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66th 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)*

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.

6. If the problems he had mentioned could be solved, his Government would reconsider its position as it had been stated in connexion with article 50.[4]

7. Mr. JACOVIDES (Cyprus) said that article 61 was a corollary of article 50 and declared that a new peremptory rule established by a law-making treaty or custom had primacy over other rules of law. His delegation would vote for the Commission's text.

8. Mr. FERNANDO (Philippines) said that his delegation fully accepted and respected peremptory norms dictated by the overriding interests of the world community, to which national interests must yield. Such norms circumscribed the autonomy of individual States. International law was a progressive science capable of modification and growth and the needs of the future were beyond prediction. There was a real need for rules of a mandatory character applicable to all, but if they were to acquire peremptory status they must have been accorded more or less universal acceptance, either express or tacit, by the whole international community.

9. Technically the Commission had been correct in asserting that the provisions of article 61 lacked the element of retroactivity, since a treaty only became void and terminated on the peremptory norm being established. Until such a time, it was valid unless vitiated by some other defect. But a peremptory norm, in so far as it superseded existing treaty relations, had an *ex post facto* element.

10. The Finnish amendment would make for clarity and his delegation supported it.

11. Mr. ALVAREZ TABIO (Cuba) said that the rule formulated in article 61 was the logical corollary of the rule stated in article 50. If the rule was that there were norms of international law from which States could not derogate, the necessary consequence was that the establishment of a new peremptory norm of general international law voided any treaty which conflicted with it. General recognition of the illegitimacy of certain types of treaty had an immediate effect on them, not only for formal reasons, based on the principle of the hierarchy of norms, but on substantive grounds deriving from the principle of justice inherent in any norm of *jus cogens*, which was the expression of the conscience of the international community at any given moment. Thus, a treaty in force which conflicted with a new norm of *jus cogens* was not only illegal but illegitimate; in other words, it not only conflicted with a subsequent higher ranking norm but became illicit and immoral.

12. That moral view was particularly important in determining the temporal scope of the new norm of *jus cogens*. Obviously, rules of law could not have retroactive effect; the problem was to establish the meaning and extent of non-retroactivity. There could be no doubt that laws became effective as soon as they entered into force, and ceased to be effective as soon as they were abrogated; the difficulty arose in the case of successive treaties which were subject to the consequences of successive norms of international law. If a treaty had come into effect under a given legal order, but the effects of the treaty had not ceased when a new peremptory norm emerged which substantially changed that legal order, the dispute about the non-applicability of the new norm would not be about non-retroactivity, but about the continuing operation of the original legal order. In other words, norms which had given way to a subsequent norm of the same character would continue to apply.

13. If the new norm of *jus cogens* was applied to a perpetual contract, the principle of non-retroactivity would not be violated, even if it was a treaty which had previously come into force. The reason was not only a matter of pure logic, but also because the conflict arose with norms which affected the actual legitimacy of a treaty, in other words, norms embodying a principle of justice radically contrary to the norm which had suffered derogation. It might be argued that, where the situation entered the territory of the illicit, the universally accepted principle of *nullum crimen, nulla poena sine lege* should be invoked. Undoubtedly that maxim was fully applicable to an act where performance and result had been exhausted before the norm defining them as illicit came into existence. But with a continuing or permanent activity whose effects had not been exhausted, even when the new norm declaring it illicit had come into force, there was no question that the resulting situation could be impeached on the basis of the new law. The Conference could hardly hold that unequal or unjust treaties still in force, no matter when concluded, could remain immutable in the face of the new international order which had carried them into the ambit of the illegal and the illegitimate. The argument that a new norm of *jus cogens* did not have retroactive effect meant that a treaty became void from the time when the new norm was established; but the principle in applying that norm to a treaty in force, even though it might have come into force at a prior date, could never be violated.

14. Mr. MIRAS (Turkey) said that article 61 was a logical corollary of article 50 and what his delegation had said about the latter held good for article 61. He would have voted against article 50 had it been put to the vote and would vote against article 61.

15. Mr. HARRY (Australia) said that his delegation had the same difficulties with article 61 as with article 50 and he could perhaps illustrate those difficulties by recounting an imaginary conversation between a legal adviser and his government. The government asked what kind of treaties it had the capacity to enter into in the relations it sought with other States, and the answer was that the capacity of sovereign States was unlimited, except where it was excluded by peremptory norms of international law which were neither listed nor defined. The legal adviser would point out that incapacity and the invalidity ensuing therefrom only applied in the case of rules of *jus cogens* existing at the time of the conclusion of the treaty. But even if a treaty were within the capacity of the State at the time of its conclusion, it might subsequently become invalid because it conflicted with a new rule of *jus cogens* which had just emerged. The legal adviser would then add that unfortunately no guidance was provided in article 61 about the conditions under which an established rule of law could be transformed into a rule having peremptory status.

[4] *Ibid.*, para. 31.

16. The Conference had to draw up a working code on the law of treaties for decades to come. All participating States had an interest in upholding treaties rather than in multiplying the grounds on which treaties could be brought down. As in the case of article 50, his delegation was ready to help in defining the conditions under which it could be established when particular rules had been invested with the extraordinary status involved in the concept of *jus cogens*. Rules could only be regarded as having that status if there was general agreement on the part of the international community as a whole, to use the words employed by the Expert Consultant in connexion with article 50. Absolute unanimity might not be required, but the substantial concurrence of States belonging to all the principal legal systems was required. If there were disagreement by a significant group of States, recognition of a rule as a norm of *jus cogens* would have to be deferred. As in the case of the development of ordinary rules of customary international law, the development of peremptory rules was not a matter of majority voting.

17. He hoped agreement would be reached on a precise draft for that very fundamental article. So long as the category of peremptory norms was not adequately defined, whether in article 61, article 50, or elsewhere, his delegation could not accept either article.

18. Mr. DE BRESSON (France) said that article 61 was closely linked with article 50 and consequently the French delegation had no need to repeat the arguments it had developed at some length at the 54th meeting about the problems involved in the voidance of treaties allegedly conflicting with *jus cogens*. The French delegation had expounded its view, but apparently not cogently enough, that a definition or method of recognition of *jus cogens*—which it accepted—was all the more essential because the object was not only to incorporate in a system of positive law principles already more or less precisely formulated, but also to lay down that treaties which had been lawful at the time of their conclusion could subsequently become void owing to the emergence of new rules. Unfortunately, in view of the decision taken by the Committee on article 50, the French delegation had found it impossible to accept the text of that article and, in consequence, it could not accept the text of article 61 either. A satisfactory solution for article 50 might, however, eventually be found and, if it were, the French delegation would be able to modify its position on article 61.

19. With regard to the text of article 61, the word " rule " should be substituted for " norm ", since " rule " better expressed the binding nature of a notion whose effects had to be recognized for the purpose of positive law. The expression " of the kind referred to in article 50 " was imprecise and linguistically unsatisfactory, and should be replaced by something more appropriate. To say that the new rule was " established " gave the impression that there existed, or could exist, some judicial or other authority or some machinery which could create a rule of *jus cogens*. The whole debate had shown that *jus cogens* could not, by its very nature, arise from such sources. The only terms suitable for article 61 would therefore be " recognized " or " identified ".

20. The notion of invalidity should be dropped, since it did not seem justified in the context and its effects were not clearly specified. It was hard to see how, if a treaty was lawful at the time it was concluded, it lost that quality merely because a rule was established after its entry into force and thereby voided it. All that need be stated was that such a treaty terminated or ceased to produce its effects. That was the conclusion to be drawn from the United States amendment to article 50 (A/CONF.39/C.1/L.302), adopted by the Committee of the Whole, by which a treaty which could be considered void owing to conflict with a rule of *jus cogens* should be void from the time of its conclusion. The notion of invalidity would clearly have to be omitted if articles 50 and 61 were to be brought into line, so that article 61 became the logical corollary of the revised article 50.

21. There remained the question whether the termination of such a treaty need necessarily affect it in its entirety or whether it could apply only to those of its provisions which conflicted with the new rule of *jus cogens*. The Finnish amendment (A/CONF.39/C.1/L.294) proposed a reasonable solution.

22. As things stood, however, the French delegation must express very strong reservations about the actual principle of draft article 61.

23. Mr. EUSTATHIADES (Greece) said the problems of *jus cogens* involved in article 61 were rather different from those in article 50. In all probability, the emergence of rules of *jus cogens* formed *a posteriori* would not occur until some years after a treaty had been concluded and, even then, only rarely, since few norms were likely to emerge, given the long and gradual evolution of international law. Disproportionate importance should not therefore be attached to the situation dealt with in article 61. But that did not mean that the few cases which did occur would not affect very important interests. It was the importance, not the frequency, that should be the deciding factor.

24. The Finnish amendment (A/CONF.39/C.1/L.294) reproduced the idea expressed by the International Law Commission in paragraph (3) of its commentary to article 61. A valid treaty affected by the subsequent emergence of a new peremptory norm of general international law clearly should not become void in its entirety, since not all of its provisions would necessarily be affected. The Drafting Committee might therefore consider making provision for separability in article 61. He supported the French delegation's suggestions with regard to other drafting changes to the article.

25. A treaty became void only *ex nunc*. It was difficult enough to date the formation of a rule of customary law, and even more difficult to know when a subsequently emergent peremptory norm had been established. With existing norms of *jus cogens*, treaties enjoyed a certain amount of security, since the norms existed before the treaty was concluded and represented an idea recognized by the international community. If, as the United Kingdom delegation had suggested, peremptory rules should be established by a certain procedure in connexion with article 50, that procedure was the more necessary in connexion with article 61. Some methods for ascertaining whether a norm had been generally recognized by the international community had been

suggested in some of the amendments to article 62. If some delegations considered that reference to that procedure should be adapted to article 50, that was even more necessary in the case of article 61.

26. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 61 to the Drafting Committee as approved in principle, together with the Finnish amendment (A/CONF.39/C.1/L.294) thereto.

It was so agreed.[5]

Article 41 (Separability of treaty provisions)
(resumed from the 42nd meeting)

27. The CHAIRMAN invited the Committee to resume its consideration of article 41 of the International Law Commission's draft.[6]

28. Mr. KEARNEY (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.350), said that, as was explained in the footnote, it had first been proposed as an amendment to article 57 (A/CONF.39/C.1/L.325) but, pursuant to the decision taken at the 61st meeting,[7] it was now submitted in conjunction with article 41. That meant that there were two United States amendments to article 41, namely the amendment in question and the amendment to add a new paragraph 3 (*c*) (A/CONF.39/C.1/L.260). Both turned on the principle of proportionality and were an attempt to combine the idea of justice and fairness with that of separability.

29. Mr. CASTRÉN (Finland) said that the conclusion to be drawn from the Committee's earlier debates, and especially from the explanations given by the Expert Consultant at the end of the discussion on article 59, was that the principle of the separability of treaty provisions was applicable in cases governed by article 59. His delegation was therefore withdrawing the first part of its amendment (A/CONF.39/C.1/L.144). On the other hand, it was maintaining the second part, dealing with paragraph 5. That amendment had already been twice presented in substance, once during the earlier debate on article 41[8] and again (as document A/CONF.39/C.1/L.293) at the 52nd meeting, during the discussion of article 50. He would now therefore merely refer the Committee to the arguments his delegation had put forward on those two occasions.

30. Mr. CHANG (China) said that his delegation was not submitting any amendment to article 41 but had examined other delegations' amendments to it with great care. At first sight, the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) seemed to be a complete redraft, but it was not in fact so sweeping. Its substantive changes amounted to the deletion of the reference to article 57 in paragraph 2; that had some merit, but the International Law Commission's text was clearer. The addition of a reference to article 57 in paragraph 4 was, however, an improvement. His delegation could not support the proposed deletion of paragraph 5.

31. His delegation could vote for both United States amendments (A/CONF.39/C.1/L.260 and L.350), but not for the amendment by Argentina (A/CONF.39/C.1/L.244) to delete paragraphs 3, 4 and 5, because that would leave too many gaps. The remainder of the Argentine amendment might be referred to the Drafting Committee.

32. Sir Francis VALLAT (United Kingdom) said he could not agree with the Chinese representative about the purport of the United Kingdom amendment. It had been intended to improve the drafting of the original article and to raise certain technical points relating to article 57. The drafting points might be left to the Drafting Committee. The points raised concerning article 57, although of substance, were mainly technical and they too might be referred to the Drafting Committee. The Committee of the Whole could take its final decision on the basis of the Drafting Committee's text.

33. He wished to withdraw his proposal for the deletion of paragraph 5 in favour of the Finnish amendment (A/CONF.39/C.1/L.144), which proposed the deletion of the reference to article 50. Separability should apply in article 50, where only a minor provision conflicted with an existing peremptory norm. With regard to the inclusion of the reference to articles 48 and 49 in paragraph 5, his delegation had been convinced that the reference to article 49 should be retained because such cases concerned a treaty as a whole, but it had no strong views about the retention of the reference to article 48.

34. Mr. DELPECH (Argentina) said that he wished to withdraw that part of the Argentine amendment (A/CONF.39/C.1/L.244) which referred to the point of substance and to request that the part dealing with paragraphs 3, 4 and 5 should be referred to the Drafting Committee.

35. The CHAIRMAN suggested that, in line with the Committee's decision on draft article 61, the second part of the Finnish amendment (A/CONF.39/C.1/L.144) be referred to the Drafting Committee.

It was so agreed.

36. Mr. HARASZTI (Hungary) said that his delegation's amendment (A/CONF.39/C.1/L.246) should be referred to the Drafting Committee, since it overlapped with the drafting amendment by the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1).

It was so agreed.

37. The CHAIRMAN put to the vote the United States amendment to insert a new sub-paragraph 3 (*c*).

The United States amendment (A.CONF.39/C.1/L.260) was adopted by 27 votes to 14, with 45 abstentions.

38. The CHAIRMAN put to the vote the first part of the United States proposal, to amend paragraph 2.

The first part of the United States amendment (A/CONF.39/C.1/L.350) was rejected by 22 votes to 18, with 50 abstentions.

39. The CHAIRMAN put to the vote the second part of the United States proposal, to add a new paragraph 6.

The second part of the United States amendment (A/CONF.39/C.1/L.350) was rejected by 35 votes to 21, with 33 abstentions.

[5] For resumption of discussion, see 83rd meeting.

[6] For the list of the amendments submitted, see 41st meeting, footnote 1. The Indian amendment (A/CONF.39/C.1/L.253) had been withdrawn (see 52nd meeting, para. 2). A second amendment (A/CONF.39/C.1/L.350) was subsequently submitted by the United States of America.

[7] Paragraph 80.

[8] See 41st meeting, para. 2.

40. Mr. ARMANDO ROJAS (Venezuela) said he would not press his request for a separate vote on paragraph 4 of the International Law Commission's text.

41. The CHAIRMAN said that if there were no objection, he would consider that the Committee agreed to refer article 41, together with the drafting amendments thereto, to the Drafting Committee.

It was so agreed.

42. Mr. WERSHOF (Canada) asked whether he was right in thinking that the remaining part of the Finnish amendment (A/CONF.39/C.1/L.144), for the deletion of the reference to article 50, would be considered by the Drafting Committee and that any delegation, including his own, would be able to request a vote on whatever text the Drafting Committee produced concerning it.

43. The CHAIRMAN replied that any delegation could ask for a separate vote on any part of any draft submitted by the Drafting Committee.

Article 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) *(resumed from the 43rd meeting)*

44. The CHAIRMAN invited the Committee to consider article 42, the discussion of which had been postponed [9] until Sections 2 and 3 of Part V had been examined.[10]

45. Mr. CASTRÉN (Finland), introducing the amendment by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1), said that, if the execution of a treaty became impossible as the result of a new situation, or, as was more clearly stated in article 58, owing to " the permanent disappearance or destruction of an object indispensable for the execution of the treaty", nothing further could be done while that situation prevailed. The parties to the treaty were obliged to recognize the fact, even if the situation resulted from an act or omission on the part of one of them. The question of responsibility was naturally reserved. The sponsors of the amendment considered that it was unnecessary to refer to article 58 in article 42. They would not object if their proposal were referred to the Drafting Committee.

46. Mr. ARMANDO ROJAS (Venezuela), introducing the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) said that article 42, first submitted in the Special Rapporteur's second report to the International Law Commission,[11] introduced a new element into the law of treaties which was undeniably important but which was also extremely dangerous in its interpretation and application. The Special Rapporteur had based the article on the principle of preclusion or estoppel, applied by the International Court of Justice in its decisions of 1960 in the case of the *Arbitral Award made by the King of Spain*,[12] and of 1962 in the *Temple of Preah Vihear* case; [13] but those decisions were far from providing incontrovertible guidance and firm precedents of general application, since several members of the Court had delivered dissenting opinions and a number of international jurists had commented adversely on them.

47. Basdevant had defined estoppel as a procedural term borrowed from English law to describe a peremptory objection which precluded a party to a dispute from taking up a position in contradiction either with what it had previously admitted, expressly or tacitly, or with what it was averring before the same court.[14] In fact, estoppel was a common law doctrine whereby an individual could not subsequently deny what he had previously accepted or recognized; in statutory law, the doctrine corresponded to the Roman *stipulatio*, equivalent to a manifestation of consent which must be explicit to have legal force. The doctrine of *forclusion* in French law and *actos propios* in Spanish law were analogous and had a limited application in international law; but the dangers of unrestricted application of the principle were evident in both municipal and international law. Indeed, it was stated in paragraph (4) of the commentary to article 42 that certain technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law, and that the Commission had therefore preferred to avoid the use of such municipal law terms as " estoppel ".

48. Clearly, a State which had expressly accepted, acquiesced in or recognized a treaty, an arbitral award or a given situation could not subsequently disown its own consent thus expressly manifested, unless that consent had been invalid from the outset, but the position was quite different where tacit consent was concerned. There were obviously many ways of interpreting the acts of States which had not expressly manifested their consent to be bound, and such interpretation presented grave dangers to States which were not fully sovereign or were not entirely free to express their sovereign will.

49. Thus, the article submitted by the Special Rapporteur in 1963 had encountered considerable opposition in the International Law Commission. One member had asserted that the rule applied only to valid treaties being avoided or denounced on supervening grounds but not to treaties which were void *ab initio* and had therefore never existed,[15] while another had expressed the view that the principle could not apply if there was coercion, if the treaty was void or non-existent, or if the *rebus sic stantibus* rule was invoked.[16] The majority of the Commission had upheld that view, and much of the potential danger of the article had thus been removed, but the Special Rapporteur had nevertheless submitted in his fifth report a draft article containing an even stronger formulation of implicit consent.[17] In introducing that

[9] See 42nd meeting, para. 54.

[10] The following amendments had been submitted: Finland and Czechoslovakia, A/CONF.39/C.1/L.247 and Add.1; Bolivia, Byelorussian Soviet Socialist Republic, Colombia, Congo (Brazzaville), Dominican Republic, Guatemala, Union of Soviet Socialist Republics and Venezuela, A/CONF.39/C.1/L.251 and Add.1-3; United States of America and Guyana, A/CONF.39/C.1/L.267 and Add.1; Guyana, A/CONF.39/C.1/L.268; Spain, A/CONF.39/C.1/L.272; Cambodia, A/CONF.39/C.1/L.273; Switzerland, A/CONF.39/C.1/L.340; Australia, A/CONF.39/C.1/L.354.

[11] *Yearbook of the International Law Commission, 1963*, vol. II, pp. 39 and 40.

[12] *I.C.J. Reports, 1960*, p. 192.

[13] *I.C.J. Reports, 1962*, p. 6.

[14] *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), p. 263.

[15] *Yearbook of the International Law Commission, 1963*, vol. I, 701st meeting, para. 5.

[16] *Ibid.*, para. 15.

[17] *Yearbook of the International Law Commission, 1966*, vol. II, p. 7.

report, he had stated that he regarded the 1963 text as an unsatisfactory compromise, and had replaced it by a " more affirmative " proposal.[18] The Commission had not accepted that text, and had confined the provision of tacit consent to conduct denoting acquiescence in the validity or maintenance in force or in operation of the treaty; but it had retained in the opening paragraph the references to the grounds for invalidity set out in articles 43 to 47 and 57 to 59, apparently without taking into account the fact that many of those cases could give grounds for invalidity *ab initio*, on an equal footing with those set out in articles 48 to 50, on coercion and *jus cogens*.

50. The Commission's decision to include a reference to articles 46 and 47 had a positive meaning only in the sense that a State might invoke fraud or coercion as grounds for invalidating consent in accordance with the formal provisions of the convention; it did not lay down the nature or consequence of that invalidity. States were free to confirm expressly what instruments were or were not invalid *ab initio*; it could not be claimed that an unjust *status quo* could be perpetuated tacitly by interpretation.

51. The sponsors of the amendment also considered it unnecessary to include references to articles 57 to 59, but the Venezuelan delegation had an open mind on that point, and was prepared to consider arguments in favour of retaining those references.

52. The sponsors were convinced that the principle set out in article 42 must apply only to express agreement that the treaty was valid or remained in force, and not to cases where the treaty was void *ab initio*; they also considered that the principle could never be invoked in respect of any conduct interpreted as simple acquiescence. If the Commission's text were adopted, States ratifying the convention would be placed in a highly dangerous situation; that would be the case particularly with new States which in the past had suffered from the pressure of the metropolitan Powers and, to a lesser extent, to those which had borne the consequences of the legal domination of powerful States in the nineteenth century. Under the present article 42, the former would be bound indefinitely by instruments in which they had supposedly acquiesced before attaining their independence, and the latter by unjust situations resulting from obligations which had been imposed on them. His delegation therefore urged the Committee to accept the eight State amendment.

53. Mr. KEARNEY (United States of America) said that the amendment by his delegation and the delegation of Guyana (A/CONF.39/C.1/L.267 and Add.1), was a corollary of the basic principle set out in article 42. The proposed new paragraph 2 was designed to limit the invocation of a ground of invalidity under articles 43 to 47, when a State which had excercised rights or obtained the performance of obligations under the treaty had failed to raise such a ground for a period of ten years. Most municipal legal systems contained statutes on limitation which extinguished unasserted private rights after a given period, and the purpose of the amendment was to establish a similar rule on the international level.

54. The familiar principle that a claim must be acted on within a reasonable period, after which the claim was no longer enforceable, varied in different legal systems on such matters as whether the expiry of the time-limit extinguished the claim or merely barred its enforcement, and as to the length of the time-limit applicable to different categories of claims; but there was unanimity on the point that the claim must be put forward without unreasonable delay, for otherwise the stability of contractual relations would be endangered, and the economy and the judicial system of a State could not function in an orderly manner. That universally accepted requirement in national law obviously called for acceptance of the principle in international law, for it might be argued that the need for stability in international contracts was much more pressing than the same requirement in contracts between individuals.

55. In studying the comments of Governments on the draft convention and the comments by representatives in the Sixth Committee of the General Assembly, the United States had been impressed by the general support for the principle set out in article 42, and hoped that the same support would be extended to the proposed addition. Although it was true that the introduction of a general time-limit for raising objections to the validity of a treaty had some novel characteristics, that novelty must be considered in the light of the fact that the Conference was engaged in the novel enterprise of laying down basic rules to govern a highly important sector of international relations. In proposing grounds for testing the validity of treaties, the International Law Commission had not hesitated to consider principles of private law when there was a paucity of international precedent: that was illustrated by the discussions in the Commission on articles 45, on error and 46, on fraud.

56. It was perfectly reasonable to provide that, in the early years after the conclusion of a treaty, a State which found that the treaty had been concluded in violation of provisions of internal law, or as a result of error or fraud, might invoke those facts to impeach the validity of the treaty. With the passage of time, however, as the parties exercised rights or obtained benefits under the treaty, their pre-treaty positions would have been changed by reliance on the binding nature of the treaty, and there should be a point of time when States could be certain that the treaty relationships into which they had entered and on which they had relied would not be disturbed. In the absence of a rule establishing a time-limit, there was a risk, as the Commission had stated in paragraph (2) of the commentary, that a State might put forward claims of invalidity on grounds of restrictions on the authority of its representative, or on a claim of error, as a subterfuge to end its obligations under the treaty. Cases of that kind had occurred in the history of international relations, and adoption of the rule proposed by his delegation would substantially reduce the number of such claims, which sometimes even tended to develop into situations leading to a breach of the peace.

57. It might be argued that a State could not discover the ground for invalidity within a specific time-limit, but in fact failure to put forward a claim of invalidity within ten years would be due, in nearly every case, not to ignorance, but to the State's unwillingness to recognize the facts or to advance a claim. To cover the extremely rare cases in which there might be an actual lack of knowledge, his delegation would have no objection to

[18] Op. cit., 1966, vol. I, part I, 836th meeting, para. 22.

adding a safety clause, such as " unless the State could not with reasonable diligence have discovered the ground prior to the expiry of the time-limit ".

58. A further practical reason for adopting the new rule was that it became more difficult, with the passage of time, for a State seeking to preserve the validity of a treaty to adduce evidence in support of its position. Witnesses might die and documents might be destroyed or lost; the longer the period that elapsed between the conclusion of the treaty and the invocation of invalidity, the less likely it would be that a reliable judgment could be made on the claim. Indeed, after ten years had passed, the State with the largest number of archivists was the most likely to prevail in any dispute; the difficulties involved were illustrated in a number of cases decided by the International Court of Justice.

59. His delegation did not insist that the time-limit should be fixed at ten years, although that seemed a reasonable time. It considered that its proposal was substantive, and should be voted on, but it would suggest that the vote be taken on the principle, and that if the principle were approved, the amendment be referred to an appropriate group for consideration of the proper time-limit and of the question of including a safety clause.

60. In view of the widespread support for the proposal in article 42, the United States had been surprised by the introduction of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) the adoption of which, for all practical purposes, would have the same effect as the deletion of the article. The amendment seemed to be designed to introduce special rules in order to cover specific long-standing disputes: but revision of the Commission's draft for such purposes would open the door to a flood of amendments, seeking to incorporate in the convention the principles designed to support stale claims of invalidity, instead of legal rules applicable to all treaties. The United States was convinced that the only realistic way of achieving a codification of the law applicable to treaties concluded by existing and future States was to deal with the future, not with the past. On the other hand, it fully understood the desire of States facing current problems not to have their legal positions undermined by any of the provisions of the convention, and would have no objection to a proposal that the convention should apply only to future treaties.

The meeting rose at 1.5 p.m.

SIXTY-SEVENTH MEETING

Monday, 13 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 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 42 of the International Law Commission's draft.[1]

2. Sir Lionel LUCKHOO (Guyana) said that in article 42 the International Law Commission had clearly been seeking to codify existing principles, while at the same time incorporating new principles deriving from developments in the international community. Article 42 as formulated by the Commission contained those elements of continuity and certainty without which law ceased to reflect the moral awareness of a society and degenerated into congeries of arbitrary imperatives. Sub-paragraph (*a*) of the article was consistent with the generally accepted principles of international law regarding consent and the sovereign independence of States, according to which a State must be considered competent to decide whether it wished to continue to enjoy rights and assume obligations under a treaty concluded in the circumstances described in articles 44 to 47.

3. Sub-paragraph (*b*) involved somewhat different considerations. The great importance in international law of the doctrines of sovereignty and consent had helped to determine the content of the jural postulate according to which the consent of States was not to be lightly presumed. Recognition of the need to inject some functional elements into the body of norms which governed conduct at the level of inter-State relations had led to the formulation of the principle that consent might be inferred from conduct. Equity and good faith required that a State which, by its conduct, had induced another State to believe that certain facts existed, should be precluded from denying their existence if, by so doing, it prejudiced the interests of that other State which had acted in good faith.

4. His delegation therefore supported article 42 as it stood, but thought that the substitution of the word " shall " for the word " may " in the first line would strengthen the element of certainty already present in the Commission's draft. That was the purpose of his delegation's amendment (A/CONF.39/C.1/L.268), which could be examined by the Drafting Committee.

5. For the reasons he had stated, his delegation could not accept the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). In introducing that amendment, the Venezuelan representative had said that the principle that a party could not be permitted to benefit from its own inconsistencies could not be invoked when the treaty was void *ab initio*. It should be noted, however, that the circumstances contemplated in articles 43 to 47 did not render a treaty void *ab initio*; the aggrieved State was merely given the right, subject to the provisions of article 62, to invoke circumstances as grounds for invalidating the treaty. If the amendment was accepted, the consequent deletion of the reference to articles 46 and 47 would mean that fraud, and the corruption of a State's representative, could be invoked to terminate a treaty although the parties, as sovereign independent entities, had expressly agreed to ignore a defect in the consent to be bound, or although the invoking State had acquiesced in the continuing validity of the treaty

[1] For the list of the amendments submitted, see 66th meeting, footnote 10.