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Twenty-second plenary meeting

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ventions which protected human rights. The Drafting Committee should nevertheless examine the wording of the amendment to see how it could be made more precise and explicit. The Nepalese delegation had therefore voted in favour of the principle expressed in the Swiss amendment.

79. He favoured the retention of the word " repudiation " in paragraph 3 (*a*).

80. Mr. DIOP (Senegal) said that his delegation's suggestion had been intended only for the Drafting Committee. In view of the explanations given by the President and the representative of Iraq, his delegation withdrew its proposal.

81. The PRESIDENT called for a vote on article 57 as a whole, as amended.

Article 57, as amended, was adopted by 88 votes to none, with 7 abstentions.[7]

The meeting rose at 1.10 p.m.

[7] For the adoption of a revised text of article 57, see 30th plenary meeting.

TWENTY-SECOND PLENARY MEETING

Tuesday, 13 May 1969, at 3.20 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)*

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

Article 58 [1]

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

1. Mr. ESCUDERO (Ecuador) said that impossibility of performance might also result from the non-existence of an object that was thought by the parties to exist at the time the treaty was concluded; the point might perhaps be covered by article 45.

2. International law drew a distinction between the various kinds of error which invalidated consent: unilateral error, reciprocal error, common error and error in law. The problem he proposed to deal with concerned the common error which States sometimes committed when they drew up a treaty defining their borders. They assumed that certain geographical features existed and had based the frontier line on them, only to find later that they did not in fact exist and that their joint assumption that they did exist had been based on inadequate or defective maps which failed to give the true geographical position. Errors of that kind had been committed in the past, for example, in the Treaty of 1772 between Russia and Austria, the Treaty of 1783 between Great Britain and the United States, and the Treaty of 1819 between the United States and Spain.

3. While an error in a treaty invalidated the treaty under article 45, impossibility of performance resulting from the non-existence of the object that was thought by the parties to exist at the time the treaty was entered into led to a completely different result, namely, termination of the treaty. That second case was not covered by article 58 although in his delegation's view it ought to be mentioned in the convention.

4. The doctrine that the impossibility of performing a treaty was a ground for terminating or withdrawing from it had been accepted in inter-American law at the meeting of the Inter-American Council of Jurists in 1927, and at the Sixth Pan-American Conference held at Havana in 1928. Article 14 of the Convention on Treaties [2] adopted at the Havana Conference clearly stated that the impossibility of performing a treaty was a ground for terminating it. There was every reason to believe that impossibility of performance resulting from the non-existence of the object of the treaty was covered by article 14 of that Convention. But no provision for that contingency was made in article 58 of the convention on the law of treaties.

5. While his delegation did not propose to submit an amendment to article 58, it wished to make it clear that the article was incomplete and that inter-American law would continue to be governed in the matter by article 14 of the Havana Convention on Treaties.

6. The PRESIDENT invited the Conference to vote on article 58.

Article 58 was adopted by 99 votes to none.

Article 59 [3]

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

[1] For the discussion of article 58 in the Committee of the Whole, see 62nd and 81st meetings.

[2] See *The International Conferences of American States 1889-1928* (New York, Oxford University Press, for Carnegie Endowment for International Peace, 1931), p. 418.

[3] For the discussion of article 59 in the Committee of the Whole, see 63rd, 64th, 65th and 81st meetings.

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) If the treaty establishes a boundary; or

(*b*) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

7. Mr. SHUKRI (Syria) said that his delegation fully endorsed the inclusion of the *rebus sic stantibus* principle in the law of treaties, and agreed with the International Law Commission as to the conditions laid down in paragraph 1 of article 59 for the application of that principle. It nevertheless had some difficulty with regard to paragraph 2 (*a*), which excepted from the *rebus sic stantibus* principle treaties establishing a boundary.

8. In making that exception the International Law Commission, in its commentary to article 59, had apparently relied on the assumption that both States concerned in the *Free Zones* case [4] appeared to have recognized that case as being outside the rule. But the practice of two or more States in such a context and with regard to such a delicate matter should not be cited as a reasonable justification for a *de lege ferenda* rule such as that in paragraph 2 (*a*). Moreover, the Permanent Court of International Justice, which had heard the *Free Zones* case, had declined to pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights, although it had actually been asked to do so by one of the parties. The Court had not held that the principle was not applicable to that category of treaties.

9. Another important point was that the arguments adduced in the *Free Zones* case, and the opinions of certain jurists to which the International Law Commission had referred, had preceded the birth of the United Nations Charter, which pronounced the right of peoples to self-determination as essential to the development of friendly relations among States, one of the purposes of the United Nations. That point had been raised at the first session by the representative of Afghanistan in a question to the Expert Consultant who had replied that self-determination was an independent principle which belonged to another branch of international law and which had its own conditions and problems.[5]

10. Such a clarification might have been satisfactory if the International Law Commission had not clearly stated in paragraph (11) of its commentary that the expression " treaty establishing a boundary " was a broader expression which would embrace treaties of cession as well as delimitation treaties. The Syrian delegation might have been prepared to accept that explanation if the idea of not applying *rebus sic stantibus* had been confined to delimitation treaties, but its misgivings were not allayed by the Expert Consultant's interpretation since the expression " establishing a boundary " had been drafted to cover treaties of cession. It could not be argued that the rights of the people of a ceded territory would not be decisively affected and that the peremptory norm of self-determination would be irrelevant at the present juncture.

11. His delegation felt strongly that illegal occupation or *de facto* possession of a territory remained illegal however long it lasted. Neither stability in international relations nor lasting peace could be expected if they were achieved at the expense of justice and the right of peoples to self-determination, nor could they be sought by maintaining colonial treaties under which territories had been ceded contrary to the wishes of the inhabitants. The *rebus sic stantibus* principle should therefore be made to apply to that category of treaty.

12. The Syrian delegation was consequently unable to accept the provisions of paragraph 2(*a*), because it did not wish to endorse the creation of a legal norm that contravened " *jus cogens* ".

13. Mr. WYZNER (Poland) said that the present wording of article 59 struck a proper balance. On the one hand it protected a party whose obligations under a treaty might become an undue burden as a result of a fundamental change of circumstances; on the other, it contained important elements preventing a possible abuse by parties to a treaty in invoking a fundamental change of circumstances in order to free themselves from their treaty obligations.

14. The International Law Commission had properly formulated article 59 as an objective rule of international law, while stressing its exceptional character. On the natural assumption that the rule implied the existence of good faith on the part of all the States involved, the Polish delegation considered that the present formulation of article 59 reconciled two conflicting elements, the dynamics of international life and the stability that was essential in every legal order. While it might be argued that stability was not an end in itself, its was nevertheless the most important factor in the case of treaties establishing boundaries. The problem of boundaries was closely connected with the most fundamental rights of States. It was for that reason that the Polish delegation maintained that no treaty establishing a boundary could be open to unilateral action on the ground of a fundamental change of circumstances.

15. History showed that the unfounded territorial claims of aggressor States had often had disastrous results, affecting not only the States directly concerned but a number of others as well. Poland, whose experience in that respect had been particularly bitter, strongly supported the exclusion of treaties establishing boundaries from the general application of the rule embodied

[4] *P.C.I.J.*, Series A/B, No. 46.

[5] See Committee of the Whole, 64th meeting, para. 28, and 65th meeting, para. 31. See also para. 52 below.

in article 59. It was convinced that the exception in paragraph 2(*a*) was essential to the maintenance of international peace and security, as provided for in the United Nations Charter. The provision was merely the direct consequence, in the field of the law of treaties, of the rule embodied in Article 2 of the Charter, which stressed the obligation to respect the territorial integrity of States. It left no room for any legal justification of territorial claims based on a fundamental change of circumstances, which might be raised by a potential aggressor.

16. Some delegations had expressed doubts with regard to unequal colonial treaties or treaties imposed by an aggressor State. The Polish delegation considered such treaties to be void *ab initio,* since they conflicted with norms of *jus cogens* and therefore did not fall under the provisions of article 59 which dealt with valid treaties only.

17. On the question of the relationship between article 59 and the principle of self-determination, his delegation shared the view expressed by the Expert Consultant at the 65th meeting of the Committee of the Whole.

18. The Polish delegation would therefore vote in favour of article 59 as approved by an overwhelming majority in the Committee of the Whole.

19. Mr. TABIBI (Afghanistan) said that his delegation supported the basic purpose of article 59 which was to recognize *rebus sic stantibus* as a cardinal principle of international law. The inclusion of that principle in article 59 strengthened the *pacta sunt servanda* rule and provided a means of terminating treaties which became too onerous to apply or hampered relations between States. However, the *rebus sic stantibus* doctrine was considerably weakened by the exceptions stated in paragraph 2(*a*) which, if adopted, would constitute endorsement of a number of colonial and unequal treaties concluded in the past by error, fraud, corruption of a representative of a State or coercion against the State or its representative. Paragraph 2(*a*) would at the same time weaken the rule of *jus cogens*. It was a fact of history that, ever since the First World War, and particularly since the signing of the United Nations Charter, the international community had been moving towards the emancipation of peoples and recognition of the right of self-determination and away from colonial and unequal treaties imposed against the free will of nations. His delegation's misgivings regarding paragraph 2(*a*) should be understood in that context.

20. No distinction could be drawn between boundary treaties and treaties establishing territorial status. Most boundary treaties dealt not with a geometric line but with territories and peoples, and in some cases determined the fate of a whole country. Recognition of colonial and unequal treaties imposed against the free will of nations and in violation of the right of self-determination must surely be wrong, and should not be accepted merely for the sake of the stability of treaties. Stability, particularly of boundary treaties, must indeed be preserved, but only in the case of lawful treaties accepted by the parties concerned. True to its traditional policy of peace and friendship with all nations, Afghanistan yielded to none in its respect for boundaries which had been legally established and accepted. It was opposed, as a matter of principle, to all colonial and unequal treaties maintained in violation of the principle of self-determination. That was why his delegation hoped that the Conference might still agree on a formula which safeguarded the legally established boundaries of States and did not endorse those imposed by force and coercion.

21. With a view to clarifying the purpose and meaning of paragraph 2(*a*) of article 59 he would venture to ask the Expert Consultant once again to explain what would be the effect of paragraph 2(*a*) on the operation of the right of self-determination of peoples and nations and on the operation of the rules in articles 45 to 50 in Part V of the convention, when it became necessary to apply them to boundary treaties.

22. The Conference must not lay down rules which might be interpreted as endorsing colonial and unequal treaties, nor should it provide for exceptions that ran counter to the fundamental principles of international law.

23. Mr. BAYONA ORTIZ (Colombia) said that the inclusion in the convention on the law of treaties of an article endorsing the *rebus sic stantibus* doctrine represented one of the most important steps taken by the International Law Commission in its efforts to contribute to the codification and progressive development of international law; in formulating article 59, the Commission had dealt with one of the most controversial questions known to international jurists.

24. The Commission's commentaries to its article were often as valuable as the articles themselves, and the commentary to article 59 was a case in point. In paragraph (1), the Commission noted that modern jurists had accepted somewhat reluctantly the doctrine of *rebus sic stantibus,* adding significantly: " Most jurists, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked ". His delegation's attitude towards the recognition of the doctrine of *rebus sic stantibus* in article 59 was based on that commentary. The observance of treaty commitments constituted an undisputed basis for international peace and coexistence, and no exception to that lofty principle could be justified unless it were intended to remedy an anomalous or unjust situation brought about by a fundamental change in the circumstances underlying those commitments. It was a safety valve, only to be used in cases where the parties to the treaty had not agreed upon a method to reform treaty provisions which had become obsolete and burdensome.

25. Other limitations were necessary if the doctrine of *rebus sic stantibus* was not to become a means of diluting the very essence of the international legal order. Examination of article 59 made it quite clear that the International Law Commission had formulated the article in such careful terms as to compel opponents of the doctrine to accept it in the

form in which it was now presented. It was no longer the old formula of Gentili and his followers, but a new conception which delicately balanced the needs both of justice and of the rule of law. The new elements introduced by the Commission were the two important requirements set forth in sub-paragraphs (*a*) and (*b*) of paragraph 1 for enabling a fundamental change of circumstance to be invoked as a ground for terminating or withdrawing from a treaty, and the exceptions set forth in paragraph 2, particularly sub-paragraph (*a*), relating to treaties which established boundaries. The Commission had thus included the *rebus sic stantibus* principle, despite the fact that there were some who disagreed with it and despite the lgitimate concern expressed by others at the risks involved for the international community if the security of treaties were undermined through an improper use of the article.

26. His delegation therefore accepted article 59 as responding to the needs of a world that was experiencing profound transformations which could sometimes lead to unjust situations or make it impossible to carry out certain treaty commitments. It did so, however, on the basis of the International Law Commission's commentaries, which laid such emphasis on the exceptional and restricted character of the rule relating to fundamental change of circumstances.

27. Those considerations led him to a matter which was also dealt with in paragraph (1) of the commentary: the concern felt by most jurists regarding the risks which the application of the doctrine of *rebus sic stantibus* " presents in the absence of any general system of compulsory jurisdiction ". It was a question which arose also in connexion with the other articles of Part V, but in the case envisaged in article 59 it was much more serious, because of the magnitude of the problems which could derive from an allegation of a fundamental change in circumstances as a ground for terminating or withdrawing from a treaty. His delegation therefore fully understood the attitude of those delegations which, at the first session, had reserved their position on article 59 until they knew the fate of the articles dealing with the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

28. The Colombian delegation, which was one of the sponsors of the proposal for article 62 *bis*, would not at that stage go as far as to make its vote in favour of article 59 conditional upon the adoption of article 62 *bis*. It wished, however, to draw attention to the importance for international tranquillity of adequate procedures for the peaceful settlement of disputes in the wide realm of the law of treaties.

29. Mr. FLEISCHHAUER (Federal Republic of Germany) said that a convention on the law of treaties would be incomplete without a provision on fundamental change of circumstances. Article 59, as approved by the Committee of the Whole, satisfactorily circumscribed the scope of application of the *rebus sic stantibus* rule in a careful and narrow manner.

30. His delegation welcomed the negative form in which paragraph 1 stated the conditions under which a fundamental change of circumstances could be invoked. That form of drafting of the operative part of the article showed that the rule must be interpreted restrictively and that the termination of, the withdrawal from or the suspension of a treaty on the ground of fundamental change of circumstances was an exceptional case. It also followed from that presentation of the rule that the State which invoked the fundamental change of circumstances carried the burden of proof and must establish the existence of the conditions stated in paragraph 1.

31. It had been suggested that paragraph 1 contained too many ambiguous terms, that it was imprecise, difficult to apply and above all open to abuse. While sympathizing with those misgivings, he could not see how article 59 could be drafted without referring to notions that were open to divergent interpretations. It was precisely for that reason that his delegation regarded article 59 as one of the articles which needed to be balanced by an automatically available procedure for the settlement of disputes; if article 62 *bis* failed to be adopted in the final vote, the particular risks involved in article 59 would be one of the weightier factors in the decision which his delegation would have to take in regard to Part V as a whole.

32. It was his delegation's view that, if a treaty contained special provisions to deal with a possible change of circumstances, those provisions would override article 59 as regards changes which were covered by the particular arrangement between the parties. Article 59, although it reflected customary international law in the sense of Article 38(1)(*b*) of the Statute of the International Court of Justice, or even one of the general principles of law within the scope of Article 38(1)(*c*), did not constitute a rule of *jus cogens*. The debates of the International Law Commission, the comments by Governments and the discusssions in the Committee of the Whole at the first session on article 59, all clearly demonstrated that the rule embodied in it did not fulfil the particular conditions laid down in article 50 for the definition of a rule of *jus cogens*. Since article 59 did not constitute *jus cogens*, the possibility of special contingency provisions in particular treaties was always open.

33. Before leaving paragraph 1, he would like to draw attention to what two writers had described as a " flaw in drafting " in article 59. In recent publications on article 59, those writers had pointed out that the wording " a fundamental change of circumstances . . . which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless . . . " might lead to the conclusion, if read literally, that a change which had been foreseen could be so invoked.[6] That result was certainly not intended and it should be fairly easy to remedy the wording so as to make the real intention clear.

[6] Olivier Lissitzyn, " Treaties and Changed Circumstances *(rebus sic stantibus)* " in *American Journal of International Law*, vol. 61 (1967), pp. 895 *et seq.*, and Egon Schwelb, " Fundamental Change of Circumstances: Notes on Article 59 of the Draft Convention on the Law of Treaties ", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. XXIX, pp. 39 *et seq.*

34. With regard to paragraph 2, he noted that the International Law Commission had discussed a proposal to include in the list of exceptions from the *rebus sic stantibus* rule a reference to changes in government policies, but had rightly decided not to do so. It had recognized in paragraph (10) of its commentary that circumstances quite outside the treaty might bring the principle of fundamental change into operation " if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty ". In his delegation's view, a change in government policy could conceivably fall under that rule and to that extent constitute grounds for bringing article 59 into operation.

35. Paragraph 3 had been added to article 59 by the Committee of the Whole as a result of the adoption of amendments by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333). His delegation welcomed that addition. The suspension of a treaty did less damage to the treaty than its termination, and wherever it was possible for States to protect their interests in respect of a defective treaty by mere suspension, provision should be made for such a possibility. His delegation believed that where a State which was confronted with a fundamental change of circumstances within the meaning of article 59 availed itself of the option of paragraph 3 and went no further than to suspend the treaty, an obligation for renegotiation arose for the other party or parties to the treaty. That obligation flowed not only from the underlying reason of article 59, paragraph 3, but also from the obligation of good faith. If that point were borne in mind, it would make it easier for States to resort to suspension followed by renegotiation, rather than proceed direct to the termination of the treaty.

36. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the rule in article 59 reflected existing international practice. The reasons which fully justified the inclusion of that article had been discussed at great length at the first session in the Committee of the Whole, particularly at its 65th meeting. In view of the different views which had been expressed by writers with regard to the *rebus sic stantibus* clause, its inclusion in the convention on the law of treaties constituted a positive factor and the text of paragraph 2 of article 59 which was now before the Conference was a very satisfactory one indeed.

37. The question had been asked to what extent the rule in article 59 covered the question of unequal treaties, treaties imposed by force, and treaties conflicting with the principle of self-determination. Clearly, those treaties were null and void under articles 49 and 50 of Section 2. Article 59, however, was placed in Section 3, a section which applied to treaties concluded in normal circumstances. As his delegation had already stated in connexion with the discussion of article 50, it strongly supported all the articles in Section 2, the provisions of which declared null and void unequal treaties and other similar treaties. Article 59, however, related not to treaties that were null and void but to treaties which had been properly and lawfully concluded; those treaties were governed by the *pacta sunt servanda* rule. They could only be terminated or suspended under the provisions of Section 3.

38. Some delegations had expressed doubts regarding paragraph 2(*a*), which excluded from the rule in paragraph 1 those treaties which established boundaries. He would not repeat all the convincing arguments which had been adduced at the 65th meeting of the Committee of the Whole in support of that provision, but would merely mention that, in reply to a question by the Afghan representative, the Expert Consultant had pointed out that the question of illegal and unequal colonial boundary treaties was covered by other articles of the convention.[7] The intention of the International Law Commission had clearly been to safeguard the application of lawful treaties that established boundaries. In paragraph (11) of its commentary to article 59, the International Law Commission had explained its reasons for including paragraph 2(*a*) and had stated that it had " concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. "

39. At the first session, the provisions of paragraph 2(*a*) had been discussed very fully and his own delegation had pointed out that article 59, like all the other articles in Section 3 of Part V, referred to legally concluded treaties; illegal and unequal treaties were dealt with in Section 2.[8] The doubts which had been expressed by certain delegations were therefore unfounded and his delegation would vote in favour of article 59.

40. Mr. KABBAJ (Morocco) said that the *rebus sic stantibus* principle, once so controversial, was now unquestionably a part of existing general international law, and it was right that the International Law Commission should have included it in article 59. But the *rebus sic stantibus* principle formulated in article 59 should have been made to apply to all international treaties; the exception laid down in paragraph 2(*a*) was all the more incomprehensible because the provision had been drafted in a negative form, and the *rebus sic stantibus* principle had been surrounded by such rigid conditions that it might well be asked what possible danger could be feared.

41. He agreed with the representative of Afghanistan that that exception considerably weakened the principle, and that it would be better either to delete paragraph 2(*a*) altogether or at least to change the wording. To begin with, it was imprecise, and might be interpreted as covering not only boundary treaties concluded with full respect for the principles of free consent, the sovereign equality of States, and other peremptory norms of international law, but also treaties resulting from violence, conquest or other circumstances precluding the free consent of the State concerned. Such a situation was clearly unjust, and if perpetuated would lead to insecurity in international relations. Admittedly other

[7] See 65th meeting of the Committee of the Whole, para. 31.

[8] *Ibid.*, para. 34.

provisions, such as those in articles 49 and 50, gave grounds for regarding such treaties as null and void *ab initio,* but it would be more logical to make it clear in paragraph 2 (*a*).

42. Secondly, the meaning given by the International Law Commission to the expression "if the treaty establishes a boundary " was so broad that it might be regarded as including treaties concluded in a bygone age when some States had taken it upon themselves to dispose of territories that did not belong to them, and decide what was to become of them and who they were to belong to. The International Law Commission had stated, in paragraph (11) of its commentary, that the exception laid down in sub-paragraph 2 (*a*) embraced treaties of cession as well as delimitation treaties, but many treaties of cession belonged to the colonial era, and could no longer continue after the changes that had taken place in ideas on international relations. The Permanent Court of International Justice had never intended to exclude treaties establishing a boundary from the application of the *rebus sic stantibus* principle, as might be supposed from its decision in the *Free Zones* case. In particular, it did not appear that the Court had intended that unjust or unequal treaties imposed by force should continue to govern treaty relations when they conflicted with the principles of the Charter and the rules of modern international law.

43. Consequently, sub-paragraph 2 (*a*) should be reconsidered so as to dispel any misunderstanding over the question of inequitable treaties. The Moroccan delegation must express strong reservations regarding sub-paragraph 2 (*a*) in its present form, and would vote against it.

44. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said it was obvious that circumstances could so change as to change the conditions of application of a treaty; that was the force of the doctrine *rebus sic stantibus.* However, change of circumstances could not be invoked with respect to a treaty establishing a boundary; such treaties must be accepted as exceptions to the general rule when the *rebus sic stantibus* principle was applied. The necessity for that was a natural consequence of the vital importance of treaties establishing a boundary. That had been recognized by the International Law Commission in paragraph (11) of its commentary to article 59, where it was stated that such treaties " should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions ".

45. The purpose of the convention, as the " treaty on treaties ", must be to help to develop treaty relations between States through the conclusion of equitable and mutually beneficial treaties. The development of such treaties would strengthen peaceful co-operation between States and peaceful relations in the world. Obviously everything that would help to achieve that aim should be included in the convention. As the International Law Commission had pointed out, to exclude sub-paragraph 2 (*a*) would make the rule in the article a possible source of dangerous frictions instead of an instrument of peaceful change. No one could agree to that. The Byelorussian delegation understood that the reference in article 59 was to equal treaties legitimately concluded.

46. His delegation regarded sub-paragraph 2 (*a*) as being in conformity with the Conference's purpose of drawing up an international legal instrument that could help the development of mutually beneficial legal treaties between States, and consequently strongly supported the article as it stood.

47. The PRESIDENT invited the Conference to vote on article 59.

Article 59 was adopted by 93 votes to 3, with 9 abstentions.

48. Mr. HAYTA (Turkey) said that, although his delegation was not opposed to the inclusion of the *rebus sic stantibus* principle, he had voted against article 59 for the reasons given on earlier occasions by Turkey, in particular at the 64th meeting of the Committee of the Whole.

49. Mr. BILOA TANG (Cameroon) said that his delegation had originally had doubts concerning paragraph 2 (*a*), but had changed its views in the light of the decision by the Organization of African Unity to adopt the principle that the boundaries inherited from the colonial period could not be changed, and also of the explanation given by the Expert Consultant at the 65th meeting of the Committee of the Whole, where he had stated that the International Law Commission " had not intended in paragraph 2 (*a*) to give the impression that boundaries were immutable, but article 59 was not a basis for seeking the termination of a boundary treaty ".[9] His delegation had accordingly been able to vote for article 59.

50. Mr. TABIBI (Afghanistan) said that he had voted against article 59, not because he was opposed to the doctrine of *rebus sic stantibus,* which was a cardinal rule of international law, but because of the exception to the rule contained in paragraph 2 (*a*); that exception might be misunderstood as endorsing illegal and unequal treaties of the colonial type. However, the arguments put forward during the discussion at both sessions of the Conference, the statement by the Expert Consultant already referred to, and the discussions of the International Law Commission all made it clear that the exception in paragraph 2 (*a*) did not endorse illegal and unequal treaties contrary to the right of self-determination, and could not provide a pretext for the formulation of rules in other international conventions under study in other organs of the United Nations to protect colonial treaties. The discussions at the present meeting showed that, although the exception in paragraph 2 (*a*) related only to legal treaties, it had been introduced for political motives.

51. Since the Expert Consultant was not himself present to reply, he would ask for the explanation the Expert Consultant had given at the 65th meeting of the Committee of the Whole to be read out, so that it would form part of the record of the present meeting.

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

52. Mr. WATTLES (Deputy Executive Secretary) said that the passage referred to from the statement by Sir Humphrey Waldock at the 65th meeting of the Committee of the Whole read:

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

53. Mr. SHUKRI (Syria) said that his delegation had abstained from voting on article 59 because it was opposed to paragraph 2 (*a*), although Syria fully supported the rest of the article.

Article 60 [10]

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 60 was adopted by 103 votes to none.

Article 61 [11]

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

54. Mr. RODRIGUEZ (Chile) said that the purpose of his delegation's amendment (A/CONF.39/L.34/Corr.1) was to give greater precision and clarity to article 61. The first change proposed, to replace the words " any existing treaty " by the words " any treaty existing at that time ", was intended to make explicit what was already implied in article 61, that the rule would apply to treaties existing at the time when a new peremptory norm of general international law emerged.

55. The second change proposed was to replace the words " becomes void and terminates " by the words " may be objected to with a view to its termination ". The purpose of that change was to avoid using as synonymous the expressions " becomes void " and " terminates ". For Chile, and for some other countries, the two terms were not synonymous, since nullity did not always coincide with invalidation through some circumstance arising subsequent to the conclusion of the treaty. Some delegations were able to accept that a subsequent ground could render a treaty void, but that view presented difficulties for others. The purpose of his amendment was to solve the problem of the two different approaches by avoiding a reference to nullity and referring only to the termination of the treaty, which led in practice to the same result.

56. Also, the second change proposed by Chile was intended to emphasize that in the case covered by in article 61 treaties could be terminated only by virtue of a prior procedure arising from an objection made by an interested party. The situation was one where a treaty became void on a ground arising later in time than the conclusion of a treaty, which could give rise to uncertainty or disagreement, such as the emergence of a new peremptory norm of general international law. It was therefore better to emphasize that an objection was needed to ensure that the termination of the treaty was admitted and recognized.

57. Mr. PINTO (Ceylon) said that his delegation had pointed out at the 55th meeting of the Committee of the Whole that the main advantage of including provisions of *jus cogens* in the convention was to express that timeless moral concept for the first time as a legal principle. The subjects dealt with in article 50, 61 and 67 did not lend themselves to precise statement, but his delegation did not regard that as a vital consideration. Many of the practical difficulties foreseen by certain delegations would probably turn out to be more apparent than real, while other such difficulties were likely to be solved by the adoption of machinery for the settlement of disputes, such as that proposed in article 62 *bis*.

58. But although his delegation gave that group of articles its unreserved support, there was one aspect of them, especially of articles 61 and 67, on which it would have welcomed greater clarity. From the procedural point of view, it was not clear who might bring an action for the application of those articles. At the first session, his delegation had suggested that articles 50 and 61 were unlikely to have any relevance to the performance of a treaty as between the parties. For instance, if a number of States agreed to engage in the slave trade, to decimate the population of another State, or to intervene in some lesser way in the internal affairs of that State, they would carry out their obligations because they wanted to, not because they considered themselves bound by a treaty which the international community regarded as void. Other members of the international community, on the other hand, particularly the State or States which suffered as a result of the treaty, might have a legitimate interest in the application of articles 50 and 61.

59. Ceylon therefore considered that any State, or at least any State party to the convention, should have the right to impeach a treaty on the ground that it conflicted with articles 50 and 61, and to initiate procedures for securing observance of the obligations which articles 67 imposed on delinquent States. That right

[10] For the discussion of article 60 in the Committee of the Whole, see 65th and 81st meetings.

[11] For the discussion of article 61 in the Committee of the Whole, see 66th and 83rd meetings.

An amendment was submitted to the plenary Conference by Chile (A/CONF.39/L.34/Corr.1).

seemed to be logical in view of the fact that contravention of articles 50 and 61 had implications which went beyond the relationship of the parties *inter se,* and it might be wise to recognize that right explicitly, since otherwise protracted procedural wrangles were likely to beset any attempt to bring an action to apply the *jus cogens* articles before an international tribunal.

60. Mr. ALVAREZ TABIO (Cuba) said that he had not intended to speak on article 61, since he agreed with the International Law Commission that it was a logical corollary of the principle contained in article 50, but the Chilean amendment (A/CONF.39/L.34/Corr.1) would change the substance of the article, particularly with respect to the emergence of a new peremptory norm of general international law.

61. The Conference had accepted the principle that there were rules of international law that were binding on all States, and the logical consequence must be that the emergence of a new peremptory norm of general international law must invalidate any existing treaty conflicting with that norm. General recognition of the unlawful nature of some types of agreement must have an immediate effect on such agreements, both for formal reasons deriving from the principle of the hierarchy of rules, and for reasons of substance directly related to the new message of justice conveyed by the new peremptory norm of international law. Any such new peremptory norm that emerged was the expression of a new view of justice in conformity with the climate of opinion prevailing at any given moment in the international community. Consequently any existing treaty that conflicted with the new peremptory norm must become not only illegal but inadmissible on general legal principles. Not only would it conflict with the peremptory norm of international law that emerged subsequently, but it would become inherently unlawful and immoral.

62. That argument was of special importance in establishing the inter-temporal effects of the new peremptory norm. Clearly a rule of law could not have retroactive effects. No one questioned that laws had effect from the time of their entry into force, and ceased to have effect once they were repealed. But the problem arose in relation to treaties which, because their effects were continuing, came under the authority of successive peremptory norms of international law. If a new treaty came into force under the authority of a given legal system, but its effects had not been terminated when new peremptory norms emerged that substantially changed the legal system, the conflict that would arise if it should be decided not to apply the new peremptory norm would be a question not of non-retroactivity, but of the continuing authority of the old legal system that had been replaced.

63. If, the new peremptory norm were applied to a continuing treaty, obviously there would be no violation of the principle of non-retroactivity, even though the treaty had entered into force before the emergence of the peremptory norm. That was because the problem related to rules that affected the legitimacy of the treaty, in other words, rules that represented a view of justice radically opposed to that formerly accepted.

64. His delegation was therefore unable to support the Chilean amendment because it represented a basic denial of the invalidating effect of norms of *jus cogens* emerging subsequent to the entry into force of a treaty. An existing treaty that conflicted with a peremptory norm of international law would not merely terminate, it would become void and terminate.

65. Mr. BINDSCHEDLER (Switzerland) said that his delegation would vote against article 61 for the same reasons as had led it to vote against article 50. But article 61 contained additional defects in connexion with the introduction of the *jus cogens* system into international law, which had not been apparent in article 50.

66. His delegation had wished to ask the Expert Consultant five questions to which it was unable to find an answer. First, how did a new peremptory norm of general international law emerge? Secondly, was a peremptory norm engendered by custom, by a treaty, or by both? Thirdly, to become a peremptory norm, did a rule have to be accepted by all the States of the international community, or only by a majority of those States and, in the latter case, by what majority? Fourthly, must a new peremptory norm contain an express declaration concerning its peremptory character, or did that character follow from the content of the new norm? Fifthly, was a peremptory norm valid only for the parties to a treaty or for all States? The Swiss delegation believed that the former presumption was correct.

67. No answers had been given to those questions throughout the lengthy debates on article 61. The answers should have been contained in the draft convention itself, since it was to become a kind of constitution for the international community governing future legislative procedure. To introduce the notion of peremptory norms of international law without providing any definition of those norms was calculated to give rise to serious legal dangers.

68. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that article 61 was the logical counterpart to article 50 and both those substantive proposals should set out the principle of *jus cogens* precisely and categorically. Article 50 defined the meaning of *jus cogens* and article 61 described the inevitable effect of the existence of *jus cogens* rules. A treaty which conflicted with a peremptory norm was null and void *ab initio,* not merely voidable. The Chilean amendment (A/CONF.39/L.34/Corr.1), however, was an attempt to alter the categorical statement in the International Law Commission's draft of article 61, and would have the effect of weakening that clause, by introducing the much vaguer element of objection with a view to the termination of the treaty, instead of stating that the treaty was void, as laid down in article 50. The effect of the Chilean amendment would be to alter the very nature of article 61, by turning an objective and categorical statement into a procedural rule; that fundamental change was inadmissible, for procedural rules were set out in other articles of the convention. His delegation would therefore vote against the Chilean amendment.

69. Mr. DE LA GUARDIA (Argentina) said that his

delegation had no doubts whatsoever concerning the existence of the principle of *jus cogens* in international law and had therefore voted for article 50. It would also vote in favour of article 61, whatever its final text might be, although it shared the misgivings of other delegations concerning the content and number of rules of *jus cogens,* and the procedure by which they might emerge in the future and render existing treaties invalid. Argentina therefore considered that the Chilean amendment represented an important clarification of article 61, for every State must have an opportunity of invoking a new peremptory norm as a ground for the invalidation of a treaty.

70. The International Law Commission's text did not explain by what procedure a treaty became void automatically, and the incorporation of the Chilean amendment would lead more logically to the procedure set out in article 62.

71. Mr. DE CASTRO (Spain) said that the Chilean amendment would have the effect of introducing a substantive change, from the statement that a treaty conflicting with a peremptory norm was void to a provision of voidability. The act of objecting to a treaty would entail, first, the objection being made only by the party to whom the right of objection was available; secondly, since the right of objection was optional, it could be waived, that was to say the treaty could be confirmed expressly or tacitly; and thirdly, since the option was open to one party only, it could not be exercised by a third State.

72. The wording approved by the majority in the Committee of the Whole said that the treaty would be void; but the fact that a treaty was void did not mean that a request could not be made that it be declared void by declaratory action, which was not incompatible with the existence of invalidity *ipso jure*. The difference between the option to object to a treaty and the possibility of exercising the right of declaratory action was that in the latter case the action was not open to any party as a right which could be waived, that it could be exercised by a third party and further that if the validity of a treaty was referred to an international court or arbitral tribunal, the court or the arbitrators could *ex officio* declare invalid the provision of the treaty conflicting with a rule of *jus cogens*. If a treaty was really contrary to such peremptory norms as those relating to human rights, the prohibition of slavery or genocide, and even new peremptory norms, its invalidity was bound to be upheld by the international court or arbitral tribunal, because they could not regard as binding any provision which ran counter to the conscience of the international community.

73. The Chilean proposal to insert the words " at that time " after " existing " had at first sight seemed desirable, since it appeared to make clear that the rules of *jus cogens* were not applicable retroactively. But since the phrase referred to existing treaties, it was superfluous, because a treaty which no longer existed could not presumably be in conflict with any rule, since it had ceased to produce effects.

74. Mr. HARASZTI (Hungary) said that his delegation was opposed to the Chilean amendment. The Conference had already adopted article 50, under which no derogation was permitted from a peremptory norm of international law; it was self-evident that if a treaty which conflicted with a peremptory norm was void, a treaty would become void and would terminate if a new peremptory norm emerged during its existence. The International Law Commission's text was perfectly clear, but the Chilean amendment made it dependent on the will of one party whether an objection should be raised and, consequently, whether or not the treaty would be applied despite the emergence of a peremptory norm with which it conflicted. Such a provision would be contrary to the rule set out in article 50.

75. Mr. SMEJKAL (Czechoslovakia) said he endorsed the view expressed by the Hungarian representative.

76. Mr. BIKOUTHA (Congo, Brazzaville) said that the Chilean delegation's attempt to make a contribution to the progressive development of international law would not have the effect desired. Its amendment would vitiate the basic principle laid down in the International Law Commission's text, by stating that a treaty conflicting with a peremptory norm might be objected to at the will of one of the parties only, thus depriving article 61 of its mandatory character. Perhaps the Chilean delegation would reconsider its position and withdraw its amendment.

77. Mr. HUBERT (France) said that the arguments that his delegation had adduced against article 50 applied equally to article 61. In the latter case, however, his delegation found an additional cause for anxiety in the use of the word " emerges ". The dictionary definition of the French verb " *survenir* " implied something sudden and unexpected; such a term could not correctly be used to describe the necessarily gradual process of the formation of a peremptory norm; which needed some time to mature.

78. Mr. SEATON (United Republic of Tanzania) said that since the Conference, in adopting article 50, had agreed that a treaty conflicting with a peremptory norm became void, he could not understand why an existing treaty which was in conflict with a new peremptory norm might merely be objected to with a view to its termination. The Chilean amendment weakened, if it did not actually nullify, article 50, and the Tanzanian delegation could not support it.

79. Mr. RODRIGUEZ (Chile) said that his delegation had voted for article 50 in the belief that that provision established an outstandingly important principle of public international law. The purpose of its amendment to article 61 was to clarify the terms of the clause and to avoid disputes concerning the application of the article. The amendment was in no way intended to circumscribe or restrict the principle of *jus cogens*. Since, however, a number of delegations appeared to have misunderstood the tenor of the amendment and considered that it might have effects contrary to those contemplated by its sponsor, his delegation would withdraw it.

80. The PRESIDENT invited the Conference to vote on article 61.

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

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

In favour: Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, Ghana, Guatemala, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Lesatho, Liberia, Libya, Madagascar, Mauritius, Mexico, Mongolia, Morocco, Nepal, Netherlands, Nigeria, Pakistan, Panama, Peru, Philippines, Poland, Republic of Korea, Romania, Saudi Arabia, Sierra Leone, Singapore, Spain, Sudan, Sweden, Syria, Thailand, Trinidad and Tobago, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark.

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

Abstaining: Gabon, Greece, Ireland, Japan, Malaysia, Malta, New Zealand, Norway, Portugal, Republic of Viet-Nam, Senegal, South Africa, United Kingdom of Great Britain and Northern Ireland, Austria, Chile, Dominican Republic.

Article 61 was adopted by 84 votes to 8, with 16 abstentions.

81. The PRESIDENT suggested that the Conference should defer its discussion of articles 62 and 62 *bis*, annex I and articles 63 and 64, in order to allow time for negotiations with a view to reaching a compromise solution.

It was so agreed.

The meeting rose at 5.55 p.m.

TWENTY-THIRD PLENARY MEETING

Wednesday, 14 May 1969, at 10.55 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) *(resumed from the 19th plenary meeting)*

1. Mr. DADZIE (Ghana) said he had been absent when the vote was taken on article 49 at the 19th plenary meeting, and his delegation had therefore been unable to indicate that it supported the article.

Article 61 (Emergence of a new peremptory norm of general international law) *(jus cogens) (resumed from the previous meeting)*

2. Mrs. ADAMSEN (Denmark), explaining her delegation's votes on article 61 and other articles of Part V of the draft convention dealing with the invalidity, termination and suspension of the operation of a treaty, said that from the outset the Danish delegation had hesitated about article 61 and other provisions of Part V. In the Committee of the Whole, it had abstained in the voting on several of those provisions, and had even voted against one of them, being of the opinion that those articles represented a considerable danger for the stability and security of treaty relations between States. But the danger would be sufficiently eliminated by the establishment of the kind of automatic procedure now provided in article 62 *bis* for the settlement of disputes arising from the application of Part V. Consequently, in the plenary Conference, her delegation had been able to vote not only in favour of article 61 but also in favour of the other articles of Part V, with the expectation that article 62 *bis* would be adopted by the Conference, either in its present form or, provided it laid down an equal satisfactory guarantee for the security and stability of treaty relations, in a different form.

3. It therefore followed that the position which Denmark would ultimately adopt with regard to the convention as a whole would depend on the results achieved by the Conference in respect of the procedure for the settlement of disputes.

4. Mr. HAYES (Ireland), explaining his delegation's vote on article 61, said it had abstained for the reasons it had given after the vote on article 50.

5. Mr. RODRIGUEZ (Chile) said that his delegation had abstained from voting on article 61, not because of the ideas which the article contained, but because it was not completely satisfied with the drafting.

Statement by the Chairman of the Drafting Committee on articles 65-69, 69 bis *and 70*

6. Mr. YASSEEN, Chairman of the Drafting Committee, introducing the texts of articles 65-69, 69 *bis* and 70, said that the drafting had been reviewed by the Drafting Committee, which had made very few changes.

7. In article 65, it had noted that, in paragraph 3, fraud, coercion and the act of corruption, which were the subjects of articles 46 to 49, were arranged in a different order from that in which they occurred in those four