

# **United Nations Conference on the Law of Treaties**

Vienna, Austria  
Second session  
9 April – 22 May 1969

Document:-  
**A/CONF.39/SR.23**

## **Twenty-third plenary meeting**

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

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, Liechtenstein, 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

articles. The Drafting Committee had therefore rearranged the terms in the order in which they occurred in articles 46 to 49, so that the concluding part of the sentence now read: “. . . paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable”.

8. With regard to article 67, which the International Law Commission had entitled “Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law”, the Drafting Committee had decided that the words “or termination” in the title were superfluous, since under article 61, if a new peremptory norm of general international law emerged, any existing treaty in conflict with that norm “becomes void and terminates”. That provision was also expressly reflected in article 67, paragraph 2. The Drafting Committee had therefore deleted the words “or termination” from the title of article 67.

9. In article 69, it had added the case of outbreak of hostilities to the cases of State succession and State responsibility, in accordance with the decision taken by the Committee of the Whole at its 76th meeting.<sup>1</sup>

10. Article 69 *bis* was a new provision, for which the Drafting Committee proposed the title: “Diplomatic and consular relations and the conclusion of treaties.”

#### *Article 65*<sup>2</sup>

##### *Consequences of the invalidity of a treaty*

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

11. Mr. ALVAREZ TABIO (Cuba) said that the Cuban delegation was not happy about the first sentence of article 65, paragraph 1. The sentence reproduced a rule which had been stated in article 39 of the International Law Commission's draft and had had a clear and precise meaning in the context of that article. There, the words “the invalidity of which is established under the present articles” had indicated that the grounds for invalidity listed in the substantive provisions of Part V were exhaustive. The present text of article 65 was ambiguous and might give the impression

<sup>1</sup> Para. 30.

<sup>2</sup> For the discussion of article 65 in the Committee of the Whole, see 74th and 83rd meetings.

that there was no such thing as invalidity *ab initio* but that invalidity must be established by the procedures laid down in the convention.

12. The Cuban delegation considered it necessary to state that, as far as it was concerned, the phrase “the invalidity of which is established under the present convention” had the same meaning as the corresponding provision in article 39, namely that the invalidity of a treaty could be established only on the grounds laid down in Part V. It would not, however, request a separate vote on that point.

*Article 65 was adopted by 95 votes to 1, with 1 abstention.*

13. Mr. RUEGGER (Switzerland), explaining his delegation's abstention, reminded the Conference that, in the Committee of the Whole, the Swiss delegation had submitted an amendment (A/CONF.39/C.1/L.358) to paragraph 1, the intention of which had been to make it clear that what was involved was not invalidity *ipso facto*, and that the invalidity must be established through an invalidation.

14. The new text submitted by the Drafting Committee was certainly a great improvement on the initial text, but, for the reasons of principle given at the first session, his delegation had been obliged to abstain.

#### *Article 66*<sup>3</sup>

##### *Consequences of the termination of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) Releases the parties from any obligation further to perform the treaty;

(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

*Article 66 was adopted by 101 votes to none.*

#### *Article 67*<sup>4</sup>

##### *Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*

1. In the case of a treaty which is void under article 50 the parties shall:

(a) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 61, the termination of the treaty:

(a) Releases the parties from any obligation further to perform the treaty;

<sup>3</sup> For the discussion of article 66 in the Committee of the Whole, see 75th, 86th and 99th meetings.

<sup>4</sup> For the discussion of article 67 in the Committee of the Whole, see 75th and 82nd meetings.

(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

*Article 67 was adopted by 87 votes to 5, with 12 abstentions.*

15. Mr. SINCLAIR (United Kingdom) said that his delegation had abstained in the voting on article 67 because paragraph 1 (a) dealt with questions of State responsibility which should be considered as coming within the scope of article 69.

16. Another point arose on paragraph 1 (a) : it provided that “ in the case of a treaty which is void under article 50 the parties shall: (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law ”. But it might happen that a treaty which was void by virtue of article 50 contained other provisions that did not conflict with such a peremptory norm of general international law. As a result of the decision taken by the Conference on article 41, no separability was permitted where the treaty was void by virtue of article 50. Nevertheless, it was the understanding of the United Kingdom delegation that, with respect to those provisions of such a treaty which did not conflict with a peremptory norm of general international law, the provisions of article 65, rather than those of article 67, would apply.

17. Mr. GROEPPER (Federal Republic of Germany) said that his delegation had abstained in the voting for the same reasons as those given by the representative of the United Kingdom.

#### *Article 68*<sup>5</sup>

##### *Consequences of the suspension of the operation of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

*Article 68 was adopted by 102 votes to 1, with 1 abstention.*

#### *Article 69*<sup>6</sup>

##### *Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a

succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

*Article 69 was adopted by 100 votes to none.*

#### *Article 69 bis*<sup>7</sup>

##### *Diplomatic and consular relations and the conclusion of treaties*

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

*Article 69 bis was adopted by 88 votes to 2, with 10 abstentions.*

18. Mr. SHUKRI (Syria) said that his delegation had abstained from the voting on article 69 *bis* because it had some misgivings about the words “ or absence ”, which might, in one case at least, inject the highly political question of recognition into the legal question of concluding treaties.

#### *Article 70*<sup>8</sup>

##### *Case of an aggressor State*

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

19. Mr. TSURUOKA (Japan) said that he wished to place on record his delegation's position. At the first session of the Conference his delegation had submitted an amendment in the Committee of the Whole proposing that article 70 should be modified to read “ The present Convention is without prejudice to any obligation in relation to a treaty which may arise for a State in consequence of a binding decision taken by the Security Council of the United Nations ” (A/CONF.39/C.1/L.366). His delegation understood that the purport of article 70 was the same as that of the Japanese amendment, but in its present form the wording of article 70 was too ambiguous for his delegation to be able to support it. It would therefore abstain.

*Article 70 was adopted by 100 votes to none, with 4 abstentions.*

20. Mr. WYZNER (Poland) said that his delegation had voted for article 70 because it believed that an aggressor State must not be able, through the law of treaties, to gain any profit from the aggression it had committed. That was why the exception provided for in article 70 deserved to be fully supported. The Polish delegation was satisfied with the present wording of article 70, which made it clear that all measures taken in conformity with the United Nations Charter, especially those envisaged by the Security Council, were

<sup>5</sup> For the discussion of article 68 in the Committee of the Whole, see 75th and 82nd meetings.

<sup>6</sup> For the discussion of article 69 in the Committee of the Whole, see 76th and 82nd meetings.

<sup>7</sup> For the discussion of article 69 *bis* in the Committee of the Whole, see 81st meeting.

<sup>8</sup> For the discussion of article 70 in the Committee of the Whole, see 76th and 82nd meetings.

exempted from the general application of the convention on the law of treaties. On the other hand, that exemption was rightly limited to the case of an aggressor State, for any aggression was an extremely grave crime. The rule in article 70 covered two kinds of treaties, those which might be imposed upon an aggressor State and those previously concluded by an aggressor State, which might be terminated, suspended or modified regardless of the will of the aggressor State.

21. Mr. GROEPPER (Federal Republic of Germany) said that his delegation had abstained in the vote on article 70 for the reasons it had given at the 76th meeting of the Committee of the Whole.

The meeting rose at 11.35 a.m.

## TWENTY-FOURTH PLENARY MEETING

*Wednesday, 14 May 1969, at 4.25 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)**

#### *Motion for immediate consideration of articles 62, 62 bis, 63 and 64*

1. Mr. SHUKRI (Syria) said that he was anxious to introduce a motion which he hoped would not cause any inconvenience to the President or to other delegations, for it was prompted solely by a desire to bring the Conference to a speedy and successful conclusion.

2. At the 22nd plenary meeting,<sup>1</sup> the President had suggested, and the Conference had agreed, that discussion of the crucial question of article 62 *bis* should be postponed in the hope that a compromise might be worked out to the satisfaction of all participants or to the overwhelming majority of them. The Syrian delegation had welcomed that decision. The Conference was deeply divided on article 62 *bis*, one side firmly believing in the automatic compulsory jurisdiction of a third party and the other convinced that, despite the praiseworthy underlying motives of compulsory jurisdiction, such a procedure should not at the present stage be imposed on States, which should be left to work out a settlement according to any agreed procedures, including arbitration and adjudication.

3. His delegation unfortunately did not feel optimistic about the prospects of a compromise, and time was running short. It therefore saw no reason to postpone the discussion any longer and formally moved that articles 62, 62 *bis*, 63 and 64 be discussed and voted on forthwith. That course would serve to dispel the tense atmosphere prevailing in the Conference and would

help it to adopt a convention which could be signed by as many States as possible.

4. Mr. KRISHNA RAO (India) said he supported the Syrian representative's motion. He would point out that the programme of meetings in the *Journal* for 14 May did not mention articles 71 to 75, although the Drafting Committee had been asked to submit its texts of these articles for the current meeting. Delegations were fully prepared to discuss articles 62 and 62 *bis*, annex I and articles 63 and 64.

5. Mr. YAPOBI (Ivory Coast) said he was surprised at the statements of the two previous speakers. The usual practice was to set aside articles which raised particular difficulties and to deal first with less controversial provisions, in order to allow time for negotiations with a view to reaching a compromise solution. The Syrian motion could only lead to a hasty vote on article 62 *bis*, which was absolutely vital to the convention, and he therefore opposed it.

6. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he agreed with the Indian representative that the Conference should follow the programme set out in the *Journal* for 14 May and begin at once to consider articles 62 and 62 *bis*. The question at issue was obviously that of compulsory jurisdiction. A large number of delegations opposed to the introduction of that notion in the convention had for long endeavoured to find a compromise solution, but the intransigent attitude of the other side had remained unchanged; indeed, one delegation seemed to be determined to prevent a satisfactory solution. The Conference must proceed to discuss the question and vote on it in the short time available.

7. Mr. ESCHAUZIER (Netherlands) said that his delegation had been involved in unofficial consultations with the preceding speakers and respected their motives, although it held a different opinion. It would be regrettable if delegations were obliged to proceed forthwith to vote on articles 62 and 62 *bis* in the form in which they had been submitted, for there still seemed to be a limited possibility of compromise with regard to article 62 *bis*. Explorations in that direction were continuing, as all delegations must be aware. He would not formally oppose the Syrian motion, but felt bound to make a statement on behalf of the original sponsors of the amendment (A/CONF.39/C.1/L.352/Rev.3 and Add.1 and 2 and Corr.1) that had led to the adoption of article 62 *bis* in the Committee of the Whole.

8. The sponsors had reconsidered their position on many occasions in a spirit of compromise and in the light of objections to the compulsory arbitration clause. They could imagine a possible compromise if those opposing compulsory jurisdiction as now set out in article 62 *bis*, which applied to the whole of Part V of the convention, would be willing to consider accepting that jurisdiction in a more limited area of Part V by selecting a number of articles which they would be willing to submit to compulsory jurisdiction. If such an offer were put forward by the other side, he was

<sup>1</sup> Para. 81.