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76th 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)*

52. Mr. SEPULVEDA AMOR (Mexico), introducing his delegation's amendment (A/CONF.39/C.1/L.357), said that it purported to add, at the end of paragraph 2, the words " or to frustrate the object of the treaty ". The concept of non-frustration was the subject of article 15 and the situation envisaged in article 68 was somewhat similar to that contemplated in article 15.

53. Mr. HARRY (Australia) pointed out that article 15, in the form in which it had emerged from the Drafting Committee, used the wording " defeat the object and purpose of a treaty ". It had been approved in that form by the Committee of the Whole at its sixty-first meeting.

54. Mr. SEPULVEDA AMOR (Mexico) said he could accept that wording. The additional words to be introduced under the Mexican amendment would therefore be " or to defeat the object and purpose of the treaty ". As far as the Spanish text of article 15 was concerned, it had been agreed at the sixty-first meeting that the term " *malograr* " was inadequate and that it would be preferable to use the word " *privar* " or " *frustrar* ". If the change was made there, it should also be made in the proposed addition to article 68.

55. Mr. YASSEEN (Iraq) said that the additional words proposed by the Mexican delegation were unnecessary. The text as it stood was broad enough to cover the obligation not to defeat the object and purpose of the treaty. Without the Mexican amendment, the text would prohibit all " acts tending to render the operation of the treaty impossible ". That language would necessarily cover the acts envisaged in the Mexican amendment.

56. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 68 to the Drafting Committee, together with the Mexican amendment.

It was so agreed. [6]

The meeting rose at 12.35 p.m.

[6] For resumption of discussion of article 68, see 82nd meeting.

SEVENTY-SIXTH MEETING

Friday, 17 May 1968, at 3.20 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 39 (Validity and continuance in force of treaties) *(resumed from the 40th meeting)*

1. The CHAIRMAN invited the Committee to resume its consideration of article 39 of the International Law Commission's draft.[1]

[1] For earlier discussion of article 39, see 39th and 40th meetings.

2. Mr. CHAO (Singapore), introducing his delegation's amendment (A/CONF.39/C.1/L.270), said that the word " Every " should be substituted for the words " Subject to paragraphs 2 and 3, a " at the beginning of the new paragraph 1 which the amendment proposed.

3. The amendment did not make any substantive change in the International Law Commission's wording; it merely sought to express in precise and positive terms what that wording implied. During the earlier discussion of article 39, some delegations had been uncertain whether the article stated a presumption of the validity or of the invalidity of treaties. The addition of the new paragraph proposed by Singapore would dispel all doubt as to the meaning of the article and would make for a better sense of continuity between article 39 and the preceding articles.

4. Mr. DE BRESSON (France) said that the French delegation, in its three interventions on articles 39, 62 and 65, had maintained that the second sentence of article 39, paragraph 1, was liable to create a regrettable ambiguity with respect to the operation of the rules of invalidity laid down in Part V. It had therefore proposed that the sentence in question, which dealt with the effects of invalidity, be transferred from article 39 to the beginning of article 65. If that proposal were adopted, article 39, paragraph 1, would deal merely with cases of invalidity and make no reference to its effects.

5. He supported the Swiss amendment (A/CONF.39/C.1/L.121) to the extent that it entailed the deletion of the second sentence of article 39, paragraph 1, but its wording was not satisfactory. In his view, the first sentence of paragraph 1 should be left as it stood in the draft.

6. Mr. BINDSCHEDLER (Switzerland) said that the problem raised by the wording of article 39 and the amendments thereto was closely connected with whatever solution was finally adopted for article 62, because it was difficult to separate the procedure from the rules of substance. He therefore moved that further discussion of article 39 and the amendments thereto be adjourned to 21 May.

7. Mr. DE BRESSON (France) seconded the Swiss representative's motion. It was difficult to vote on article 39 at the present stage because the problem it raised was connected not only with article 62 but also with the precise formulation of paragraph 1 of article 65. If the Drafting Committee accepted the French proposal to transfer the second sentence of article 39, paragraph 1, to article 65, that would solve that particular problem.

8. The CHAIRMAN put the motion for adjournment to the vote.

The Swiss motion for adjournment was adopted.[2]

Article 69 (Cases of State succession and State responsibility) [3]

9. Mr. HARASZTI (Hungary), introducing his delegation's amendment (A/CONF.39/C.1/L.279), said that the effect on treaties of an outbreak of hostilities was one of the most controversial problems of international law.

[2] For resumption of the discussion of article 39, see 81st meeting.

[3] The following amendments had been submitted: Hungary and Poland, A/CONF.39/C.1/L.279; Switzerland, A/CONF.39/C.1/L.359; Japan, A/CONF.39/C.1/L.365.

Rules had evolved in international practice, but had lost much of their value owing to the increasing number of exceptions. Yet it was evident that, even if many treaties were not directly affected by an outbreak of hostilities, some were terminated and others inevitably suspended.

10. The International Law Commission had preferred not to deal with the problem in the draft convention and had stated its views on the matter in paragraph 29 of the introduction to its report. The Hungarian delegation fully approved the Commission's argument but still thought that the convention should contain an express reference to the case of the outbreak of hostilities.

11. On the basis of article 39, it would obviously be impossible to claim that the outbreak of hostilities had terminated a particular treaty or suspended its operation, since the case was not covered in Part V of the convention. A similar question, namely, the effect of State succession on treaties, had been satisfactorily solved in article 69. There was no denying that in the case of a succession of States, some treaties lost their legal force and others retained it. The International Law Commission had rightly refrained from dealing with that very difficult problem in the draft convention, but it had expressly referred to it in article 69. His delegation thought the same attitude should be taken with respect to the case of the outbreak of hostilities.

12. Mr. BINDSCHEDLER (Switzerland) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.359) was to complete the article. He did not understand why the International Law Commission had decided to insert in article 69 a general reservation concerning cases of State succession and State responsibility but had preferred not to mention the case of the outbreak of hostilities.

13. He endorsed the remarks of the Hungarian representative and considered that the International Law Commission had been right to refrain from dealing in the convention with the problem of the effect of hostilities on treaties. The amendment by Hungary and Poland (A/CONF.39/C.1/L.279), as well as his own delegation's amendment, should be examined by the Drafting Committee.

14. Mr. FUJISAKI (Japan), introducing his delegation's amendment (A/CONF.39/C.1/L.365), said that the enumeration in article 69 was by no means exhaustive; there were several other matters relating to other areas of international law that could be mentioned. The reference to hostilities in the amendments submitted by Switzerland (A/CONF.39/C.1/L.359) and Hungary and Poland (A/CONF.39/C.1/L.279) might be useful, but there was no certainty that the list would then be complete. The scope of the reservation could not be stated in general terms in the operative part of the convention, and his delegation had therefore proposed that the reservation be included in the preamble. He asked that the general principle expressed in his delegation's amendment be put to the vote in the Committee.

15. Mr. NAHLIK (Poland) said that the question raised in the amendment co-sponsored by his delegation (A/CONF.39/C.1/L.279) had already been dealt with in the written observations submitted by his Government. Paragraph 2 of article 39 showed that the list of grounds mentioned in the International Law Commission's draft for the termination or even suspension of the operation of a treaty must be considered exhaustive. But the general clauses contained in article 51, relating to the termination of a treaty by consent of the parties, and in article 54, relating to the suspension of the operation of a treaty by consent of the parties, were sufficiently broad to be considered as subsidiary rules covering a number of grounds that " classic " international law mentioned separately. Nevertheless, the omission of any clause relating to the effects on treaties of an outbreak of hostilities could create uncertainty. The International Law Commission's attempt, in paragraph (2) of its commentary to article 69, to justify that omission was not, in his delegation's view, convincing.

16. Undoubtedly, the attitude of international law to war had changed radically during the last fifty years. Not only war, but all recourse to armed force, even any threat of such recourse, had been expressly prohibited. Nevertheless, although in another guise, armed conflicts, and so hostilities, still occurred. Obviously, no one thought of applying in such cases the traditional rule that war automatically abrogated all treaties between belligerents. But an outbreak of hostilities might have some effect on the fate of treaties. The situations that might arise were admittedly different from those of former times. A distinction should be drawn, for example, between bilateral treaties and multilateral treaties, between treaties to which only the belligerents were parties and treaties to which neutrals were also parties, between treaties the application of which presupposed normal relations and treaties concluded specially for the case of armed conflict, between treaties stipulating continuing obligations and treaties creating a durable, objective situation, and so on.

17. Contemporary writers were very circumspect in dealing with the problem, but they did not ignore it. It would be difficult for the Conference to enter into all the aspects of the problem, but the convention on the law of treaties, which was to be a codifying instrument, could not ignore the existence of the problem. Article 69 should therefore at least include a reservation concerning the outbreak of hostilities, similar to the one adopted by the International Law Commission itself in respect of the problems of State succession and State responsibility.

18. Since an amendment similar to that co-sponsored by Poland had been proposed by the Swiss delegation (A/CONF.39/C.1/L.359), it would be advisable to refer both amendments to the Drafting Committee.

19. With regard to the amendment by Japan (A/CONF.39/C.1/L.365), he did not think it would be sufficient merely to include the reservation in the preamble.

20. Sir Francis VALLAT (United Kingdom) said that article 69 should be as complete as possible. Consequently, he was glad that further consideration of article 39 had been deferred, as his delegation's position on that article would depend on the final text adopted for article 69.

21. He supported the principle of the amendments by Hungary and Poland (A/CONF.39/C.1/L.279) and by Switzerland (A/CONF.39/C.1/L.359), but thought it would be preferable just to adopt the idea expressed in

those amendments and then to refer them to the Drafting Committee. Questions of State succession and of the outbreak of hostilities affected treaties and had been left outside the scope of the convention. On the other hand, the question of international responsibility had been touched upon in several articles. The order in which the questions should be mentioned in the article should also be studied. He doubted the usefulness of transferring article 69 to the preamble, as proposed in the Japanese amendment (A/CONF.39/C.1/L.365), but thought that the question of substance raised in that amendment also deserved to be studied by the Drafting Committee.

22. Mr. ALVAREZ (Uruguay) said he supported the arguments developed by the International Law Commission in paragraph (2) of its commentary to justify its omission from article 69 of the case of an outbreak of hostilities. Both the International Law Commission's 1956 draft on the law of the sea and the four conventions adopted by the first United Nations Conference on the Law of the Sea, held at Geneva in 1958, contained rules to be applied in time of peace. From the legal standpoint, it would be necessary to examine whether the insertion proposed in the amendments to article 69 was compatible with the relevant provisions of the Charter.

23. Mr. WERSHOF (Canada) said he considered that the amendments to article 69 raised a question of substance on which the Committee should take a decision before referring them to the Drafting Committee.

24. Mr. MARESCA (Italy) said that he supported the Swiss amendment (A/CONF.39/C.1/L.359) and the Hungarian and Polish amendment (A/CONF.39/C.1/L.279). Other codifying conventions, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, had expressly referred to the case of armed conflict.

25. The idea in the Japanese amendment (A/CONF.39/C.1/L.365) was interesting. There were, in fact, other matters that concerned the question of treaties and which the International Law Commission had been reluctant to include in the convention. An example was the question of the " most-favoured-nation clause ", which was not confined to commercial or customs law but had multiple applications, even in diplomatic and consular law. That was only one example in a whole series of questions that had not been settled by the convention. It would therefore be preferable to adopt a broader formulation to indicate that a range of questions belonging to another branch of international law had not been mentioned in article 69.

26. Sir Francis VALLAT (United Kingdom) proposed that for voting purposes the Japanese amendment be divided into two parts. The first vote would relate to the replacement of article 69 by a paragraph of the preamble to the convention; the second vote would be on the desirability of including a general reference such as that stated at the end of the amendment.

27. Mr. FUJISAKI (Japan) said he was quite willing for his amendment to be voted on in two parts.

28. The CHAIRMAN put the first part of the Japanese amendment (A/CONF.39/C.1/L.365) to the vote.

The first part of the Japanese amendment was rejected by 64 votes to 4, with 20 abstentions.

29. The CHAIRMAN put the second part of the Japanese amendment to the vote.

The second part of the Japanese amendment was rejected by 45 votes to 22, with 20 abstentions.

30. The CHAIRMAN put the principle contained in the amendments by Hungary and Poland (A/CONF.39/C.1/L.279) and by Switzerland (A/CONF.39/C.1/L.359) to the vote.

The principle contained in both amendments was adopted by 72 votes to 5, with 14 abstentions.

31. Mr. VARGAS (Chile) said his delegation had voted for the amendments by Hungary and Poland and by Switzerland, though he thought there was a mistake in the Spanish version of the former. The word " *ruptura* " before the words " *de las hostilidades* " was not correct. It would be better to say " *comienzo* " or " *abertura* ", which corresponded better to the French " *ouverture* " and the English " outbreak ".

32. Mr. EUSTATHIADES (Greece) said that the Greek delegation preferred the Swiss amendment, because the words " between States " in the amendment by Hungary and Poland might imply that the exception applied to treaties concluded between States participating in hostilities, whereas armed conflict might also have consequences for the relations between belligerent and neutral States. Also, it would be better to say " armed conflict of an international character " instead of " hostilities ".

33. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 69, as amended, to the Drafting Committee.

It was so agreed. [4]

Article 70 (Case of an aggressor State) [5]

34. Mr. FUJISAKI (Japan), introducing his delegation's amendment (A/CONF.39/C.1/L.366), said that the scope of article 70 was both too narrow, because it dealt only with cases of aggression and overlooked other serious violations of the Charter, and too broad, because the " measures taken in conformity with the Charter " might be interpreted as including measures taken unilaterally by a State. The Japanese delegation was therefore proposing that the article should deal with the obligations arising for States in general, and not only for an aggressor State, in consequence of a binding decision by the Security Council.

35. Mr. SUPHAMONGKHON (Thailand) said his delegation fully supported the principle in article 70. It had, however, submitted an amendment to that article (A/CONF.39/C.1/L.367) because it believed that the use of the words " aggressor " and " aggression " might give rise to difficulties. The efforts of the League of Nations and the United Nations to define aggression

[4] For resumption of the discussion of article 69, see 82nd meeting.

[5] The following amendments had been submitted: Japan, A/CONF.39/C.1/L.366; Thailand, A/CONF.39/C.1/L.367.

had so far been unsuccessful, despite the great hatred that aggression had always aroused in nations. Moreover, the United Nations had recently been led to take certain measures of implementation without specifying that there had been an aggression. The amendment by Thailand, which eliminated the terms " aggressor " and " aggression ", was in conformity with Article 103 of the Charter. It could be referred to the Drafting Committee as it was a drafting matter.

36. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that he had been astounded when he had read the amendments. The amendments to article 70 had neither political, nor legal, nor moral justification.

37. On the political plane, although the outstanding contemporary problem was the defence of peace, the Conference was not entitled to restrict the scope of the sole but important article on aggressor States in any way whatsoever.

38. On the legal plane, to defend aggression was contrary to the fundamental principles of international law and especially the rule of *jus cogens* prohibiting the use of force. The provisions of the Charter, notably Article 2 (4), Article 53 and Article 103 deprived the amendments of all legal basis. To accept such amendments would mean weakening the entire international legal system on which peace had been founded since the Second World War.

39. On the moral plane, those amendments were a veritable sacrilege, for they derided the fifty million dead which the last world war had cost mankind. His own country had had 5 million killed, one out of every nine inhabitants, and the war had brought misery to every home. He had never imagined that in Vienna, where Soviet soldiers killed in the fight against aggression were buried beside Beethoven's tomb, a delegation could rise to defend the aggressor, especially in Human Rights Year.

40. The two amendments (A/CONF.39/C.1/L.366 and L.367) were totally unacceptable. Article 70 established a minimum norm on which there could be no compromise.

41. Mr. ALVAREZ TABIO (Cuba) said he supported article 70, for it stated a self-evident rule. To delete that rule would undermine the United Nations system which had been established to save mankind from the scourge of war. He was therefore against the amendments by Japan and Thailand, which could alter the substance of article 70.

42. Mr. MOUDILENO (Congo, Brazzaville) said he endorsed the comments of the two previous speakers and would vote against the two amendments to article 70.

43. His delegation vehemently protested against the proposal to delete the word " aggressor ", just as it had already protested when it had heard delegations claim that the word " corruption " was unseemly. Chapter VII of the Charter dealt expressly with aggression, to which it devoted more than ten articles. Furthermore, the Japanese amendment (A/CONF.39/C.1/L.366) misread the process by which decisions of the international community were formed. It was only in the last resort that the Security Council came into play. The Charter accorded a very substantial role to action by Member States, in particular under Articles 43, 45, 48 and 49. Article 51 of the Charter recognized that every State enjoyed the right of legitimate self-defence, a natural right which could be exercised to repel aggression without awaiting a decision by the Security Council. The Japanese amendment would infringe that inalienable right.

44. Mr. TRUCKENBRODT (Federal Republic of Germany) said that, as indicated in paragraph (4) of the commentary to article 70, there was no need to include a reservation of the kind proposed in a general convention on the law of treaties. There was nothing to prevent its retention, but its meaning must be absolutely clear. It should neither create a convenient loophole for the termination of treaties which a party no longer found convenient, nor be so formulated as to impose a particular solution to problems that arose in particular situations. The reservation should be neutral.

45. The text, as it stood, was unsatisfactory. The International Law Commission had not succeeded in eliminating the dangers to which it had itself drawn attention in the commentary, in particular the danger arising out of the use of the terms "aggressor" and "aggression", which were controversial. However, since article 70 referred to the United Nations Charter, his delegation took the view that those words had to be interpreted in the light of Chapter VII of the Charter, concerning binding decisions of the Security Council.

46. The amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367) were far clearer than the draft article. However, in view of the interpretation he had just mentioned, his delegation would not object formally to the retention of the article in its present form, although its attitude would depend on the general economy of the convention.

47. Sir Francis VALLAT (United Kingdom) said he doubted whether it was really necessary to retain a provision such as article 70. The question was already settled by Article 103 of the Charter, at least as far as States Members of the United Nations were concerned. It would doubtless be preferable to rely on the provisions of the Charter. In any case, the words "aggression" and " aggressor " had to be interpreted in the light of Article 39 of the Charter, which empowered the Security Council to determine the existence of any act of aggression, make recommendations and decide what measures should be taken.

48. His delegation had noted with interest the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367), but it would accept the opinion of the Committee and therefore would abstain from voting.

49. Mr. BINDSCHEDLER (Switzerland) said that the provision in article 70 seemed out of place in a convention on the law of treaties. The consequences of measures taken under the Charter in case of aggression affected not only treaties but many other spheres. Moreover, the wording of the article was ambiguous, because " measures taken in conformity with the Charter " could mean the binding decisions taken by the Security Council under Chapter VII of the Charter, but also individual or collective measures of self-defence taken under Article 51 of the Charter. If article 70 referred to those measures as well, there would be the danger

to which paragraph (3) of the commentary referred, and which the International Law Commission had sought to avoid.

50. The Swiss delegation was therefore in favour of deleting the article, or, failing that, of improving the wording. It supported the Japanese amendment (A/CONF.39/C.1/L.366) because it deleted the terms " aggressor " and " aggression " and referred to the binding decisions of the Security Council.

51. Mr. MUTUALE (Democratic Republic of the Congo) said he would vote against the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367) if they were put to the vote. Under the Japanese amendment, the operation of article 70 depended on binding decisions by the Security Council; that raised thorny problems, particularly the question of what organ was competent to decide juridically that a State was an aggressor. The General Assembly, at its last session, had set up a committee of thirty-five members to study the question of aggression. It was not for the Conference to anticipate the outcome of the work of that Committee.

52. He was in favour of article 70, which formulated a useful reservation with adequate precision. He hoped that the authors of the amendments would not press them to a vote.

53. Mr. KOUTIKOV (Bulgaria) said that the Japanese amendment (A/CONF.39/C.1/L.366) was totally unacceptable to his delegation. It was far from having the clarity and precision of the wording submitted by the International Law Commission. The Japanese proposal introduced disturbing elements and completely destroyed the idea implicit in the original text, which was based on measures taken in conformity with the Charter of the United Nations in the case of aggression by a State. Those considerations also applied to the Thailand amendment (A/CONF.39/C.1/L.367). His delegation would therefore vote against those two amendments and in favour of article 70 of the International Law Commission's draft.

54. Mr. TALALAEV (Union of Soviet Socialist Republics) said his delegation had a very special moral right to speak with wrath of aggression and aggressor States. As a consequence of the aggression of which it had been the victim during the Second World War, the Soviet Union had suffered human and material losses which no State and no people had experienced throughout the history of mankind. The Soviet Union had had 20 million killed, a number equal to the population of a large modern State. The Soviet delegation therefore fully supported those delegations which considered that the very idea of eliminating the reference to aggression from article 70 was tantamount to sacrilege. Of course, it was easy enough for States which had not suffered in their flesh and in their blood, States which had remained neutral or whose neutrality had been guaranteed, to assert that the article was out of place. But the USSR could not forget the history of its sufferings.

55. The amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367) transformed the question of the measures to be taken against an aggressor into a quite different question, namely, that of the measures in general in connexion with a treaty which might be taken either by the Security Council, according to the Japanese amendment, or under the Charter, according to the Thai amendment. Such measures might have nothing to do with aggression. The Security Council might, for example, take binding decisions relating to a procedure for settling a dispute.

56. The amendments would reduce the scope of article 70 to nothing. But article 70 was closely linked with articles 30, 31 and 49, which had already been adopted. Obviously article 31 could not apply to an aggressor, and though resort to force was prohibited under article 49, that article did not cover legitimate resort to force as a measure against an aggressor State. Otherwise, it would mean placing on the same footing a peace treaty imposed by an aggressor on the victim of the aggression, and a treaty imposed on the aggressor after its defeat.

57. War of aggression was the most serious international crime. They were not dealing with any rights or benefits which an aggressor might claim, but only with the aggressor's obligations.

58. He was surprised at the objection that the notion of aggressor State was still ill-defined. It was essential to avoid confusing two problems, one the definition of a term and the other the inclusion in the convention of a principle which no one questioned. The notion of force had not been defined either, and yet it was expressly referred to in Article 4 (2) of the Charter and in article 49 of the draft Convention.

59. Article 70 was entirely consistent with the fundamental principles of the Charter and of contemporary international law. The Soviet Union delegation, therefore, fully supported the article and would vote against the amendments by Japan and Thailand.

60. Mr. FUJISAKI (Japan) said he regretted very much that representatives who had spoken against his delegation's amendment (A/CONF.39/C.1/L.366) had completely misunderstood its sense and purpose. When introducing the amendment, he had clearly indicated that his delegation could see no reason for limiting the application of article 70 to cases of aggression. The amendment was designed not only to condemn aggressors but also to extend the application of the article to all cases—including the case of aggression—in which a binding decision had been taken by the Security Council.

61. The representative of the Ukrainian SSR had referred to Article 53 of the Charter, but no such retrospective implication was to be found either in the text of article 70 or in the commentary to it. It therefore seemed all the more necessary to adopt the Japanese amendment in order to dispel any doubt on the matter.

62. Mr. MAKAREWICZ (Poland) said the convention should contain a clause such as article 70. Aggression was the greatest of crimes and always caused upheavals in international relations. There were always important problems to settle after a war, and provision must be made for the measures necessary to prevent an aggressor from continuing to constitute a danger. Those measures found their expression in concrete treaties imposing appropriate obligations on the aggressor State. The entry into force and continuance in force of such treaties might not depend on the will of the aggressor State. It was therefore extremely important to provide clearly

that the present convention was without prejudice to any obligation under a treaty which might arise for an aggressor State as a consequence of measures taken in conformity with the United Nations Charter with reference to that State's aggression. Without such a provision, articles 31 or 49 and perhaps some others could lead to a dangerous confusion. Article 70 was the natural complement to articles 31 and 49. The Polish delegation would like to stress that it fully supported article 70 as it stood.

63. As for the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367), since any obligation arising out of the Charter by virtue of Article 103 prevailed over any other commitment of States Members of the United Nations, there was no need to repeat that in a convention on the law of treaties. What should be stressed in the convention on the law of treaties was the case of an aggressor State, for which certain obligations might arise after its aggression had been liquidated. For those reasons the Polish delegation was opposed to the amendments.

64. Mr. KEARNEY (United States of America) said that article 70 raised a problem because it was not clear, especially with regard to the grounds and effects of measures taken in conformity with the Charter of the United Nations. The Japanese amendment (A/CONF.39/C.1/L.366) had the merit of clarifying the position and of not confining itself to a single area in which the Security Council might take a decision. It not only dealt with aggression, but it covered any decisions that the Security Council might take and provided a safeguard with respect to such decisions. The United States delegation would support the amendment.

65. Mr. NACHABE (Syria) said the Japanese amendment (A/CONF.39/C.1/L.366) modified the precise application of article 70 and weakened its substance. The amendment by Thailand (A/CONF.39/C.1/L.367), to eliminate the words " aggressor " and " aggression ", was unjustified, since article 70 dealt specifically with the case of an aggressor State.

66. Mr. BOLINTINEANU (Romania) said his delegation was in favour of article 70 as drafted by the International Law Commission. The article certainly dealt with the case of an aggressor State, against which measures must be taken in conformity with the relevant provisions of the Charter. Such measures might have an effect on the articles to which article 70 was related. The Romanian delegation was therefore opposed to the amendments.

67. Mr. MEGUID (United Arab Republic) said that his delegation considered that article 70 should be retained in its present form and that it could not accept the two amendments for the reasons already given by previous speakers. It had been said that aggression had not been defined, but that was no reason for deleting the words " aggressor State " from article 70. One thing that was certain was that the use of armed force was an undeniable element in aggression. Obvious and recent examples might be cited. The delegation of the United Arab Republic would therefore vote for the retention of article 70 as it stood.

68. Mr. WERSHOF (Canada) said his delegation strongly endorsed the United Kingdom representative's observations. It was not sure that such an article was necessary in a convention on the law of treaties and it had some doubts about the clarity of the text submitted by the International Law Commission. It was, however, prepared to accept that text.

69. The amendments by Japan and Thailand (A/CONF.39/C.1/L.366 and L.367) were reasonable and should have been examined more objectively. However, in view of the objections to which they had given rise, the Canadian delegation would abstain from voting on them.

70. The delegation of the Ukrainian SSR had expressed its indignation at the amendments in exaggerated terms and attributed unworthy motives to their authors. The Canadian delegation regretted that very much, all the more since it saw nothing reprehensible in the purpose for which the amendments had been submitted in the context of the law of treaties.

71. Mr. SUPHAMONGKHON (Thailand) said he was surprised at the reactions to his delegation's amendment. He had explained the reasons for submitting that amendment in his introductory statement. His delegation was in full agreement with the principle set out in article 70; its only doubt concerned the meaning of the word " aggression ". Should an attempt be made to define that term in article 2 of the convention? Also, the reservations contained in article 70 were too restrictive; the article did not cover all the measures that might be taken by the United Nations. In his delegation's view, the scope of article 70 should be broadened.

72. Mr. HARRY (Australia) said that the Committee did not have to discuss the notion of aggression, because no State was in favour of aggression. Nor did it have to revert to questions already dealt with in articles 49 and 50. Nor, finally, did it have to define aggression. What it had to consider was a situation where an act of aggression had been committed.

73. There were two possible cases. In the first case, a State had committed an aggression against another State and the Security Council had taken a binding decision to institute measures against the aggressor. A peace treaty might follow and in that case article 70 rightly provided that the convention should contain nothing prejudicial to any obligation arising out of such a treaty. In the second case, a State made an armed attack on another State and the latter, either alone or in agreement with other States, adopted measures which might be taken in conformity with the Charter. Should article 70 then apply? The present wording confused the two situations. In his delegation's view, it should be referred to the Drafting Committee for examination in the light of the observations by delegations and the Japanese amendment (A/CONF.39/C.1/L.366), which sought to limit the application of article 70 to the first case.

74. Mr. MWENDWA (Kenya) said that his delegation did not question the motives of the authors of the amendments. But the present text of article 70 was quite clear; it formulated a reservation by referring to an aggressor State and the Charter of the United Nations.

75. With regard to the definition of aggression, a Committee was already studying that question and could be fully relied upon. Accordingly, his delegation supported

article 70 of the International Law Commission's draft and would oppose the amendments. A fundamental issue was involved which could not be referred to the Drafting Committee. The amendments should be put to the vote.

76. Mr. YASSEEN (Iraq) said be also thought that article 70 was very clear and presented no difficulty. The argument that aggression had not been defined could not be accepted, because the application of a legal rule did not depend on the definition of the terms it contained. The organs responsible for applying the Charter were obliged to define aggression in each particular case. Under the present international legal system, aggression constituted the supreme crime. Consequently it must be expressly mentioned in the draft convention, even if only in connexion with a reservation.

77. With regard to the amendments by Japan and Thailand, he did not question the good faith of their authors, but they were not acceptable because they did not mention aggression. Even if the Committee wished to broaden the scope of the rule stated in article 70, it would be necessary to mention aggression and then add something to cover the other measures that might be taken by the United Nations. His delegation was in favour of the original text and against the proposed amendments.

78. Mr. BREWER (Liberia) said that the amendments by Japan and Thailand went a little further than the original text in that they dealt with measures taken against a State in conformity with the Charter of the United Nations, whether or not it was an aggressor State. It should be remembered, however, that the title of the article was " Case of an aggressor State ". It would be preferable to amend both the title and the text to ensure that the article applied equally to the aggressor State and the State against which measures had been taken in conformity with the Charter. All that was needed was to add the words " or any other State " after the words " for an aggressor State " in the third line, and the words " or any other activities contrary to the provisions of the Charter of the United Nations " at the end of the article.

79. The CHAIRMAN said he would first put to the vote the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367).

The amendment by Japan was rejected by 58 votes to 7, with 27 abstentions.

The amendment by Thailand was rejected by 54 votes to 4, with 30 abstentions.

80. Mr. DE BRESSON (France) said, in explanation of his vote, that his delegation could not subscribe to any proposal intended to settle within the limits of the debate the most difficult political problems. He was convinced that the proposed amendments could not have had that purpose, and had preferred to abstain from voting on texts which it considered to be technical, and the scope of which was accordingly difficult to assess. His delegation supported article 70 as it stood.

81. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 70, with the oral amendment by Liberia, to the Drafting Committee.[6]

It was so agreed.

The meeting rose at 6 p.m.

[6] For resumption of the discussion of article 70, see 82nd meeting.

SEVENTY-SEVENTH MEETING

Monday, 20 May 1968, at 10.45 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 71 (Depositaries of treaties) and *Article 72* (Functions of depositaries) [1]

1. The CHAIRMAN invited the Committee to consider articles 71 and 72 of the International Law Commission's draft.

2. Mr. CASTRÉN (Finland), introducing his amendment to article 71 (A/CONF.39/C.1/L.248), said that its purpose was to complete the provisions of the article so as to take into account those cases where there was more than one depositary. In its written comments, the IAEA had mentioned the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water of 1963 and the Treaty on Outer Space of 1966 as recent examples of treaties providing for three depositaries instead of the traditional number of one. It was necessary to have due regard to that novel practice, which would no doubt continue in the future.

3. The first part of his amendment to article 72 (A/CONF.39/C.1/L.249) was designed to modify the wording of paragraph 1 (*a*) so that the depositary's duties regarding custody should cover amendments to the treaty, as well as the original text of the treaty, as suggested by FAO in its written comments. The second part purported to alter the wording of paragraph 1 (*e*) so as to make clear that it was not only the States entitled to become parties to the treaty, but also those which were already parties, that must be informed of all acts, communications and notifications relating to the treaty.

4. Mr. ARIFF (Malaysia), introducing his delegation's amendments to articles 71 and 72 (A/CONF.39/C.1/L.290/Rev. 1 and L.291), said that they would have the

[1] The following amendments had been submitted:

To article 71—Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1), Finland (A/CONF.39/C.1/L.248), Bulgaria, Byelorussian SSR, Cambodia, Guinea, Mali and Mongolia (A/CONF.39/C.1/L.351), Mexico (A/CONF.39/C.1/L.372).

To article 72—Finland (A/CONF.39/C.1/L.249), Byelorussian SSR (A/CONF.39/C.1/L.364), Mongolia (A/CONF.39/C.1/L.368), United States of America (A/CONF.39/C.1/L.369), Mexico (A/CONF.39/C.1/L.372).

To articles 71 and 72—Malaysia (A/CONF.39/C.1/L.290/Rev.1 and 291) and China (A/CONF.39/C.1/L.328).