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61. For the reasons it had given in the debate on article 62 *bis,* his delegation would vote against article 76.

62. Mr. HAYTA (Turkey) said that his delegation would vote in favour of article 76 because it advocated the establishment of compulsory jurisdiction for the settlement of disputes arising out of the interpretation and application of all treaties.

63. The PRESIDENT invited the Conference to vote on the Swiss proposal.

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

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

In favour: Cambodia, Canada, Chile, China, Colombia, Costa Rica, Denmark, Dominican Republic, El Salvador, Federal Republic of Germany, Finland, France, Guyana, Holy See, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Pakistan, Panama, Philippines, Portugal, Republic of Viet-Nam, San Marino, Senegal, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Australia, Austria, Barbados, Belgium.

Against: Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Czechoslovakia, Ethiopia, Hungary, India, Indonesia, Iraq, Kenya, Kuwait, Malaysia, Mexico, Mongolia, Morocco, Nigeria, Poland, Romania, Saudi Arabia, Sierra Leone, South Africa, Sudan, Syria, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Afghanistan, Albania, Brazil.

Abstaining: Central African Republic, Ceylon, Cyprus, Ecuador, Gabon, Ghana, Greece, Guatemala, Honduras, Iran, Israel, Ivory Coast, Jamaica, Lebanon, Liberia, Libya, Madagascar, Peru, Republic of Korea, Singapore, Spain, Trinidad and Tobago, Tunisia, Yugoslavia, Zambia, Argentina, Bolivia.

The result of the vote was 41 in favour and 36 against, with 27 abstentions.

The Swiss proposal (A/CONF.39/L.33) was not adopted, having failed to obtain the required two-thirds majority.

The meeting rose at 1 p.m.

THIRTIETH PLENARY MEETING

Monday, 19 May 1969, at 4.5 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)*

Proposed new article 76 (continued)

1. The PRESIDENT invited representatives who wished to do so to explain their votes on article 76.

2. Mr. PINTO (Ceylon) said that his delegation had abstained in the vote on the new article 76 proposed by Switzerland (A/CONF.39/L.33), but wished to make it clear that that vote should not be taken as implying any unwillingness to support the International Court of Justice. On the contrary, the Ceylonese delegation to the present Conference, to the Sixth Committee of the General Assembly and to other international conferences had expressed the view that the principal organ of the United Nations should be supported in appropriate cases. Although Ceylon was not a signatory of the optional clause in Article 36 of the Statute of the Court, it had frequently accepted the Court's compulsory jurisdiction with respect to disputes under certain multilateral agreements. And the Ceylonese Government, though it believed them to be wrong, did not share the general dissatisfaction with the Court which had followed some of its decisions.

3. His delegation had been unable to support the Swiss proposal only because of certain technical and practical difficulties in determining the real scope of the proposed new article, to which it would, however, continue to give serious thought. The phrase " disputes arising out of the interpretation or application of the Convention " could cover disputes under individual treaties where such a dispute also involved a dispute arising out of the interpretation and application of the convention itself. The implications of that possibility were not entirely clear, and it would seem that further close consideration would be required before a decision could be arrived at.

4. His Government would continue to support the idea of referring appropriate disputes to the International Court of Justice and also the principle contained in Article 36 (3) of the United Nations Charter, under which legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

5. Mr. RODRIGUEZ (Chile) said that his delegation had consistently subscribed to the view that adequate machinery should be established for the settlement of disputes between States parties to a treaty. It had done so in the conviction that something should be done to bring *de facto* situations into line with legal rules. Accordingly, Chile had supported the initiatives taken by Japan and Switzerland in the Committee of the Whole with a view to including in the convention a provision for the compulsory settlement of disputes under Part V. It had subsequently abstained from voting on article 62 *bis* because the article provided not only for arbitration but also for compulsory conciliation, a procedure which was not suitable for disputes relating to the invalidity, termination, withdrawal from or suspension of the operation of a treaty. His delegation had nevertheless voted for the article when it had been submitted to the plenary Conference for a decision, because it considered that some procedure for settling disputes under Part V ought to be included in the convention.

6. At the previous meeting the Chilean delegation had

voted for the Swiss proposal to include in the convention a new article 76 providing for compulsory adjudication in disputes arising out of the interpretation or application of the convention. It had done so in spite of its doubts concerning the scope of the article, which restricted compulsory adjudication to disputes arising out of the interpretation or application of the convention itself. It had taken that restriction to mean that article 76 would not apply to disputes relating to the interpretation or application of a treaty that was governed by the convention. In effect, disputes arising from the interpretation and application of many of the rules embodied in the convention would, because of their dispositive character, remain outside the scope of article 76.

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

Article 77 [1]

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention shall apply only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that, since article 77 did not appear in the International Law Commission's draft, its title had been prepared by the Drafting Committee. In the English version of the text, the Committee had replaced the words " subject in accordance with international law " by the words " subject under international law ", a change required by the rules of English usage. The corresponding changes would have to be made in other articles of the draft where the phrase " subject in accordance with international law " appeared, particularly in articles 3 and 40. The Drafting Committee had made no change in article 77 which affected the text in all language versions.

8. The Drafting Committee had considered the question of the position of article 77 in the draft convention and had decided that it should be placed in Part I of the draft between articles 3 and 4, since it concerned a general question governing the convention as a whole. In the English and French versions, the verbs in article 77 should be in the present tense, as they were in the other articles of Part I.

9. Mr. ALVAREZ TABIO (Cuba) said that his delegation would be compelled to vote against article 77 for a number of reasons. At first glance, it might appear absurd that objections should be raised to a rule which was intended to express a universally recognized principle, for it was obvious that rules of law applied from the time of their entry into force and that, in the absence of any provision to the contrary, they were directed toward the future. Nevertheless, the principle of non-retroactivity was only one aspect of the problem of the application of international law in point of time; in addition to that principle, other problems arose for which it was necessary to seek a just solution.

10. In the first place, it was necessary to consider the conflicts which arose when the same legal situation fell under various rules which succeeded each other in time. It was then essential to avoid a situation where the legal order which had lapsed might superimpose itself on the new law. And from that point of view, the formula presented in article 77 was unacceptable, since it laid down the principle of non-retroactivity in inflexible terms, while excluding the problems raised by the inter-temporal law. As the International Law Commission had stated in paragraph (3) of its commentary to article 24: " The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date ".

11. Secondly, the object of article 77 was to regulate the temporal effects of a convention whose essential purpose was to consolidate generally accepted rules of customary law; in other words, it was not a question of non-retroactivity proper, but only of the application of pre-existing rules systematically arranged in a codification of the law of treaties. It could not be argued that the opening clause of the article recognized the existence of a prior international legal order, since the effectiveness of that legal order depended on the possibility that existing treaties might be subject to it. If that misleading clause were accepted, the rules of international law set forth in the convention would possess full authority with respect to treaties concluded after their entry into force, something which could only apply to prior legal situations which would be governed by them if they were subject to the rules " independently of the convention ". That phrase deprived the convention of any real force by denying it authority, as such, over a treaty which, because it retained its effects in time, came under the established substantive rules.

12. Thirdly, the problem became more acute in connexion with peremptory norms of international law, which now, under the convention, acquired indisputable authority. An example was the conflict which arose in determining the meaning of article 49 in the light of the inflexible norm in article 77. As the International Law Commission had stated in paragraph (1) of its commentary to article 49: " the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today ". Whatever differences of opinion there might have been concerning the state of the law prior to the establishment of the United Nations, most international lawyers firmly maintained that Article 2 (4), together with other provisions of the Charter, authoritatively stated modern customary law with respect to the threat or use of force. As the International Law Commission had pointed out in paragraph (1) of its commentary to article 50, the rule concerning the prohibition of the use of force, which was the rule in article 49, " in itself constitutes a conspicuous example of a rule in international law

[1] The proposed new article 77 was discussed in conjunction with the final clauses at the 100th to 105th meetings of the Committee of the Whole.

having the character of *jus cogens* ". Yet article 77 contained a general reservation which made the application of any rule of international law, whatever its character, subject to the condition that the treaty must be governed by it independently of the convention.

13. While article 49 recognized the authority of the convention to impose of itself the principle which it was codifying in relation to any treaty which was opposed to it, article 77 denied any such authority in the case of inter-temporal situations. Article 61, taken in conjunction with article 49, stated that any existing treaty that was opposed to a universally accepted norm of *jus cogens* became void and terminated, but article 77 weakened that principle by introducing doubts about the authority of that rule prior to the entry into force of the convention. In short, the convention was denying in one article what it already recognized in others. The contradiction could be resolved by applying the universally accepted rule of law that special law derogated from general law where it conflicted with it. But even then there would still remain a latent conflict, since an excessively wide margin was left for wrong interpretation.

14. Another question was what repercussions article 77 might have on codified general rules which contained an element of progressive development. For example, there was the case of estoppel; with respect to treaties concluded prior to the convention, would estoppel apply with the restrictions imposed upon it by the last clause in the first paragraph of article 42, or would it apply without considering that element of progressive development? In other words, would the doctrine of estoppel also apply to unequal treaties where consent had been obtained by coercion? Could it give validity and effect to a treaty which was void *ab initio?*

15. Article 77 carried the principle of non-retroactivity beyond what was reasonable and by denying the law of treaties as such any power to govern prior provisions which came under its authority, would maintain a persistent uncertainty with respect to the scope of certain customary rules of international law established in the convention.

16. The Conference, near the end of its task, seemed to be introducing an element whose practical effect would be to render inoperative the basic function of an instrument designed to affirm in unambiguous terms certain fundamental principles, not only of with respect to the law of treaties but also with respect to of international as a whole.

17. Mr. TORNARITIS (Cyprus) said that his delegation's views on article 77 had been expressed at the 103rd meeting of the Committee of the Whole. Rules of international law adopted for the first time through the convention on the law of treaties could not have retroactive effect, but it was self-evident that rules already in existence and incorporated in the draft convention should continue to be applicable to international agreements, whether the agreements were entered into before or after the adoption of the convention. Most of the substantive, as distinct from the procedural, rules set out in the convention fell into the latter category.

18. Mr. HUBERT (France) said that his delegation had voted in favour of article 77 in the Committee of the Whole and would do the same in the plenary Conference, on the following understanding: that article 77 was to be interpreted as meaning that a treaty concluded before the entry into force of the convention on the law of treaties in respect of a State party to the convention might be invalidated by virtue of the rules set forth in the convention but existing independently of it; on the other hand, if a case of voidability had been created by the said convention, for example in a case arising out of the application of a peremptory norm of *jus cogens,* a treaty concluded prior to the entry into force of the convention in regard to a State party to it was not voidable on that account.

19. The PRESIDENT invited the Conference to vote on article 77.

Article 77 was adopted by 81 votes to 5, with 17 abstentions.

20. Mr. ESCUDERO (Ecuador) said that he had been instructed to state, with regard to article 77, that it was his Government's understanding that the rules referred to in the first part of article 77 included the principle of the peaceful settlement of disputes set forth in Article 2 (3), of the United Nations Charter, whose *jus cogens* character conferred upon that rule a universal, peremptory force. Consequently, Ecuador considered that the first part of article 77 was applicable to existing treaties. It was therefore clear that article 77 contained the incontrovertible principle that when the convention codified rules of *lex lata,* the latter, being pre-existing rules, could be invoked and applied to treaties concluded before the entry into force of the convention, the instrument in which they were codified.

21. Mr. SMEJKAL (Czechoslovakia) said that his delegation had stated its position on article 77 at the 102nd meeting of the Committee of the Whole. His delegation had voted for article 77 not only because it contained a generally recognized principle of law but because it followed clearly from the article that non-retroactivity in no way affected the need to apply all the rules stated in the convention to which treaties would be subject under international law, and thus ensured that the principles of international law codified by the convention would be fully applied independently of the coming into force of the convention.

22. Those principles of international law necessarily applied to all treaty relations at the time they were established, for in such cases it was not possible to speak of the principle of non-retroactivity, only of the need to apply legal principles existing at the time of the establishment of the treaty obligations. Thus, for example, treaties whose conclusion had been obtained by the threat or use of force in violation of the principles of international law in force at the time of conclusion of those treaties were null and void.

23. Mr. BLIX (Sweden) said that his delegation, which had been a sponsor of the proposal just adopted as article 77, wished to explain its positive vote with a

clarification on one minor point. It was his delegation's understanding that, when applied to a multilateral treaty, the article meant that the convention would be applicable between States which participated in the conclusion of a multilateral treaty after the convention had come into force for them, although there might be other parties to the same multilateral treaty for which the convention had not come into force.

Statement by the Chairman of the Drafting Committee on articles 44 and 57

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had considered, at the request of the Conference, two amendments relating respectively to articles 44 and 57. It had decided to make no change in article 44 but had made a few changes in article 57.

25. Article 44 [2] was entitled " Specific restrictions on authority to express the consent of a State ". The Conference had adopted the Drafting Committee's text for that article but had referred to it a drafting amendment by Spain (A/CONF.39/L.26) to reword the article to read:

The omission by a representative expressing the consent of his State to be bound by a treaty to observe a specific restriction imposed by his State on the authority granted to him for that purpose may not be invoked as invalidating the consent unless the restriction was notified to the other negotiating States prior to his expressing such consent.

26. The Drafting Committee had considered that the Spanish amendment gave rise to a number of drafting difficulties. In the French and English versions, the subject of the sentence was a long way from the verb and it did not seem possible to improve the translation of the original Spanish in that respect. The expression " his State " was perhaps somewhat unfortunate. It referred to the " representative ", but it sometimes happened in modern practice that a State was represented by a person who was not a national of that State. Finally, the word " imposed ", referring to " specific restriction " had created some misgivings. For those reasons, the Committee could not recommend the adoption of the Spanish amendment to article 44.

27. The new text proposed for article 57 read:

Article 57

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

28. The Drafting Committee had originally submitted a text for article 57 [3] consisting of four paragraphs. At the 21st plenary meeting, the Conference had accepted a number of drafting changes proposed by the United Kingdom (A/CONF.39/L.29) and had adopted the principle contained in a Swiss amendment (A/CONF.39/L.31) which it had requested the Drafting Committee to consider in the light of the discussion. The Swiss amendment was to add a paragraph 5, reading:

The foregoing paragraphs do not apply to provisions relating to the protection of the human person contained in conventions and agreements of a humanitarian character, in particular, to rules prohibiting any form of reprisals against protected persons.

29. The Drafting Committee had noted that paragraph 4 already began with the words " The foregoing paragraphs . . . ", and read: " The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach ". In view of the final words of paragraph 5, the Drafting Committee had assumed that it had not been the Conference's intention to remove the provisions of that paragraph from the scope of application of paragraph 4, and it had therefore replaced the words " The foregoing paragraphs " at the beginning of paragraph 5 by the words " Paragraphs 1 to 3 ". Bearing in mind the definitions given in article 2, the Drafting Committee had replaced the expression " conventions and agreements " by the word " treaties ", had substituted the word " provisions " for the word " rules ", and after inverting in the English version the order of the words " protected persons ", had added at the end of the paragraph the words " by such treaties ".

30. Mr. ROSENNE (Israel) said that it was his delegation's understanding that the meaning of the intro-

[2] For the discussion of article 44, see 18th plenary meeting.

[3] For this text, and the discussion of articles 57, see 21st plenary meeting.

ductory phrase in paragraph 2 (*a*) as now submitted by the Drafting Committee was that the other parties might by unanimous agreement suspend the operation of the treaty in whole or in part or terminate it in whole or in part.

31. The PRESIDENT said that, if there were no objection, he would take it that the Conference agreed to adopt article 57 as amended by the Drafting Committee.

It was so agreed.

Draft resolution relating to article 1

32. The PRESIDENT suggested that, if there were no objection, the draft resolution relating to article 1, contained in paragraph 32 of the report of the Committee of the Whole on its work at the first session (A/CONF.39/14), might be considered as unanimously adopted.

33. Mr. ROSENNE (Israel) said that if the draft resolution were put to the vote, his delegation would abstain because it was not convinced that the matter was really ripe for the further study contemplated by the resolution, and he did not wish to commit his delegation's position in case the matter should be discussed by the General Assembly.

34. Mr. BLIX (Sweden) said that his delegation had no objection to the substance of the draft resolution. A number of points of a drafting nature had, however, been made on behalf of the International Bank for Reconstruction and Development, which had not yet been considered by the Drafting Committee. He therefore moved that a decision on the draft resolution be postponed in order that he might have time to submit a drafting amendment.

35. The PRESIDENT said that the decision on the draft resolution would accordingly be postponed until the following day.[4]

Election of a member of the Credentials Committee

36. The PRESIDENT said that the Conference had to elect a member of the Credentials Committee to replace the representative of Mali, who was absent. He suggested that the representative of the United Republic of Tanzania would be a suitable replacement.

It was so agreed.

The meeting rose at 5 p.m.

[4] See 32nd plenary meeting.

THIRTY-FIRST PLENARY MEETING

Tuesday, 20 May 1969, at 11 a.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(resumed from the previous meeting)*

Statement by the Chairman of the Drafting Committee on the declaration on the prohibition of military, political or economic coercion in the conclusion of treaties and related resolution

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that, at its 20th plenary meeting, the Conference had adopted a declaration on the " Prohibition of the threat or use of economic or political coercion in concluding a treaty " and a related resolution. As the Conference had requested, the Committee had reviewed the wording of the declaration and the resolution and was submitting a new text incorporating the drafting amendments it had made. It read as follows:

Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties

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 the sovereign equality of States,

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

Deploring the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States,

Desiring to ensure that in the future no such pressure will be exerted in any form by any State in connexion with the conclusion of a treaty,

1. *Solemnly condemns* the threat or use of pressure in any form, whether 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 the 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.

Resolution relating to the declaration on the prohibition of military, political or economic coercion in the conclusion of treaties

The United Nations Conference on the Law of Treaties,

Having adopted the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties as part of the Final Act of the Conference,

1. *Requests* the Secretary-General of the United Nations to bring the declaration to the attention of all Member States and other States participating in the Conference, and of the principal organs of the United Nations;

2. *Requests* Member States to give the Declaration the widest possible publicity and dissemination.

2. With regard to the title of the declaration, the Committee had considered that in the phrase " threat or use of coercion " the word " coercion " alone should be kept since a threat was one form of coercion. Moreover, as operative paragraph 1 referred to pressure in any form, " whether military, political or economic " those three adjectives should be reproduced in the title in that order. Lastly, the word " treaty " after " conclusion of " should be in the plural, since the declaration related to the conclusion of treaties in general, not to the conclusion of a particular treaty.