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Twentieth plenary meeting

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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 meeting)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.

of international law, and its application would help to promote the rule of law and to strengthen co-operation among nations. Article 49 meant that all forms of coercion, whether military, political or economic, exercised at the time of conclusion of a treaty, automatically resulted in the nullity of the treaty. The draft declaration was a valuable instrument which would help to ensure the widest dissemination of the principle embodied in article 49 and his delegation would therefore vote both for the draft declaration and for the Afghan draft resolution.

8. Mr. TSURUOKA (Japan) said that at the 48th meeting of the Committee of the Whole, the Japanese representative had said that his delegation would be unable to support the nineteen-State proposal (A/CONF.39/L.67/Rev.1/Corr.1) to add the words "including economic or political pressure" after the words "the threat or use of force" in article 49 of the Convention. The Japanese delegation had made it clear at that time that it was second to none in the support of the view that the exercise of political or economic pressure on another State in order to coerce it into concluding a treaty in violation of the principles of the sovereign equality of States and of freedom of consent must be universally condemned. It had nevertheless been unable to support the proposal in its original form as an amendment to article 49, for the very reason that the notion of "political and economic pressure", however reprehensible it might be, had not yet been sufficiently established in law to be incorporated into the convention as a ground for invalidating a treaty.

9. His delegation had therefore welcomed the constructive initiative of the sponsors of the amendment in withdrawing it and replacing it by a declaration condemning "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".

10. In the same spirit, his delegation was prepared to support the proposal by Afghanistan designed to secure wider publicity and dissemination for the declaration. He must point out, however, that the mere formulation of principles and an attempt to promote the purposes of the proposal by dissemination were insufficient for the attainment of its lofty ideals. It was essential that the norm stated in article 49 should be observed in all good faith and in all its strictness by every State without exception, regardless of political, economic, social or ideological differences, and regardless of its political, economic, social or ideological affinity. What was really needed was the will and determination on the part of all States to carry out that obligation. The Japanese delegation sincerely hoped that that will and determination would be truly reflected in the actual conduct of States in international relations of the present day.

11. Mr. NASCIMENTO E SILVA (Brazil) said that the declaration was a compromise text and should not be amended; the Drafting Committee could deal with the drafting changes that had been suggested. There

might however, be some merit in including the Afghan proposal on dissemination of the declaration in the declaration itself.

12. Mr. SMEJKAL (Czechoslovakia) said that his delegation maintained the position it had taken at the first session of the Conference and fully supported the draft declaration since it stressed the importance of the basic principle of international law that no coercion, whether military, political or economic, could be exerted in any form by any State in connexion with the conclusion of a treaty.

13. His delegation also supported the Afghan draft resolution, particularly its operative paragraph 2 in which Member States were requested to give to the declaration the widest possible publicity and dissemination.

The draft declaration was adopted by 102 votes to none, with 4 abstentions.²

The draft resolution submitted by Afghanistan (A/CONF.39/L.32/Rev.1) was adopted by 99 votes to none, with 4 abstentions.³

14. Mr. WERSHOF (Canada) said that his delegation had voted for the draft declaration because the Canadian Government fully subscribed to the provisions of its operative paragraph 1.

15. Some representatives had expressed the view that the adoption of the draft declaration was consistent with their position that the word "force" in Article 2(4) of the United Nations Charter and in article 49 of the convention meant political or economic pressure as well as military force. The Canadian Government's position, as stated in the General Assembly and in other United Nations committees was that the word "force" as used in the Charter and in article 49 of the convention did not include political or economic pressure, but referred only to military force. His delegation wished to make that point clear.

16. Mr. HUBERT (France) said that the reasons mentioned by the Canadian representative had prompted his delegation to abstain in the vote on the draft declaration.

17. Mr. ESCHAUZIER (Netherlands) said that some delegations had linked the draft declaration with article 49 of the convention and had argued that the word "force" as used in that article should be interpreted as including political or economic pressure. While he respected their views, his Government's position was that the word "force" as used in Article 2(4) of the United Nations Charter and in article 49 of the convention referred to armed force alone. In fact, it could be argued that, if the term had been meant to cover economic or political coercion, there would have been no need for the draft declaration.

18. The Netherlands Government nevertheless dep-

² For the adoption of an amended title and text, see 31st plenary meeting.

³ Certain changes were subsequently made by the Drafting Committee. See 31st plenary meeting.

recated the use of any pressure or form of coercion and recognized the paramount importance of the declaration and the need for its wide dissemination as proposed in the draft resolution just adopted.

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE (*resumed from the previous meeting*)

Article 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) (*resumed from the previous meeting*)

19. The PRESIDENT invited the Conference to resume its consideration of article 50.

20. Mr. KEARNEY (United States of America) said that although his delegation had voted for article 50 at the first session in the Committee of the Whole, it now regarded that article with some concern. There was nothing very radical in the basic concept of the existence of certain rules from which no derogation by way of treaty could be tolerated. However, the ultimate and most important question was how the existence, scope and content of a peremptory norm were to be recognized and established.

21. It was easy to say that *jus cogens* existed because a treaty promoting slavery or piracy was clearly unenforceable in existing international life, but it had taken many centuries to establish the universal agreement that now existed concerning the fundamental illegality of piracy; in earlier times, protracted conflicts and even wars had resulted from arguments over practices in that field. The elimination of the use or misuse of letters of marque and reprisal, for example, was a subject which had required a very long time before widely acceptable international rules could be worked out. In time, there had come to be a recognition on the part of most States that there was a rule prohibiting private vessels from engaging in hostilities on the high seas and that that rule was peremptory. From that time forward, States were no longer free to contract, by way of treaty, to engage in conduct violating the rule.

22. That was a process of development through community action which had needed a considerable time. Instant declarations and paper resolutions did not establish customary international law, much less did they give it a peremptory character. What was required to establish customary international law was a considerable body of established practice that supported the norm. To give a norm of customary international law a peremptory character, State practice must be unambiguous and, as set forth in the present text of article 50, its peremptory character must be accepted and recognized as a matter of legal obligation by the international community of States as a whole. That would clearly require, as a minimum, the absence of dissent by any important element of the international community.

23. In accordance with its understanding of the nature of the process that resulted in the establishment of a peremptory norm and the need for impartial determination of a claim that a particular treaty had been affected by such a norm, his delegation supported article 50.

24. Mr. KOULICHEV (Bulgaria) said that the concept of *jus cogens*, on which article 50 was based, had been so widely approved at the first session that it was regrettable that the text recommended by the Committee of the Whole had not received unanimous support. His delegation attached great importance to that text, which it considered one of the foundations of the future convention on the law of treaties, although it was prepared to give careful consideration to any suggestions for its possible improvement.

25. Among the objections put forward to article 50 was its very general character and lack of precision, as well as the inadequacy of its definition of *jus cogens*. His delegation, while fully aware of all the difficulties connected with the problem of identifying peremptory norms of general international law, had the impression that those difficulties, most of which were inherent in the identification of all customary norms of general international law to which *jus cogens* belonged, had been very much exaggerated by writers, as well as by some of the representatives who had spoken on the question during the debate. Although article 50 certainly left something to be desired from the point of view of the theory of international law, and even from the point of view of its practical application, in most cases the criterion it set up, which had been corroborated by practical experience, would serve to establish the peremptory nature of a given rule with sufficient certainty.

26. The rule set forth in article 50 had been studied with particular care both by the International Law Commission and by the Conference. In those conditions, it was significant that even those who criticized the present text of article 50, while recognizing the positive nature of the principle expressed in it, had been unable to make a more constructive contribution, except on certain points of detail, to the formulation of the rule. It must be admitted that the present text reflected a stage of development in international law beyond which it would be difficult for the Conference to go. The Conference should rather confine itself to noting the consequences which the undeniable existence of the rules of *jus cogens* had on the law of treaties, a task which was satisfactorily accomplished in articles 50, 61 and 67.

27. Much emphasis had been placed on the need for establishing some procedure for the objective settlement of disputes by determining whether treaties conformed with *jus cogens*. His delegation, however, was formally opposed to all attempts to subordinate the adoption of the rule of article 50 to the prior establishment of safeguards against abuses. The existence of norms of *jus cogens* was a reality which had its proper place in the convention on the law of treaties, independently of any procedure which might be provided in the convention for the settlement of disputes.

28. One argument which had been advanced against article 50 was that its lack of precision might open the door to abuses and so endanger the stability of contractual relations. His delegation was convinced that any such fear was exaggerated. There was no text in all the draft articles, no matter how clearly formulated,

which could not give rise to abusive interpretations and applications if the States which applied it failed to exercise good faith. Moreover, the concept of *jus cogens* was not the only one in international law, and especially in the law of treaties, which could be more easily illustrated by examples than given a precise definition. It should not be taken for granted that abuses would be inevitable. When another concept of contemporary international law, the general principles of law, had been mentioned in the Statute of the International Court of Justice, doubts had been expressed whether it was possible to identify the principles in question, and there had been fears of an abusive application. But the practice of States and international jurisprudence had shown that those fears were groundless and that the general principles of law had a definite place in international law. Moreover, the practical effects of the principles expressed by article 50 should not be exaggerated. It was easy to understand that few States today would decide to conclude a treaty which betrayed an intention to violate a norm of *jus cogens*, and thereby affront the conscience of the entire international community. In practice, conflicts between treaties and *jus cogens* would not occur very often.

29. Both in the practice and in the theory of international law article 50 could play a preventive role by attaching the sanction of nullity to any contractual violation of the rules which served the higher interests of the entire international community and from which no derogation was permitted. Thus, far from constituting a source of difficulties and abuses in relations between States, the rule in article 50 would help to strengthen the role of international law in those relations. For those reasons, his delegation fully supported article 50 as recommended by the Committee of the Whole.

30. Mr. RUEGGER (Switzerland) said that the attitude of his delegation to article 50, which many countries friendly to his own considered of the highest importance, had not changed since the first session. From the human or moral point of view, it was reassuring to hear so many similar statements concerning the priority which should be given to rules to safeguard respect for human rights. His own Government, for example, considered that the various Geneva conventions for the protection of war victims constituted a milestone in international law. Morality, however, was one thing, but law was another; even natural law, by virtue of a few convincing examples, did not authorize a leap into the unknown. If rules were to be established which went beyond international conventions and customary law, it was necessary to apply the principles which everywhere governed the creation and revision of constitutions.

31. As at present worded, article 50 would only be a source of uncertainty. How was it possible to ask even those parliaments which were most favourable to the development of international law to accept in advance norms which were not only vague, but were unaccompanied by the necessary safeguards for States? Article 50 stated that a peremptory norm of general

international law was a norm accepted and recognized by the international community of States as a whole. But who was to express that universal consent, in other words, who was the international legislator? With all due respect for the United Nations General Assembly, he could not believe that one of its resolutions, perhaps adopted by only a small majority, could ever constitute *jus cogens*. And as the United Kingdom representative had pointed out, there was no sufficient indication as to how a rule could be declared to take priority over a treaty. Like the French representative, therefore, he regretted that he found it necessary to take a negative attitude to article 50 since in his view, if international law was to progress, there should be no departure from the firm, existing foundations of the law.

32. Mr. YASSEEN (Iraq) said that the international legal order already recognized a hierarchy of international rules. Those were rules which took priority over others, so that it could be said that the system provided for in article 50 was already a part of positive international law. No one would deny nowadays that a treaty for the legalization of slavery or procuring for immoral purposes was void *ab initio*; it would be void because the rules prohibiting those activities were rules of *jus cogens*. Although there might be some cases where the application of that system could present difficulties, such difficulties should not be invoked as a pretext for not recognizing the system as such, since the international community already possessed the appropriate means for solving them. Institutional deficiencies in international law ought not to be a reason for denying the existence of a system, which clearly already existed, namely, that which provided for the priority of *jus cogens* in the international juridical order.

33. In his opinion, to attempt to make the acceptance of article 50 dependent on the recognition of some compulsory means for solving disputes would be an obstacle to the institutional development of international law. The recognition of existing norms could provide valid and effective grounds for the future establishment of institutions which would defend those principles and norms. For those reasons, his delegation was in favour of article 50 as adopted by the Committee of the Whole at the first session.

34. Mr. TORNARITIS (Cyprus) said that he found article 50 acceptable and he would support it for the reasons stated by his delegation in the Sixth Committee of the General Assembly on a number of occasions, and more recently at the 53rd meeting of the Committee of the Whole. Difficulties could of course arise over the application of article 50, as with that of any legal provision, but he did not believe that those difficulties were insurmountable. In municipal law, the concept of "public policy" was not clearly defined and had been described as an "unruly horse" but ways and means had been found to tame it.

35. Article 50 constituted a firm progressive step in the process of codification of the law of treaties and the important principle it embodied deserved the full support of the Conference.

36. Mr. MARESCA (Italy) said that his delegation had given full consideration to the objections put forward against the rule embodied in article 50.

37. It had been said that the International Law Commission, by adopting article 50, had introduced a new and important concept into international law. In fact, the concept of *jus cogens* had been in existence for a long time before that Commission formulated article 50; it had deep roots in international law and derived its origin in part from concepts of natural law. During the past thirty years, the more extreme members of the positivist school had held that there was no international law outside treaty law. Other writers had, however, pointed out that international law consisted not only of treaty law but also of customary law; the rules of customary international law were based on the legal conscience of States and were binding even on States which had not participated in their formation. In the body of customary international law, there was a very small number of rules which admitted of no derogation and which were precisely the rules of *jus cogens*. It was a significant fact that the existence of such rules had been recognized as early as 1914 by Anzilotti, one of the greatest exponents of the positivist school of thought.

38. Since the rules of *jus cogens* were essentially customary rules, no definitive enumeration of them could be given; they were in process of historical formation and any attempt to enumerate them would restrict the possibilities of their future development. From his own experience, he could cite the example of the clause which he had had the honour of proposing for inclusion in the four Geneva Conventions of 12 August 1949 on the protection of prisoners of war, the sick and wounded and civilians in time of war. The clause, which had been included in all those four humanitarian Conventions, read: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."⁴ Similar rules could be cited, drawn from such important instruments as the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide.⁵

39. Rules of *jus cogens* were to be found essentially in the following three major categories: first, the rules intended to safeguard the fundamental rights of the human person; secondly, the rules concerning the prevention of the use of force and the maintenance of peace — a treaty whereby two or more States agreed to wage war could constitute a crime against peace;

⁴ See articles 50 and 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, articles 51 and 52 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, articles 130 and 131 of the Geneva Convention relative to the Treatment of Prisoners of War and articles 147 and 148 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War; *United Nations, Treaty Series*, vol. 75, pp. 62 and 64, p. 116, p. 238 and p. 388 respectively.

⁵ *United Nations, Treaty Series*, vol. 78, p. 277.

thirdly, the rules for the protection of the independence of States — a treaty on the lines of the eighteenth century agreements for the partition of Poland would now constitute a violation of a peremptory norm of international law. Those norms had certain factors in common. In the first place, they were norms of general international law acknowledged by the international community as a whole, that was to say they were based on the legal conscience of the whole of mankind. In the second place, they were in a sense the exception rather than the rule, with the consequence that a State which invoked a norm of *jus cogens* must establish the norm's existence and demonstrate that the norm invoked was recognized by the international community at large as a peremptory norm of international law.

40. The problem then arose of the method whereby it would be possible to determine whether a norm of *jus cogens* existed as such. His delegation considered that, in case of disagreement, that task could only be performed by an objective authority. It was essential that the convention should make provision for procedure to ascertain the existence of a norm of *jus cogens* and to settle any disputes that might arise on that issue. The existence of such a procedure was essential in order to give the norms of law the necessary degree of certainty. For those reasons, his delegation urged the Conference to adopt both article 50 and article 62 *bis*.

41. Mr. TALALAEV (Union of Soviet Socialist republics) said he had not found the objections to article 50 very convincing. The question whether a particular rule constituted a peremptory norm was perhaps not always absolutely clear, but in practice it was always possible to determine which norms were peremptory. All delegations agreed that there did exist rules of *jus cogens* and specific examples of such rules had been given during the discussion. In his delegation's view the peremptory norms of international law were, above all, the fundamental principles of contemporary international law. In particular, all inhuman and similar unequal treaties which had been concluded in violation of the principle of the sovereign equality of States came under article 50. Unequal treaties and other treaties which violated that basic principle were illegal.

42. Article 50 recognized the existence of rules of international legality which were acknowledged by the whole community of States irrespective of their political or social systems. Those rules were equally binding upon all States and were criteria of international legality. That being so, article 50 was fully supported by his delegation.

43. Mr. RAMANI (Malaysia) said that, at the 56th meeting of the Committee of the Whole, his delegation had expressed reservations over the extremely ambiguous and imprecise language used in article 50 and its equally ineffective content. It had hoped that the text would have been improved but, unfortunately, the new text provided no assistance in determining what constituted a peremptory norm and what such a norm involved.

44. Apart from the claim to invalidity made by one of the parties to a treaty on the basis of article 50, another

more disturbing situation could arise. After a treaty had been properly negotiated and concluded by two States within the realities of their mutual relations, a third State which was a stranger to the treaty could, on the basis of article 50, choose to disregard the rights and obligations created by the treaty as between the parties. Such a situation was obviously unacceptable.

45. It had been suggested by a number of speakers that the provisions of the United Nations Charter contained some peremptory norms of international behaviour. The recent history of international relations, however, bristled with problems that had arisen precisely because of the disregard of such norms by some States, whereas other States claimed that they had in fact conformed with the norms in question. Article 50 would not help in any way to solve such problems: it would merely open another door to claims of invalidity of treaties, not only by the parties but also by others.

46. For those reasons, although his delegation favoured the principle of the recognition of *jus cogens*, it was unable to go the full length to which the article inevitably led. It would therefore be unable to vote in favour of article 50.

47. Mr. ESCHAUZIER (Netherlands) said that, although his delegation would vote for article 50, he was bound to place on record the fact that he shared in large measure the concern expressed by other delegations regarding the lack of clarity of the concept of *jus cogens* and the possibility of conflicting interpretations which could arise as a result. It was for that reason that, as stated at the first session, the Netherlands delegation attached particular importance to the procedure for invalidation on grounds of a violation of a rule of *jus cogens*. The adoption of a satisfactory procedure for the settlement of disputes, which meant particularly article 62 *bis*, was thus very relevant to article 50.

48. Mr. TYURIN (Byelorussian Soviet Socialist Republic) said that it was a characteristic of all times that changes in contemporary life led to changes in international law. The most important aims of contemporary international law were to consolidate world peace and security and to guarantee the freedom and independence of peoples, and it was those aims that had led to the emergence of the rules and principles of *jus cogens*, which were generally recognized and from which States could not depart in their bilateral or multilateral treaty relations. Among those important new principles were the prohibition of wars of aggression, the prohibition of the threat and use of force, the principle that disputes must be settled only by peaceful means and the principle of national self-determination. In addition to the establishment of the new rules, such long-recognized principles of international law as respect for State sovereignty, non-interference in the internal affairs of States, equal rights of States and conscientious observance of international commitments were being further developed and consolidated.

49. Article 50 was designed to ensure that treaties would not be used as a cover for actions contrary to the basic tenets of international law. Although the

principle of strict observance of international obligations must be upheld, it must be realized that not all treaties were supported by international law. To be valid, they had to comply with the letter and spirit of the United Nations Charter, Article 103 of which stated: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The clear provisions of that article of the Charter demonstrated the existence of principles of *jus cogens*.

50. There was no need to define the rules of *jus cogens* or to enumerate them in the present convention. The convention was intended to codify the law of treaties, not the rules of *jus cogens*. Article 50 dealt satisfactorily with the only problem which was relevant by stating the prohibition of any departure from the rules of *jus cogens*.

51. Mr. REDONDO-GOMEZ (Costa Rica) said that article 50 gave a satisfactory solution to the old dispute regarding the primacy of positive law over international morality or *vice-versa*.

52. It safeguarded the principle of security in legal relations by making a treaty applicable in the first instance; at the same time, it provided for the possibility that it might give way to a higher principle. Other delegations had stated fully and adequately the arguments in favour of article 50 and there was no need for him to reiterate them. He only wished to stress that article 50 was in keeping with a century-old tradition in his country, according to which the legal order — both internal and international — was based on higher moral principles.

53. Mr. ALVAREZ (Uruguay) said that, in the Committee of the Whole, his delegation had pointed out that the meaning and scope of article 50 as drafted by the International Law Commission were simple and that the article "would have relatively limited effects"; it had gone on to say that "the international community recognized certain principles which chimed with its essential interests and its fundamental moral ideas" and that "it was not enough to condemn the violation of those principles; it was necessary to lay down the preventive sanction of absolute nullity" of the treaty which constituted the "preparatory act" of that violation. At the same time, his delegation had stressed that it was important not to exaggerate the scope of the principle "either in a positive direction, by making of it a mystique that would breathe fresh life into international law, or in a negative direction, by seeing in it an element of the destruction of treaties and of anarchy."⁶

54. In his delegation's view, the amendments submitted at the first session by Romania and the USSR (A/CONF.39/C.1/L.258/Corr.1), by the United States (A/CONF.39/C.1/L.302) and by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) had all proved useful to the Drafting Committee and had

⁶ See 53rd meeting of the Committee of the Whole, para. 48.

enabled it to improve the text of article 50 to a point which it would be very difficult to surpass. For those reasons, his delegation would support article 50 as it now stood.

55. Mr. DENIS (Belgium) said that his delegation would welcome the introduction into international treaty relations of an ethical principle such as that embodied in article 50, but it found the text difficult to accept even with the improvements made by the Committee of the Whole.

56. The purpose of the codification of the law of treaties was to provide stability and security in treaty relations, but unfortunately article 50 seriously jeopardized that security. Wherever the convention made an exception to the *pacta sunt servanda* rule, it had done so in clear, precise and detailed terms. Article 50 also constituted an exception to the *pacta sunt servanda* rule but, in that case, no such precaution had been taken because it had proved impossible to define the concept of *jus cogens*. The main reason was that, as had been pointed out by Professor Tunkin at the Lagonissi Conference on the subject in 1966, the concept was a new one.⁷ It was in fact so new that the discussion on article 50 in the Committee of the Whole had provided no information of any certainty about the content of the rule or how it was to be applied in practice.

57. The concept of "public order" had been successfully applied in municipal law because municipal law constituted an organized legal order. The international legal order, however, was as yet unorganized and to incorporate the concept of *jus cogens* into it would therefore be premature. It would even be dangerous because of the possibility of abuse if the article were applied in situations outside the scope of international law. For those reasons his delegation had finally come to the conclusion that it must vote against article 50.

58. Mr. DIOP (Senegal) said that the text of the article had been substantially improved. There had been a large majority in favour of article 50 in the Committee of the Whole and the present discussion had shown that there was now overwhelming support for it. Nevertheless, his delegation still entertained some misgivings, because the discussion had shown that there remained differences of view with regard to the character of peremptory norms, norms which it had not been found possible either to define or to enumerate. His delegation could not be satisfied with the mere statement of the rule, if the meaning and content of the rule were to remain in doubt. Its concern could only be allayed if effective safeguards, and particularly procedural safeguards, were included in the convention. Article 62 was not enough: article 62 *bis* must also be included for the reasons stated by his delegation at the 43rd and 96th meetings of the Committee of the Whole.

59. His delegation's final attitude to article 50 would thus depend on the fate of article 62 *bis*. Since that

article had not yet come before the Conference, his delegation reserved its position and would therefore not be able to vote in favour of article 50. It would abstain from voting both on that article and on article 61, just as it had done on paragraph 5 of article 41, in the hope that the principles contained in article 62 *bis*, which was a necessary complement to article 62, would finally be adopted by the Conference.

60. He wished to place on record that the Government of Senegal made its acceptance of Part V of the convention conditional upon the inclusion of adequate machinery, with sufficient safeguards, for the settlement of disputes.

61. Mr. EL-BACCOUCH (Libya) said that his delegation endorsed the idea contained in article 50, which constituted a step forward in the codification of international law.

62. It was generally recognized, both by jurists and by States, that there existed a number of fundamental norms of international law from which no derogation was permitted and on which the structure of international society was based. Although his delegation would have preferred a clearer wording for the article and would have favoured the use of the term "public order" instead of "*jus cogens*", it would nevertheless vote in favour of the article, on the understanding that the terms "*jus cogens*" and "public order" were interchangeable.

63. His delegation construed the expression "a norm accepted and recognized by the international community of States as a whole" in a liberal manner. Actual unanimity on that issue was not essential; it was sufficient that a legal norm should be upheld by the overwhelming majority of States for it to have the character of *jus cogens*. On that understanding, his delegation would vote in favour of article 50 as submitted to the Conference.

64. Mr. VEROSTA (Austria) said that, in the vote on article 50 at the first session, his delegation had abstained. The formulation of the article had now been greatly improved, however, although a few points still required clarification and his delegation would accordingly vote for article 50 on the understanding that some necessary procedural machinery for the settlement of questions raised by the article would be set up. His delegation had been encouraged in that connexion by the evident support for article 62 *bis*.

65. The PRESIDENT invited the Conference to vote on article 50.

At the request of the representative of France, the vote was taken by roll-call.

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

In favour: Morocco, Nepal, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Republic of Vietnam, Romania, Saudi Arabia, Sierra Leone, Singapore, 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,

⁷ Conference on International Law, Lagonissi (Greece), *Papers and Proceedings: II, The Concept of Jus Cogens in International Law* (Geneva, Carnegie Endowment for International Peace), p. 87.

United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, 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, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libya, Madagascar, Mauritius, Mexico, Mongolia.

Against: Switzerland, Turkey, Australia, Belgium, France, Liechtenstein, Luxembourg, Monaco.

Abstaining: New Zealand, Norway, Portugal, Senegal, South Africa, Tunisia, United Kingdom of Great Britain and Northern Ireland, Gabon, Ireland, Japan, Malaysia, Malta.

Article 50 was adopted by 87 votes to 8, with 12 abstentions.

66. Mr. HAYES (Ireland) said that his delegation had abstained in the vote on article 50 not because it opposed the principle of *jus cogens* but because neither the International Law Commission nor the Conference had yet succeeded in devising a definition of *jus cogens* which would clearly identify at any given time the principles it comprised. It was obvious that there was no general agreement among delegations as to which principles comprised the total body of *jus cogens* at present and that the spontaneous growth of any such agreement in the future was unlikely as the content of *jus cogens* would clearly be subject to variations from time to time. The principle embodied in article 50 would prove unworkable in practice and would constitute a threat to the stability of treaty relationships unless associated with some independent and authoritative means of deciding whether a principle invoked by a party as *jus cogens* was in fact a peremptory norm.

67. His delegation considered the procedures set out in articles 62 and 62 *bis* adequate and if those articles were accepted, his delegation could support article 50. Pending acceptance of those articles, however, it had been compelled to abstain on article 50.

68. Mr. TSURUOKA (Japan) said that, as his delegation had stated at the 55th meeting of the Committee of the Whole, it believed it was natural for the community of nations to feel the need for peremptory norms of international law and it was therefore sound to establish the principle of *jus cogens*. The question was, what were peremptory norms of international law and who was to determine which norms were peremptory and were to be applied to a particular treaty while ensuring its consistent and universal application. Those questions were primarily of a legal nature and could not be left to be settled through the means to be established on an *ad hoc* basis between the parties to the dispute. Article 50, while allowing for subsequent modification, did not specify what the existing rules of *jus cogens* were and that was why his delegation had submitted a

proposal (A/CONF.39/C.1/L.339) to provide for the settlement by the International Court of Justice of disputes relating to a claim under article 50 or article 61. Although that proposal had not been accepted, his delegation remained convinced that adoption of the concept of *jus cogens* should be linked with an assurance of adjudication by the highest legal organ of the community of nations and it was for that reason that it had been unable to vote for article 50.

69. He wished to place on record his delegation's position on article 50, which was that the parties to the convention on the law of treaties should be guided in the future by wisdom in the general application of the article to specific cases; in particular, they should develop sound State practice maintaining consistency and objectivity in applying strictly and scrupulously the requirements of a peremptory norm of general international law, that was to say "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".

70. Mr. SINHA (Nepal) said his delegation was highly gratified that article 50, which embodied one of the most fundamental provisions in the whole convention, had been adopted by a substantial majority. He would nevertheless have liked to see the words "at the time of its conclusion" omitted, since they made the article slightly less definite, and a reference included in the article to particular uncontested norms of *jus cogens*, such as the renunciation of war and the suppression of slavery and piracy. A treaty violating the United Nations Charter or stipulating the practice of *apartheid* or racial discrimination would also be contrary to *jus cogens*.

Statement by the Chairman of the Drafting Committee on articles 51-61

71. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 51 to 61 constituted Section 3 of Part V of the convention.

72. Two amendments to the title of article 51 had been referred to the Drafting Committee by the Committee of the Whole at the first session. One, by the Republic of Viet-Nam (A/CONF.39/C.1/L.222/Rev.1) proposed that the title be amended to read "Termination of a treaty or withdrawal of the parties"; the other by Greece (A/CONF.39/C.1/L.314/Rev.1) was to change the title to "Termination of or withdrawal from a treaty by a party in virtue of the provisions of the treaty or by consent of the parties". The Drafting Committee took the view that the Greek amendment reflected the content of the article and therefore proposed that the title be amended to read "Termination of or withdrawal from a treaty under its provisions or by consent of the parties".

73. The introductory clause of article 51, as approved by the Committee of the Whole, read "A treaty may be terminated or a party may withdraw from a treaty". The Drafting Committee considered that the wording

should be brought into line with the beginning of article 39, paragraph 2, and had therefore redrafted the introductory clause to read "The termination of a treaty or the withdrawal of a party may take place". Another amendment to the text of article 51 concerned sub-paragraph (a) as approved by the Committee of the Whole which read "in conformity with the provisions of the treaty allowing such termination or withdrawal." In the Drafting Committee's view, the words "allowing such termination or withdrawal" were superfluous and it had therefore deleted them.

74. The Drafting Committee considered that the title of article 53 as proposed by the International Law Commission was not quite in line with the provisions of the article. It had therefore amended it to read "Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal".

75. In the Drafting Committee's opinion the title of article 54 should be brought into line with the title it had proposed for article 51 and it had therefore amended it to read: "Suspension of the operation of a treaty under its provisions or by consent of the parties".

76. It had deleted the words "allowing such suspension" in sub-paragraph (a) of article 54, in line with the similar amendment it had made to sub-paragraph (a) of article 51.

77. The title of article 55 in the International Law Commission's draft was "Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only". The Drafting Committee had decided to delete the word "temporary", since any suspension was by nature temporary, and to replace the word "consent" by the word "agreement", the word used in the text of the article.

78. The Drafting Committee had noted that the French version of article 26, on the application of successive treaties relating to the same subject-matter, referred to "traité antérieur" and "traité postérieur". That wording had not always been followed in article 56 as approved by the Committee of the Whole, where the words "précédent" and "subséquent" were used. The Drafting Committee had therefore made the necessary changes in both the title and the text of the article.

79. The Drafting Committee had considered that there was a lack of balance in the structure of paragraph 2 of article 59 as approved by the Committee of the Whole. While the introductory clause, read in conjunction with sub-paragraph (a), was clear enough, the same clause, when read in conjunction with sub-paragraph (b), did not clearly state the grounds on which a fundamental change of circumstances might not be invoked. The Committee had therefore decided to add the words "as a ground for terminating or withdrawing from a treaty" in the introductory clause of operative paragraph 2. The clause, as amended, covered both sub-paragraphs (a) and (b).

80. The title of article 60 as adopted by the International Law Commission read "Severance of diplomatic relations", and was in conformity with the text of the

article. The Committee of the Whole had subsequently inserted the words "or consular" after the word "diplomatic" in the text of the article and the Drafting Committee considered that the corresponding change should also be made in the title, as proposed by Hungary (A/CONF.39/C.1/L.334).

81. In article 61, the Drafting Committee had added the words "(*jus cogens*)" to the title, since they appeared in the title of article 50.

82. The text of article 61 remained unchanged except in the Spanish version; the Spanish-speaking members of the Drafting Committee had suggested that the words "será nulo" should be replaced by the words "se convertirá en nulo". The change had been made after consultation with other Spanish-speaking representatives.

Article 51⁸

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

- (a) In conformity with the provisions of the treaty; or
- (b) At any time by consent of all the parties after consultation with the other contracting States.

Article 51 was adopted by 105 votes to none.

Article 52⁸

Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 52 was adopted by 105 votes to none.

Article 53⁹

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

83. Mr. BRAZIL (Australia) said that sub-paragraph 1 (b) of article 53 read "a right of denunciation or withdrawal may be implied by the nature of the

⁸ For the discussion of articles 51 and 52 in the Committee of the Whole, see 58th and 81st meetings.

⁹ For the discussion of article 53 in the Committee of the Whole, see 58th, 59th and 81st meetings.

An amendment was submitted to the plenary Conference by Iran (A/CONF.39/L.35).

treaty". That particular element did not appear in the International Law Commission's text of the article; it had been originally inserted at the 59th meeting of the Committee of the Whole by the narrow vote of 26 to 25, with 37 abstentions. It had been proposed as an amendment (A/CONF.39/C.1/L.311) by the United Kingdom delegation, which had argued that a broadening of the availability of implied denunciation would lessen the likelihood of resort to the more drastic grounds of termination set forth in Part V. Having reflected on the matter, the Australian delegation doubted whether that in itself was a good reason for inserting a ground of termination in Part V. It now considered that the better approach was the one adopted in the original text, under which implied termination or denunciation depended upon the implied intention of the parties. The character of the treaty was only one of the elements to be taken into account. The Australian delegation therefore requested a separate vote on sub-paragraph 1 (b) of article 53.

84. Mr. DE LA GUARDIA (Argentina) said that he had consulted a number of Spanish-speaking delegations regarding the use of the word "*retirada*" in the Spanish version of articles 51 and 53. They had agreed that it would be better to say "*retiro*", as had been suggested by the representative of Ecuador at the 16th plenary meeting in connexion with article 40.

85. The PRESIDENT said that the Drafting Committee would take note of the Argentine representative's observation.

86. Mr. ALVAREZ TABIO (Cuba) said his delegation opposed the motion for a separate vote on sub-paragraph 1 (b) of article 53. The article struck a proper balance between the subjective and objective elements involved in setting a term to treaties which contained no provision regarding termination, denunciation or withdrawal. Article 53, considered as a whole, made a positive contribution to the progressive development of international law by curbing the abusive practice of perpetual treaties, the purpose of which was to impose a policy enabling the strong to dominate the weak. A treaty of indefinite duration could now be brought to an end by application of the *rebus sic stantibus* clause implicit in all such treaties. History showed how circumstances could change fundamentally in a comparatively short period of time. Again, the right to withdraw from a treaty was a factual matter which was necessarily governed by the circumstances of each particular case, especially by reference to the character of the treaty.

87. At the first session, the Committee of the Whole had considered an amendment submitted by Spain, Venezuela and Colombia (A/CONF.39/C.1/L.307 and Add.1 and 2), which provided that "when a treaty contains no provision regarding termination, denunciation or withdrawal, any party may denounce it or withdraw from it unless the intention of the parties to exclude the possibility of denunciation or withdrawal appears from the nature of the treaty and the circumstances of its conclusion". It had decided instead in favour of a United Kingdom amendment (A/CONF.39/C.1/L.311)

under the terms of which, subject to reasonable notice of intent, the right of denunciation or withdrawal might be implied from the treaty. The treaties in question were by their very nature temporary. Neither the intention of the parties nor the *pacta sunt servanda* rule could affect the real position, and it was illogical and unnatural to deny the temporary character of certain types of treaties. If sub-paragraph 1 (b) were deleted, the right of denunciation or withdrawal would have to be inferred from a presumption based on circumstances which were not defined, which might include the nature of the treaty. If it was accepted that a presumed intention to terminate the treaty could be inferred from its nature, why not simply admit that some treaties were by nature temporary and that consequently the presumed intention of the parties to accept denunciation or withdrawal could be inferred from their temporary character?

88. He would remind the Conference that a separate vote on sub-paragraph 1 (b) had been requested at the 81st meeting of the Committee of the Whole. The sub-paragraph had then been adopted by 56 votes to 10, with 13 abstentions, and the article as a whole by 73 votes to 2, with 4 abstentions. The Cuban delegation therefore opposed the motion for a separate vote on sub-paragraph 1 of article 53 and requested that the motion be put to the vote.

The meeting rose at 6.20 p.m.

TWENTY-FIRST PLENARY MEETING

Tuesday, 13 May 1969, at 10.50 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 53 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal) (continued)

1. The PRESIDENT invited the Conference to continue its discussion of article 53. The representative of Australia had asked for a separate vote on article 53, paragraph 1 (b) and the representative of Cuba had opposed that request.

2. Mr. BRAZIL (Australia) said that, in his delegation's view, a separate vote on article 53, paragraph 1(b) would be reasonable; but since it was apparent that the majority of representatives at the Conference wished the sub-paragraph to be retained, the Australian delegation would not press for a separate vote on it so as not to hold up the Conference's work.