United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.65

65th meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

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.

conditions. The prime difficulty was the reasonable application of the principle of *rebus sic stantibus* in the context of contemporary life. It should be applied with discretion, since exaggerated use of it would be fatal to the stability of treaties. The Drafting Committee should therefore attempt to make paragraphs 1 (*a*) and 1 (*b*) more flexible, perhaps by strengthening the definition of the term "fundamental". The provision should apply only when a State found it completely impossible to perform a treaty, or where a treaty conflicted with its most vital interests.

8. At the 64th meeting, the representative of Afghanistan had expressed doubts about paragraph 2 (*a*). He appreciated the Afghan representative's concern, but it should not be forgotten that the article dealt only with legal treaties. Illegal and unequal treaties should be void not only under the terms of article 59, but also where they conflicted with a rule of *jus cogens*. Newly emergent States had the right to state their attitude towards treaties previously concluded by the metropolitan Power, but that was not relevant to article 59. What was in issue was a change in the whole system, not merely in so far as it affected treaties. The *rebus sic stantibus* principle affected only certain treaties, and that was why the International Law Commission's text was commendable in that it destroyed the notion of the immutability of previous circumstances. Some had seen a contradiction between *rebus sic stantibus* and *pacta sunt servanda*, but only the latter was immutable.

9. He could not accept the United States amendment (A/CONF.39/C.1/L.335), because it made the article less precise, nor the Venezuelan amendment (A/CONF.39/C.1/L.319), because it stated the rule positively. Nor could he support the Canadian (A/CONF.39/C.1/L.320) and Finnish (A/CONF.39/C.1/L.333) amendments.

10. Mr. ENGEL (Denmark) said the Danish delegation shared the view that fundamental changes of circumstances might be invoked as a ground for terminating or withdrawing from a treaty under the conditions and within the limits specified in article 59. That principle should find a place in the modern law of treaties.

11. Since, however, the contracting parties were likely to assess circumstances differently and to draw different legal conclusions from the facts, it was essential to ensure that a State should not be entitled to withdraw from a treaty under article 59 unless it was prepared to submit any dispute on the point to the decision of an arbitral or judicial body. The dangers to the security of treaties presented by the adoption of the principle of *rebus sic stantibus* in the absence of any rule to that effect were obvious. The Danish delegation's position would consequently depend on what safeguards were provided in article 62 against the arbitrary application of article 59, and it must reserve its final position on article 59 until the shape of article 62 was known.

12. Mr. HARASZTI (Hungary) said the International Law Commission was to be commended on its clear formulation in draft article 59 of the controversial principle of *rebus sic stantibus* and his delegation would accept the text as it stood, though it was quite prepared to examine carefully the various amendments submitted.

13. He had noted with satisfaction that the idea underlying article 59 had met with wide acceptance even by those delegations which had been reluctant to accept the principle in the Sixth Committee. Without going further into the substance, he would merely say that he agreed with the view that the principle of *rebus sic stantibus* was not incompatible with the *pacta sunt servanda* rule but was a necessary corollary of it.

14. The Hungarian delegation could accept the idea in the Canadian (A/CONF.39/C.1/L.320) and Finnish (A/CONF.39/C.1/L.333) amendments, enabling States to suspend a treaty in the case of a fundamental change of circumstances, since that was consistent with State practice; an example was the well-known case of the International Load Line Convention which had been suspended by the United States of America with express reference to the *rebus sic stantibus* clause. His delegation could also accept the second idea in the Finnish amendment (A/CONF.39/C.1/L.333), concerning the separability of treaties with respect to termination, since that too was consistent with State practice, but it was not convinced of the necessity of that amendment, since in its opinion article 41 would also be applicable in the case of a fundamental change of circumstances.

15. His delegation could not support the United States amendment (A/CONF.39/C.1/L.335) because it was ambiguous and might give rise to unnecessary disputes. Further, it might prevent the application of article 59 with regard to a number of treaties containing provisions dating from the colonial era. Nor could his delegation support the Japanese amendment (A/CONF.39/C.1/L.336), which was not truly a drafting amendment, as the Japanese representative had claimed, but affected the substance. The additional condition embodied in the Japanese amendment would seriously limit the application of the rule laid down in article 59. The International Law Commission's negative formulation was preferable to the positive formulation in the Venezuelan amendment (A/CONF.39/C.1/L.319), because the negative formulation stressed the exceptional character of the *rebus sic stantibus* rule as compared with *pacta sunt servanda.*

16. Mr. KABBAJ (Morocco) said that article 59 should certainly be included in the draft convention on the law of treaties because a strict statement of the *rebus sic stantibus* rule would contribute to the stability of treaty relations. Paragraph 2 (*a*) was, however, open to objection. The case of the treaties dealt with in that sub-paragraph, especially with the broad interpretation given by the Commission, had never been completely accepted in legal theory, in case-law or in State practice. There were changes of circumstances so fundamental that it would be both inequitable and legally wrong to regard the treaties affected by them as immutable, especially where the origin was illegal. In the opinion of many jurists and in accordance with State practice, even so-called perpetual treaties might be revised as a result of a fundamental change of circumstances. Although the Permanent Court of International Justice had made no decision on the application of the *rebus sic stantibus* principle to treaties relating to territorial problems in the *Free Zones* case, [2] it had not thereby intended to contest the existence of the principle nor to set aside the possibility of applying it to that kind of treaty.

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

17. His delegation was perturbed at the statement in paragraph (11) of the Commission's commentary that the expression "treaty establishing a boundary" embraced treaties of cession as well as delimitation treaties. A large number of treaties of cession had been concluded in unjust and illegal circumstances and therefore belonged to the past, now that the circumstances had been affected by profound changes in the notions of international relations; they could not, therefore, be perpetuated indefinitely. That consideration applied to the amendments by the Republic of Viet-Nam, Venezuela and the United States (A/CONF.39/C.1/L.299, L.319 and L.335) whose effect was either to maintain the exception in its broader sense, or to extend its scope.

18. Mr. FERNANDO (Philippines) said that article 59 as drafted by the International Law Commission was designed to remove any remaining doubts about the general principle of *rebus sic stantibus*, even though its invocation under particular circumstances might sometimes be considered dubious. The *pacta sunt servanda* rule was basic, but it was only realistic to assert that rigid adherence to it at all times and in all conditions, notwithstanding a radical change of circumstances, could lead to disputes. Article 59 supplied a necessary corrective. Since it was worded in a negative form, there was no danger that the provision would be regarded as an exception to the *pacta sunt servanda* rule. It was flexible and the field of interpretation was not unduly narrowed. When the rule was expressed in very general terms, the importance of environmental facts and conditions became clearer. In view of the circumstances in which treaties between colonial powers and developing countries had been concluded and of the fact that modification of such treaties was accepted in modern international life, some such provisions as those in article 59 were highly desirable. The International Law Commission's text might perhaps be improved, but the principle embodied in it was commendable.

19. Mr. MATINE-DAFTARY (Iran) said that he would like to give a specific illustration from the history of his own country of how the *rebus sic stantibus* principle had provoked controversy in the past. The Government of Iran had invoked the *rebus sic stantibus* principle in order to rid itself of the baneful Capitulations régime. That régime, which had made increasingly serious encroachments on Iranian sovereignty for nearly a century, had been imposed on Iran by Czarist Russia in 1828, following a military defeat. It had been abolished on the morrow of the October Revolution and its abolition had been confirmed by the treaty between Iran and the Soviet Union, signed at Moscow in February 1921. The western Powers, however, had persisted in exercising consular jurisdiction in Iran, partly by virtue of conventions imposed during the course of the nineteenth century on the Russian model, and partly by virtue of the most-favoured-nation clause. Despite the far-reaching judicial and administrative reforms after 1921 following the establishment of the modern Iranian Army, representing a fundamental change of circumstances in Iran, the States parties to the conventions had opposed the Iranian claim and contested the very existence of the *rebus sic stantibus* principle in international law. Only after lengthy negotiations and after receiving assurances as to the guarantees provided by the Iranian courts had the western Powers finally yielded and the capitulations been abolished in April 1927.

20. He had given that illustration in order to show that the very natural and logical principle of *rebus sic stantibus* had been the subject of controversy. The principle underlay Article 19 of the League of Nations Covenant and Article 14 of the United Nations Charter. The International Law Commission was therefore to be commended on having brought the controversy to an end with article 59 of its draft.

21. The criticisms of the Commission made in the course of the debate seemed hardly constructive. The Commission had been accused of using vague terms, but the amendments put forward did not suggest any changes that would improve the text. They could be referred to the Drafting Committee.

22. Mr. MARESCA (Italy) said that article 59 was one of the most successful articles drafted by the International Law Commission, and was remarkably well-balanced. It kept the most-favoured-nation treatment as an exception and linked a traditional notion with a new idea, namely, that it was not only a change of circumstances but also a radical transformation in obligations that enabled a State to invoke grounds for the termination of a treaty.

23. Article 59 was closely bound up with article 62. It was hard to see how the *rebus sic stantibus* clause could operate, especially with regard to the termination of a treaty, without the agreement of the parties, but it could not depend solely upon the will of another party.

24. The advantage of the Finnish amendment (A/CONF.39/C.1/L.333) was that it brought back the idea of the suspension of a treaty or, in other words, helped to preserve the treaty by admitting the possibility of separability. The Canadian amendment (A/CONF.39/C.1/L.320) had a similar effect. His delegation had considerable sympathy for the United States amendment (A/CONF.39/C.1/L.335), since it made clearer the notion of territorial status as an absolute exception to the *rebus sic stantibus* rule.

25. Mr. MWENDWA (Kenya) said that the existence and importance of the *rebus sic stantibus* principle had not been questioned during the debate. His delegation agreed with many others that the convention on the law of treaties would be incomplete if it failed to include a provision on fundamental change of circumstances as a ground for terminating a treaty. The International Law Commission's draft was entirely satisfactory; if any changes apart from drafting changes were made to it, they would upset the delicate balance achieved by the Commission between the need to preserve the stability of treaty relations, on the one hand, and the demands of change, on the other. The negative form in which draft article 59 had been couched was an essential part of that balance. His delegation could not support the Venezuelan amendment (A/CONF.39/C.1/L.319) because it sought to put the article in positive form.

26. The exceptions to the rule, particularly the provision in paragraph 2 (*a*), were of special importance. Some delegations had been understandably reluctant to admit that exception in view of the arbitrary way in which some

boundaries, including many former colonial territorial boundaries, had been established. Nevertheless, territorial boundaries were so inextricably interwoven with the sovereignty and integrity of a State that the Commission had been wholly justified in excluding treaties establishing boundaries from the ambit of *rebus sic stantibus*. The merit of the International Law Commission's formulation of the exception was that it not only kept the balance but was stated clearly and unequivocally. Any attempt to rewrite the exception was likely either to broaden its scope or make the text ambiguous. His delegation would therefore vote against the United States amendment (A/CONF.39/C.1/L.335) and against the first part of the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.299); the second part introduced a new and highly controversial element of a non-juridical nature. Similarly his delegation would vote against the Japanese amendment (A/CONF.39/C.1/L.336), since it introduced a subjective element where an objective criterion was required. The Canadian and the Finnish amendments (A/CONF.39/C.1/L.320 and L.333) were less objectionable, but his delegation would prefer the retention of the article as it stood.

27. Sir Humphrey WALDOCK (Expert Consultant) said that the Netherlands representative had asked him to explain the notions embodied in such terms as " fundamental ", " radically " and " scope of obligations " used in stating the conditions necessary for the application of the principle. He interpreted the question as indicating some uneasiness as to whether the conditions had been tightly enough drawn in draft article 59. As an English judge had said in connexion with an analogous situation in English law, it was almost impossible by any nice combination of words to state a rule in advance of any possible controversy; all that could be done was to state as strictly as possible circumstances in which the rule might apply. Strictness was particularly needed in article 59 since a change in circumstances, unlike a supervening impossibility of performance, was hard to state in concrete terms. The Commission had felt that it had had to be specially careful in formulating the article from the point of view of the stability of treaties. It had examined many combinations of words before it had arrived at the present text; but if the Conference could improve the text by making it stricter and more objective, so much the better.

28. The Commission had considered the negative statement of the rule specially important. He himself, as Special Rapporteur, had originally worded the draft article slightly differently, stating it in terms of " only if ", but the Commission had insisted that the notion should be expressly stated in the negative. The Venezuelan amendment (A/CONF.39/C.1/L.319) therefore ran completely counter to the International Law Commission's opinion.

29. There had been some support for the Canadian and Finnish amendments to add the notion of suspension. The Commission had considered the point and had found it difficult to reach a clear conclusion. The Commission's view had been that article 59, which dealt with a fundamental change of circumstances, might conflict with the idea of mere suspension. It was true that the Commission had provided for temporary impossibility in article 58, but that was a sharper case and made it easier to conceive of a situation where suspension might be appropriate. There were also other articles dealing with the suspension of a treaty by the agreement of the parties, so that if there was a case where that was desirable, there would always be that outlet. The real relevance of the point was to a situation where one party wished to terminate a treaty and the other resisted. In the case of fundamental change, the notion of suspension might not be very practicable. More important, however, was the feeling that, if the possibility of suspension were added, that might weaken the strict philosophy of the whole article. To allow suspension might give the impression that the change of circumstances might not be quite fundamental. That reasoning had induced the Commission not to include a provision for suspension.

30. With regard to the question of separability, other speakers had pointed out that the principle was stated in article 41. The Commission's intention had been that article 59 should clearly be subject to the provisions of article 41, and so it had omitted the expression " in whole or in part ".

31. The reasons for including paragraph 2 (*a*) were given in the commentary. The Afghan representative had asked what was the relation between that provision, and self-determination, and illegal and unequal colonial boundary treaties. The answer had to be found in the present convention itself. The question of illegality was dealt with in the two articles treating of *jus cogens*. The question of self-determination was also covered in the commentary. In the Commission's view, self-determination was an independent principle which belonged to another branch of international law and which had its own conditions and problems. The Commission had not intended in paragraph 2 (*a*) to give the impression that boundaries were immutable, but article 59 was not a basis for seeking the termination of a boundary treaty.

32. He had some sympathy for the United States proposal (A/CONF.39/C.1/L.335) for rewording paragraph 2 (*a*). He himself had raised the question in the International Law Commission in the form of a possible enlargement of the article to cover territorial régimes. The Commission, however, had considered that it would be too hard to find a form of words which would not unduly enlarge the exceptions and had come down firmly for the present provision.

33. With regard to paragraph 2 (*b*) and cases of provocation or inducement by the act of the party concerned, the Commission had considered the matter, but had thought it undesirable to state it as an element separate from breach. The rule contained in the article concerned treaties of a certain duration, and even acts done *bona fide* in application of the treaty might tend to bring about a change of circumstances. The Commission had therefore confined the provision to breach, and where acts provoking or inducing a change were not *bona fide* acts, the case would fall within paragraph 2 (*b*), since they would constitute breaches of the treaty.

34. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the Expert Consultant's remarks on subparagraph 2 (*a*) had allayed some of his delegation's doubts. Clearly, the principle of self-determination was covered by other articles of the draft, and article 59,

like all the other articles in Section 3 of Part V, referred to legally concluded treaties; illegal and unequal treaties were dealt with in Section 2. Sub-paragraph 2 (*a*) of article 59 was of the greatest importance to all States, as was proved by the decisions of various organizations, including African organizations, which had stressed the need for the observance of treaties establishing boundaries.

35. Mr. CASTRÉN (Finland) said that he would not ask for a vote to be taken on the second part of his delegation's amendment (A/CONF.39/C.1/L.333), which related to the question of the separability of treaty provisions. That point could be decided when the Committee gave further consideration to article 41. Indeed, the Expert Consultant seemed to have agreed with the Finnish suggestion in connexion with that article.

36. Mr. ARMANDO ROJAS (Venezuela) said he would withdraw his delegation's amendment (A/CONF.39/C.1/L.319), on the understanding that the Drafting Committee might be able to make use of some of the elements it contained.

37. The CHAIRMAN said he would invite the Committee to vote first on the principle contained in the amendments proposed by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333), to include in paragraph 1 a reference to suspension of a treaty.

The principle was approved by 31 votes to 26, with 28 abstentions.

38. The CHAIRMAN said he would now invite the Committee to vote on the Japanese, Republic of Viet-Nam and United States amendments, in that order.

The Japanese amendment (A/CONF.39/C.1/L.336) was rejected by 41 votes to 6, with 35 abstentions.

*The amendment by the Republic of Viet-Nam to sub-paragraph 2 (*a*) (A/CONF.39/C.1/L.299) was rejected by 64 votes to 1, with 13 abstentions.*

*The amendment by the Republic of Viet-Nam to sub-paragraph 2 (*b*) (A/CONF.39/C.1/L.299) was rejected by 50 votes to 2, with 24 abstentions.*

The words " or otherwise establishing territorial status " in the United States amendment (A/CONF.39/C.1/L.335) were rejected by 43 votes to 14, with 28 abstentions.

39. The CHAIRMAN suggested that article 59, as amended in principle, be referred to the Drafting Committee, together with the first part of the United States amendment.

It was so agreed.[3]

40. Mr. WERSHOF (Canada) said that his delegation's abstention in the vote on the United States amendment (A/CONF.39/C.1/L.335) did not mean that it was opposed to the principle of that proposal. It was merely that the amendment had been circulated so recently that the Canadian Government had not had time to consider the potentially important implications of the text.

41. Mr. MEGUID (United Arab Republic) said that his delegation's approval of paragraph 2 of article 59 was contingent on the understanding that unjust, unequal and wrongfully imposed treaties were excluded from the scope of that clause.

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

42. Mr. TABIBI (Afghanistan) said that his delegation also understood sub-paragraph 2 (*a*) as not covering unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination.

Article 60 (Severance of diplomatic relations)

43. The CHAIRMAN invited the Committee to consider article 60 and the amendments thereto.[4]

44. Mr. MARESCA (Italy), introducing the amendment submitted jointly by the Italian and Swiss delegations (A/CONF.39/C.1/L.322), said that, although the International Law Commission's wish to make the texts of the articles as brief as possible was commendable, in the case of article 60, that brevity had led to some obscurity. Severance of diplomatic relations could in fact affect legal relations established by two categories of treaties. First, there were many treaties in which diplomatic relations were the only technical means of execution, through the essential communications that they established in such matters as consultation, extradition and so forth. Secondly, diplomatic relations were the direct and exclusive subject of some treaties, such as, for example, the 1961 Vienna Convention on Diplomatic Relations. In the event of severance of diplomatic relations, legal effects would be produced in both cases. The execution of treaties in the first category would necessarily be interrupted in the absence of normal channels: the good offices of a third State might be sought, but such a State could not be called upon to carry out all the work of a diplomatic mission. In the case of treaties directly concerned with diplomatic relations, the effects were much more serious, for such instruments would in effect be terminated or suspended, and the non-operation of their provisions might cause breaches of international law. The omission of any exception to the rule in article 60 could have the dangerous effect of giving the impression that diplomatic relations could be severed without serious consequences.

45. Mr. BENYI (Hungary), introducing his delegation's amendment (A/CONF.39/C.1/L.334), said that Hungary fully supported the basic principle of the International Law Commission's text of article 60. Nevertheless, his delegation had felt obliged to fill an important gap in that text. Although diplomatic relations usually included consular relations, the latter might come into being without the former: States were free to establish consular relations even in the absence of diplomatic relations, and consular relations were frequently the only formal links between countries. Moreover, economic and commercial ties sometimes preceded formal inter-State relations.

46. When diplomatic relations had been severed in the past, it had nearly always been agreed that consular relations should continue; there were many examples of that throughout the world. Accordingly, it should be specified that the severance of consular relations did not affect the treaty obligations existing between the countries concerned; otherwise, it might be assumed that

[4] The following amendments had been submitted: Italy and Switzerland, A/CONF.39/C.1/L.322; Hungary, A/CONF.39/C.1/L.334; Japan, A/CONF.39/C.1/L.337; Chile, A/CONF.39/C.1/L.341.

treaties concluded between States which were linked only by consular relations depended solely on the continuance of those relations, and a State in such a position might invoke article 60 as an escape clause for ridding itself of its obligations under a treaty it did not wish to perform. The Hungarian delegation had therefore proposed the inclusion of the words " and consular " after the word " diplomatic " in the title and first line of the article, in the belief that that amendment would strengthen the *pacta sunt servanda* principle.

47. His delegation fully supported the principle of the Italian and Swiss amendment (A/CONF.39/C.1/L.322), but considered that the words " and consular " should be inserted in the appropriate place in that text, and also that the word " normal " was unnecessary, because it did not appear either in the title or in the article and, moreover, introduced an element of ambiguity. It should be stated clearly with regard to the proposed exception that the treaty would be suspended, not terminated, if the severance of diplomatic and consular relations made it impossible to comply with the obligations of the treaty.

48. Mr. OWADA (Japan) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.337) was merely to reverse the order of articles 60 and 61. The present article 60 was not concerned with a real case of termination or suspension, but was rather a proviso inserted *ex abundanti cautela*, and would more appropriately be placed at the end of Section 3, of Part V. That minor point could be referred to the Drafting Committee.

49. Mr. VARGAS (Chile) said that his delegation's amendment (A/CONF.39/C.1/L.341) comprised two separate ideas which were, however, closely interrelated. The first sentence of the proposed new paragraph 2 was based on the international practice whereby multilateral and bilateral treaties were concluded between States which had severed diplomatic relations. Although it might be considered unnecessary to state such a self-evident fact, it should be borne in mind that one of the tasks of the Conference was to codify existing international law and practice. Moreover, the absence of such a provision might lead to the assumption that States could not conclude treaties among themselves if diplomatic relations had been severed.

50. The second sentence was a necessary complement to the first: whereas the conclusion of treaties was a legal act binding two or more States, severance of diplomatic relations had a political significance and affected relations between Governments. It therefore seemed advisable to state that the conclusion of a treaty in those circumstances did not affect the situation between the two States in regard to diplomatic relations. The problem was connected with that of recognition, for the conclusion of a treaty might be held to imply tacit recognition.

51. The Chilean delegation hoped that the principle of its amendment would be approved by the Committee. It would not press for the inclusion of the provision as paragraph 2 of article 60; if the principle were approved, the Drafting Committee might prefer to place the clause elsewhere in the convention.

52. Mr. LADOR (Israel) said that his delegation also appreciated the brevity of the International Law Commission's text, but recognized that the price of that brevity was that some of the provisions had to be read in conjunction with others. Thus, article 60 derived directly from the principle *pacta sunt servanda* which the Committee had approved in article 23, but it could not be regarded as a full statement of the rule governing severance of diplomatic relations. His delegation therefore supported the Italian and Swiss amendment (A/CONF.39/C.1/L.322).

53. He stressed that there was yet another consequence of the rule, namely, that of the applicability of those conventions which presupposed the absence of normal diplomatic relations and therefore often went so far as to suggest recourse to other means of communication for the full performance of the obligations incumbent on the parties to the treaty. Classical examples of such treaties were what were known as the humanitarian conventions. Such recourse was within the spirit of the draft convention, since the term " performed " in article 23 was more precisely specified in article 27, paragraph 1, as an obligation of good faith.

54. The Hungarian amendment (A/CONF.39/C.1/L.334) also conformed with those ideas, although from another point of view. There were, indeed, cases where the severance of diplomatic relations was accompanied by continuance of consular relations, since the consular function was that of the protection of individual interests. It was therefore questionable whether a parallel should be established between the severance of diplomatic and of consular relations without mentioning the subsidiary methods of consular protection as an element in the maintenance of the treaties in force.

55. His delegation could support the Chilean amendment (A/CONF.39/C.1/L.337), particularly if the second sentence were deleted and the words " or absence " were inserted after the word " severance ". Such a general provision might then be included in Part I of the draft convention.

56. Incidentally, his delegation considered that the word " postulate " in the English version of the Italian and Swiss amendment (A/CONF.39/C.1/L.322) was an unsatisfactory translation of the French " *présupposent* ", and that the word " require " would be preferable.

57. Mr. ARIFF (Malaysia) said that the principle that treaty obligations between parties to a treaty should continue despite the severance of diplomatic relations between them was rooted in practice. Some treaties might be so fundamental to the very existence of States that they simply could not be dispensed with, whatever political differences might arise. For example, the new island State of Singapore was dependent on Malaysia for its water supply; the treaty under which Malaysia had to supply a certain quantity of water daily to Singapore could not be terminated or suspended between the two States for any political reason. Another kind of treaty whose continuance might be fundamental to the existence of a State was one concluded between a land-locked country and a neighbouring maritime State: a treaty providing the former State with an outlet to the sea essential to its economic survival must continue to exist despite the severance of diplomatic relations.

58. The Malaysian delegation was therefore in favour of the principle of article 60, but did not consider the

wording entirely appropriate, since it failed to take into account the political sentiment of States. It was not always true in State practice that the severance of diplomatic relations left the legal relations of the parties unaffected. The Italian and Swiss amendment (A/CONF.39/C.1/L.322) went a long way towards remedying that shortcoming of the Commission's text, and the Malaysian delegation could support it. Perhaps, however, the sponsors would agree to the insertion of the word " continued " before the word " existence ", in order to strengthen the proviso by specifying that normal diplomatic relations must continue to exist.

59. His delegation recognized that cases might arise in which severance of diplomatic relations would not preclude the conclusion of treaties and the establishment of legal relations which were essential for the economic survival of States. It could therefore support the Chilean amendment (A/CONF.39/C.1/L.341) in principle, although it considered the wording rather too loose in its presumption that States would wish to enter into treaties while there was diplomatic friction between them. In practice, States would more often than not refrain from concluding treaties when relations between them were strained. On the other hand, the option to conclude treaties in such circumstances should be stated, and the Chilean delegation might consider accepting the following wording for paragraph 2: " The severance of diplomatic relations between two or more States is no ground for preventing the conclusion of treaties which are fundamental to the existence of these States". His delegation considered that the second sentence of the Chilean amendment was already implicit in the first sentence and should therefore be deleted.

60. Mr. MOUDILENO (Congo, Brazzaville) said that his delegation agreed in principle with the Commission's text of article 60, but considered that the wording had some shortcomings. First, the term " between parties to a treaty " was rather vague, and it would be advisable to specify diplomatic relations between parties to a treaty " in force "; the term " parties to a treaty " was used even in the articles on the initial stages of the conclusion of treaties, and it seemed advisable to make it clear that the parties in question were bound by the treaty obligations referred to in article 60. Secondly, the expression " in itself " seemed superfluous. Thirdly, it might be advisable to change the position of the adjective " legal ", so that the article would read " The severance of diplomatic relations between parties to a treaty in force does not legally affect the relations established between them by the treaty ".

61. The Commission's wording, moreover, failed to take into account the psychological climate of international relations. It was inaccurate to state categorically that the severance of diplomatic relations had no legal effect on the relations established by the treaty. The Italian and Swiss amendment (A/CONF.39/C.1/L.322) indeed filled a gap, and his delegation could support that proposal in principle; nevertheless, the amendment lacked an essential element, in that it did not make clear whether the effect of the exception would be covered by article 58, on supervening impossibility of performance, or by article 59, on fundamental change of circumstances. In any case, his delegation hoped that the amendment would be adopted by the Committee.

62. Mr. CUENDET (Switzerland) said he was glad to see that the joint Italian and Swiss amendment (A/CONF.39/C.1/L.322) had gained a wide measure of support. Although it might indeed be asked whether article 60 was absolutely indispensable, his delegation supported it because it met certain political necessities. The rule it contained must, however, be set out as precisely as possible; treaties directly affecting diplomatic missions were nullified by the severance of diplomatic relations and were often replaced by others concluded, not with the sending State, but with the protecting power. That was the reason for the amendment by Italy and Switzerland.

63. He supported the Hungarian amendment (A/CONF.39/C.1/L.334), which would make for greater precision, but would involve some drafting modification of the joint amendment. The Japanese amendment (A/CONF.39/C.1/L.337) should be examined by the Drafting Committee. The Chilean amendment (A/CONF.39/C.1/L.341) should perhaps appear in another part of the draft; the second idea expressed in that amendment seemed to belong rather to the law of diplomatic relations.

64. Mr. CALLE Y CALLE (Peru) said he supported the principle laid down in article 60, which was in line with modern doctrine. The joint amendment was justified and made the article more complete. He also supported the Hungarian amendment, as well as the Chilean amendment which stipulated that new treaties could be concluded even if diplomatic relations had been severed between the States concerned. Important agreements would be frustrated if severance were to be a barrier to the conclusion of treaties.

65. Mr. BOLINTINEANU (Romania) said that he was concerned with the practical aspects of the severance of diplomatic relations. As the Commission had indicated in its commentary, the severance of diplomatic relations might make the performance of some political treaties impossible. There were other treaties whose performance required the existence of diplomatic relations; the point was dealt with in article 25 of the Harvard Draft. Thus some categories of treaties could be affected by severance and provision should be made for allowing an exception in their case, so as to attenuate the rigidity of article 60. For those reasons his delegation supported the joint amendment by Italy and Switzerland (A/CONF.39/C.1/L.322); the Drafting Committee could make any drafting improvements to it that might prove necessary.

66. Mr. CHAO (Singapore) said he had noted with satisfaction that the representative of Malaysia had said that even the severance of diplomatic relations, which he hoped would never occur, would not affect the water agreement between Singapore and Malaysia.

67. He agreed with the rule stated in article 60, but there were certain treaties, as recognized in paragraph (4) of the Commission's commentary, which by their very nature contemplated the continuance of diplomatic relations. He therefore supported the joint amendment by Italy and Switzerland (A/CONF.39/C.1/L.322), which was an improvement on the Commission's text and stated unequivocally what was implicit in the text. The word " normal ", however should be deleted because it might create uncertainty.

68. He doubted whether article 60 was the right place for the Chilean amendment (A/CONF.39/C.1/L.341), which he supported. Article 60 dealt with the termination of treaties and not with their conclusion. Favourable consideration should be given to the Japanese amendment (A/CONF.39/C.1/L.337) by the Drafting Committee.

69. Mrs. THAKORE (India) said that the Commission's commentary indicated what were the general exceptions to the rules governing invalidity, termination and suspension. At one time the Commission had considered that severance of diplomatic relations might constitute a ground for termination if it resulted in the disappearance of the means for performing the treaty, but later the view was taken that it should not *per se* affect the validity of the treaty because it might be invoked as a new ground for termination. She supported the Commission's present view and would consequently be unable to support the amendment by Italy and Switzerland (A/CONF.39/C.1/L.322).

70. She supported the Hungarian amendment (A/CONF.39/C.1/L.334) because some States might have consular without having diplomatic relations. For example, a treaty of friendship, commerce and navigation might provide for the establishment of diplomatic or consular relations, or both, between the parties and also provide for the protection of the rights of nationals in the territory of the other party in connexion with trade, shipping and other matters. It stood to reason, in such a case, that if either diplomatic or consular relations, or both, were severed, that should not affect the observance of other obligations arising under such a treaty.

71. The Chilean amendment (A/CONF.39/C.1/L.341) was already implicit in the article but it could be examined by the Drafting Committee.

72. Mr. DEVADDER (Belgium) said he supported article 60 in principle and also the joint amendment by Italy and Switzerland (A/CONF.39/C.1/L.322), but they should be made more precise and the effects of a treaty falling to the ground or of rights and obligations being suspended should be elucidated.

73. Mr. MAKAREWICZ (Poland) said that there was wide support for the proposition contained in article 60, but it was desirable to mention consular relations also because States not infrequently maintained consular relations without maintaining diplomatic relations. He therefore supported the Hungarian amendment (A/CONF.39/C.1/L.334). He also supported the Italian and Swiss amendment (A/CONF.39/C.1/L.322) because the impact of severance of diplomatic and consular relations on a treaty might depend on the nature of the treaty. Some treaties would not be affected whereas others, such as those that established joint organs of which diplomatic agents were members, would be affected because the means of application would disappear. He was also in favour of the Chilean amendment (A/CONF.39/C.1/L.341).

74. He would emphasize that, in the case of the severance of diplomatic or consular relations, the conclusion of a treaty might effectively contribute to lessening the tension between the States concerned.

75. Mr. KEARNEY (United States of America) said he favoured the joint amendment by Italy and Switzerland and the Hungarian amendment since they would serve to elucidate the meaning of article 60 as formulated by the Commission.

76. Mr. KEMPFF MERCADO (Bolivia) said he supported the rule in article 60 together with the joint Italian and Swiss amendment, which would render it more complete. He could not agree that the Chilean amendment was already covered by article 60, since it dealt with the possibility of treaties being concluded in the future when diplomatic relations had been severed. It was unnecessary to specify, as suggested by the representative of Congo (Brazzaville), that the treaties in question must be of fundamental importance. He was in favour of the Chilean amendment but its placing should be left to the Drafting Committee.

77. Mr. BISHOTA (United Republic of Tanzania) said that the principle in article 60 was not in dispute and should apply to any future treaty. He favoured the Chilean amendment, though he was not entirely satisfied with its wording. Nor was he certain that it deserved a separate paragraph. Its content could be conveniently covered if it were formulated in the following terms: " The severance of diplomatic and consular relations between States does not in itself affect treaty relations between them ".

78. He could also accept the Hungarian amendment. On the other hand, he was uncertain whether the joint amendment by Italy and Switzerland was necessary, since it seemed to be fully covered by the words " in itself " in the original text.

79. Mr. WERSHOF (Canada) said he supported the joint Italian and Swiss amendment. The Drafting Committee should, however, redraft it in clearer terms and also advise on the best place for the Chilean amendment.

80. Mr. RUIZ VARELA (Colombia) said that article 60 reflected international doctrine and practice. He favoured the Hungarian amendment as well as the Chilean amendment, both of which would fill gaps in the Commission's draft. His Government was of the opinion that all States should be free to negotiate with each other, whether or not they maintained diplomatic relations, and that was the policy it followed itself.

81. Mr. EUSTATHIADES (Greece) said that although he agreed with the idea in the joint amendment, it was already reflected in article 60. If, however, it were felt desirable to insert it *ex abundanti cautela*, he would have no objection, but hoped that the Drafting Committee would manage to produce a more precise wording. A number of treaties presupposed the existence of diplomatic relations for their application and if the wording were not precise enough, their existence might be endangered. The Hungarian amendment was acceptable but would be clearer if it read " diplomatic or consular ". The Chilean amendment was correct but should be given another place in the draft: that was a matter that the Drafting Committee could deal with.

82. The CHAIRMAN said he would now put the various amendments to the vote, beginning with the Hungarian amendment.

The Hungarian amendment (A/CONF.39/C.1/L.334) was adopted by 79 votes to none, with 11 abstentions.

83. The CHAIRMAN put to the vote the principle of the joint Italian and Swiss amendment, the exact wording of which would be left to the Drafting Committee.

The principle of the joint Italian and Swiss amendment (A/CONF.39/C.1/L.322) was adopted by 62 votes to none, with 25 abstentions.

84. Mr. ROSENNE (Israel) asked for separate votes to be taken on the two sentences in the Chilean amendment (A/CONF.39/C.1/L.341).

85. Mr. VARGAS (Chile) said that his delegation accepted the Israel suggestion to insert the words " or absence " after the words " the severance " in the first sentence of the Chilean amendment. The placing of the paragraph could be left to the Drafting Committee.

86. The CHAIRMAN put to the vote successively the principles of the first and second sentences of the Chilean amendment (A/CONF.39/C.1/L.341).

The principle of the first sentence, as amended, was adopted by 56 votes to 2, with 30 abstentions.

The principle of the second sentence was adopted by 43 votes to none, with 44 abstentions.

87. Mr. CASTRÉN (Finland) said that he had abstained from voting on all the amendments because the joint amendment was already covered in article 60 and the others were unnecessary.

88. The CHAIRMAN said that article 60 would be referred to the Drafting Committee, together with the Japanese amendment (A/CONF.39/C.1/L.337).

The meeting rose at 1.15 p.m.

SIXTY-SIXTH MEETING

Monday, 13 May 1968, at 11 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 61 (Emergence of a new peremptory norm of general international law)

1. The CHAIRMAN invited the Committee to consider article 61 of the International Law Commission's draft.[1]

2. Mr. CASTRÉN (Finland) said that, according to paragraph (3) of the Commission's commentary to article 61, the principle of separability of the provisions of a treaty was applicable under article 61, unlike the case dealt with in article 50, where the treaty was void *ab initio* if it conflicted with a rule of *jus cogens* existing at the time when it was concluded. But the text of article 61 did not reflect that proposition and the purpose of the Finnish amendment (A/CONF.39/C.1/L.294) was to clarify the text in that regard. Otherwise it would give rise to doubts about the scope of the principle of separability. As the amendment was a drafting one, it could be sent to the Drafting Committee. The point might be covered in article 41.

3. Mr. BARROS (Chile) said that his delegation's attitude to the articles on *jus cogens* had been misunderstood. It certainly accepted the notion of *jus cogens* as a superior rule to all others. The wording of article 50 was imprecise and would have to be clarified and a better definition of the rule given. He had some apprehensions about the effect of article 61, similar to those he had expressed in connexion with article 50,[2] since it was difficult to foresee how the rules of *jus cogens* would operate in the future and what effect that would have on parliaments having to ratify the treaties in question. If the Committee decided to maintain article 61, he would support the Finnish amendment.

4. Sir Francis VALLAT (United Kingdom) said that article 61 was closely linked with article 50. The fundamental principle of *jus cogens* was recognized by the vast majority of States represented at the Conference and should be confirmed in the convention, but there were difficulties over its content and application which, with good will, should be solved; otherwise, the most unhappy consequences would ensue. The question was, how the future of international law was to be determined. Some criterion for identifying peremptory norms for the purpose of articles 50 and 61 would have to be found. Ideally, it would be most satisfactory to have express agreement on them from time to time, since it would be sowing the seeds of future conflict if it were impossible to agree now on the content of the peremptory norms, even for the purpose of article 50. The United States amendment to article 50 (A/CONF.39/C.1/L.302) pointed in the right direction, and it was a matter of deep regret to his delegation that the Committee was denied the opportunity of conciliation owing to a tied vote,[3] but perhaps moderation would prevail and a formula would be found that provided some safeguard on the question of content, without in any way undermining the basic principle of *jus cogens*.

5. The question of separability in relation to article 61 would be covered by the Finnish amendment (A/CONF. 39/C.1/L.294) or by article 41. In proper cases the principle was absolutely sound and it would be absurd and disruptive of good international relations in many cases if the whole of a treaty were to be rendered void merely because, on one interpretation, one of its provisions happened to conflict with a peremptory rule or norm of international law. Treaties of a broad character such as commercial treaties, treaties of extradition, or treaties settling complicated disputes, might conflict only in a minor respect with a peremptory norm of existing or future international law. It would be better and wiser, bearing in mind the principle in Article 103 of the Charter, to permit separability rather than to regard the whole treaty as void and invalid. He was, of course, speaking of cases where only a separable provision conflicted with a peremptory norm and not the whole treaty. Satisfactory procedures for deciding the method of application of *jus cogens* were essential, in the interests of the international community as a whole.

[1] Amendments had been submitted by India (A/CONF.39/C.1/L.255) and Finland (A/CONF.39/C.1/L.294).

[2] See 52nd meeting, paras. 53-62.

[3] 57th meeting, para. 76.