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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.

law and, as the International Law Commission had said in its commentary, it had often been invoked in State practice. The Commission had concluded that the principle should find a place in the law of treaties, provided that its application was carefully delimited and regulated.

6. The principle, based on grounds of equity and justice, was presented in an objective form in the draft article. The text was acceptable to the Cuban delegation.

7. The United States amendment (A/CONF.39/C.1/L.335), which was designed to remove from the application of the *rebus sic stantibus* rule treaties establishing territorial status, was incompatible with the principle of self-determination and contrary to resolutions of the United Nations General Assembly which strongly condemned all manifestations of colonialism. The amendment also ran counter to the principles stated in the draft convention, and in particular to that embodied in article 50, which the Committee had recently approved.

8. The Venezuelan amendment (A/CONF.39/C.1/L.319) improved the text of the draft article because it stated the principle in a positive form and because the Spanish text was better worded.

9. Mr. DE CASTRO (Spain) said that his delegation was satisfied with the International Law Commission's text because it established the exact scope of the *rebus sic stantibus* rule and laid down strict conditions for its application. The Commission had succeeded in striking an acceptable balance between, on the one hand, the principles of equity and justice enabling a party to invoke the right to terminate or withdraw from a treaty in the event of a fundamental and unforeseen change of circumstances and, on the other, the limits of application of the rule. By adopting that article, the Conference would establish an essential rule which would have the effect of ensuring harmony between the dynamism inherent in an international community and the continuous evolution of international law. The *rebus sic stantibus* rule did not conflict with the *pacta sunt servanda* rule.

10. The Canadian and Finnish amendments (A/CONF.39/C.1/L.320 and L.333) provided for the possibility of suspending a treaty in the event of a fundamental change of circumstances, but in that event there would seem to be no justification for keeping the treaty in force. The addition of the phrase " confirming a negotiated political settlement " proposed in the amendment submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.299) seemed liable to lead to all manner of misunderstandings; moreover the phrase was superfluous, since any treaty could be said to be a negotiated political settlement between the parties. The Japanese amendment (A/CONF.39/C.1/L.336) also seemed superfluous, for the very purpose of the *rebus sic stantibus* rule was to eliminate a situation that placed an undue burden on the parties. Furthermore the word " serious " introduced an element that was difficult to define.

11. The United States amendment (A/CONF.39/C.1/L.335), to add the words " or otherwise establishing territorial status ", also narrowed the scope of article 59 and was based on a vague notion that might give rise to controversy. In the Special Rapporteur's first draft of the article,[2] there had been a reference to the grant of territorial rights; but it was significant that during the International Law Commission's debates, out of the sixteen members present, more than twelve had opposed the inclusion of those words, on the grounds that the notion presented serious theoretical problems and unduly limited the scope of the rule. The United States amendment was therefore unacceptable to the Spanish delegation.

12. The text submitted by the International Law Commission might be revised by the Drafting Committee. Paragraph 1 referred to a change " which was not foreseen by the parties ". Perhaps it would be better to say " which could not reasonably be foreseen by the parties ". In paragraph 1, sub-paragraph (*a*), it might be possible to say " an essential basis of what was agreed between the parties ", in order to make it clear that it was not a matter of what one or other party wanted. In sub-paragraph (*b*) it would be desirable to mention not only obligations, but also rights. Lastly, in the Spanish text, it would be advisable to replace the words " *poner término* " by the words " *dar por terminado* ".

13. Mr. OSIECKI (Poland) said that his delegation had always regarded the *pacta sunt servanda* principle as a fundamental guarantee of the stability of international relations; treaties in force must be performed in good faith. Article 59 provided for the possibility of terminating or withdrawing from a treaty in the event of a fundamental change of circumstances. His delegation realized that, once such a possibility was admitted, it was open to serious abuse; Poland fully shared the views expressed by the representative of the Ukrainian SSR. The International Law Commission had placed the emphasis on the conditions which were to govern that possibility: namely, that the existence of the circumstances in question constituted an essential basis of the consent of the parties, and that the effect of the change was radically to transform the scope of the essential obligations imposed by the treaty. In his delegation's view that could happen only in extremely unusual circumstances which drastically upset the balance in the legal situation of the parties. That fact would have to be taken into account in drawing up the final text of article 59.

14. Stress should also be laid on another aspect of the problem, which affected the entire international community, namely, the need to guarantee international peace and security. It was obvious that peace and security would be constantly threatened if the boundaries between States were not scrupulously respected. That idea was expressed in the Charter of the United Nations, and the International Law Commission had also been guided by it in paragraph 2 (*a*). Moreover the Commission had acknowledged in paragraph (11) of its commentary that treaties establishing a boundary should be recognized to be an exception to the rule. Lastly the International Court of Justice, in the *Case concerning the Temple of Preah Vihear*, had expressed the opinion that one of the primary objects of any treaty establishing a frontier between States was to achieve " stability and finality ".[3] Hence his delegation fully endorsed the

[2] *Yearbook of the International Law Commission, 1963*, vol. II, p. 80, article 22, para. 5.

[3] *I.C.J. Reports, 1962*, p. 34.

position adopted in the matter by the International Law Commission in paragraph 2 (*a*), which would obviate the kind of interpretations which could be given to the vague and ambiguous wording of Article 19 of the Covenant of the League of Nations.

15. His delegation also approved of the clause embodied in paragraph 2 (*b*), which was a very pertinent application of the old Latin maxim *nemo commodum capere potest ex injuria sua propria.*

16. His delegation could not accept the Venezuelan amendment (A/CONF.39/C.1/L.319); it altered the scope of article 59, whose essential characteristic was to establish an exception to the *pacta sunt servanda* principle and which made it clear that the situations in which that exception might be invoked must be regarded as entirely exceptional.

17. The amendments submitted by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333) seemed open to misunderstanding. On the one hand, they might imply that where there were no grounds for termination, there were *a fortiori* no grounds for suspension. On the other hand, they might imply that suspension was possible in cases where, in view of the radical nature of the changes, only the termination of a treaty ought to enter into consideration. With regard to the second part of the Finnish amendment, on the subject of separability of treaty provisions, the case seemed to be adequately dealt with in article 41.

18. The amendment in document A/CONF.39/C.1/L.299 would change the draft article too drastically; the exception laid down in paragraph 2 (*a*) must be formulated precisely and not in vague words which would increase the difficulties of interpreting the entire article.

19. In view of the difficult questions it dealt with, article 59 must be drafted with the utmost precision. In that respect the United States amendment (A/CONF.39/C.1/L.335), which removed from the application of the *rebus sic stantibus* rule any settlement of territorial questions, might give rise to misunderstanding. The notion of " territorial status " and the word " otherwise " did not seem sufficiently clear; moreover, the replacement of the expression " establishing a boundary " by the expression " drawing a boundary " did nothing to improve the text; the latter expression was open to unduly restrictive interpretations. The present wording therefore seemed preferable.

20. The Japanese amendment (A/CONF.39/C.1/L.336) did not improve the text either. In short, his delegation was in favour of retaining article 59 as submitted by the International Law Commission.

21. Mr. HARRY (Australia) said that in appraising article 59 his delegation had been guided by three main considerations. First, where there was a fundamental change of the circumstances which had constituted an essential basis of the consent of the parties to be bound by the treaty, it was reasonable to seek a review of the treaty. Secondly, there was justification for maintaining that international law recognized a doctrine of *rebus sic stantibus*, but the precise conditions under which that doctrine applied could not be regarded as settled; the most that could be said was that—as the International Law Commission put it in paragraph (6) of the commentary—" the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties ". Thirdly, as a ground for terminating treaties, a fundamental change of circumstances was particularly open to abuse, thus prejudicing the security of treaties; the Commission itself had recognized that. The fact was that circumstances were always changing, and the doctrine in question, if formulated too loosely, was a standing temptation to States to seek release from the obligations of treaties which had become inconvenient or more onerous than they had contemplated.

22. The International Law Commission had been aware of the danger and had endeavoured to state as objectively as possible the limited circumstances in which the doctrine could be invoked as a ground for terminating a treaty. His delegation would have preferred the Commission to have drafted an article inviting the parties to negotiate in good faith a review of the treaty, and providing that the question of termination of the treaty could arise only if the negotiations failed.

23. As formulated, paragraph 1 of the article laid down fairly clear conditions, but it remained to be seen whether a general change of circumstances quite outside the treaty, for example a change in government policy, could be a ground for terminating a treaty. As indicated in paragraph (10) of the commentary, the Commission had been divided on that point; his delegation, for its part, found it difficult to agree with those members of the Commission who had maintained 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. If a change of political attitude made the treaty unacceptable to both parties, they should obviously agree to terminate it. His delegation was firmly of the opinion that a change in government policy should in no event be invoked as a ground for unilaterally terminating a treaty.

24. With regard to paragraph 2 (*a*), which concerned treaties establishing a boundary, he pointed out that the Australian Government, in its written observations in 1965 on an earlier version of the article, had expressed the view that the provision should cover not only treaties establishing a boundary but also treaties relating to other kinds of territorial determinations. [4] That was still its view. His delegation therefore supported the United States amendment (A/CONF.39/C.1/L.335). As the United States representative had indicated, there were many arrangements of a territorial character which could not be described as treaties " establishing a boundary ", but to which the exception specified in paragraph 2 (*a*) should apply. However, the Antarctic Treaty, which the United States representative had cited as an example, was *sui generis*. It did not, strictly speaking, establish territorial status. What it did was to provide a special régime for a defined area. The parties had not agreed not to press claims, but that acts or activities while the Treaty was in force did not affect claims. It was a very important treaty setting up a unique and very promising system of scientific co-operation and demilitarization, including denuclearization, and the Australian Government did not consider that any party had the right to terminate it in any conceivable circumstance except as provided by the

[4] *Yearbook of the International Law Commission, 1966*, vol. II, p. 280, comment on article 44.

Treaty itself. It could be described as a treaty designed to maintain the *status quo* for the duration of its operation. Consequently, the Drafting Committee might slightly modify the formula proposed by the United States and say, for example, "treaty relating to the status of territory".

25. It was common practice to include in treaties intended to operate for long periods a provision for consultation or review at regular intervals or at the request of either party. In practice, those provisions greatly facilitated relations between the States concerned. It would have been helpful if their existence had been noted in the article itself. Perhaps an indirect allusion to them could be seen in the statement in paragraph 1 that the fundamental change of circumstances invoked must be one which had not been foreseen by the parties at the time of the conclusion of the treaty. In any event, it was highly desirable that article 59 should not prejudice the operation of the provisions for consultation and review which many treaties contained.

26. In the light of those considerations, his delegation would not take a final position on article 59 until the wording of article 62, concerning the settlement of disputes, had been decided. In the meantime it would abstain if article 59 were put to the vote.

27. Mr. TABIBI (Afghanistan) observed that the principle of *rebus sic stantibus* had long been accepted as a ground for the termination of treaties and it was desirable that the future convention should include a rule on the subject. The inclusion of article 59 strengthened the *pacta sunt servanda* rule; it was a safety-valve which operated when a treaty became too onerous to apply and when the continuance of the obligations created by it placed a strain on relations between the parties.

28. The International Law Commission had stated the rule very well in paragraph 1. But that paragraph by itself was enough. The exceptions stated in paragraph 2 greatly weakened the doctrine by excepting boundary treaties from the general rule, in the name of the stability of treaties but to the detriment of the interests of nations and individuals. He agreed with the Swiss representative that certain treaties establishing a legal régime should not be capable of being voided, but it was wrong to claim that boundary treaties and treaties establishing territorial status, of which the United States representative had spoken, should be excepted from the application of the rule. It would be useful if the Expert Consultant would explain what the relationship would be between paragraph 2 (*a*), if it were adopted, and the right of self-determination, which was recognized in the Charter and from which no derogation was permitted. The provision was also incompatible with the principle of peaceful relations among States, since undue rigidity was a source of disputes. A boundary line was not a geometric line, but determined the fate of millions of human beings. In the *Free Zones* case,[5] the Permanent Court of International Justice had not held that the *rebus sic stantibus* doctrine was not applicable to that kind of treaty. A treaty imposed during the colonial era for colonial or military reasons should not be exempted from the rule. Paragraph 2 (*a*) should therefore be deleted. If a majority imposed that exception for political reasons, he hoped that the Conference would find some way to save the future convention and protect States against any abusive application of the provision.

29. He would therefore vote against all amendments calculated to protect colonial and "iniquitous" treaties which, as such, conflicted with several provisions in the draft. Like the representative of the Ukrainian SSR and the Swiss representative, he believed that the Committee should make the rule as effective as possible.

30. Mr. RAJU (India) said the Indian delegation accepted article 59. A fundamental change of circumstances should be recognized as a ground for terminating a treaty, whether perpetual or not. The rule should be stated in such a way as to preclude the arbitrary denunciation of a treaty. The Indian delegation was in favour of the negative form in which paragraph 1 was couched; it also accepted the fundamental conditions stated in that paragraph and was in favour of the two exceptions set out in paragraph 2.

31. Accordingly, it could not support the amendment by the Republic of Viet-Nam to paragraph 2 (*a*) (A/CONF. 39/C.1/L.299), the effect of which would be to restrict unduly the application of the principle stated in paragraph 1, since almost all treaties confirmed a negotiated political settlement. Nor could it accept the broader scope which the amendment would give to paragraph 2 (*b*).

32. With regard to the United States amendment (A/CONF.39/C.1/L.335), the Indian delegation considered that it would be unwise to substitute the term "drawing" for "establishing", for the reason stated in the last sentence of paragraph (11) of the commentary. As to the remainder of the United States amendment, the words "or otherwise establishing territorial status" were somewhat obscure and the examples given by the United States representative had not thrown any light on the meaning. The term "territorial status" might easily connote political status. But treaties determining the political status of a territory were often cited as illustrations of the application of the *rebus sic stantibus* principle and not as exceptions to that principle. As it did not know exactly what was the scope of the proposed change, the Indian delegation would abstain on that amendment.

33. It was inclined to support the Canadian amendment (A/CONF.39/C.1/L.320) and the first part of the Finnish amendment (A/CONF.39/C.1/L.333), but would like the Expert Consultant to explain why the International Law Commission had decided not to refer to suspension in the opening paragraph of paragraph 1.

34. The second part of the Finnish amendment, relating to the question of separability, was already implied in the present text, taken together with article 41, paragraph 3.

35. The Indian delegation would support the Japanese amendment (A/CONF.39/C.1/L.336), but could not support the Venezuelan amendment (A/CONF.39/C.1/L.319) as it preferred the negative phrasing of the principle.

36. Mr. STREZOV (Bulgaria) said that the International Law Commission had shown an enlightened caution in article 59. It had sought to be realistic and had admitted the possibility of invoking a fundamental change of circumstances for terminating or withdrawing from a treaty; yet, in view of the risk of abuse, it had made that

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

possibility conditional upon a number of circumstances which would have to be considered in deciding whether the attitude of the State invoking the article was justified.

37. His delegation approved of the text proposed by the International Law Commission, but would like the conditions under which the principle *rebus sic stantibus* would operate to be stated with greater clarity and precision. In particular, in paragraph 1 (*b*), it was necessary to know the precise meaning of the words " radically to transform the scope of obligations still to be performed under the treaty ". When the necessary alterations had been made, the article would reflect a judicious balance between the demands of international life and the no less important needs of the stability of treaties.

38. His delegation could not accept the United States amendment, which would unduly extend the scope of paragraph 2 (*a*).

39. The Finnish and Canadian amendments might be referred to the Drafting Committee.

40. Mr. COLE (Sierra Leone) said that article 59 provided a reasonable compromise between the need for the stability of treaties and the traditional principle *rebus sic stantibus*.

41. His delegation supported in substance the article proposed by the International Law Commission and also those amendments which improved the text.

42. It sincerely hoped that article 59 would be interpreted and applied so as to protect the interests of all States, in particular small States. However perfect international legislation might be, it would always rest with nations to put it into effect. The great problem did not therefore reside in the imperfection of the text but in the difficulty of persuading nations to resort to peaceful means of settling their disputes. Those considerations would determine his delegation's attitude to the substantive amendments to article 59.

43. Mr. KOVALEV (Union of Soviet Socialist Republics) congratulated the International Law Commission on having settled endless controversies as to whether the principle of fundamental change of circumstances was a recognized norm of international law. For a long time, government attitudes had varied from country to country, and opinions on the subject had often been divided even within States. It had taken time for the doctrine to crystallize. In the opinion of Sir Hersch Lauterpacht some years back, the *rebus sic stantibus* rule was " almost " a principle of international law. The International Law Commission had rendered great service to the international community by dispelling the last glimmer of doubt represented by the word " almost ".

44. His delegation welcomed that evolution. The profound transformations brought about by a genuine social revolution or by decolonization meant that there was a fundamental change from the circumstances which had existed at the moment of the conclusion of a treaty before the revolution. In such circumstances of fundamental change, it would be a violation of the people's sovereignty to impose the application of the treaty. At the same time, a mere change in a country's internal policy or government was not a fundamental change of circumstances; in that respect, the Soviet Union delegation supported the statement in the last sentence of paragaph (10) of the commentary.

45. The purpose of the rule stated in article 59 was to facilitate the elimination of a *status quo* which society had rejected and the retention of which could prejudice international relations. The norm operated when circumstances had so changed that the treaty had lost all meaning, would be detrimental to peace, and contrary to the principle of the equality and mutual advantage of the parties.

46. Recourse to the rule could only be exceptional and a very delicate matter. The occasions on which it had been applied in the practice of the Soviet State were extremely rare. One example was the annulment of the Treaty of Brest-Litovsk by the Soviet Union on 13 November 1918. There had however been another ground for terminating that treaty, because some of its provisions had been violated by the other party. Since the annulment had subsequently been recognized by the new German Government, it was also an example of the modification of a treaty by mutual agreement between the parties.

47. Article 59 fulfilled essential needs, and the negative formulation of its introductory paragraph emphasized the exceptional nature of the cases to which the rule applied. The Soviet delegation was therefore unable to support the Venezuelan amendment (A/CONF.39/C.1/L.319), which would state the rule positively.

48. It would support the amendments submitted by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333), which would add a reference to suspension in the opening portion of paragraph 1. That accorded with practice and the laws of logic.

49. The exceptions stipulated in paragraph 2 were justified. However far-reaching the change of circumstances, the interests of peace required that the rule could not be invoked with respect to a boundary treaty.

50. His delegation had doubts about the United States amendment (A/CONF.39/C.1/L.335), which had not been dispelled by the sponsor's explanations. First, the word "establishing" had the advantage of being a legal term, whereas the word " drawing " was purely technical and tended to weaken the rule. The reference to a treaty " otherwise establishing territorial status " was very vague. The Soviet delegation would add to the criticisms made by several representatives that it irresistibly evoked the idea of a cease-fire or armistice line. The United States amendment was therefore unacceptable.

51. Paragraph 2 (*b*) might not be absolutely clear, but the proposed amendments, far from improving it, made it even more obscure, and the Soviet Union delegation would vote against them.

52. The observation by the Swiss representative on the impossibility of terminating a treaty unilaterally on the ground of fundamental change of circumstances was confirmed by neither practice nor history. A party could at all times request the revision of a treaty, but a change of circumstances would be invoked only when the parties disagreed. In that connexion, the Soviet delegation agreed with the United Kingdom representative that the problem could be solved by applying article 62, but unlike him it regarded the machinery provided in article 62 as satisfactory and adequate.

53. Finally, " iniquitous " agreements and colonial treaties, to which the Afghan representative had referred, were void *ab initio* in virtue of article 50 as conflicting with a norm of *jus cogens*. Article 59, on the other hand, was concerned with legitimate treaties which had to be terminated on the ground of a fundamental change of circumstances.

54. Mr. QUINTEROS (Chile) said that his delegation attached special importance to the problems raised by the doctrine of *rebus sic stantibus*. It was well that the convention should recognize the fundamental aspects of that doctrine. The formula proposed by the International Law Commission amply met the need to recognize the dynamic nature of international society. Under the conditions laid down in article 59, a fundamental change of circumstances constituted a legitimate ground for terminating or withdrawing from a treaty. Formulated in that manner, the *rebus sic stantibus* rule did not violate the principle of the non-revision of treaties; it was founded on justice and was designed to maintain inter-State relations in the realm of law.

55. The rule stated in article 59 usefully complemented the rule *pacta sunt servanda*, the rigid application of which was liable, in certain circumstances, to introduce an element of injustice into contractual relations between States. Article 59 had been formulated in a sufficiently objective and restrictive manner to prevent abuse. The exceptions provided for in paragraph 2 offered adequate safeguards.

56. Despite the almost universal recognition of the doctrine of *rebus sic stantibus* and despite international and judicial practice, views differed concerning certain aspects of the application of that doctrine. In his delegation's opinion, it would be too rigid to limit the application of that principle to so-called perpetual treaties, to the exclusion of treaties of long duration.

57. Further, the Commission's formulation of article 59 might be taken to mean that, despite a fundamental change of circumstances under the conditions laid down, a party injured by a unilateral act of denunciation of a treaty was not authorized to terminate or withdraw from the treaty. His delegation considered that in such a case recourse must be had to an international tribunal, and that the procedure to be followed under article 62 represented an important safeguard.

58. The problem of the separability of treaties should also be considered in connexion with the application of the *rebus sic stantibus* principle; article 41 provided a solution to that problem.

59. With regard to the amendments to article 59, that by the Republic of Viet-Nam (A/CONF.39/C.1/L.299) was unsuitable because it introduced into paragraph 2 new elements designed to limit the scope of the article. The expression " confirming a negotiated political settlement " called for an assessment that would necessarily be extra-judicial. Similarly, the expression " was deliberately provoked " would be open to an essentially subjective interpretation. Consequently, his delegation could not support the amendment.

60. As to the Venezuelan amendment (A/CONF.39/C.1/L.319) according to which article 59 would be expressed affirmatively, his delegation thought that the negative formulation proposed by the International Law Commission reflected more faithfully the very limited character of the cases that constituted an exception to the general principle that a change of circumstances could not be invoked as a ground for terminating a treaty. It would therefore be unable to support that amendment.

61. On the other hand, it was in favour of the Canadian amendment (A/CONF.39/C.1/L.320), which usefully added that the *rebus sic stantibus* principle might not be invoked as a ground for suspending a treaty. For the same reason, his delegation also supported the Finnish amendment (A/CONF.39/C.1/L.333).

62. The United States amendment (A/CONF.39/C.1/L.335) substituted the words " drawing a boundary " for the words " establishing a boundary " in paragraph 2 (*a*). But the International Law Commission had explained in paragraph (11) of its commentary to article 59 that it had deliberately replaced the expression " treaty fixing a boundary " by the words " treaty establishing a boundary ", as being a broader expression which did not merely embrace delimitation treaties. The amendment also proposed to include, in addition to boundary treaties, treaties " otherwise establishing territorial status "; that would unduly broaden the scope of a rule which had the character of an exception and as such ought to remain as precise and specific as possible. For that reason the Chilean delegation was not in favour of the amendment.

63. Lastly, his delegation could not support the Japanese amendment (A/CONF.39/C.1/L.336), as the new element it proposed to insert—the phrase " to a serious disadvantage of the party invoking it "—necessarily called for a subjective interpretation.

64. Mr. ALCIVAR-CASTILLO (Ecuador) said that although his delegation welcomed the inclusion in the convention of the *rebus sic stantibus* principle, it had certain objections to raise concerning the formulation of that principle in the draft.

65. The principle had always been the subject of much controversy. The traditional view that the *rebus sic stantibus* principle not only constituted an exception to the *pacta sunt servanda* rule, but was even its antithesis, was no longer admitted at the present time. Henceforth, both rules were general norms of international law. Nevertheless, the International Law Commission had been obliged to take into account to some extent the misgivings that the *rebus sic stantibus* principle had aroused among those who continued to affirm that the *pacta sunt servanda* rule was sacrosanct, an attitude that had no sound foundation in law but on the contrary reflected power politics. His own delegation took the view that the *pacta sunt servanda* rule should be considered as a norm of general international law, the effects of which were limited by other equally important or more important norms. The *rebus sic stantibus* principle, which was limited to the termination of a treaty, was of more limited scope than other principles entailing the nullity *ab initio* of a treaty. For that reason, his delegation did not approve of the negative terms in which the International Law Commission had framed article 59, as that implied that the intention was to continue to regard the *rebus sic stantibus* principle as an exception to the *pacta sunt servanda* rule. Such a theory was indefensible at the present stage of the evolution of international

law. The positive formulation proposed in the Venezuelan amendment (A/CONF.39/C.1/L.319) would be an improvement.

66. On the other hand, his delegation found it less easy to understand the provision in paragraph 2 (*a*) which excluded treaties establishing a boundary from the scope of the *rebus sic stantibus* principle. The United States amendment (A/CONF.39/C.1/L.335) still further aggravated the situation by proposing to exclude, in addition, treaties " otherwise establishing territorial status ". Whereas in the draft the sole purpose of paragraph 2 (*a*) was to protect " peace " treaties, the vague expression proposed by the United States tended to perpetuate existing colonial systems and territorial régimes established by force.

67. In his view it was clear that the United Nations General Assembly could, in virtue of Article 14 of the Charter, recommend the revision of international treaties. The fact that it had not yet made use of that right in no way detracted from the value of that principle. In an article published in 1948,[6] Blaine Sloan had expressed the opinion that a General Assembly recommendation concerning the revision of a treaty was tantamount to the express recognition of a fundamental change of circumstances as compared with those that had existed at the time the treaty was entered into, and that that fact could not fail to influence the arbitral or judicial body that had to decide the dispute.

68. His delegation realized that it would be difficult to modify article 59 at the present stage and had refrained from submitting an amendment. Nevertheless, it hoped that the necessary changes could be made in the near future.

69. Mr. AL-RAWI (Iraq) said that his delegation was in favour of the principle laid down in article 59 and of the way in which it had been drafted by the International Law Commission.

70. The principle was accepted by most authors. It had existed in international State practice for centuries and was recognized by the internal law of most countries. Sometimes, States invoked a change of circumstances without expressly mentioning the *rebus sic stantibus* rule or referring to a general principle. In other cases—and there were many—the *rebus sic stantibus* principle had been explicitly invoked.

71. His delegation was firmly convinced that if the application of a treaty in a given situation was not in conformity with the objectives of the parties, because the circumstances differed greatly from those existing at the time the treaty was entered into, the treaty should no longer be applied.

72. His delegation could not accept any of the amendments submitted to article 59, as it considered that the text of that article was clear, satisfactory and in accordance with State practice. The Commission had been wise not to include the words " *rebus sic stantibus* " either in the text or in the title of the article, so as to avoid the theoretical implications of that expression. His delegation supported article 59 as it stood.

73. Mr. MIRAS (Turkey) said that at the present stage of international law, a party that was no longer satisfied with a treaty as the result of a fundamental change of circumstances could request the other party to open negotiations with a view, where necessary, to modifying the treaty so as to adapt it to the new conditions. If the parties failed to reach agreement, they could have recourse to judicial settlement or arbitration, as the assessment of the effects of a fundamental change of circumstances could be entrusted only to an impartial third party. The unilateral and irregular denunciation of a treaty was devoid of all legal effect.

74. When commenting on the first draft, his Government had suggested[7] that article 59 should be modified so as to stipulate that the interested parties should first enter into negotiations *inter se* and only bring the dispute before an international tribunal if they were unable to reach agreement. Judicial safeguards were essential for the article; without them, article 59 would be unacceptable to his delegation. As it also considered that the wording could be improved, its attitude towards the article would depend on the final drafting and on the drafting of article 62. The same applied to the relevant amendments.

75. Mr. MEGUID (United Arab Republic) said he approved of the principle in draft article 59.

76. The principle had been stated in Article 19 of the League of Nations Covenant and it was regrettable that that Article had not been given its counterpart in the United Nations Charter. Article 59 of the International Law Commission's draft had the great merit of filling that gap in international law.

77. No doubt it was true that the majority of modern treaties were expressed to be of short duration, or were entered into for recurrent terms of years with a right of denunciation at the end of each term, or else they were expressly or implicitly terminable after notification. But, as the International Law Commission observed in paragraph (6) of its commentary, there might remain " a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party ".

78. That was what the Egyptian Government had tried to do when it had wished to terminate the treaty of alliance with the United Kingdom of 1936,[8] article 16 of which incorporated the principle of the perpetuity of the alliance. But when negotiations had proved abortive, and after a vain appeal to the Security Council, a law had been promulgated in 1951 terminating the treaty by the application of the *rebus sic stantibus* clause.

79. His delegation supported the retention of article 59 and was prepared to accept any improvement in the drafting.

80. Mr. SAMAD (Pakistan) said he was in favour of the *rebus sic stantibus* principle stated in draft article 59. The existence of the principle in international law had been recognized by jurists, but most of them had held

[6] " The binding force of a recommendation of the General Assembly of the United Nations " in *British Yearbook of International Law, 1948*, p. 29.

[7] *Yearbook of the International Law Commission, 1966*, vol. II, pp. 341 and 342.

[8] League of Nations, *Treaty Series*, vol. CLXXIII, p. 402.

that certain limits should be placed upon its scope of application and that the conditions under which it might be invoked should be regulated. Without such limitations, and in the absence of any system of compulsory jurisdiction, there was a risk that the principle might impair the stability of treaties.

81. The International Law Commission had therefore done well to attach restrictions to the right to invoke the principle, in order to prevent abuse. His delegation was accordingly in favour both of paragraph 2 (*a*) and of paragraph 2 (*b*), which was based on the rule that a party ought not to benefit from its own wrong doing.

82. With regard to the form of article 59, the Pakistan delegation would not strongly oppose the positive wording proposed in the Venezuelan amendment (A/CONF.39/C.1/L.319), but preferred the negative form in which the International Law Commission had couched the article. His delegation was not in favour of the other amendments to article 59, for they did not improve the text.

83. It was to be hoped that the application of article 59 would be made subject to independent and impartial adjudication.

84. Mr. OUTRATA (Czechoslovakia) said the International Law Commission had done excellent work in drafting article 59 and had succeeded in devising the right balance between the need to include in the convention a clause without which it would not truly reflect contemporary positive international law and the need to stress the exceptional character of that clause and to set limits to its application. The Czechoslovak delegation was therefore prepared to support article 59 as it stood.

85. Most of the amendments improved neither the substance nor the form of the text. The Venezuelan proposal (A/CONF.39/C.1/L.319) that the principle should be stated positively would not alter the legal meaning, but would go against the wish expressed by most delegations that the exceptional character of the application of the *rebus sic stantibus* clause should be stressed as strongly as possible. His delegation could not endorse the reference to the suspension of a treaty proposed by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333). The Japanese amendment (A/CONF.39/C.1/L.336) was superfluous and had the disadvantage of introducing a subjective element.

86. The Czechoslovak delegation was prepared to accept the general idea in the United States amendment (A/CONF.39/C.1/L.335) that some territorial régimes established by treaties, and in particular by multilateral treaties, should be protected against unilateral denunciation, as should treaties establishing boundaries. But that did not apply to all such territorial régimes. There might well be situations in which a party would be completely justified in invoking the clause with respect to a territorial status established by agreement, if resort to the clause was the only way to terminate a treaty which had become a liability to international peace and friendly relations among nations. The present wording of the United States amendment, however, was not precise enough and might lead to unjustified interpretations. The Czechoslovak delegation would therefore be unable to support it, but as the amendment was to be referred to the Drafting Committee, it would reserve its position until the Drafting Committee submitted a revised text to the Committee of the Whole.

87. Mr. DE BRESSON (France) said his delegation was prepared to recognize the existence of the principle of a fundamental change of circumstances as a rule of positive law. Generally, therefore, it favoured article 59 as proposed by the International Law Commission, although it did not interpret it as in itself enabling a State to avoid its undertakings unilaterally. His delegation considered nevertheless that it would be advisable to study the wording of article 59 with great care and to make it more precise where necessary.

88. The United States amendment (A/CONF.39/C.1/L.335) had the merit of showing that the wording used to describe the cases mentioned in paragraph 2 (*a*) of the draft article was perhaps not wholly satisfactory, although it might be asked whether the wording suggested by the United States was not too broad and too imprecise. Although his delegation did not accept the formula proposed in that amendment, it considered that the idea it contained could be submitted to the Drafting Committee.

89. The Venezuelan amendment (A/CONF.39/C.1/L.319) had the disadvantage of reversing the principle laid down in article 59 and of turning the exception into the rule. It thus considerably enlarged the scope of a provision which should in all cases be applied only with the greatest caution.

90. His delegation doubted whether the Japanese amendment (A/CONF.39/C.1/L.336) was really essential and thought that the idea it expressed might be implicit in the existing text of article 59.

91. The remaining amendments were more of a drafting nature. His delegation had no objection to them in principle.

92. Whatever its attitude might be to article 59 as such, the French delegation reserved its position generally until the questions concerning the settlement of differences arising from the application of Part V of the draft articles had been discussed in the context of article 62.

93. Mr. MUTUALE (Democratic Republic of Congo) said his delegation approved of the principle expressed in article 59 of the draft. As formulated by the International Law Commission, that principle was based on justice and equity. It was also a useful principle which helped to promote the stability of treaty relations, prevented their violent rupture and provided a remedy for the desperate plight of a State which found itself unable to meet burdensome obligations because the circumstances which had induced it to accept those obligations had ceased to exist, without such an eventuality having been contemplated in the treaty. The principle should however be watered down because its application by States entailed certain risks; it should therefore be made subject to conditions such as the International Law Commission had very wisely provided.

94. With regard to the amendments to article 59, that submitted by Japan (A/CONF.39/C.1/L.336) was unacceptable, because it was sufficient that a fundamental change of circumstance should radically transform the scope of obligations still to be performed under the

treaty for it to be invoked as a ground for terminating or withdrawing from the treaty.

95. The Venezuelan amendment (A/CONF.39/C.1/L.319) was also unacceptable, because it ran counter to the cautious and sensible attitude adopted by the International Law Commission concerning the application of the *rebus sic stantibus* principle.

96. The amendments submitted by Finland (A/CONF.39/C.1/L.333) and Canada (A/CONF.39/C.1/L.320) raised difficulties to which the sponsors themselves had drawn attention. How, for instance, could a fundamental change of the circumstances which had constituted an essential basis of the consent of the parties entail only the suspension of the treaty? The Finnish amendment, however, contained a provision regarding separability which his delegation could accept.

97. He could not support the United States amendment (A/CONF.39/C.1/L.335) because it introduced an insufficiently precise notion: the words " territorial status " might also cover a cession of territory, a proposition which his delegation could not accept.

The meeting rose at 6.10 p.m.

SIXTY-FIFTH MEETING

Saturday, 11 May 1968, at 9.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 59 (Fundamental change of circumstances) *(continued)*

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

2. Mr. EVRIGENIS (Greece) said that some delegations had expressed doubts about the wisdom of including the rule in article 59 in the draft convention. His delegation, while appreciating their arguments, was nevertheless in favour of including at least the principle, although it was not blind to the difficulty of formulating a substantive rule on the matter and of establishing the conditions under which it would be applied by an adjudicating body. But the difficulties were not such as to make it necessary to omit the principle from the convention. The rule that a fundamental or unforeseeable change of circumstances affected the performance of a treaty was now firmly established in the legal conscience everywhere, although it might not be easy to frame it in a comprehensive and satisfactory manner. The rule would operate in any case, whether it was included in the convention or not. It was inconceivable that, after displaying a progressive attitude on so may other questions, the Conference should leave entirely aside a concept which owed its existence to the continuous evolution and transformation of international life.

3. The International Law Commission had worked out an admirable definition, in view of the complexity of the subject. It was a well-balanced combination of the French doctrine of "*imprévision*" and the German theory of " *geschäftsgrundlage* " and it could provide, through the medium of suitable tribunals, an equitable solution without endangering the stability of international treaty relations. His delegation would support the International Law Commission's text in principle, though it would reserve its position until the official form of article 62 was known. It would also support the Canadian amendment (A/CONF.39/C.1/L.320) and the Finnish amendment (A/CONF.39/C.1/L.333) because they introduced a desirable element of flexibility with regard to the legal effects of a fundamental change of circumstances.

4. A few small drafting changes needed to be made to the Commission's text. The words " as a ground for terminating or withdrawing from " in paragraph 2 (*a*) would be better placed at the end of the introductory sentence; otherwise, sub-paragraph (*b*) would appear to be left in the air as a legal rule, without any sanction attached to it. It might be better to substitute the word " another " for the words " a different " in paragraph 2 (*b*), since the word " different " might give the impression that it meant an obligation having a different object and not, as should be the case, a legally different obligation. That change would bring the text into line with the Netherlands amendment (A/CONF.39/C.1/L.331) to article 58 which had already been adopted.

5. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that though the title of article 59 was " Fundamental change of circumstances ", the subject of the article was in reality *rebus sic stantibus*. It dealt, therefore, with a very ancient principle which, however, had some new aspects. The article made provision for new grounds for terminating or withdrawing from a treaty and, accordingly, dealt with a very radical principle of law, particularly of international law. It had been argued that the principle that, if a fundamental change of circumstances occurred, a party might unilaterally terminate a treaty, was implicit in all treaties. The principle had not yet, however, been confirmed in the law of treaties nor had it been finally introduced into international law. It was not a general principle of international law, because it was not yet universal. The International Law Commission was therefore to be commended for the excellent text in which it had embodied the *rebus sic stantibus* principle. His delegation supported the Commission's text, despite a few weak points which had already been noted.

6. The principle had often been interpreted broadly to imply that any change in circumstances enabled a State to terminate a treaty. The article would therefore have to be worded very strictly, since unduly elastic interpretation was undesirable. At the same time, it must be brought into line with the progress of modern international law and accepted only if the changes were objective and if its application was designed to preserve friendly relations between States.

7. The prime object was to prevent the perpetuation of situations which had become obsolete. In concluding a treaty the parties should, where possible, not only have regard to the circumstances at the time of its conclusion but should also make a scientific attempt to assess future

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