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60th meeting of the Committee of the Whole

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

101. Article 10 *bis* was entirely new, and Governments had had no opportunity of expressing their opinions. It would be paradoxical to introduce a residuary rule in that article when the Committee of the Whole had decided not to prescribe a residuary rule with regard to the traditional modes of expressing consent.

102. The Drafting Committee had realized the danger of introducing a presumption in virtue of which a State could become bound to another State by such a simple and common act as an exchange of notes.

103. It was for the Committee of the Whole to take the final decision.

104. Mr. BADEN-SEMPER (Trinidad and Tobago) asked for the drafting point concerning the plural form of the word " States " to be dealt with separately from the substantive question if a vote was taken. In article 9 *bis*, the word " State " was in the singular, although that article also dealt with the exchange of instruments. It was merely a question of drafting, however, which could be settled by the Drafting Committee without a vote by the Committee of the Whole.

105. The CHAIRMAN invited the Committee of the Whole to adopt article 10 *bis* and to leave it to the Drafting Committee to decide whether the word " States " in the phrase " The consent of States " at the beginning of the article should remain in the plural.

Article 10 bis *was approved by 69 votes to 1, with 18 abstentions, subject to the reservation stated by the Chairman.*

The meeting rose at 5.45 p.m.

SIXTIETH MEETING

Thursday, 9 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

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)*

Article 55 (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only)

1. The CHAIRMAN invited the Committee to consider article 55 of the International Law Commission's draft.[1]

2. Mr. DE BRESSON (France) said that the French amendment (A/CONF.39/C.1/L.47) was in line with the other French amendments concerning restricted multilateral treaties. That category of treaties should at all times be applied entire by all the parties, and should therefore be excluded from the application of article 55. The amendment should be referred to the Drafting Committee.

3. Mr. ALVARADO (Peru) said that the Peruvian amendment (A/CONF.39/C.1/L.305) was in keeping with the International Law Commission's text. From a procedural point of view there was an obvious analogy between article 55 and article 37. The Commission had stated in paragraph (2) of its commentary to article 55 that, although it did not think that formal notice should be made a specific condition for temporary suspension of the operation of the treaty, its omission from the present article was not to be understood as implying that the parties in question might not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty. Notifying the other parties was a matter of international courtesy. His delegation's amendment should be referred to the Drafting Committee.

4. Mr. EVRIGENIS (Greece) said that the purpose of the Greek amendment (A/CONF.39/C.1/L.317) was to make article 55 more precise. It was the only provision in that part of the draft that used the expression " provisions of the treaty " instead of the expression " of the treaty ", and it was desirable even for reasons of uniformity in terminology to make clear that the suspension of the application of a multilateral treaty could apply to the whole treaty or to certain of its provisions only. That was the purpose of the amendment, which could be referred to the Drafting Committee.

5. Mr. ZEMANEK (Austria) said that the six-State joint amendment (A/CONF.39/C.1/L.321 and Add.1) had superseded the Austrian, Finnish and Polish amendment (A/CONF.39/C.1/L.6 and Add.1 and 2) and the Canadian amendment (A/CONF.39/C.1/L.286). Its aim was to harmonize article 55 and article 37. Given the similarity of the situations dealt with in those two articles, it was desirable that the wording of article 55 should follow as closely as possible that of article 37. It was in the interests of the security of treaties that the obligation to notify the other parties of an agreement to suspend *inter se* should be a specific and not merely a general obligation.

6. Mr. STANFORD (Canada), speaking as one of the sponsors of the six-State joint amendment, said that the purpose of the changes to article 55 that it proposed was to provide a similar formulation to that contained in article 37. The phrase " is not prohibited by the treaty " had also been incorporated.

7. The Commission's text of article 55 laid down three cumulative conditions for suspension by agreement between certain of the parties only. The first was that the treaty " contains no provision regarding the suspension of its operation "; the other two were given in sub-paragraphs (*a*) and (*b*). The sponsors of the six-State amendment proposed that the first condition be changed to read " if such suspension is not prohibited by the treaty ", which was the language used in article 37. The mere fact that the treaty contained some provision relating to suspension should not prevent two or more parties from agreeing on suspension as between themselves, unless the provision actually prohibited it. The text in the amendment retained the other two conditions

[1] The following amendments had been submitted: Austria, Finland and Poland, A/CONF.39/C.1/L.6 and Add.1 and 2; France, A/CONF.39/C.1/L.47; Canada, A/CONF.39/C.1/L.286; Peru, A/CONF.39/C.1/L.305; Greece, A/CONF.39/C.1/L.317; Austria, Canada, Finland, Poland, Romania and Yugoslavia, A/CONF.39/C.1/L.321 and Add.1; Australia, A/CONF.39/C.1/L.324.

in the Commission's draft, with slight changes. The words " as between the parties as a whole " had been deleted from sub-paragraph (*b*) of the Commission's draft and a reference added to " the object and purpose of the treaty as a whole ". That accorded with the wording of article 37. The reason for the deletion was that the situation contemplated by article 55 necessarily affected the position of those parties to the initial treaty who were also parties to the subsequent agreement. Sub-paragraphs (*a*) and (*b*) fully protected the rights of the other parties to the initial agreement.

8. The proposals in the six-State amendment were not mere drafting changes but at the same time were not controversial, and he hoped that they would find favour.

9. Mr. HARRY (Australia) said that, when the Committee had considered articles 16 and 17, concerning reservations, it had accepted the principle that there was a certain class of treaties the application of which in their entirety between all the parties was an essential condition of the consent of each party to be bound. The precise kind of treaty to be regarded as coming within that category was still to be decided. The Commission had concluded that, in such cases, reservations should not be permitted unless they were accepted by all the parties. If that rule applied to reservations, it should also apply to the situations dealt with in articles 37 and 55, which were analagous.

10. The tests laid down by the Commission in article 55 could give rise to disputes and call into question the efficacy of such restrictions. It was necessary, at least in the case of that class of treaty where its integrity was fundamental and its application in its entirety was essential, to have some more secure protection for the integrity of the treaty and the rights of the other parties. The Australian amendment (A/CONF.39/C.1/L.324) was designed to provide that protection by excluding from the application of article 55 the class of treaties referred to in article 17, paragraph 2; its effect would be to prevent *inter se* suspensions in the case of such treaties unless all the other parties gave their consent.

11. The amendment was one of substance and it would be undesirable to vote on it until the Committee had decided on the content of article 17, paragraph 2. Pending that decision, the amendment could be held in suspense by the Drafting Committee.

12. Mr. SEPULVEDA AMOR (Mexico) said he agreed with the Austrian and Canadian representatives. The suspension of a treaty must not affect the enjoyment of the rights or the purpose of the obligations of the other parties, or be incompatible with the execution of the object and purpose of the treaty. But a third requirement should also be mentioned. In stating the conditions governing *inter se* suspension, the article made no reference to the need to give the other parties prior notification in due form of the intended suspension. tI was not sufficient merely to say, as the commentary did, that the omission of that condition was not to be understood as implying that the parties in question might not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty; the obligation must be clearly stipulated in the text of the convention. Accordingly, although he was fnlly satisfied with the six-State amendment, he would suggest that the Drafting Committee consider adding a second paragraph drafted somewhat as follows: " Unless the treaty otherwise provides, the parties concerned shall notify the other parties of their intention to suspend the operation of provisions of the treaty temporarily and as between themselves alone ".

13. As *inter se* suspension might affect the situation or the rights of other parties, for example in the case of a treaty establishing a free trade area or containing rules for the pacific settlement of disputes, the obligation to notify was essential for the purpose of the security of treaties. The requirement would be analogous to the one contained in article 37. But it would only be a question of providing for an obligation to notify; it was not the intention that such a notification would have any other effects than those produced by a further communication. If a situation arose in which those States which were not parties to the *inter se* suspension objected to it, the provisions of Part V, Section 4, on procedure, would apply.

14. Mr. MARESCA (Italy) said that an agreement to suspend *inter se* should be regarded as an absolute exception, only permissible when certain conditions were met. It must not be incompatible with the object of the treaty or in any way detract from the exercise of the rights of the other parties. A proper and rigid procedure must be laid down to prevent chaos. He supported the six-State amendment, which provided for a special procedure, and also viewed the Australian amendment with sympathy. As he was in favour of the principle of separability, he would have no objection to the Greek amendment (A/CONF.39/C.1/L.317). He also supported the French amendment.

15. Mr. SAULESCU (Romania) said that the purpose of the six-State amendment was to produce a clearer text. Article 55 dealt with the difficult problem of the conditions in which suspension *inter se* could be allowed. The conditions must be specified clearly and be accompanied by the necessary safeguards so as to protect the other parties. There was an obvious connexion between articles 55 and 37, and suspension under article 55 could only be permitted if the treaty did not prohibit such action. That was the first condition, as stated in the six-State amendment. The second was that suspension should not affect the rights and obligations of the other parties or be incompatible with the execution of the object and purpose of the treaty.

16. Paragraph 2 of the amendment was in conformity with the views expressed by the Commission in its commentary, and required notification to the other parties, as provided in article 37.

17. Mr. CHANG (China) said that he could accept the Commission's text in principle, but it would be improved by the six-State amendment, which brought article 55 into line with article 37 and laid down conditions in which two or more parties could suspend *inter se*. He supported the Australian amendment, as it would make the provision more explicit and contained the requirement that other parties should be notified of a decision to suspend *inter se*.

18. Mr. ROSENNE (Israel) said that article 55 dealt with an area of the law of treaties in which State practice

was scanty; indeed, none was referred to in the commentary to the article. It was therefore necessary to exercise caution, so as not to produce a text that was too rigid and might prove unworkable in practice. The fact that no up-to-date collection of modern final clauses was available made it difficult to study in depth the problems involved.

19. His delegation favoured the six-State amendment (A/CONF.39/C.1/L.321 and Add.1) subject to the following remarks. In general, it was desirable that the rule in article 55 should be framed as a residuary rule; but the requirement that the suspension should not be expressly prohibited might be too rigid. Paragraph 1 of the amendment expressed better than the International Law Commission's text the essential elements of *inter se* suspension. It might, however, be improved by the reintroduction, after the words " other parties " in paragraph 1(*a*), of the words " as a whole ".

20. With regard to paragraph 2, it was acknowledged in the concluding sentence of paragraph (2) of the commentary that the parties to an *inter se* suspension had " a certain general obligation to inform the other parties " to the treaty. That idea was rather vaguely expressed and should be clearly stated in the article, as was done in paragraph 2 of the amendment. He understood paragraph 2 of the amendment as referring to article 73 with respect to the manner in which the notification should be made, unless the treaty provided otherwise. The Drafting Committee could settle the precise wording. It was of course understood that the agreement for *inter se* suspension itself would subsequently be registered under Article 102 of the Charter.

21. The analogy with article 37 should not be carried too far; there was a point at which the similarities between articles 37 and 55 ended. It was essential to avoid *inter se* suspension and *inter se* modification developing into concealed reservations that would evade the provisions of the draft articles on reservations. What might be permissible in the cases envisaged in article 37 was not necessarily and automatically permissible or acceptable in the cases contemplated in article 55. The Drafting Committee should scrutinize very closely the nature of the relationship between the two sets of provisions.

22. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that his delegation had serious misgivings over article 55, which would encourage States to take the undesirable course of suspending the operation of a multilateral treaty between certain parties only. It was true that a number of safeguards had been introduced into the article, but they were not sufficient. To take an example, the provisions of article 55 would make possible an *inter se* suspension by two of the parties of the operation of the 1948 Pact of Bogotá, on the pacific settlement of disputes.[2] Such suspension might not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, but it would nonetheless affect the general interest; other American States were interested in the peaceful settlement of disputes arising between two American States. For those reasons, his delegation could not vote in favour of article 55.

23. He noted that no State practice had been adduced in the commentary in support of the idea of *inter se* suspension. Article 55 had been introduced as a matter of pure logic on the grounds that, since *inter se* modification had been provided for in article 37, it was logical to provide also for *inter se* suspension. But law was not simply a matter of logic; it was above all a matter of experience. Examples could be found of the situation envisaged in article 37, but none of the situation contemplated in article 55. Article 37 gave expression to a progressive practice which called for recognition. Article 55 did not rest on any practice and was of a regressive character. The late Professor Scelle had stressed the difference between the orthopaedic treatment of *inter se* modification and the paralysis of *inter se* suspension.

24. For those reasons, his delegation would support those amendments which introduced safeguards and limitations into the article, such as the Australian amendment (A/CONF.39/C.1/L.324) and the six-State amendment (A/CONF.39/C.1/L.321 and Add.1). The latter, however, used in the opening sentence of paragraph 1 the wording " if such suspension is not prohibited by the treaty ". He would urge the sponsors of the amendment to revert to the more restricted language used in the original text: " When a multilateral treaty contains no provisions regarding the suspension of its operation ". The need for that change was illustrated by the provisions of article 16, paragraph 3 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[3] Those provisions made it possible to suspend innocent passage of foreign ships through the territorial sea, but only on certain stringent conditions. The Convention thus did not prohibit the suspension of its provisions on innocent passage but it did make suspension subject to strict requirements. With the language proposed in the six-State amendment, it would be possible for two parties to the Convention to enter into an *inter se* agreement for the suspension of innocent passage. The original text of article 55 would preclude such *inter se* suspension.

25. Mr. CHEA DEN (Cambodia) said that article 55 reflected the International Law Commission's concern for the stability of treaties. Suspension, like invalidity, should be treated as an exception and therefore be regulated with caution. His delegation supported the six-State amendment (A/CONF.39/C.1/L.321 and Add.1), which was consistent with that preoccupation and introduced useful additions and improvements into the wording of the article.

26. He supported the suggestion that the French amendment (A/CONF.39/C.1/L.47) should be referred to the Drafting Committee, pending a decision on the question of restricted multilateral treaties.

27. Mr. DIOP (Senegal) said that he shared the International Law Commission's view that, in principle, the consent of all the parties was necessary for termination, but that such was not necessarily the case with the suspension of the operation of a treaty.

28. He supported the proposal in the six-State amendment to introduce the requirement of notification. That would strengthen the safeguards already contained in the article for the benefit of the other parties to the treaty. Notification would enable them to take appropriate measures to safeguard their rights.

[2] United Nations, *Treaty Series*, vol. 30, p. 84.

[3] United Nations, *Treaty Series*, vol. 516, p. 216.

29. He also supported the French amendment (A/CONF.39/C.1/L.47), which would exclude from the operation of article 55 multilateral treaties of a restricted character. Rigid application of the rule contained in article 55 could create insoluble problems for the performance of such treaties. A restricted multilateral treaty concerned only a few States for which the application of the treaty in its entirety between all the parties was an essential condition for successful performance. An obvious example was the case of a treaty for the improvement and economic development of a river basin. An *inter se* agreement between two of the parties to such a treaty for the suspension of its operation, even on a temporary basis, would undermine the operation of the treaty as a whole.

30. Mr. WERSHOF (Canada) said that the suggestion by the representative of Israel to insert after the words " other parties " in paragraph 1 (*a*) of the six-State amendment (A/CONF.39/C.1/L.321 and Add.1) the additional words " as a whole ", was acceptable, and could perhaps be referred to the Drafting Committee.

31. With regard to the remarks of the Uruguayan representative, he said that the sponsors of the six-State amendment had used the wording " is not prohibited by the treaty " rather than " When a multilateral treaty contains no provision " because the mere existence in the treaty of a provision on suspension should not of itself rule out the possibility of *inter se* suspension, provided of course that the other conditions set forth in the article were fulfilled. Treaty provisions on the subject of suspension could be very varied and often related to the question of suspension by all the parties.

32. He suggested that a vote be taken on the principle in the six-State amendment. If the principle were approved, the Drafting Committee could then consider questions of wording.

33. It was his understanding that, although the French amendment (A/CONF.39/C.1/L.47) would be referred to the Drafting Committee, the Committee of the Whole would at some stage be called upon to take a decision on the substantive issue involved. The Australian amendment (A/CONF.39/C.1/L.324) should also be referred to the Drafting Committee on the same understanding since it dealt with the same problem in a different manner.

34. The Peruvian amendment (A/CONF.39/C.1/L.305) dealt with one of the points in the six-State amendment, namely, that of notification, in a slightly different way. He still preferred the method adopted in the six-State amendment, but would have no objection to the Peruvian amendment being referred to the Drafting Committee.

35. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that he understood from the explanations given by the Canadian representative that approval of the principle involved in the six-State amendment (A/CONF.39/C.1/L.321 and Add.1) would not prevent the Drafting Committee from adjusting the wording of paragraph 1 so as to make it clear that an agreement on *inter se* suspension would be subject to any restrictions placed on suspension by the treaty itself.

36. Sir Humphrey WALDOCK (Expert Consultant) said he supported those remarks on the question of treaty restrictions on suspension. It was quite common for a multilateral treaty to contemplate in advance the possibility of temporary suspension and to regulate it carefully.

37. The inclusion of the provisions of article 55 had to some extent been based on considerations of logic; but some members of the International Law Commission had also emphasized that those provisions dealt with a phenomenon which was common enough in State practice.

38. With regard to the question of notification, he said that the International Law Commission had regarded it as desirable. In his own original draft, *inter se* suspension had been made subject to the same notification requirements as *inter se* modification. That requirement had been dropped in the Commission's Drafting Committee, apparently because of a feeling that it would be too strict to require notification in all cases, in view of the temporary character of suspension. The introduction of such a requirement would not, however, run counter to the Commission's approach.

39. The CHAIRMAN said that the Peruvian amendment (A/CONF.39/C.1/L.305) would be referred to the Drafting Committee. The same applied to the French amendment (A/CONF.39/C.1/L.47) and the Australian amendment (A/CONF.39/C.1/L.324), on the understanding already expressed on previous occasions. He would put the Greek amendment (A/CONF.39/C.1/L.317) to the vote.

The Greek amendment was rejected by 25 votes to 13 with 49 abstentions.

40. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had abstained from voting on the Greek amendment (A/CONF.39/C.1/L.317) because it was clearly of a drafting character and should have been referred to the Drafting Committee, along with the other amendments of the same type. By virtue of the principle that the greater contained the less, the suspension of the whole treaty included the suspension of a part thereof. Accordingly, no question of substance was involved.

41. The CHAIRMAN invited the Committee to vote on the principle in the six-State amendment subject to the explanations given during the discussion.

The principle in the amendment by Austria, Canada, Finland, Poland, Romania and Yugoslavia (A/CONF.39/C.1/L.321 and Add.1) was approved by 82 votes to none, with 6 abstentions.

42. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 55, together with the principle in the six-State amendment and the various drafting amendments he had already mentioned, to the Drafting Committee.

It was so agreed.[4]

Article 56 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty)

[4] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to " restricted multilateral treaties " until the second session of the Conference. Further consideration of article 55 was therefore postponed.

43. The CHAIRMAN invited the Committee to consider article 56 and the amendments thereto.[5]

44. Mr. ZEMANEK (Austria), introducing his delegation's amendment (A/CONF.39/C.1/L.7), said that it did not involve any change of substance. Its purpose was merely to introduce expressly into the wording an idea which was already implicit in the existing text.

45. Paragraph 3 of article 26, on the application of successive treaties relating to the same subject-matter, specified that where " the earlier treaty is not terminated or suspended in operation under article 56 ", the earlier treaty applied " only to the extent that its provisions are compatible with those of the later treaty ". In order to make it possible to apply that provision, paragraph 1 (*b*) of article 56 should make it clear that it related to a case where the two treaties were not capable of being applied at the same time in their entirety. The Austrian amendment (A/CONF.39/C.1/L.7) would therefore replace the words " are not capable " in paragraph 1 (*b*) by the words " are in none of their provisions capable ".

46. Mr. STANFORD (Canada) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.285) was to provide that in the appropriate cases a subsequent treaty could have the effect of partially terminating or partially suspending an earlier treaty dealing with the same subject-matter. The present text of article 56 contemplated only the termination or suspension of the treaty as a whole. It was not clear whether article 41, on separability of treaty provisions, would meet the particular circumstances contemplated by article 56. The clause or clauses varied by the subsequent treaty could well have been " an essential basis of the consent of the other party " within the meaning of paragraph 3 (*b*) of article 41; nevertheless, it might be entirely appropriate for that portion of the earlier treaty which was not incompatible with the later treaty to remain in force. His delegation's amendment could be referred to the Drafting Committee.

47. Mr. AVAKOV (Byelorussian Soviet Socialist Republic), introducing his delegation's amendment (A/CONF.39/C.1/L.292), said he supported the idea contained in article 56.

48. The purpose of his amendment was to introduce in paragraph 1 (*b*) and also in paragraph 2 a reference to the instrument in which the intention of the parties had been expressed. That instrument could be either the treaty itself or some other instrument relating to the treaty. The point, although one of drafting, was an important one; the effects of termination or suspension were serious and it was necessary to state precisely in article 56 the manner in which the consent of the parties would be established.

49. Mr. VOICU (Romania), introducing his delegation's amendment (A/CONF.39/C.1/L.308), said that it was of a purely drafting character and related only to the French text. It should be referred to the Drafting Committee.

50. Mr. KIANG (China), introducing his delegation's amendment (A/CONF.39/C.1/L.327), said that the changes which it would introduce in the wording of the opening part of paragraph 1 and in paragraph 1 (*a*) would make the wording more precise. It would also delete as unnecessary the word " far " in paragraph 1 (*b*). The provisions of article 56 related to the case where the later treaty was at variance with the earlier one; the degree of variance was immaterial.

51. Mr. ROSENNE (Israel) said that his delegation was unable to support the inclusion of article 56 in the draft convention, because it regarded it as completely redundant and merely repetitious of other provisions of the draft; it seemed to duplicate article 51 and, to some extent, articles 35 and 36.

52. Under article 51, a treaty might be terminated at any time by the consent of all the parties, and under articles 35 and 36, a treaty could be amended at any time by the consent of all the parties. Obviously, the conclusion of a further treaty relating to the same subject-matter, according to paragraph 1 of article 56, meant that the parties had consented to something which might or might not result in the termination or modification of the earlier treaty. If the later treaty was clear, that was the end of the matter, and there was no room for article 56 to operate; if the later treaty was ambiguous, there seemed to be no reason why the normal processes of interpretation should not be applied. Those normal processes were, moreover, already incorporated in the opening phrase of paragraph 1 (*a*), and when they were applied to establish the intention of the parties, the normal consequences would follow: either the earlier treaty would be terminated or amended by consent, that being the intention of the parties, or the parties would agree that the two treaties could and should be applied simultaneously. Paragraph 2 of article 56 simply represented what was clearly stated in article 53.

53. The fact that those considerations had been recognized by the International Law Commission was clear from the last sentence of paragraph (1) of the commentary. His delegation did not consider it necessary or advisable to include what was in effect a special rule of interpretation in the form of an article of the convention. While it did not disagree with the conclusions to which article 56 led, it nevertheless thought that the inclusion of the article would add unnecessary confusion to an already complex draft convention. The Israel delegation would therefore abstain from voting on all the amendments before the Committee and reserved its right to vote against the article at the appropriate time.

54. Mr. HARRY (Australia) said that, although his delegation had originally doubted the need for including article 56, the debate had convinced it of the desirability of setting out such a provision. It hoped that the Drafting Committee would give careful attention to the drafting amendments that had been submitted: the terminology in the different languages of the convention should also be carefully scrutinized. For instance, the English text of the opening paragraph referred to " a further treaty ", whereas the purely temporal terms " earlier " and " later " were used in the subsequent paragraphs; that anomaly did not seem to apply to the French and Spanish texts, and might be studied by the Drafting Committee.

[5] The following amendments had been submitted: Austria, A/CONF.39/C.1/L.7; Canada, A/CONF.39/C.1/L.285; Byelorussian Soviet Socialist Republic, A/CONF.39/C.1/L.292; Romania, A/CONF.39/C.1/L.308; China, A/CONF.39/C.1/L.327. The Romanian amendment related only to the French text of the article.

55. Sir Humphrey WALDOCK (Expert Consultant) said that the Canadian amendment to sub-paragraph 1 (*b*) (A/CONF.39/C.1/L.285) seemed to go rather beyond the normal intention of the parties in the case at issue in providing that the incompatibility between the provisions of the later treaty and those of the earlier one should be such that not all of the provisions of the two treaties were capable of being applied at the same time. The International Law Commission had not considered that termination should be implied whenever the subsequent treaty had an impact on some of the provisions of the earlier treaty. The Canadian amendment was more far-reaching than it seemed at first sight, and would have the effect of altering the rule laid down by the Commission.

56. Mr. WERSHOF (Canada) said he agreed with the Expert Consultant concerning the scope of his delegation's amendment, and would withdraw that part of it which related to sub-paragraph 1 (*b*). He hoped that the Canadian amendment to the opening phrase of paragraph 1 would be considered by the Drafting Committee.

57. The CHAIRMAN suggested that article 56 and the amendments thereto be referred to the Drafting Committee.

It was so agreed.[6]

Article 57 (Termination or suspension of the operation of a treaty as a consequence of its breach)

58. The CHAIRMAN invited the Committee to consider article 57 and the amendments thereto.[7]

59. Mr. CASTRÉN (Finland), introducing his delegation's amendment (A/CONF.39/C.1/L.309), said that Finland accepted the principle expressed in paragraph 1 of the article and the machinery laid down in paragraph 2. Nevertheless, it might be wise, in order to bring them into conformity with sub-paragraph 2 (*b*) and paragraph 1, to supplement sub-paragraphs (*a*) and (*c*) of paragraph 2 by stating expressly that a material breach of a multilateral treaty by one of the parties entitled the other parties to suspend the operation of the treaty in whole or in part.

60. His delegation also considered that the sanctions provided for in paragraph 2, particularly that of the termination of the treaty as between all the parties, seemed unduly rigorous in the case of treaties of general interest, such as those for the protection of human rights. Sir Gerald Fitzmaurice, an earlier Special Rapporteur on the law of treaties, had mentioned other treaties which should be maintained in force even if they were violated materially by a party to the treaty.[8] On the other hand, it was very difficult to agree on all the categories of treaties which should be placed on the same footing as treaties on human rights, and the Finnish delegation had decided not to prepare a list of exceptions or to propose a new wording for paragraph 2; it would only appeal to the parties to the convention in their wisdom to apply the sanctions in paragraph 2 with moderation, and to apply the most severe measures only in extreme cases.

61. His delegation had submitted its amendment to paragraph 3 in the belief that the definition of a material breach of a treaty entitling the innocent parties to the rights set out in the preceding paragraph could be improved. The provision that such a breach consisted in the violation of a provision essential to the accomplishment of the object or purpose of the treaty seemed insufficient: it was equally important to take into account the nature or degree of the violation itself. Even if a violation did not make it difficult or impossible to accomplish the object or purpose of a treaty, it might prejudice important rights of the innocent parties if it continued for a long time; similarly, if one of the parties violated several secondary provisions of the treaty, simultaneously or successively, that attitude might be described as a serious violation and should entitle the other parties to resort to the measures set out in paragraph 2. The purpose of the addition proposed by his delegation was to take such situations into account. It might be argued that the term " of a serious character " was not very precise; perhaps the Drafting Committee could find more satisfactory wording.

62. Mr. CARMONA (Venezuela) said that the question of breach of treaties was one of the most difficult before the Conference. The International Law Commission had considered the problem since 1963, and the Special Rapporteur's introductory work on it had shown a reaction against the theory of excessive rigidity which had hitherto prevailed and had resulted in an uncompromising insistence on the principle of the stability of treaties. The discussions in the International Law Commission had shown that those eminent jurists considered the principle of good faith to be the essential basis of an article on situations arising from a breach of a treaty.

63. The late Professor de Luna had clearly stated his views on the subject when he had said that " the principle that ' a material breach of a treaty by one party entitles the other party or parties to denounce or withdraw from the treaty or to suspend, in whole or in part, its operation ' was not an exception to the rule *pacta sunt servanda*, but rather a corollary of the principle of the sanctity of treaties. In the application of its provisions, a treaty should not conflict with the principle of good faith, without which the rule *pacta sunt servanda* was meaningless. That explained the maxim of the Roman jurists: '*frangenti fidem, fides non est servanda*'." He had then gone on to quote such international precedents as the *Polish Nationals in Danzig*,[9] the *Serbian* and *Brazilian Loans*[10] and the *North Atlantic Coast Fisheries*[11] cases, in all of which the Permanent Court of International Justice and the Permanent Court of Arbitration had stressed the element of good faith. Moreover, under Article 2, paragraph 2 of the United Nations Charter, Members were bound " to fulfil in good faith the obligations assumed by them." A further, highly important, point made by Professor de Luna was that if the party

[6] For resumption of discussion, see 81st meeting.

[7] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.309; Venezuela, A/CONF.39/C.1/L.318; United States of America, A/CONF.39/C.1/L.325; Spain, A/CONF.39/C.1/L.326.

[8] See *Yearbook of the International Law Commission, 1957*, vol. II, p. 31, article 19, and para. 125 of Sir Gerald Fitzmaurice's commentary (p. 54).

[9] *P.C.I.J.*, Series A/B (1932), No. 44.

[10] *P.C.I.J.*, Series A (1929), Nos. 20 and 21.

[11] *Reports of International Arbitral Awards*, vol. XI, p. 167.

injured by a breach continued to be bound by the treaty without having the right to denounce it, there would be a violation of the principle of reciprocity, which itself was merely an expression of the principle, embodied in Article 2, paragraph 1, of the Charter, of the sovereign equality of all States.[12]

64. That was the fundamental principle governing the whole matter: to try to draw a contrary conclusion by contending that States might abuse the principle in bad faith and invoke pretexts to evade their obligations would simply have the effect of punishing States acting in good faith for the bad faith of defaulting States. A balance must be struck between the principle which entitled States to free themselves of obligations they had contracted in good faith when those obligations had been violated by others, and abuses of that principle which might jeopardize the stability of treaties; but in no case should the principle of reciprocity be undermined by, so to speak, awarding the prize to the defaulting State to the detriment of the innocent party.

65. The Venezuelan amendment to article 57 (A/CONF.39/C.1/L.318) was largely based on the texts prepared by the International Law Commission during its fifteenth and seventeenth sessions. The main change it sought to introduce related to the effect of the article on bilateral and on multilateral treaties: his delegation did not believe that the differentiation between the two types of treaties in the Commission's text was entirely justified. Although it was true that, in the case of a bilateral treaty, only one State would be the injured party, it was perfectly possible that violation of a multilateral treaty might affect all the parties, if they were equally interested in maintaining the treaty; every State must be free to choose whether to suspend the operation of the treaty or whether to terminate it, even if the other parties chose to continue to be bound by their obligations. The Venezuelan delegation therefore considered that the requirement of the consent of all the parties, laid down in sub-paragraph 2 (*a*) (ii) of the Commission's text, was tantamount to imposing an inadmissible right of veto.

66. Attention had been drawn in the International Law Commission to the danger that a State wishing to evade its obligations under a treaty might cause a third State to provoke a violation which would entitle the former State to withdraw from the treaty. But the Commission seemed to have overlooked the inverse possibility that the defaulting State might by influencing another party prevent unanimous consent to the suspension or termination of obligations contracted by the injured State, thus compelling it to fulfil those obligations without reciprocity and infringing its sovereign rights by subterfuge. Perhaps the Drafting Committee could find a compromise text which would avoid both those undesirable situations.

67. A crucial aspect of the article was the definition of the nature of the breach of a treaty. The use of such words as " essential ", " material " or simply " serious " had been suggested; but the difficulty lay in establishing what a " serious " violation really was. Such an important matter clearly could not be left to arbitrary appraisal according to circumstances, and yet the Commission's text of paragraph 3 seemed to be unduly rigid, especially in providing that material breach consisted in a repudiation of the treaty not sanctioned by the convention; the Venezuelan delegation had therefore returned to the 1963 text and had proposed that sub-paragraph 3 (*a*) should read " The unjustified repudiation of the treaty ".

68. Finally, it was obvious that the right to suspend or terminate a bilateral or multilateral treaty was subject to the provisions that would ultimately be adopted on procedure, so that the crucial questions dealt with in article 57 would not be subject to the whims or bad faith of one party.

69. The amendment submitted by the Spanish delegation (A/CONF.39/C.1/L.326) was similar in intent to the Venezuelan amendment, and might be considered together with it. Perhaps the Drafting Committee might be asked to consider the whole article in the light of the debates in the International Law Commission and the comments in the Committee.

The meeting rose at 1 p.m.

SIXTY-FIRST MEETING

Thursday, 9 May 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

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)*

Article 57 (Termination or suspension of the operation of a treaty as a consequence of its breach) *(continued)* [1]

1. Mr. DE CASTRO (Spain), introducing his delegation's amendment (A/CONF.39/C.1/L.326), said that article 57 dealt with one of the most important points in the draft. It was based on the idea that in certain circumstances the performance of a treaty could upset the balance which should normally exist between the obligations of the contracting States.

2. His delegation hoped that the Drafting Committee would find a more satisfactory term than " *recusación* ", used in paragraph 3 (*a*) of the Spanish text of the article.

3. The Spanish amendment related to paragraph 3 (*b*). The rule stated in that sub-paragraph was reasonable; his delegation fully supported it, but feared that it was expressed in a manner open to an unduly narrow interpretation. For a treaty might contain provisions which, although not essential to the accomplishment of its object or purpose, were essential for one or more parties in respect of the obligations contracted. If that sub-paragraph was interpreted according to the rules laid down in article 27 of the draft, a breach of such provisions might not be invokable as constituting a material breach of the treaty. Instead of referring to the " provisions " of the treaty, it would be preferable to look to its tenor, in other words the obligations, rights and

[12] *Yearbook of the International Law Commission, 1963*, vol. I, 693rd meeting, paras. 3-5.

[1] For the list of the amendments submitted, see 60th meeting, footnote 7.