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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.

basic rule, *pacta sunt servanda*. The risk of tension was all the more real since the international community had not yet established a system of compulsory jurisdiction. The International Law Commission had shown itself alive to the dangers by excluding from the application of article 59 treaties establishing boundaries, for if a single party invoked the rule in such cases, dangerous friction was bound to arise.

3. It was his delegation's view that the rule *pacta sunt servanda* should be understood *rebus sic stantibus*, being based on the idea of justice and of the observance of a balance between the obligations incumbent on the parties to a treaty, in the light of the factual circumstances existing at the time of negotiation. If that balance was subsequently disrupted to the detriment of one of the parties as a result of circumstances not provoked by that party, the injured party must be entitled to redress the balance to some extent. It was therefore not entirely just to exclude a treaty establishing boundaries from the benefits of article 59, since those were the political and perpetual treaties in which the condition *rebus sic stantibus* was particularly essential.

4. Nevertheless, his delegation had not proposed the deletion of paragraph 2, but merely an amendment which might provide an escape clause, or a general procedure whereby a State invoking fundamental change of circumstances should first try to communicate with the other party in an attempt to obtain its consent to modify the treaty or to denounce it. Treaties establishing a boundary were not the only ones where unilateral denunciation was likely to lead to dangerous tension: others were treaties which provided for the peaceful settlement of armed conflict or established a definite political status for a certain country. The party invoking a change of circumstances as grounds for withdrawal from a treaty was sometimes the very State which had deliberately provoked or organized the change, or had committed a breach of its treaty obligations. If such practices were to be perpetuated under article 59, there would be no more morality or security in international relations; that was why his delegation had submitted its amendments to sub-paragraphs 2 (*a*) and 2 (*b*) of article 59.

5. Mr. CARMONA (Venezuela) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.319) was to give positive form to a provision which the International Law Commission had drafted in the form of an exception. The Commission's text seemed to emphasize a limitation in which the balance between the *status quo* essential for treaty stability and the need to take changing situations into account was disrupted, essentially altering the meaning and scope of the obligations deriving from the treaty. At the present stage of the development of international law, it could not be claimed that the *status quo* should be maintained without taking into account the development of international relations, since if it were, international law would become so petrified that there would be a risk of serious explosions, with disastrous consequences for the integrity of the treaty. Article 59 provided an escape clause for maintaining the balance between the two principal factors involved.

6. It was clear from the commentary that a change of circumstances had its own autonomous existence, and must not be regarded *a priori* as a derogation from the *pacta sunt servanda* rule. It was therefore logical to state the principle *rebus sic stantibus* in positive form. The Venezuelan amendment to sub-paragraph 1 (*b*) restated the proposal that the Special Rapporteur had submitted in his fifth report to the Commission, [2] which seemed to correspond more closely than did the existing text to the purposes of the article.

7. Mr. WERSHOF (Canada) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.320), to include the word " suspending " before the word " terminating " in paragraph 1, despite the International Law Commission's decision not to include suspension as a possible consequence of the invocation of a change of circumstance, and despite the Expert Consultant's view that mere suspension could not be a consequence of the application of the doctrine expressed in the article.

8. In his delegation's opinion, the possibility of suspension could be excluded from the article only if it were considered that " fundamental change " was synonymous with irreversible, permanent or unalterable change. Few representatives would be likely to accept any of those terms as a substitute for "fundamental change". His delegation's view found support in the opinion of Professor Oliver Lissitzyn, in his commentary on the Commission's draft article 59 [3] where he stated that the termination of a treaty obligation was not the only possible and proper effect of invocation of a change of circumstances; depending on the expectations of the parties and the nature of the change, the proper effect might be suspension or limitation of performance, as the case might be.

9. In view of the divergent and conflicting views on the application of the rule in article 59 and of the paucity of judicial decisions and State practice in the matter, it would be unwise to exclude completely the possibility of suspension as a consequence of a fundamental change of circumstance.

10. Mr. CASTRÉN (Finland) said that his delegation had submitted its amendment to the introductory sentence of paragraph 1 (A/CONF.39/C.1/L.333) in order to render it more flexible and to restrict the effects of its application on treaty stability. First, it was designed to make it clear that the principle of separability of treaties also operated in the cases governed by article 59; in introducing his delegation's amendment (A/CONF.39/C.1/L.144) to article 41, on separability of treaty provisions, he had tried to give the reasons for and against its application in connexion with the *rebus sic stantibus* doctrine. [4] Secondly, since it was preferable to abandon part of a treaty rather than terminate it entirely, the Finnish delegation considered that the parties might resort to less stringent measures than the termination of a treaty or of some of its provisions, and had proposed the inclusion of the words " or suspending the operation " in paragraph 1, as was provided in paragraph 1 of article 57, on termination or suspension as a consequence of a breach of the treaty. There was one more method of dealing with situations where fundamental changes of circumstances

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 44.

[3] *American Journal of International Law*, vol. 61, p. 895.

[4] See 41st meeting, para. 1.

occurred, and that was to revise the treaty, but that possibility seemed to be implicit in article 62, on procedure.

11. Mr. KEARNEY (United States of America) said that the purpose of the United States amendment (A/CONF. 39/C.1/L.335) was to clarify the principle expressed in sub-paragraph 2 (*a*). The United States considered that if the doctrine *rebus sic stantibus* was to be incorporated in the convention, there must be safeguards against its misuse. The international community as a whole benefited from any rule which would have the effect of reducing the possibilities of reopening territorial questions settled by treaty, and the wording of sub-paragraph 2 (*a*) must not exclude any treaties intended to settle territorial disputes.

12. The term " a treaty establishing a boundary " was unduly restricted. Oppenheim defined boundaries of State territory as " the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the open sea ".[5] Paragraph (11) of the commentary clearly indicated that the expression in sub-paragraph 2 (*a*) " would embrace treaties of cession as well as delimitation treaties ". Although the International Law Commission had discarded the phrase " fixing a boundary " in favour of " establishing a boundary ", the sub-paragraph still failed to cover several important groups of treaties, which, while not establishing boundaries, established territorial status or settled territorial disputes.

13. Examples of such treaties were condominium agreements, such as the agreement between the United States and the United Kingdom establishing condominium status for Canton and Enderbury Islands,[6] which settled a long-standing dispute and in respect of which neither party should be in a position to invoke *rebus sic stantibus*. Another common type of treaty used to settle territorial disputes was one in which neither party renounced its existing claims, but the parties agreed not to press their claims, in the light of mutual concessions relating to such matters as treatment of minority groups, customs concessions, or joint development of resources. Such treaties recognized a *status quo* or created a régime which took the place of establishing a boundary. An example of that kind of arrangement was the Antarctic Treaty;[7] that treaty, however, had special features which precluded the application of the *rebus sic stantibus* doctrine. Another problem was the settlement of disputes concerning islands: when a party withdrew its claim to an island by a treaty, no boundary was established, and unless that point was covered, a State might conceivably claim that *rebus sic stantibus* applied to such a territorial settlement.

14. There was another type of treaty, which did not itself establish boundaries but was designed to ensure that boundary disputes were settled in a spirit of co-operation and friendship. The United States had treaties of that kind with Canada and Mexico. On both its borders, joint commissions had jurisdiction over a wide range of territorial problems and had operated most successfully. To be successful, however, such joint operations must be set up for a long period, in order to allow ample time for establishing procedures for preventing disputes in both countries; if the *rebus sic stantibus* doctrine were to be applied the object and purpose of the treaties would be defeated.

15. The United States delegation did not claim that its proposed wording for sub-paragraph 2 (*a*) was ideal, but it did believe that it was an improvement on the Commission's text. Its hope was that the proposal would be accepted by the Committee as a further attempt to reduce the frequency and severity of territorial disputes by covering a particular range of treaties, which it was highly important to maintain.

16. Mr. FUJISAKI (Japan), introducing the Japanese amendment (A/CONF.39/C.1/L.336), said that the doctrine of *rebus sic stantibus* was founded on the notion of equity and could be invoked if a fundamental change of circumstances created a situation in which the balance of obligations was radically altered so that the burden fell heavily upon one of the parties. He thought the phrase " radically to transform the scope of obligations " in the International Law Commission's draft meant the same as what his delegation was proposing, and he hoped his amendment would be referred to the Drafting Committee.

17. He supported the United States amendment (A/CONF.39/C.1/L.335). The cases mentioned in the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.299) appeared to be already covered in the Commission's draft of the article.

18. Mr. STUYT (Netherlands) said it was sometimes claimed that the *rebus sic stantibus* clause was the counterpart of the *pacta sunt servanda* rule, and the Commission had referred to that problem in paragraph (7) of its commentary; but in fact, the two notions were entirely different. Once a treaty came into existence, it had to be executed in good faith; otherwise it remained a dead letter. But whether or not the treaty remained binding, despite a fundamental change of circumstances, was an entirely different matter. It was a practical problem and could not be solved merely by referring to the logical principle of good faith.

19. Some maintained that the *rebus sic stantibus* clause was necessary and at the same time dangerous. It was quite clear from the Commission's commentary that it was necessary, and that view was supported by the 1950 opinion of the United Nations Secretary-General in connexion with treaty régimes for the protection of minorities after the First World War. It was also maintained that it was going too far to make no provision for a change of policy or to exclude treaties fixing boundaries.

20. His delegation was in favour of combining articles 59 and 62. Article 59, however, was the only article in the draft which contained a number of ambiguous terms. It was impossible, for example, to know with certainty what was meant by such terms as " fundamental ", " with regard to ", " foreseen ", " essential basis ", " radically ", or " the scope of obligations ", and it would be dangerous to employ such expressions in a legislative text. The article also raised a problem of placing, and some would consider that it ought to be transferred to the provisions concerning the application and interpretation of treaties.

21. He would reserve his delegation's final position until the full scope of Part V had been elucidated. In any event,

[5] Oppenheim, *International Law*, 8th edition, vol. I, p. 531.

[6] League of Nations, *Treaty Series*, vol. CXCVI, p. 344.

[7] United Nations, *Treaty Series*, vol. 402, p. 71.

it could not vote for article 59, unless it were made subject to an objective procedure for determining when it would be applied and not left to the free choice of a party wishing to invoke the doctrine *rebus sic stantibus*.

22. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that the doctrine of *rebus sic stantibus* was one of the most controversial in the history of international law. Its essence was that if the circumstances existing at the time of the conclusion of the treaty changed so fundamentally that performance became impossible or meaningless, then any party might denounce the treaty. Many eminent jurists considered that the doctrine existed, including even the theologian Thomas Aquinas, but there was still some doubt as to whether it had acquired the character of a rule of law. Practice was extremely cautious and Governments avoided recognizing the doctrine and creating precedents, realizing the danger that it might have for the security of treaties and the principle of *pacta sunt servanda*. It was a matter of great responsibility to decide whether such a rule existed. Generally recognized norms of international law were created by agreement between States representing the main socio-political and legal systems of the world.

23. The theory and practice of western countries recognized the doctrine in principle. In support of that view many eminent jurists of western Europe could be cited, among them McNair, Jessup, McDougall and Friedmann. But the comments of some western Governments on the draft articles had been reserved. The representatives of African and Asian Governments had adopted a favourable attitude in the Sixth Committee and had claimed that it was a rule of positive international law. Among them had been Mr. Yasseen. A similar standpoint had been taken by the Latin American countries. The socialist countries did not reject the existence of the doctrine but considered that it should be applied only in very exceptional cases and with the greatest possible caution.

24. On the whole the Commission's draft was acceptable, and rightly contained certain specific limitations. The reasons for the inclusion of paragraph 2 (*a*) had been convincingly expounded in the commentary. The restriction in paragraph 2 (*b*) was very important, because the violation of an obligation could not release a government from its treaty obligations, even if there had been a fundamental change of circumstances.

25. He could not support the United States amendment (A/CONF.39/C.1/L.335), which raised doubts about the limitations and would dilute the force of the article; it was also far less precise than the original, which was broad enough to cover such matters as islands. The Japanese amendment was not precise enough and he would not vote for it. Although he was in favour of the Commission's text, he hoped that the Drafting Committee could render it more precise and paragraph 1 (*b*) more stringent. Account should be taken of the Finnish and Canadian amendments, which would certainly improve the text.

26. Mr. BINDSCHEDLER (Switzerland) said that his delegation agreed that the rule relating to fundamental change of circumstances formed part of contemporary general international law. When formulating that rule, however, it was essential to make it as restrictive as possible in order to provide safeguards against abuse. The text of article 59 was satisfactory in that respect; in particular, the negative presentation served to stress that the case envisaged in the article was an exception to the higher principle of *pacta sunt servanda*. Unfortunately, however, the text did not make it clear that the *rebus sic stantibus* doctrine could not be invoked unilaterally by the party adversely affected by the change of circumstances, if it wished to avoid its obligations under a treaty. The majority of scholars agreed that a fundamental change of circumstances only authorized the affected party to demand negotiations for the purpose of terminating or revising the treaty. In the event of a dispute, that party was entitled to bring the case to an international court.

27. In paragraph (4) of the commentary, the International Law Commission had indicated that State practice showed " a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground ". No single case could be cited of a unilateral application of the *rebus sic stantibus* doctrine. The denunciation by Russia in 1870 of the clauses of the Treaty of Paris of 1856, dealing with the status of the Black Sea, had been strongly resisted by the other European Powers; the dispute had been settled by the London Conference of 1871, which had replaced that status by a new agreed régime. In that same paragraph (4) of the commentary, it was recalled that " In the *Free Zones* case [8] the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that the principle does not allow unilateral denunciation of a treaty claimed to be out of date ". To its credit, that Government, although its interests would have been served by a unilateralist approach, argued that the *rebus sic stantibus* doctrine would cause a treaty to lapse only where the change of circumstances had received legal recognition, either by agreement of the parties or by international adjudication.

28. The lack of clarity of article 59 on that question left the matter open. The matter would not be grave if article 62 were adopted in a form which ruled out the possibility of grounds of invalidation being invoked unilaterally. The Swiss delegation, therefore, could not give its approval to article 59 until it knew the final form which article 62 was to take. He accordingly reserved his delegation's position on article 59.

29. With regard to the amendments, he thought the amendment by the Republic of Viet-Nam to paragraph 2 (*a*) (A/CONF.39/C.1/L.299) went too far in proposing to exclude " a negotiated political settlement " from the operation of article 59. In point of fact, political settlements, such as treaties of alliance, lent themselves to the application of the *rebus sic stantibus* doctrine.

30. As for the amendment by the Republic of Viet-Nam to paragraph 2 (*b*), the Swiss delegation would have no objection to the inclusion of an express reference to the case where the change had been deliberately provoked

[8] *P.C.I.J.*, Series A/B (1932), No. 46.

by the party invoking it, or was the result of a breach of the treaty by that party. However, such an amendment seemed hardly necessary; a change of that type would represent a violation of the treaty and the principle of good faith would debar the party concerned from invoking it as a ground for seeking to invalidate the treaty.

31. He also had doubts regarding the proposals by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333) for the inclusion of a provision on suspension. Where a change of circumstances was so fundamental as to bring into operation article 59, the only conclusion would seem to be that the treaty must be terminated or revised; there would be no room for mere suspension. However, his delegation would not oppose those amendments, since there might conceivably be cases in which it would be sufficient to suspend the operation of the treaty; should that be so, it was undesirable to go any further.

32. He supported the United States amendment (A/CONF.39/C.1/L.335) to insert in paragraph 2 (*a*) a reference to treaties " establishing territorial status ". A provision of that kind would be very helpful to a country like Switzerland which had concluded many treaties with neighbouring States on the joint utilization of rivers forming boundaries. A treaty which provided the basis for hydro-electric installations must be of an enduring character and could not be exposed to the risk of termination on the grounds of *rebus sic stantibus*. The same was true of treaties relating to freedom of navigation on certain rivers, or to right of passage through certain territories. Switzerland, for example, had very complicated frontiers, many of them in mountainous and difficult terrain. In such frontier areas, a place in the territory of one country was often accessible only by passing through the territory of another. Clearly all those treaties, which affected territorial status, must be excluded from the operation of article 59.

33. He appreciated the idea contained in the Japanese amendment (A/CONF.39/C.1/L.336) but it did not seem necessary to specify that the rule in article 59 would be invoked by the State which was placed at a disadvantage by the change of circumstances. One could hardly imagine the rule being invoked by the State which benefited from that change. Article 59 was one of the most important articles of the whole draft and must be formulated with the utmost care in order to safeguard the *pacta sunt servanda* rule.

34. Sir Francis VALLAT (United Kingdom) said that the doctrine of *rebus sic stantibus* had provoked a great deal of controversy among scholars, while attempts to apply it in State practice had constantly given rise to international disputes. The reason was simply that any misapplication of that principle struck at the security and stability of treaty relations. It was therefore important to maintain in article 59 the proper balance between stability and change.

35. It was his Government's view that the doctrine of *rebus sic stantibus* did not give an automatic right to repudiate a treaty. The party adversely affected by a fundamental change of circumstances should first request the other parties to release it from its obligations. It was only if the other parties refused to accede to that request that the doctrine could be invoked. He stressed the word " invoked " because, in the circumstances envisaged, there would clearly be a dispute between the parties, which would in all probability turn on whether the change of circumstances was fundamental enough to justify the doctrine being invoked. It was difficult to reach a conclusion on article 59 without knowing what procedural safeguards in the way of machinery for the settlement of disputes would be included in article 62, which in its present form was inadequate, and his delegation therefore reserved its final position on the substance of article 59 until the content of article 62 had been decided.

36. He wished, however, to raise three points at that stage. The first was his delegation's understanding of the effect of article 59, in the sense that no State was entitled to invoke its own acts or omissions as amounting to a fundamental change of circumstances giving rise to the operation of article 59.

37. The preponderant opinion in the International Law Commission had rightly been that the doctrine of *rebus sic stantibus* could only be invoked by a State acting in good faith. It had also been generally agreed that the test as to whether a fundamental change of circumstances had occurred must be an objective one and should not rest on implied terms or ascertainment of intentions.

38. The second point was indicated in paragraph (10) of the commentary, where it said: " Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty ". His delegation believed that it would have been preferable to include an express provision on the point, but noted with satisfaction that there had been no dissent in the Commission on that question. Also in paragraph (10) of the commentary, reference had been made to the view of some members of the Commission that a treaty of alliance was " a possible case where a radical change of political alignment by the Government of a country might make it unacceptable, *from the point of view of both parties*, to continue with the treaty ". He did not dispute that general proposition, but doubted whether the case should be discussed under the heading *rebus sic stantibus*. The United Kingdom amendment to article 53 (A/CONF.39/C.1/L.311), which had been adopted by the Committee at the 59th meeting, had been intended to deal with that type of case by indicating that the particular character of the treaty could be such that a right of termination on reasonable notice might be implied.

39. The third point was mentioned in paragraph (8) of the commentary where it was stated: "The Commission also recognized that jurists have in the past often limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination ". In that paragraph, the Commission gave its reasons for not limiting the *rebus sic stantibus* principle to treaties which contained no provision regarding their termination. The Commission was clearly aware that its proposals were *de lege ferenda* in so far as they were not limited to perpetual treaties. However

cogent the Commission's argument might be for adopting that course, it must be recognized that the absence of such a limitation made even more necessary an objective machinery for the settlement of disputes arising out of the application of article 59.

40. In general, his delegation approved the manner in which the International Law Commission had sought to delimit the scope of the doctrine of *rebus sic stantibus* by casting it as a " right to invoke " rather than as an absolute rule and by setting out the provisions in negative terms, subject only to limited and narrowly defined exceptions.

41. With regard to the amendments, he would not be able to support the proposal by Venezuela (A/CONF.39/C.1/L.319) since its effect would be to change the emphasis of the article by transforming it from a negative rule accompanied by exceptions, to a positive rule subject to the fulfilment of certain conditions.

42. He viewed with sympathy the amendments by Canada (A/CONF.39/C.1/L.320), Finland (A/CONF.39/C.1/L.333) and the United States (A/CONF.39/C.1/L.335) but thought that it would be preferable to deal with the Finnish amendments in the context of article 41, on separability of treaty provisions.

43. Mr. KEMPFF MERCADO (Bolivia) said that he wished to have it placed on record that Bolivia had consistently maintained that the observance of treaties did not exclude the possibility of modification. There could be no question of proclaiming the absolute sanctity of a treaty establishing a boundary where such a treaty had resulted from conquest and violence and had created a manifestly unjust international situation. No treaty could endure for all time and be immune to the action of new circumstances. It would be unnatural and bordering on the absurd to consider the inviolability of international agreements as implying that they were in principle perpetual and unalterable.

44. During the past fifty years, writers on international law had been unanimous in stressing the need to lay down practical rules for facilitating treaty revision. Article 19 of the Covenant of the League of Nations provided that the Assembly of the League should " from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable ". That provision of the Covenant constituted a recognition of the *rebus sic stantibus* doctrine, which did not basically conflict with the *pacta sunt servanda* principle; it was a reasonable and fair interpretation of the latter principle that it refused to admit the perpetuity of treaties.

45. Bolivia considered it an essential condition for the continuity of treaties that the possibility of peaceful modification should not be excluded; that rule must apply both to treaties establishing boundaries and to peace treaties which were manifestly unjust, and which belonged to a period when war was considered legal.

46. Consequently his delegation totally disagreed with the provisions of paragraph 2 (*a*) of article 59, which were not based on valid legal grounds.

The meeting rose at 12.30 p.m.

SIXTY-FOURTH MEETING

Friday, 10 May 1968, at 3.15 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 59 (Fundamental change of circumstances) *(continued)* [1]

1. Mr. JACOVIDES (Cyprus) said his delegation, like the International Law Commission, considered that the *rebus sic stantibus* principle should have its place in the modern law of treaties, provided that its application was properly delimited and regulated. The doctrine was a safety-valve of the utmost importance. If the only way open to the parties to terminate or modify a treaty was to conclude a new agreement, and if one of the parties objected, without a valid reason, to the conclusion of a new agreement, that would impose an undue burden on the party wishing to terminate the treaty, for it would be placed in a situation in which law was inconsistent with equity. It was true that that kind of situation would not often occur, but the doctrine had a certain value as a residuary rule, and the International Law Commission had done well to devote article 59 to it.

2. The International Law Commission had endeavoured to delimit the application of the *rebus sic stantibus* doctrine by listing the conditions that appeared in article 59. His delegation agreed in general with the conditions laid down, but it understood the position of those members of the Committee who had expressed a preference for less restrictive rules.

3. With regard to the question discussed in paragraph (11) of the commentary, his delegation considered that the principle of self-determination was an independent principle based upon the Charter, an essential element of the sovereign equality of States and, as such, a peremptory norm of general international law from which no derogation was permitted. The procedural safeguards for the application of that doctrine might be examined in the context of article 62.

4. The text submitted by the International Law Commission was well balanced and satisfactory in substance; apart from the Venezuelan amendment (A/CONF.39/C.1/L.319), which his delegation would not oppose, his delegation would support the existing text.

5. Mr. ALVAREZ TABIO (Cuba) said that he did not think there could be any objection to the recognition in international law of the principle stated in article 59. There was no doubt that the *pacta sunt servanda* principle obliged States to abide by the rules they had established by agreement. However, agreements once concluded could be denounced as a result of a fundamental change of circumstances. It was then that the *rebus sic stantibus* rule applied. That rule was a very ancient one, but since the First World War it had been firmly established, and it was upheld by a number of eminent jurists. There was evidence of the existence of the principle in customary

[1] For the list of the amendments submitted, see 63rd meeting, footnote 1.