recourse to arbitration or judicial procedure when other means of settlement had proved ineffective.

41. As it stood, article 50 amounted to recognizing a party's right to denounce a treaty unilaterally at its own discretion, which was clearly unacceptable. It was very important that the text of the article should be acceptable to all, or nearly all, because it was intended to establish a new or at least hitherto little known rule. Consequently, his delegation agreed with those who thought that the Committee should not vote on the article at that stage, but should refer the text and amendments thereto, together with articles 61, 62 and possibly other articles, to a conciliation group or working party. If that group did not succeed in working out a text which was acceptable to the great majority, the success of the Conference's work and even the convention itself might be seriously endangered.

42. Mr. CHAROENCHAI (Thailand) said his delegation attached particular importance to Part V of the draft articles, which contained fundamental rules and made a substantial contribution to the development of positive international law. It warmly congratulated the International Law Commission on having included article 50 in the draft. Although they had emerged so late, the peremptory norms of general international law constituting *jus cogens* could not be disregarded by civilized States. It was right that a treaty violating those norms should be declared void, by virtue of a rule corresponding to that which already existed in private law. He reminded the Committee of the important passage in McNair's *The Law of Treaties* cited by the Brazilian representative at the previous meeting. [4]

43. The International Law Commission had been right not to give examples, for an enumeration might hinder the development of *jus cogens*. It was preferable to rely on the judgement of the International Court of Justice or any arbitral tribunal to which the matter might be referred.

44. His delegation also endorsed the opinion expressed in paragraph (6) of the commentary concerning the non-retroactive character of the nullity prescribed; if a new rule of *jus cogens* emerged, a previously concluded treaty conflicting with that rule would only become void when the new rule was established; it would not be void *ab initio*. That principle was laid down in article 61 of the draft.

45. With regard to the amendments, it seemed unnecessary to repeat the word " norm " as proposed by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1). The amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) was also unnecessary; the formula proposed by the International Law Commission ought not to raise too many difficulties in application. The same applied to the United States amendment (A/CONF.39/C.1/L.302).

46. As to the United Kingdom sub-amendment (A/CONF.39/C.1/L.312), his delegation recognized the force of the arguments advanced by its author, but feared that negotiation of the protocols might be very difficult. An enumeration of peremptory norms, a solution also suggested by the United Kingdom representative, would be sure to give rise to interminable discussions in the Conference.

47. His delegation could not support the Mexican amendment (A/CONF.39/C.1/L.266), as it would prefer the question of non-retroactivity to be the subject of a separate article. Nor could it support the Finnish amendment (A/CONF.39/C.1/L.293), since it regarded the violation of a norm of *jus cogens* as sufficiently serious to render the whole treaty void.

48. Although it was not opposed to some of the amendments being considered by the Drafting Committee, the delegation of Thailand supported the text proposed by the International Law Commission and would prefer it not to be changed.

49. The CHAIRMAN announced that the Mexican amendment (A/CONF.39/C.1/L.266) was withdrawn.

50. Mr. ARIFF (Malaysia) said he thought it was safe to say that from the earliest times societies had been governed by some peremptory norms, at first as customs. As societies developed and formed States, their peremptory norms became public policy, depending on their

[4] Para. 20.

degree of organization and their community spirit; its function was to protect the community's essential interests. Transferred to the international sphere, public policy became what could be called *jus cogens*, which was indispensable for an increasingly organized international society in which relations tended to become multilateral rather than bilateral, and in which the interests of the international community as a whole consequently prevailed over the individual interests of each State.

51. At one time, States had been able to agree on almost anything, without restriction, by virtue of the rule of sovereignty, reinforced by the principle *pacta sunt servanda*. But once the use of force had been prohibited by instruments such as the League of Nations Covenant and the United Nations Charter, other limitations on sovereignty had become possible. That prohibition marked the appearance of *jus cogens*, a new development in international law having the same function as in early societies and later in societies of States. There was no denying the existence or the necessity of a body of rules of *jus cogens* to protect the interests of international society, even though opinions differed on the content and sources of those rules, and on the means of establishing them. Moreover, *jus cogens* evolved and new rules were added to the old; international jurisprudence, international conventions and diplomatic practice all contributed to that development. The notion of *jus cogens* was therefore difficult to define in contemporary practice, but it was none the less indispensable.

52. The International Law Commission had undoubtedly done a great service by including an article on *jus cogens* in its draft, but the proposed text was much too wide to be really useful in practice. It defined the norms of *jus cogens* by their effect, not by their content, and there were no criteria for recognizing them, except the few given in the commentary. No doubt the Commission had been right not to list examples; that might have taken it too far, as it pointed out in paragraph (3) of the commentary. However, it would hardly be practical for Ministries of Foreign Affairs to have to rely on a principle stated in such general terms when deciding whether a treaty derogated from a peremptory norm. Reference to practice and jurisprudence to define the content of the rule more precisely would result in divergent and therefore controversial answers, especially as *jus cogens* itself was not immutable.

53. The concluding words of article 50 provided a valuable safeguard, but the article did not say how it was to be determined whether the norms in question had the same character; that was a serious gap, which the Drafting Committee should endeavour to fill.

54. It remained to provide a means of determining the content of *jus cogens*. The amendment submitted by Greece, Finland and Spain, the United States amendment and the United Kingdom sub-amendment largely solved the problem and should therefore be given due consideration. His delegation favoured the three-State amendment (A/CONF.39/C.1/L.306 and Add.1 and 2), which stressed the universality of the norm of *jus cogens*. It proposed, however, that the words " recognized by the international community as a norm " should be replaced by the words " recognized as such by the international community and ", which would avoid repeating the word " norm ". The United States amendment (A/CONF.39/C.1/L.302) seemed to be based on the same considerations as the three-State amendment, since the words " of the world " undoubtedly suggested universality.

55. The United Kingdom sub-amendment (A/CONF.39/C.1/L.312) would considerably improve article 50. The proposed protocols would be very useful. But as the notion of *jus cogens* was elusive and dynamic, it would be extremely difficult, if not impossible, to work out a useful, satisfactory and practical definition, though the words " from time to time " in the amendment were calculated to facilitate the task. The first two sentences of paragraph (2) of the Commission's commentary emphasized the difficulties involved.

56. For those reasons, his delegation thought the best solution would be to adopt the text proposed by the International Law Commission, emphasizing the universal character of the norm, possibly by incorporating the three-State amendment (A/CONF.39/C.1/L.306 and Add.1 and 2), which his delegation unreservedly supported. But it would prefer the Committee to set up a conciliation group to seek a resolution acceptable to all rather than take a vote on the amendments and the article at that stage.

57. Mr. BADEN-SEMPER (Trinidad and Tobago) said that before the debate on article 50 his delegation had considered submitting a proposal to delete the article, as all the available evidence indicated that the principle of *jus cogens* could not be considered to be *lex lata*; and even though it was considered by some to be a desirable innovation, no one seemed quite certain of the juridical nature or content of norms having the character of *jus cogens*.

58. In view of the positions taken by States regarding the article, however, his delegation had refrained from proposing its deletion; for all the participants in the Conference except one had come out in favour of retaining the article.

59. The discussion had shown that the international legal system had arrived at a new stage in its development. The approach adopted in Article 103 of the United Nations Charter had been cautious and modest. Developments over the past two decades had permitted a more confident and positive approach. His delegation would therefore support the inclusion of article 50 in the draft convention.

60. As to the legal nature and effects of *jus cogens*, his delegation did not think that that notion was identical with public policy or *ordre public*. It was true that the latter notion did exist in positive international law and had frequently been in issue before the International Court of Justice and the European Commission on Human Rights. But the voidance of treaties that were incompatible with a peremptory norm was a different matter, which could not be assimilated to public policy. Nor could his delegation accept the proposition that all treaties encroaching on the rights of third States were contrary to *jus cogens*. It was difficult to accept that the international community at large had a legal interest in protecting the rights of non-parties to a treaty. In international law, the rights of third States were not absolutely inviolable; there were rules of customary international law which allowed third parties to protect their rights quite adequately.

61. The nature and extent of the conflict between a treaty and a peremptory norm of general international law from which no derogation was permitted deserved much closer attention. A useful comparison might be made between Article 103 of the Charter and the relevant provisions of the draft convention. Whereas Article 103 of the Charter referred to a conflict of " obligations ", the draft articles referred to conflict between a " treaty " and a " norm " or between a " situation " and a " norm " (article 67). The language of the draft articles was thus less precise, so that it led to difficulties of interpretation. Where a treaty could be considered severable, it was easy to determine under Article 103 of the Charter which provisions could continue to operate. The same was not true of article 61 of the draft convention. In that connexion, the International Law Commission's view that any incompatibility with a norm of *jus cogens* must necessarily be fundamental was unrealistic.

62. As to the amendments to article 50, the joint amendment by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), though a drafting amendment, had considerable merit. The English text of the amendment, was not very elegant, however, and the same result might be achieved by deleting the word " peremptory " from the text of the article, but leaving it in the title.

63. His delegation had difficulty in understanding the United States amendment (A/CONF.39/C.1/L.302). It seemed to be based on the premise that *jus cogens* was a general principle of law recognized by civilized nations. His own delegation had a different conception of *jus cogens*, which it considered to be primarily a rule of customary international law manifested in the practice of States and in their conviction that such practice was legally binding on them. General multilateral treaties such as the United Nations Charter could also be a source of norms having the character of *jus cogens*.

64. As to general principles of law " recognized in common by the national and regional legal systems ", his delegation considered not only that that was a most unlikely source of rules of *jus cogens*, but that it would be dangerous to rely on analogies with municipal law in a matter of such fundamental importance.

65. The delegation of Trinidad and Tobago could not support the United Kingdom sub-amendment (A/CONF.39/C.1/L.312) to the United States amendment, since it would have the effect of destroying the basic principle stated in the draft article.

66. His delegation agreed that it was most undesirable to attach to article 50, or to any other article of the draft, a requirement of compulsory arbitration which would nullify the customary procedures for settling disputes between States. It could not agree with the United Kingdom representative that article 49 was a particular example of article 50. Article 49 operated in the context of consent to be bound by a treaty, whereas article 50 was concerned with the object of the treaty even when both parties freely consented to be bound by it.

67. Lastly, his delegation did not think that postponement of the vote on article 50 would serve any useful purpose.

68. Mr. MAIGA (Mali) said that *jus cogens* was a concept of positive international law which, though highly controversial, nevertheless reflected legal reality.

69. Public international law had undergone profound changes. International society, which had been egalitarian, consisting solely of juridically equal sovereign States, had evolved quickly since 1945 towards a hierarchic society in which an international power superior to States was gradually imposing its authority. International law was thus becoming, to an increasing extent, a community law. The notion of *jus cogens* faithfully reflected the political and sociological changes that had taken place in international society; hence it had its place in the draft convention.

70. The norms of *jus cogens* were of capital importance for the international community. As the International Law Commission had pointed out, for a norm to possess the character of *jus cogens* it must be peremptory, must partake of general law and must void any treaty which violated it. Such norms were the corner-stone of the progressive development of contemporary international law. Moreover, they were essential to the stability of international relations and constituted one of the most effective instruments for peaceful coexistence between States with different economic and social systems.

71. His delegation therefore fully supported the International Law Commission's draft article 50. It firmly rejected the artificial and subjective arguments put forward by some delegations with a view to preventing the inclusion of the *jus cogens* rule in the draft convention.

72. It had been argued that *jus cogens* restricted the freedom of the will of States and impaired their sovereignty. That allegation was unjustified. The *jus cogens* rule ensured the protection of a State, whether powerful or developing, against its own weakenesses; far from weakening the position of small States, it protected them against the superior force of their possible future partners, in other words, against inequalities in negotiating power. That showed how important *jus cogens* was to the international community as a whole.

73. The moral and spiritual values inherent in *jus cogens* could only assert themselves with the desired peremptory force if no geographical limits were placed on their applicability. Hence there could be no question of a regional *jus cogens*.

74. His delegation was convinced that the *jus cogens* rule would help to strengthen the legal conscience of the nations, today constantly disturbed by many political, economic and social factors that were endangering what was and should remain the essence of international law, namely the new relationships based on mutual respect for the personality of States.

75. His delegation was not in favour of setting up a working party to study article 50 and asked that the article be put to the vote.

76. It supported the amendment submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1), which made the International Law Commission's text clearer and more precise.

77. Sir Humphrey WALDOCK (Expert Consultant) explained that the International Law Commission had based its approach to the question of *jus cogens* on positive law much more than on natural law. It was because it had been convinced that there existed at the present time a number of principles of international law

which were of a peremptory character that it had undertaken the drafting of article 50.

78. The International Law Commission had always been faced with two problems: to define *jus cogens* and, if need be, to expand the article by enumerating the various cases of conflict with a rule of *jus cogens*. But, as it had explained in its commentary, it had not been able to go beyond the general formulation of the notion of *jus cogens* as an element of the law of treaties.

79. Some speakers had implied that it was much as though there was a provision in criminal law laying down penalties, but not the cases to which they were to apply. That comparison did not truly reflect the position, for in the " common law " systems, the notion of public policy and of illegality in the law of contract had been developed mainly from decisions of the courts; it was only in comparatively recent times that judges, increasingly aware of the relationships between them and the legislature in that sphere, had come to consider that the courts should not extend the categories of illegality any further by judicial decision. But those considerations did not apply in the same way to international law in the present state of its development and of the organization of the international community, and when the Commission had decided to set out the rule of *jus cogens* in article 50, its decision had been largely justified.

80. He had been glad to note that the majority of delegations had not contested the principle of the article, but only the adequacy of its formulation, or the possibility of giving it adequate expression.

81. He wished to emphasize that the text of article 50, if interpreted in good faith and in accordance with the natural meaning of the words, already contained implicitly many of the elements found in the various amendments. A general rule of international law necessarily implied general recognition by the international community. He recognized, however, that the wording could and should be improved in order to make explicit what at present was only implicit in the text: namely, the need for general recognition of the norm as a norm of *jus cogens*. The amendment submitted by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2), for example, made the International Law Commission's text clearer on that point and deserved consideration.

82. The representative of Tanzania had expressed the view that the final words of article 50, " and which can be modified only by a subsequent norm of general international law having the same character ", weakened the article as a whole. He himself was of the opposite opinion. That provision strengthened the definition by specifying that the norm in question was of so peremptory a character that it could only be modified by another norm of the same character. *Jus cogens* could evolve; for example, the recent international definition of the crime of piracy given in the Convention on the High Seas [5] had modified the concept of piracy as expressed in the internal law of certain countries. Similarly, in view of the development of international organizations and the increasing delegation of powers to them, the notion of the sovereign equality of States was liable to change. The provision should not, therefore, be regarded as weakening the general principle stated in article 50 but as reinforcing the definition.

83. He shared the doubts expressed about the United States amendment (A/CONF.39/C.1/L.302). It was for the community of States as such to recognize the peremptory character of a norm. Moreover, the amendment might give rise to technical difficulties, because international law was often more advanced in certain spheres than national legal systems, for instance with regard to the coercion of a State and the rules regarding the use of force, and in many countries the constitution still laid down that in the event of a conflict between internal law and international law, internal law prevailed. Consequently, although he appreciated the United States' desire to place more emphasis on the fact that a peremptory norm must be recognized by the international community as a whole, he himself thought that the amendment approached the question from the wrong angle.

84. The CHAIRMAN announced that Finland had withdrawn its amendment (A/CONF.39/C.1/L.293) but reserved its position on article 41, relating to the separability of treaty provisions.

The meeting rose at 6 p.m.

[5] United Nations, *Treaty Series*, vol. 450, p. 11.

FIFTY-SEVENTH MEETING

Tuesday, 7 May 1968, at 8.40 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 49 (Coercion of a State by the threat or use of force) *(resumed from the 51st meeting)* [1]

1. The CHAIRMAN invited the Committee to resume its discussion of article 49 of the International Law Commission's draft and called upon the Netherlands representative to introduce the draft declaration proposed by his delegation (A/CONF.39/C.1/L.323), which read as follows:

" DRAFT DECLARATION ON THE PROHIBITION OF THE THREAT OR USE OF ECONOMIC OR POLITICAL COERCION IN CONCLUDING A TREATY

" *The United Nations Conference on the Law of Treaties*

" *Upholding* the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith;

" *Reaffirming* the principle of sovereign equality of States;

" *Convinced* that States must have complete freedom in performing any act relating to the conclusion of a treaty;

" *Mindful* of the fact that in the past instances have occurred where States have been forced to conclude

[1] For the list of the amendments submitted to article 49, see 48th meeting, footnote 2.