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not to consider it until it had examined articles 16 and 17. After examining those articles, it had decided that the text of article 14 required no change.

99. The CHAIRMAN invited the Committee of the Whole to confirm its approval of article 14.

Article 14 was approved.

Article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force) [14]

100. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 15 adopted by the Drafting Committee read as follows:

"*Article 15*

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

" (*a*) it has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

" (*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

101. The Drafting Committee had made several drafting changes in article 15, all in the introductory part of the article. The Committee of the Whole had decided to delete sub-paragraph (*a*) and in view of that decision the Drafting Committee had thought fit to delete the word " proposed " before the word " treaty ", since without sub-paragraph (*a*) only signed or ratified treaties would be involved. In the French text, the Drafting Committee had replaced the words " *est obligé* " by the word " *doit* " and in the Spanish text it had used the word " *deberá* "; the English words " is obliged " had not been changed. The Drafting Committee had replaced the words " acts tending to frustrate the object of a treaty " by the words " acts which would defeat the object and purpose of a treaty ". It wished to emphasize that that was a purely drafting change, made in the interests of clarity. It had added the word " purpose " to the word " object " because the expression " object and purpose of the treaty " was frequently used in the convention. The absence of the word " purpose " in the introductory phrase of article 15 might lead to difficulties in interpretation. The change in no way affected the substance of the provision and did not widen the obligation imposed on States by article 15.

102. Mr. EVRIGENIS (Greece) said he thought that in the French text it would be advisable, from the drafting point of view, to place the word " *lorsque* " at the end of the introductory phrase, so as to avoid having to repeat it in sub-paragraphs (*a*) and (*b*). That also applied to article 12.

103. Mr. SINCLAIR (United Kingdom) said that his delegation had proposed the deletion of article 15 because it had had some difficulty in accepting sub-paragraph (*a*) and the introductory phrase. Since the Committee of the Whole had deleted sub-paragraph (*a*) and the Drafting Committee had amended the introductory phrase by deleting, *inter alia*, the words " tending to frustrate ", the United Kingdom delegation could now support the article.

[14] For earlier discussion of article 15, see 19th and 20th meetings.

104. Mr. BARROS (Chile) said he regretted that the term " *malograr* " was still used in the Spanish text. It was not employed in its normal sense and corresponded neither to the English word " defeat " nor to the French word " *priver* ". It would be preferable to use the word " *privar* " or " *frustrar* ".

105. The CHAIRMAN invited the Committee of the Whole to approve the text of article 15 submitted by the Drafting Committee, subject to those comments.

Article 15 was approved.

106. Mr. BISHOTA (United Republic of Tanzania) observed that the articles submitted by the Drafting Committee had no titles.

107. The CHAIRMAN said that the Drafting Committee had deferred consideration of the titles of all the articles.[15]

The meeting rose at 6.15 p.m.

[15] See 28th meeting, para. 2.

SIXTY-SECOND MEETING

Thursday, 9 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 58 (Supervening impossibility of performance)

1. The CHAIRMAN invited the Committee to consider article 58 of the International Law Commission's draft.[1]

2. Mr. SUAREZ (Mexico), introducing his amendment (A/CONF.39/C.1/L.330), said that in article 58 the International Law Commission had dealt with a particular case of *force majeure*, that of the disappearance or destruction of an object indispensable for the execution of the treaty. The very wide definition of a treaty given in article 2 covered a great variety of treaties, including those of a commercial or financial character, the performance of which might come up against many other cases of *force majeure*. He was thinking, in particular, of the impossibility to deliver an article by a given date owing to a strike, the closing of a port or a war, or of the possibility that a rich and powerful State, faced with temporary difficulties, might be obliged to suspend its payments. In such cases, the law should establish the rights of the parties and not rely on their mutual good will.

3. *Force majeure* was a well-defined notion in law: the principle that " no person is required to do the impossible " was both a universal rule of international law and a question of common sense. Its application had not caused courts any special difficulties and it was

[1] The following amendments had been submitted: Mexico, A/CONF.39/C.1/L.330; Netherlands, A/CONF.39/C.1/L.331; Ecuador, A/CONF.39/C.1/L.332/Rev.1.

unnecessary to draw up a list of the situations covered by that rule.

4. According to paragraph (3) of the International Law Commission's commentary to the article, such cases might be regarded simply as cases in which *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But not to incur responsibility for an act or its omission was to have the right of performance or non-performance of an act. If in the case of *force majeure* a State did not incur any responsibility, that was because so long as *force majeure* lasted, the treaty must be considered suspended.

5. If the notion of *force majeure* belonged not to the law of treaties but to the doctrine of responsibility, article 58 would not have a place in the draft convention. His delegation was of the opinion that a principle so important as that of *force majeure* should be included in the draft and should not be reduced to a particular case of which the practice of States furnished few examples.

6. Mr. GEESTERANUS (Netherlands) said that his delegation's amendment (A/CONF.39/C.1/L.331) proposed two changes in article 58. The first concerned the replacement, in the second line, of the words " for terminating it if " by the words " for terminating or withdrawing from the treaty if ", the wording used in article 59. That was a purely drafting change.

7. The second change was more important and its purpose was to state an exception to the rule laid down in the article. That exception derived from the general principle of law that a party could not take advantage of its own wrong. Article 59 expressly stated that exception, and there was no reason to proceed differently in article 58 when, according to paragraph (1) of the commentary to the article " Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into ".

8. Mr. GARCIA-ORTIZ (Ecuador) said that his amendment (A/CONF.39/C.1/L.332/Rev.1) was of a drafting nature. In his delegation's view, cases of the disappearance or destruction of an object of the treaty were not infrequent and should moreover be covered by a separate article, as they referred to situations different from those dealt with in article 59.

9. Nevertheless, impossibility of performance might also result from the non-existence of the object that was thought to exist at the time the treaty was entered into. The Ecuadorian amendment took account of that possibility.

10. Mr. ARIFF (Malaysia) said that a glance at article 58 showed that the rule embodied in it was based on the theory of frustration in the English law of contract. The International Law Commission had been right to provide for the termination of a treaty in the event of the permanent disappearance or destruction of the object of the treaty, but if the disappearance of the object was temporary, then the operation of the treaty was merely suspended. The Commission had also been right to reject the idea that the treaty would be terminated automatically and to provide instead that the impossibility of performance of a treaty could only be invoked as a ground for its termination. The reasons given in paragraph (5) of the commentary fully justified that solution.

11. Nevertheless, his delegation was in favour of adding a special clause to cover cases where the treaty had been partly performed before its termination. Although it appreciated the problems of equitable adjustment that might then arise, the Commission had explained in paragraph (7) of its commentary that it " doubted the advisability of trying to regulate them by a general provision in articles 58 and 59 ". That explanation was not satisfactory; the Expert Consultant might perhaps throw more light on it. If the Committee agreed to the principle of adding a new special provision, the Drafting Committee could be requested to draw up a second paragraph suitably worded.

12. Apart from that omission, his delegation supported the substance of article 58. It had not had time to submit a formal amendment to the wording of the article, but it hoped that the Drafting Committee would consider the possibility of making the following changes in the first sentence of that article: replace the expression " performing a treaty " by " performance " and replace the word " it " by " a treaty " after " for terminating " in the English text; add the words " and total " after the word " permanent "; insert the words " of the foundation " between the word " disappearance " and the word " or "; lastly, substitute the word " the " for the word " an " before the word " object ". The amended text would then read:

> " A party may invoke an impossibility of performance as a ground for terminating a treaty if the impossibility results from the permanent and total disappearance of the foundation or from the destruction of an object indispensable for the execution of the treaty."

13. With respect to the propos amendments, he agreeded with the substance of the Mexican amendment (A/CONF. 39/C.1/L.330), but was not in favour of changing the text as the idea was already implicit in it. Moreover, the proposed formulation seemed to narrow the scope of the draft. Nor did he favour the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1), since he did not see how the parties could have agreed in the first place with respect to a thing that did not exist at the time the treaty was concluded.

14. Lastly, his delegation supported the proposals in the Netherlands amendment (A/CONF.39/C.1/L.331), for which he considered there was good reason.

15. Mr. BRIGGS (United States of America) said he fully supported the principle set forth in article 58. He agreed with the International Law Commission that a supervening impossibility of performance and a fundamental change of circumstances were distinct grounds for invoking release from treaty obligations. The second case referred less to impossibility of performance than to unwillingness to perform. He also thought that the International Law Commission had been right to decide that that ground should be invoked, which implicitly brought in the procedure laid down in article 62. While it did not propose to submit a formal amendment, his delegation wished to draw attention to an inconsistency in the draft. Although the first sentence referred to an impossibility of performance resulting from permanent

disappearance or destruction, the second sentence appeared to imply that the so-called permanent disappearance or destruction might be only temporary. Accordingly, he suggested that the second sentence of the article should be redrafted to read: " If the object can be replaced or the treaty can be performed using an alternate means, the disappearance or destruction of its object may be invoked only as a ground for suspending the operation of the treaty ".

16. The expression "*force majeure*" which the Mexican amendment (A/CONF.39/C.1/L.330) proposed to introduce in article 58 lacked precision. The expression " impossibility of performance " amply covered that notion. His delegation supported the change proposed in the first part of the Netherlands amendment (A/CONF. 39/C.1/L.331). With regard to the second part of that amendment, the question was perhaps more one of responsibility. However, he had no objection to the addition of that paragraph. Lastly, in the light of the explanations given by the representative of Ecuador, the non-existence of the object would seem to be covered by a possible error.

17. Mr. KOUTIKOV (Bulgaria) said he regarded article 58 as bordering on the institutions of internal civil law. It seemed to be a striking example of the interpenetration of the principles and institutions of two very distinct disciplines: internal civil law and international law. In international law, the rule expressed in article 58 had a limited scope. Its subject was the impossibility of carrying out a treaty as a result of the final disappearance or destruction of an object indispensable for its execution. As in internal civil law, the rule applied to a corporeal object or objects, otherwise there could scarcely be either disappearance or destruction. His delegation therefore was in favour of the substance of article 58, but suggested that the Drafting Committee should consider the possibility of replacing the adjective " permanent " by " final ", because the disappearance or destruction of corporeal objects could not be temporary. Moreover, the French text of paragraph (1) of the commentary to the article used the adjective " *définitive* ".

18. His delegation did not support the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1), because if the non-existence of the object had been overlooked in good faith, the case was one of error, and if on the other hand the non-existence had been known but concealed, the case was one of fraud.

19. Nor did it support the Netherlands amendment (A/CONF.39/C.1/L.331), particularly the second part. The case envisaged was the disappearance or destruction of the object as objective events beyond the control of the party which was required to perform the action connected with the object. The new paragraph 2 proposed in the Netherlands amendment, however, introduced a purely subjective factor.

20. Lastly, the Mexican amendment (A/CONF.39/C.1/ L.330) should be referred to the Drafting Committee, even if only to allow it to express an opinion on the necessity or advisability of expressly introducing the notion of *force majeure*. Article 58 confined itself and should confine itself to circumstances of *force majeure*, but solely within the limits prescribed by the text of the draft article.

21. Mr. MOUDILENO (Congo, Brazzaville) said he thought the amendments submitted by Mexico (A/CONF. 39/C.1/L.330) and Ecuador (A/CONF.39/C.1/L.332/ Rev.1) proposed sensible drafting changes. The Netherlands amendment (A/CONF.39/C.1/L.331) reflected the ideas which his own delegation would have expressed had it had time to introduce an amendment; it rightly included in article 58 the important point of the cause of the disappearance or destruction of the object, because there were some causes connected with a party's behaviour which should not entitle it to make use of the disappearance as a pretext for evading its obligations.

22. His delegation would have preferred article 58 to read:

" 1. A party may, to terminate a treaty, invoke the impossibility of performing it as a result of the disappearance or final destruction of an element indispensable for the performance of the treaty.

" 2. If the impossibility referred to in the foregoing paragraph is merely temporary, it may be invoked only with a view to suspending the operation of the treaty.

" 3. The foregoing paragraphs shall not apply when the supervening impossibility of performance results from a breach by the party invoking them either of the treaty or of a different international obligation owed to the other parties to the treaty."

Such a formulation, which expressed the views he had outlined, would also, in his delegation's opinion, have the advantage of giving greater weight to article 58, which at present was so brief that it was somewhat overshadowed by the important articles 57 and 59. That oral proposal could be referred to the Drafting Committee.

23. Mr. ALVAREZ TABIO (Cuba) said he thought article 58 should cover the case of the non-existence of the object of a treaty. He therefore supported the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1).

24. He favoured the Mexican amendment (A/CONF.39/ C.1/L.330), but thought it necessary to take account of the specific case mentioned in article 58, namely, that the object in question must be one that was indispensable for the execution of the treaty and one whose absence, when established, would have immediate effect on the validity of the treaty.

25. He supported the first part of the Netherlands amendment (A/CONF.39/C.1/L.331), but thought that the second part was perhaps not essential, in view of the fact that the case covered by article 58 arose from an exceptional situation independent of the will of the parties. Moreover, he had been unable to understand the precise meaning of the paragraph in Spanish. If the object of the second part was to include a paragraph similar to paragraph 2 (*b*) of article 59, that might perhaps help to improve the wording of article 58.

26. Mr. DE BRESSON (France) said that his delegation approved of the existing wording of article 58, subject to drafting improvements, and had no objection to the change in paragraph 1 of the article proposed in the

Netherlands amendment (A/CONF.39/C.1/L.331). It had doubts, however, about the proposed new paragraph 2, which might be out of place in article 58.

27. He thought that the Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1) dealt with an issue different from that covered by article 58 and referred rather to a case of error or fraud. The Mexican amendment (A/CONF.39/C.1/L.330) seemed to raise a more delicate problem. Article 58 dealt with a specific case of *force majeure*: one in which the disappearance or destruction of an object indispensable for the execution of a treaty could be objectively ascertained. The Mexican amendment, on the other hand, proposed that all cases of *force majeure* should be covered. The notion of *force majeure* was well known in internal law because many years of judicial practice had helped to define it and make it clear. His delegation was not convinced that the notion was equally clear in international law, and feared that its inclusion in article 58 would broaden the scope of the article and make its application more difficult. He thought it preferable therefore to confine the idea of *force majeure* to the case covered by article 58.

28. Mr. MAKAREWICZ (Poland) said he thought the Mexican amendment (A/CONF.39/C.1/L.330) did not seem necessary since articles 58 and 59 were complementary and seemed to leave no gaps. Further, the notion of *force majeure* would introduce an element of internal law hitherto foreign to international law, and he thought the wording of the article should continue to be based on objective factors.

29. The Ecuadorian amendment (A/CONF.39/C.1/L.332/Rev.1) was of a drafting nature and should be referred to the Drafting Committee.

30. The first part of the Netherlands amendment (A/CONF.39/C.1/L.331) was a drafting change and should also be referred to the Drafting Committee.

31. The second part of that amendment was based on a perfectly sound principle, but too close a parallel should not be drawn between articles 58 and 59, because article 58 dealt solely with the case in which the object of a treaty had disappeared or had been destroyed permanently, and it was difficult to see how a treaty could be performed if its object no longer existed.

32. The justifiable concern of the Netherlands delegation might be taken into account in the context of State responsibility. Under article 69, however, the question of State responsibility had been excluded from the scope of the convention on the law of treaties.

33. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the aim of article 58 might to a certain extent and in some cases coincide with that of article 59, since the impossibility of performing a treaty could result from an alteration in a situation just as much as from a fundamental change of circumstances. The International Law Commission had rightly considered the need for a separate article dealing with the impossibility of performing a treaty owing to the permanent disappearance or destruction of its object. The distinction between articles 58 and 59 was sufficiently clear in a whole range of cases, particularly where the physical destruction or permanent disappearance of an actual object was in question. Article 58 could therefore be kept separate from article 59 in the draft convention. There was, however, a certain analogy between the two articles; the provision in paragraph 2 (*b*) of article 59 could apply if a party deliberately destroyed the object of the treaty, since the aim of that paragraph was to prevent a contracting party, acting in breach of the treaty or its international obligations, from contributing to the permanent disappearance or destruction of the object of the treaty and invoking that as a ground for demanding the invalidity of the treaty. He was therefore in favour of the Netherlands amendment (A/CONF.39/C.1/L.331) supported by the representative of the Congo (Brazzaville), which could help to improve the text of article 58 and should therefore be referred to the Drafting Committee. It should be pointed out that the question of State responsibility might of course arise as a result of unlawful acts by a party to a treaty with a view to the destruction of its object. That was a separate problem, however.

34. With regard to the Mexican amendment (A/CONF.39/C.1/L.330), he agreed with the Polish, French and United States representatives that the notion of *force majeure* as understood in the internal law of certain States had not been clearly defined and had no precise meaning in international law. Recourse to analogies taken from internal law should be avoided, particularly in international law. His delegation was therefore opposed to the Mexican amendment.

35. Mr. CHAO (Singapore) said he was not certain whether article 58 could prohibit a contracting party from invoking an impossibility of performing a treaty as a ground for terminating it, if that impossibility resulted from acts it had deliberately committed. Neither the commentary to article 58 nor the second part of the Netherlands amendment (A/CONF.39/C.1/L.331) specifically mentioned the point. The act of self-inducing an impossibility did not necessarily in every case entail a breach of the treaty or an international obligation. In those exceptional cases, that only occurred if the guilty party later attempted to use the self-induced impossibility to terminate the treaty. He supported the principle embodied in the Netherlands amendment, but said he would be grateful if the Expert Consultant would clarify that point.

36. Mr. GEESTERANUS (Netherlands) expressed his gratitude to the Cuban representative for drawing attention to the Spanish translation of the second part of the Netherlands amendment and explained that the purpose of the amendment was to introduce the same exception into article 58 as was provided in paragraph 2 (*b*) of article 59. The wording of the two clauses in both the articles should be the same. The correctness of the Spanish text could be examined by the Drafting Committee.

37. Mr. ALCIVAR-CASTILLO (Ecuador) said he did not regard the non-existence of an object as constituting a case of error or fraud, since the notion of error had a specific place in the general theory of law, particularly in that of civil law. Error referred to facts or situations for which special provision was made under article 45. The non-existence of an object came under the notion of the impossibility of performing the object, a notion quite distinct from error.

38. The contention of some delegations that his amendment was out of place in article 58 was justified; he agreed that the question involved in his amendment had a consequence quite distinct from that of the termination of a treaty as provided in article 58. The impossibility of performing the object entailed the non-existence of the treaty, since it rendered the treaty void *ab initio.*

39. In its written observations (A/CONF.39/6), his Government had requested the inclusion of an article providing that a treaty was void if its performance was impossible by reason of the non-existence of something provided for at the time of the conclusion of the treaty and essential for its execution. He would not insist on his amendment being put to the vote, although he reserved the right to submit to the appropriate organ, on a suitable occasion, a new article concerning the impossibility of performing the object of a treaty.

40. Mr. BADEN-SEMPER (Trinidad and Tobago) said he would confine himself to commenting briefly on the second part of the Netherlands amendment (A/CONF.39/C.1/L.331). His delegation wondered whether it was really necessary to insert such a provision in the article. That also applied to article 59.

41. The second part of the amendment stated a general principle of law recognized by all civilized nations, which was summed up in the maxim *ex turpi causa non oritur actio.* That was a procedural rule which was not peculiar to the law of treaties. Further, treaties could only be interpreted in the light of good faith, which implied that the party invoking the grounds laid down in article 58 could not do so lawfully unless it had no cause for self-reproach. Accordingly, his delegation was not in favour of the second part of the Netherlands amendment.

42. Sir Humphrey WALDOCK (Expert Consultant) said that the question of equitable adjustment in the case of a treaty which had been partly performed had been examined by the International Law Commission as a result of the written comments by Governments. He himself had submitted a draft on the matter, but the Commission after thorough consideration had preferred not to formulate a special rule in the present article. After discussion, it had come to the conclusion that the question of the law governing the parties after the termination of a treaty was much wider than the case of a fundamental change of circumstances and should be considered on a general basis. The Commission had therefore inserted in article 66 provisions concerning the consequences of the termination of a treaty, but in preparing that article it had decided that it could not enter very far into the equities of the situation after a treaty had terminated and the only conclusion that it had been able to reach on that extremely thorny subject was stated in paragraph (4) of the commentary to article 66, which referred to the application of the rule of good faith.

43. The question raised in paragraph 2 of the Netherlands amendment (A/CONF.39/C.1/L.331) had been examined by the International Law Commission at the second part of its seventeenth session, held in Monaco. A proposal to insert in article 58 a provision similar to that in article 59, paragraph 2 (*b*), had been submitted at that time.[2] The Commission had considered that the subject concerned the application of a general principle of law and was closely connected with the question of State responsibility. He had pointed out at the time that there were two sides to the question, that of the direct operation of State responsibility and that of the application of the principle as a means of defence against failure to perform a treaty.[3] The Commission had eventually decided to place the provision only in article 59, although it had recognized that the same considerations applied to a great extent to both articles. It had thought that the problem of a fundamental change of circumstances brought about by the acts of one of the parties would be more likely to be significant and that there was a special case for mentioning the principle in article 59.

44. Mr. SUAREZ (Mexico) said that after hearing the Expert Consultant's explanations, he would not ask that his amendment be put to the vote.

45. The CHAIRMAN invited the Committee to vote on the second part of the Netherlands amendment. The first part of the amendment was a drafting matter.

The second part of the Netherlands amendment (A/CONF.39/C.1/L.331) was adopted by 30 votes to 10, with 40 abstentions.

46. The CHAIRMAN said that article 58, as amended, and the first part of the Netherlands amendment, to replace the words "for terminating it" by the words "for terminating or withdrawing from the treaty", would be referred to the Drafting Committee.[4]

The meeting rose at 10.10 p.m.

[2] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 832nd meeting, para. 28.

[3] *Ibid.*, 833rd meeting, para. 28.

[4] For resumption of discussion, see 81st meeting.

SIXTY-THIRD MEETING

Friday, 10 May 1968, at 10.50 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 59 (Fundamental change of circumstances)

1. The CHAIRMAN invited the Committee to consider article 59 of the International Law Commission's draft.[1]

2. Mr. PHAN-VAN-THINH (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/C.1/L.299), said that, in a world of continual change, the application of the rule *rebus sic stantibus* to treaties was obviously essential. But unless that application was subject to strict regulations, arbitrary invocation and interpretation of the rule might seriously prejudice the

[1] The following amendments had been submitted: Republic of Viet-Nam, A/CONF.39/C.1/L.299; Venezuela, A/CONF.39/C.1/L.319; Canada, A/CONF.39/C.1/L.320; Finland, A/CONF.39/C.1/L.333; United States of America, A/CONF.39/C.1/L.335; Japan, A/CONF.39/C.1/L.336.