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Nineteenth plenary meeting

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

Article 2(4) of the United Nations Charter and an important contribution to the maintenance of international peace and security. The Chilean delegation disagreed, however, with some of the interpretations given to the text of article 49 as approved by the Committee of the Whole. Article 77, on the non-retroactivity of the convention on the law of treaties, made it clear that article 49 applied only to treaties concluded after the entry into force of the convention. As far as doctrine was concerned, moreover, the only thing it was possible to maintain with any certainty was that the prohibition of the threat or use of force in international relations dated from the United Nations Charter. Before that, the Covenant of the League of Nations and the Pact of Paris, although they represented a clear advance on traditional international law, did not specifically and categorically prohibit the threat or use of force in the way that the Charter did. Consequently, even in the absence of a provision on the non-retroactivity of the convention on the law of treaties, article 49 could not apply to situations dating from before the Charter. His delegation also considered that the invalidity referred to in article 49 and in all the other articles in Part V should affect treaties concluded in the future, in accordance with the procedures laid down in the convention itself.

76. In the light of those considerations, which had been confirmed by the adoption of other rules, and especially of the fact that, in his delegation's view, the proposed convention would be incomplete unless it contained some provision stating that a treaty was void if its conclusion was procured by the threat or use of force, the Chilean delegation would vote in favour of article 49.

77. Mr. SHUKRI (Syria) said that his delegation would vote for article 49 on the understanding that the expression " threat or use of force " was to be understood in its broadest sense as including the threat or use of pressure in any form, whether military, political, psychological or economic. In a spirit of compromise, his delegation, like that of Tanzania, would not press any amendment to that article but would accept it in the spirit of the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty adopted by the Committee of the Whole at the first session.

78. Mr. HUBERT (France) said that his delegation had abstained in the votes on articles 45 to 48 because of its concern for the maintenance of the necessary balance between Part V of the convention and the clauses relating to the settlement of disputes. It would vote for article 49, however, since France attached the highest importance to the principle that there should be no resort to force in international relations.

79. Mr. HAYTA (Turkey) said that his delegation, while not opposed to the general aims of article 49, was unable to support it because it still had some doubts concerning the precise scope of the expression " the threat or use of force ".

80. Mr. EL DESSOUKI (United Arab Republic) said that his delegation would support article 49 in the spirit of the draft declaration which had been adopted by the Committee of the Whole at the first session.

81. Mr. TABIBI (Afghanistan) said that article 49 was one of the most important articles of the draft convention; in its present form, however, it was not entirely satisfactory to the smaller nations of Asia, Africa and Latin America. At the first session, the nineteen-State amendment, (A/CONF.39/C.1/L.67/Rev.1/Corr.1), of which his delegation had been a co-sponsor, had been withdrawn in favour of the draft declaration adopted by the Committee of the Whole. That draft declaration, however, contained a number of loopholes; in particular, the title made no mention of military coercion in addition to economic and political coercion. In view of the importance which article 49 had for the developing countries, therefore, he formally proposed, under rule 27 of the rules of procedure, that further discussion of article 49 be adjourned till the next meeting.

The motion for the adjournment was carried by 58 votes to 11, with 29 abstentions.

The meeting rose at 5.50 p.m.

NINETEENTH PLENARY MEETING

Monday, 12 May 1969, at 11 a.m.

President: Mr. AGO (Italy)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Article 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The PRESIDENT said that since there were no further speakers on article 49, he would put the article to the vote.

At the request of the representative of the United Republic of Tanzania, the vote was taken by roll-call.

Panama, having been drawn by lot by the President, was called upon to vote first.

In favour: Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sudan, Sweden, Syria, Thailand, Trinidad and Tobago, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Australia, Austria, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chile, China, Colombia, Congo (Brazzaville),

Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Malta, Mauritius, Mexico, Monaco, Mongolia, Netherlands, New Zealand, Nigeria, Norway, Pakistan.

Against: None.

Abstaining: Switzerland, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Belgium.

Article 49 was adopted by 98 votes to none, with 5 abstentions.[1]

2. Mr. ROMERO LOZA (Bolivia), explaining why his delegation had voted in favour of article 49, said that to have voted against it would have meant rejecting one of the fundamental principles underlying international co-existence. A provision that a treaty was void if its conclusion had been procured by the threat or use of force was the only way of safeguarding weak countries against treaties which were unjust or abitrary, or which prevented the satisfactory operation of factors conducive to economic development.

3. Article 62 *bis*, as approved by the Committee of the Whole, laid down adequate procedures for the application of article 49. The latter article applied, and would apply, not on the basis of certain specified dates, but on the basis of events which had taken place and which violated fundamental principles of international law.

4. By providing that a treaty was void if its conclusion had been procured in violation of principles of international law which had existed before the United Nations Charter and had been embodied in it, article 49 would make it possible to restore rights which had been unjustly infringed.

Draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty

5. Mr. TABIBI (Afghanistan) said he regretted to note that the present text of article 49, which the Conference had just adopted, did not reflect the views of the majority in the Conference as expressed at its first session in an amendment proposed by Afghanistan and many other delegations (A/CONF.39/C.1/L.67/Rev.1/Corr.1). That amendment, under which a treaty would be void if its conclusion had been procured by the threat or use of force, including economic or political pressure, was nothing more than a statement of what had become a principle of general international law, as laid down for example in Article 1(3), Article 55 and above all Article 2(4) of the United Nations Charter; in articles 15 and 16 of the Charter of the Organization of American States;[2] in the Declarations of the Conferences of the Heads of State or Government of Non-Aligned Countries made at Belgrade in 1961 and at Cairo in 1964; in the draft declaration on rights and duties of States prepared by the International Law Commission,[3] and so forth. However, in order to meet the objections of a number of delegations, the sponsors of the amendment, and in fact the large majority in the Conference which had supported the amendment had agreed not to vote on it in the Committee of the Whole and instead to seek a compromise, which took the form of a general declaration.[4] The sponsors of the amendment had accepted that compromise on the understanding that the precise scope of acts involving the use of force, whether military, economic or political, should be determined in practice by interpretation of the provisions of the Charter. The summary records of the Conference must be extremely clear on that point for the purpose of the future interpretation of article 49 as now worded.

6. His delegation was submitting a draft resolution to the Conference with a view to supplementing the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty, which the Committee of the Whole had adopted as a result of the compromise agreed to by Afghanistan and the other sponsors of the amendment he had mentioned (A/CONF.39/C.1/L.67/Rev.1/Corr.1). The text of the Afghan draft resolution as already circulated (A/CONF.39/L.32) had to be replaced by a revised version (A/CONF.39/L.32/Rev.1), which would be circulated shortly. He requested the Conference to postpone its consideration of the draft declaration approved by the Committee of the Whole until the Afghan draft resolution had been circulated in its revised form.

It was so agreed.[5]

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed)*

Article 50 [6]

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

7. Mr. HUBERT (France) said he regretted to have to oppose an article which had attracted a large number

[1] See the statements by the representative of Ghana at the 23rd plenary meeting and by the representative of Morocco at the 34th plenary meeting.

[2] United Nations, *Treaty Series*, vol. 119, p. 56.

[3] For text, see *Yearbook of the International Law Commission, 1949*, pp. 287 and 288.

[4] See 57th meeting of the Committee of the Whole, para. 1.

[5] For the adoption of the draft declaration and the draft resolution, see 20th plenary meeting.

[6] For the discussion of article 50 in the Committee of the Whole, see 52nd-57th and 80th meetings.

of votes in its favour at the first reading and which, moreover, was actuated by the best intentions, to which his delegation paid a willing tribute. But in life intentions must give way to hard facts.

8. A glance at article 50 showed that it declared void, in advance and without appeal, an entire category of treaties but failed to specify what treaties they were, what were the norms whereby they would be voided, or how those norms would be determined.

9. The keynote of article 50 was imprecision; imprecision as to the present scope of *jus cogens,* imprecision as to how the norms it implied were formed, and imprecision as to its effects.

10. First, imprecision as to the present scope of *jus cogens.* One of the most curious features of *jus cogens* was the difficulty experienced by its most ardent champions in delimiting the notion. The International Law Commission itself had shown extreme caution in its commentary to draft article 50. In paragraph (3) it first gave a few examples suggested by " some " of its members, such as treaties contemplating an unlawful use of force contrary to the principles of the Charter, or contemplating the performance of any other act criminal under international law, or contemplating the commission of acts such as trade in slaves, piracy or genocide. The Commission went on to say that treaties violating human rights, the equality of States or the principle of self-determination " were mentioned ", but did not specifically say whether it had itself accepted the views thus expressed by some of its members. On the other hand, it frankly confessed in paragraph (2) that " there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* ". Thus the difficult problem had been left to the Conference to solve. The efforts that had been made were praiseworthy, but it was doubtful whether they had succeeded in allaying misgivings.

11. The lack of precision as to the way in which norms having the character of *jus cogens* came into being was not removed by the present wording of the article. What was meant by norms defined as norms " accepted and recognized by the international community of States as a whole "? Did that mean that the formation of such norms required the unanimous consent of all States constituting the international community, or merely the assent of a large number of States but not of them all? If the latter, how large was the number to be and what calculations would have to be resorted to before it would be admitted that it had been reached? Who would decide in the event of a dispute? If, as was to be hoped, a system of compulsory arbitration was adopted, the arbitrator would be saddled with that task, and he would have to have wider latitude to judge than he had in normal cases, since he would be called upon to make law, not merely to interpret existing law. And if compulsory arbitration had to be discarded, the dispute could run into the dead end of a conciliation procedure which might lead nowhere. It was impossible to view such a prospect without the gravest misgivings.

12. There was the same lack of precision, to say the least of it, as to the effects of article 50. It would make disputes a permanent feature of the law of treaties; yet in that law stability was essential, above all in the interests of new States, which needed a climate of security and confidence for their development. States would hesitate to commit themselves to treaties which might be brought to nothing by the emergence of some norm which was suddenly declared to be a peremptory norm. Not only legal instruments, but international relations themselves, would be undermined.

13. The Committee of the Whole had plainly perceived the danger, since it had adopted a provision on the non-retroactivity of the convention, in order to protect treaties concluded before its entry into force from being claimed to be invalid on the ground of *jus cogens.* That was a useful provision, which the French delegation supported. But its text was still open to differing interpretation. Moreover, it did not protect treaties concluded after the entry into force of the convention which an arbitrator or conciliator might hold to be in conflict with peremptory norms which in their view existed before the convention came into force, to say nothing of any new norms which might emerge under article 61 and might be such as to entail the invalidity of those treaties. There again, there were no adequate safeguards in the draft convention.

14. An attempt had been made to remove those grave cases of uncertainty by establishing a system for settling disputes arising from the application of article 50 as well as from the application of the other provisions in Part V of the convention. His delegation very much hoped that such a system would be adopted; but that would not suffice to eradicate the danger, precisely owing to the uncertainty of a text which was too absolute for such fluid content and too fluid to be expressed in such absolute terms.

15. In the face of such criticisms some speakers asserted that the notion of *jus cogens* was nothing more than the transference to the international system of notions of internal law such as public policy, public law or constitutional law. But, as one advocate of *jus cogens* had himself stated, there were substantial differences between the position of international society and that of national society.

16. Other speakers again had urged that to leave it to the courts and to practice to define the notion of *jus cogens* and to determine which norms were peremptory norms would simply be to follow the example set by States in framing the internal laws applicable to their nationals. But there, too, the comparison was basically unsound, for it was one thing to compel individuals to obey rules which progressively emerged until they gained the force of law and quite another to claim to impose on sovereign States obedience to norms which they might never have accepted or recognized.

17. In fact, if article 50 was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes,* then the result would be to create an international source of law subject to no control and lacking all responsibility. The result

would be to deprive States of one of their essential prerogatives, since to compel them to accept norms established without their consent and against their will infringed their sovereign equality. The " treaty on treaties " would then not be in conformity with the overriding treaty, the Charter, which recognized and guaranteed that sovereignty.

18. It had also been asserted that the incorporation of the notion of *jus cogens* into positive international law represented progress. That was the argument most likely to attract the French delegation's support provided that progress was real progress and not just innovation. But the French delegation was convinced that article 50 contained the seeds of insecurity in international relations and exposed international law to an ordeal which it would be wise to avoid. If it was simply a question of the examples cited by the International Law Commission in its report, then it would be possible to express an opinion in full knowledge of the facts. But the article went further, and his delegation for one was not prepared to take a leap in the dark, and to accept a provision which, because it failed to establish sufficiently precise criteria, opened the door to doubt and compulsion. His delegation believed that article 50 was essential neither to the success of the convention nor to the progress of international law, but might, on the contrary, place them in jeopardy. The French delegation would therefore vote against article 50.

19. Mr. BRAZIL (Australia) said that the doctrine of *jus cogens* in articles 50 and 61 was the most significant element of progressive development of international law contained in Part V. While his delegation did not dispute that treaties which conflicted with a fundamental rule of international public order should not be enforceable, the problem was the way in which the principle could be expressed and applied with the necessary precision.

20. In fact, the International Law Commission had chosen to invite the Conference to approve a doctrine of *jus cogens* of unspecified substantive content. It pointed out in paragraph (2) of its commentary that the majority of the general rules of international law did not have the character of *jus cogens,* adding in paragraph (3) that the emergence of rules of *jus cogens* was comparatively recent and recommending that it should be left to State practice and the jurisprudence of international tribunals to work out the full content of the doctrine. Later, in paragraph (4) of its commentary, the Commission had been more specific on the very difficult question of how the rules of *jus cogens* could be modified, and it envisaged that as most likely to be effected through a general multilateral treaty. The idea, however, that a list of the rules of *jus cogens* might be formulated in a protocol to the convention on the law of treaties had found no real support at the first session of the Conference.

21. In those circumstances, the Australian Government shared the difficulties of the French delegation in agreeing to become bound by a doctrine so imprecisely formulated, despite the improvements made to the wording of article 50 at the first session. On reflection, it found that it could not share the view expressed by some other delegations that the shortcomings of the present formulation would be remedied or at least made acceptable if an objective procedure for the settlement of disputes were adopted under the proposed article 62 *bis.* His delegation therefore reserved its position completely and would not be able to support either article 50 or article 61. Since the purpose of the Conference was to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained, it could not be satisfied with an imprecise doctrine of invalidity of treaties.

22. As to the other substantive articles in Part V, his delegation was able to support most of them, but that support was subject to the understanding that his delegation considered there was an organic connexion between those articles and the provisions of adequate procedures for the settlement of disputes.

23. Mr. ABAD SANTOS (Philippines) said that his delegation whole-heartedly supported the principle of *jus cogens.* The wording of article 50 was of course not perfect. For one thing, the fact that a treaty conflicted with a peremptory norm of international law should not necessarily render the whole treaty void if only some of its provisions conflicted with the norm in question. Another weakness was the drafting: in the second sentence of the article, the word " norm " appeared too often, and it could perhaps be simplified.

24. At any rate, article 50 was essential to the extent that the principle of *jus cogens* was vital for the international community; it was a principle which, in international law, reflected various principles of municipal law concerning public policy, good customs, morals, and so on. It had been argued that the principle of *jus cogens* was not defined in article 50; but good customs, morals and public policy were not necessarily defined in municipal law, and yet no insoluble difficulties had ever arisen in applying them in specific cases. It must be remembered that the Conference was concerned not merely with the codification of international law but also with its progressive development. An imperfect provision was better than no provision at all. His delegation considered that, in the present state of the development of international law, article 50 was satisfactorily worded, and it would vote in favour of it.

25. Mr. GROEPPER (Federal Republic of Germany) said that his delegation, like many others, recognized the existence of a category of peremptory norms of international law. It was definitely a new category in the structure of international law and its emergence called for reconsideration of the positivist theory and of the relations between the various sources of international law as enumerated in Article 38 of the Statute of the International Court of Justice.

26. The emergence of the notion of *jus cogens* in international law was a direct consequence of social and historical evolution, which had had a far-reaching influence on the development of international law. Technical interdependence and the multiplication of

links between States had produced a situation where the ordered coexistence of States became impossible not only in the absence of some sort of international public order but also for want of certain concrete rules from which derogation was not permitted. Examples which sprang to mind were rules such as the prohibition of the use of force in relations between States, non-intervention in domestic affairs, and various rules relating to human rights. Those were rules from which no State could derogate without upsetting the international order politically and legally.

27. However, the Government of the Federal Republic of Germany felt concern about article 50 because the notion of *jus cogens* had not yet been clearly defined and the article could therefore give rise to abuse of a kind detrimental to the principle of *pacta sunt servanda* and the interests of States. His delegation had considered from the outset that article 50 should embody criteria for identifying norms of *jus cogens* and some form of safeguard against the abuse to which it could give rise.

28. Safeguards were already provided in the procedural clauses for the settlement of disputes, namely articles 62 and 62 *bis*. His delegation had commented on those articles in the Committee of the Whole and would revert to the matter if necessary when they were examined by the plenary Conference.

29. With regard to criteria for identifying norms of *jus cogens,* his delegation noted with satisfaction that the Committee of the Whole had considerably improved the original wording of article 50. The present text, by adverting to universal recognition and acceptance by the community of States as such, confirmed what the International Law Commission had indicated in its commentary to article 50, namely that there were not many rules of *jus cogens.* The present version of the article meant that in order to show that a norm was peremptory, it would be necessary not only to establish that it was applied and recognized in relations between States but also that the community of States applied it as peremptory law. In view of those strict criteria, his delegation did not see any insuperable opposition between the notion of *jus cogens* and the principle of the sovereignty of States. Any State against which a rule of *jus cogens* was invoked could not only claim that the norm in question failed to meet the criteria laid down in article 50; it could also call on the State invoking it to prove that it was a peremptory rule.

30. His delegation was therefore prepared to vote in favour of article 50 as now worded, on the assumption that articles 62 and 62 *bis,* which offered the necessary safeguards against any abuse to which article 50 might give rise, would be adopted in the form approved by the Committee of the Whole.

31. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that, in accordance with the principle that all States were subject to a higher international order as members of the international community, the existence of certain norms of *jus cogens* in general international law was undeniable, and treaties which conflicted with those norms were void *ab initio*.

32. Article 50 stated a rule of *lex lata* and therefore represented an advance in the codification of existing law, for it would be absurd to think that *jus cogens* would only come into being with the entry into force of the convention on the law of treaties: that would be tantamount to saying that before its entry into force, States could commit with impunity all kinds of outrages in international relations, such as procuring the conclusion of a treaty by the use of force, and that because of the convention, international law had made great progress by prohibiting all international acts of that kind from one day to the next. By codifying the existing law, article 50 gave concrete form to a fundamental principle and delimited it.

33. His delegation found the definition contained in article 50 satisfactory and complete. In order to become *jus cogens* a norm had to fulfil two conditions: it had not only to be accepted, it had also to be recognized as such by the international community as a whole — not, be it noted, by a more or less numerous group of States, but by the international community as a whole. Moreover, the essential nature of the norm appeared from the expression " from which no derogation is permitted ".

34. The norms of *jus cogens* stated the limitations placed on State sovereignty by international law, for the theory that States, in exercise of their sovereign rights, could conclude treaties as they saw fit in violation of those peremptory norms was untenable, and it was quite apparent from the advisory opinion of the International Court of Justice on reservations to the Genocide Convention [7] that the norms of *jus cogens* were binding on all States, even if there was no contractual undertaking in respect of them.

35. In his delegation's view the norms of *jus cogens* could include certain fundamental principles such as prohibition of the use of force, the obligation to settle international disputes by peaceful means, non-interference in the internal affairs of States, sovereign equality and, in general, the principles set forth in Articles 1 and 2 of the United Nations Charter.

36. For the maintenance of international peace and security, all the members of the international community must abide whole-heartedly by article 50 and make compliance with that article 50 unconditional and universal. The article stated the present peremptory law, and it should apply to all treaties, of whatever kind, without any discrimination based on a desire to keep advantages obtained by the use of force or through violation of the law. One of the foundations of modern international law was the acceptance of the norms of *jus cogens* by the entire international community.

37. The category of rules whose peremptory character was accepted and recognized should, of course, be strictly limited to principles which were of paramount importance for the maintenance of legal stability in the international community.

38. The International Law Commission had attached such importance to the norms of *jus cogens* that it had envisaged that when parties concluded a treaty in

[7] *I.C.J. Reports, 1951,* p. 15.

violation of those norms, the instrument as a whole should be considered void *ab initio*. As was indicated in article 41, paragraph 5, the Conference had refused to accept the idea that only the part of the treaty which was incompatible with a norm of *jus cogens* should be void.

39. Certain treaties, especially the United Nations Charter, contained norms of *jus cogens*. He thought it was not sufficient to denounce treaties of that kind in order to evade the obligation to observe the rules of *jus cogens* referred to in them. It would be absurd, for example, if a State which withdrew from the United Nations or was excluded from it should consider that that fact exempted it from the obligation not to resort to the threat or use of force. The United Nations Charter, in Article 2 (6), provided that " The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

40. Since in its view the arguments advanced against article 50 were completely groundless and merely expressed the political interests of a few States which wished to continue to enjoy certain ill-gotten advantages, his delegation would vote in favour of article 50.

41. Mr. ALVAREZ TABIO (Cuba), said that however difficult it might be to identify a norm of *jus cogens*, there could be no doubt that it was necessary to recognize the peremptory nature of certain rules.

42. The objection had been made that it was not easy to agree on the norms which constituted *jus cogens*. Nevertheless, it was undeniable that, for example, the principles set forth in Article 2 of the United Nations Charter, in the Preamble, and in Article 1 were peremptory norms of general international law.

43. It had also been maintained that the risks inherent in determining and applying norms of *jus cogens* were such that it would not be desirable to embody that principle in the convention without first providing all necessary guarantees against possible abuse. But, in fact, the possibility of abuse arose not from the application of those peremptory norms but from the refusal to recognize them.

44. In his delegation's view, it was important to recognize that a treaty which violated the rules of *jus cogens* was void *ab initio*.

45. Moreover, the rules of *jus cogens* should be distinguished from other international rules on the basis of their content and effects, not of their source. General multilateral treaties, particularly the United Nations Charter, were undoubtedly the most frequent source of norms of *jus cogens*, but in some cases, such as the prohibition of the use of force, the Charter had limited itself to formulating those rules so as to provide a suitable framework for their effective application.

46. *Jus cogens* was developing and changing and the Drafting Committee had taken that aspect into account in its text since it had confined itself to recognizing the principle without listing the various norms which it covered.

47. In the light of those comments, his delegation would vote for article 50.

48. Mr. VOICU (Romania) said that during the discussion at the first session the existence of peremptory norms from which no derogation was allowed had been widely recognized.

49. The recognition of the concept of *jus cogens* confirmed the basic principles of international law. In his delegation's view, strict observance of those principles would tend to promote justice, peace and co-operation between States and to strengthen the rule of law in international relations.

50. His delegation whole-heartedly supported article 50 which reflected the degree of development reached by contemporary international law, made a considerable contribution to its progressive development and was based on the political and legal realities of the contemporary world. The article also had the undeniable merit of stating the legal consequences that resulted from the existence of peremptory norms in treaty law.

51. The article provided that violation of a rule of *jus cogens* made a treaty void, for if there was a danger that any derogation from a norm of *jus cogens* would undermine a universally accepted legal order, it followed that a treaty containing such a derogation could only be regarded as void *ab initio*. To admit that treaties contrary to the peremptory norms accepted and recognized by the community of States as a whole could be valid would be a threat to the international legal order and would consequently impede the operation of the whole system of peaceful co-operation and friendly relations between equal and sovereign States. Article 50 was therefore an essential part of the structure of the convention, in that it prevented the conclusion of treaties in conflict with a peremptory norm of general international law. Peremptory norms would be a means of strengthening the awareness of what was legally right in international life, and respect for *jus cogens* would promote the consolidation of the international rules of law, which was essential to the legal security of the international community and to the stability of treaty relations between States.

52. His delegation did not share the views of those representatives who wished to make the adoption of article 50 conditional on the establishment of the procedure provided for in article 62 *bis*. It would therefore vote for article 50 as it stood.

53. Sir Francis VALLAT (United Kingdom) said his delegation accepted that in any ordered international society there must be some basic rules from which States could not derogate by treaty. But it still had doubts as to the scope and content of article 50 and continued to be preoccupied by three major points.

54. Firstly, the article gave no indication as to the actual content of existing rules of *jus cogens*. As the effect of contravention of a peremptory norm was to render a treaty null and void, it would not be wise to leave the content of article 50 to be worked out in the future. Everyone would agree, of course, that a treaty to promote the slave trade would contravene a rule of *jus cogens*. But a few narrow examples of

that sort did not suffice to define the real content of the article, and the lack of agreement on the scope of *jus cogens* gave rise to genuine anxiety on the part of Governments.

55. Secondly, article 50 did not give absolutely clear guidance as to the manner in which rules of *jus cogens* emerged and could be identified. It was true that the text presented by the Drafting Committee was a considerable improvement on the original wording of article 50, but the phrase " a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted " remained very imprecise. It raised the question of the burden of proof, which might be crucial in a case where a rule of *jus cogens* was invoked by State A as a ground for invalidating a treaty with State B. If the latter was able to establish that it had not accepted and recognized the rule as a peremptory norm, that would clearly be a material factor which would surely weigh heavily in the balance.

56. Thirdly, the effect of article 50 was to render void the treaty as a whole. As a result of the decisions the Conference had taken on article 41, it would not even be possible to invalidate only the part of the treaty which conflicted with the rule of *jus cogens* and to leave the remainder of the treaty operative. The consequences of applying article 50 would therefore be extremely grave.

57. The United Kingdom delegation did not intend to submit any amendment to article 50 or to request a separate vote on any part of it. It recognized that a majority of delegations did not share its anxieties about the article and that they considered article 50 to be the keystone of the convention. His delegation would not, therefore, vote against the article but would abstain, partly for the reasons he had just mentioned, but mainly for the reasons he had given in connexion with article 45 at the previous meeting.

58. Mr. BILOA TANG (Cameroon) said the notion of *jus cogens* appeared completely revolutionary and was related to the extremely controversial concept of international public policy. It was, in fact, a somewhat vague notion, whose main usefulness was to make manifest the desire for a more orderly world. The International Law Commission had dealt with it in articles 50, 61 and 67, but the examples it had given in its commentaries, such as the prohibition of slavery and *pacta sunt servanda,* either added nothing new or referred to principles which were not even legal rules. The discussions in the United Nations, particularly in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, showed that it would have been impossible to find satisfactory wording to define most of the principles having the character of *jus cogens.* The obvious conclusion, therefore, was that most of the rules of *jus cogens* were merely tokens of a moral aspiration and were a political bone of contention, so that the greatest caution was required.

59. In the Committee of the Whole, the representative of Cameroon had expressed the hope that the new international law would reflect the new situation and that it would no longer be based solely on " the general principles of law recognized by civilized nations ". International law had been for far too long the law of a certain region, of certain Powers and of certain States. Those States were therefore strongly tempted to try to continue to define and determine the rules which should be considered as having the character of *jus cogens,* at the risk of compelling the small countries to cease acting as sovereign States even in matters of domestic policy, if the more powerful States so decided.

60. Since Cameroon hoped for a better international order and believed in the free will of States, his delegation considered that a norm of international law, if it was to be peremptory, must be recognized and accepted by the greater part, if not the whole, of the international community.

61. Mr. CAICEDO PERDOMO (Colombia) said that his delegation, having considered the problems raised by articles 50, 61 and 67 of the future convention, would vote in favour of article 50 as submitted by the Drafting Committee. The previous year's discussions and the work of the Conference had shown that *jus cogens* was essential to a developed international community. Few denied the existence of that notion, and all were subject to the superior norms of general international law. It was not an immutable and rigid notion, since it made it possible to eliminate obsolete rules and to introduce new rules reflecting the evolution of the international community. Its very flexibility was proof of its vitality.

62. Article 50, as submitted by the Drafting Committee, gave a very satisfactory presentation of the notion of *jus cogens.* It was an improvement on the International Law Commission's text, since it took account of the United States proposal (A/CONF.39/C.1/L.302) to insert the words " at the time of its conclusion" and of the comments of those delegations which sought a clearer definition of the words " peremptory norm of general international law ". The new text, while more precise, was worded with the same caution as that shown by the International Law Commission. Article 50 was thus a satisfactory solution to the problems posed by the introduction of the principle of *jus cogens*: it took account of the anxieties expressed by various delegations and reflected the general view held in the international community.

63. Some representatives had asked what principles the notion of *jus cogens* could be held to cover. If put in those terms, the problem was insoluble. The enumeration of peremptory rules would give *jus cogens* a restrictive connotation out of keeping with its flexibility and vitality. Contrary to what the French representative had said, the force of *jus cogens* lay in the fact that the actual norms remained uncertain and imprecise. Besides, the fact that the proposed wording took account of amendments submitted by delegations with different political and legal views was proof of the strength of the article and of its conformity with the wishes of the entire international community. The

Colombian delegation would therefore vote in favour of article 50.

64. Mr. HAYTA (Turkey) said that his delegation had stated its position on *jus cogens* at the 53rd meeting of the Committee of the Whole. Article 50 introduced a new rule into international law: it was the notion of public policy and it had been borrowed from internal law. Was such a transfer possible? And even if it were, was the corresponding rule clearly set out? Those questions had been discussed at length and his delegation was still unable to reply in the affirmative.

65. It had been said that it was a question of a hierarchy of legal norms in international law. But such a hierarchy presupposed a hierarchy among sources, which was not to be found in the international community where circumstances were different from those in which internal law was applied. International treaty relations were based on the consent expressed by sovereign States.

66. In his delegation's view, article 50 had another major disadvantage: its lack of precision. It did not make it possible to determine in what way a peremptory norm would be considered as being a rule of *jus cogens*. Moreover, the rule was not accompanied by adequate guarantees. No appropriate machinery for adjudication was provided for. As had already been stated many times, the rule was therefore liable to lead to serious disturbances in treaty relations between States and consequently in international life. His delegation therefore maintained its position on article 50. It wished to make it clear that Turkey could not consider itself bound by the provisions of article 50 as set forth in the Drafting Committee's text.

67. Mr. NAHLIK (Poland) said that the importance of the principles laid down in articles 50 and 61 had often been stressed. Not very long ago, the question had been raised whether international law contained any rules at all of a peremptory character which States could not contract out of by *inter se* agreement. Whatever the situation might have been in the nineteenth century and at the beginning of the twentieth, today there certainly existed an organized community of States, and, within it, a hierarchy of norms established by those States themselves. The rules occupying a higher level in that hierarchy must therefore prevail over any others. That view had frequently been expressed, and article 50 had been adopted the previous year by an overwhelming majority comprising States which represented all geographical regions, all political and social systems and all legal traditions. That left no further room for doubt as to the existence of norms of a peremptory character in international law.

68. That being so, if the convention on the law of treaties was to be complete, it should contain two provisions: first, a provision that any treaty violating a peremptory norm already in existence was void *ab initio*; and secondly, a provision that any treaty incompatible with a supervening norm of *jus cogens* would cease to be in force. Articles 50 and 61 met those two requirements. The two provisions were of particular importance to nations which had only recently regained their independence. It was perfecly understandable that they should be entitled to rid themselves of any remnants of the colonial régime, including those embodied in treaties.

69. There seemed to be little difficulty in answering the question which rules of international law were peremptory in character and how that character could be established. According to article 50, they were norms accepted and recognized by the international community of States as a whole. Recognition could be either express or implied, by treaty or by custom. A norm adopted by some States in a treaty could eventually become binding upon other States by way of custom; the Conference had reaffirmed that possibility by adopting article 34 of the convention.

70. The United Nations Charter provided a striking example of a case where States had expressly given one group of rules a hierarchical value superior to that enjoyed by any other rules. Besides the inherent importance of the main principles embodied in Articles 1 and 2 of the Charter, particular note should be taken of Article 103 of the Charter, since it expressly provided that the obligations of the Members of the United Nations under the Charter were to prevail over obligations they might have contracted under any other international agreement.

71. Most of the other norms of *jus cogens* had essentially the same aim as those expressed in the Charter. Their peremptory character flowed mainly from their very content, which would be meaningless if some States were permitted to derogate from them. The prohibition of slavery and genocide, and the right of peoples to self-determination, had been quoted as examples of such norms at the Conference and on other occasions, such as the conference of international lawyers specially convened to that effect in 1966. Thus there seemed little room for doubt about which particular norms of international law constituted norms of *jus cogens*.

72. He did not share the opinion expressed or implied by some other speakers that it would be advisable to establish a list of norms having a peremptory character. If such a list were included in the convention, it would not be in keeping with its character as an instrument of codification.

73. A special agreement dealing with the matter would not be advisable either. If it merely quoted examples of such norms, it would diminish the value of the norms not included in it. If it was intended to be exhaustive, it could easily become out of date, as ratification procedures were sometimes rather slow. Besides, the situation of States which, for one reason or another, did not feel inclined formally to become parties to any such agreement would be, to say the least of it, ambiguous.

74. His delegation strongly supported article 50 both in substance and in its present formulation. He did not think that the article, which was perfectly consistent with international law already in force, could properly be adduced as an excuse for an attempt to introduce into international law something so essentially new as

the principle of compulsory arbitration contained in article 62 *bis*.

75. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said he was glad to see that the International Law Commission had included in the draft convention an article to the effect that a treaty was considered void if it conflicted with a peremptory norm of *jus cogens*. It would indeed be difficult to maintain that there were peremptory rules of international law from which States might derogate by means of treaties. The rules set out in the Charter constituted a striking example of international norms of *jus cogens*. Those norms included the principles accepted and recognized by the international community of States as a whole and constituting the very basis of modern international law. Notable examples were non-intervention in the domestic affairs of States and respect for the sovereignty of States. There was a close connexion between the principles and norms of *jus cogens* which formed the basis of the international legal order and the moral aspirations of all peoples. Those rules were considered indispensable and it was impossible to make progress without them. In current practice, treaties incompatible with peremptory norms of general international law were considered void *ab initio*. Draft article 50 was acceptable to his delegation, which would vote in favour of it.

The meeting rose at 1 p.m.

TWENTIETH PLENARY MEETING

Monday, 12 may 1969, at 3.30 p.m.

President: Mr. AGO (Italy)

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)*

Draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty (resumed from the previous metting) [1]

1. The PRESIDENT invited the Conference to consider the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty which had been recommended to the Conference by the Committee of the Whole in connexion with article 49. The draft declaration read:

The United Nations Conference on the Law of Treaties,

Upholding the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith,

Reaffirming the principle of sovereign equality of States,

Convinced that States must have complete freedom in performing any act relating to the conclusion of a treaty,

Mindful of the fact that in the past instances have occurred, where States have been forced to conclude treaties under pressures in various forms exercised by other States,

Deprecating the same,

Expressing its concern at the exercise of such pressure and anxious to ensure that no such pressures in any form are exercised by any State whatever in the matter of conclusion of treaties,

1. *Solemnly condemns* the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent;

2. *Decides* that the present declaration shall form part of the Final Act of the Conference on the Law of Treaties.

2. Mr. TABIBI (Afghanistan) said that he wished first to introduce a draft resolution of a procedural nature submitted by his delegation (A/CONF.39/L.32/Rev.1), the purpose of which was to provide an organic link for the draft declaration on the prohibition of the threat or use of coercion. He particularly wished to point out that the word " military " had been inadvertently omitted from the title of the draft declaration when it was approved by the Committee of the Whole at the first session and should now be restored.

3. With regard to his own delegation's draft resolution he proposed, as a purely procedural change, that paragraph 1 be amended to read " *Invites* the Secretary-General of the United Nations to bring the declaration to the attention of all Member States of the United Nations and of those participating in the Conference as well as of the principal organs of the United Nations ".

4. The PRESIDENT said that the wording just proposed by the representative of Afghanistan would be submitted to the Drafting Committee for consideration.

5. Mr. MUTUALE (Democratic Republic of Congo) said that the word " force " as employed in the United Nations Charter and in article 49 of the draft covered all forms of force starting with threats and including, in addition to bombardment, military occupation, invasion or terrorism, more subtle forms such as technical and financial assistance or economic pressure in the conclusion of treaties. The principle of good faith was paramount at all stages of the conclusion of a treaty and in order that the obligations it embodied might be assumed in good faith, there must be no threat of force at the time of its adoption. His delegation therefore supported the draft declaration.

6. Mr. ALVAREZ TABIO (Cuba) said that his delegation shared the view that a restrictive interpretation of the expression " use of force " was incompatible with the spirit of the Charter. The concept of the use of force must cover all forms of pressure — military, political and in particular economic — and all such pressures must be condemned if inter-State relations and treaty law were to be established on a solid basis of equality. His delegation would therefore vote for the draft resolution submitted by Afghanistan.

7. Mr. SECARIN (Romania) said that article 49 was of primary importance for the progressive development

[1] See 57th meeting of the Committee of the Whole, paras. 1-4.