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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.

faculties it had created. The Spanish amendment therefore proposed a return to the traditional principle *inadimplenti non est adimplendum*. The amendment was intended to exclude minor, incidental or purely negligent infringements from the grounds which could be invoked under article 57.

4. The amendment divided sub-paragraph (*b*) into two separate sub-paragraphs: a new sub-paragraph (*b*) referring to obligations and a sub-paragraph (*c*) referring to rights and faculties. Sub-paragraph (*c*) contained an idea which might arouse some misgivings; but the Spanish delegation thought it essential to transfer to the international plane the idea of abuse of rights. That idea was inseparable from the notion of good faith, which had already prevented so many abuses in internal law. The *Tacna-Arica Arbitration* [2] exemplified the view reproduced in paragraph (4) of the commentary that the abuse of a right created a situation which frustrated the operation of the treaty.

5. The Spanish amendment took account of the fact that one of the purposes of treaties was to help maintain international peace; if an abuse of a right created by a treaty was so serious as to justify its being held unlawful, it must be regarded as a material breach of the treaty. For example, the performance of a trade or assistance treaty might be a pretext for economic subjection or political interference. The amendment would therefore safeguard the principle of the independence and equality of States.

6. The ideas he had outlined might already be embodied in the International Law Commission's wording, but the Spanish delegation was proposing a formula which would prevent any misunderstanding and make it necessary to interpret a treaty in terms of good faith.

7. Mr. WOZENCRAFT (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.325), explained that it was intended to reconcile the principles stated in article 57 with the practical problem of ascertaining the consequences of a material breach.

8. The International Law Commission had drafted the article with great care. The text and commentary served the cause of the stability of treaty relations by providing that a material breach could be invoked by a party to terminate a treaty or suspend its operation, but did not produce that effect in itself. Article 57 did not, however, indicate whether a material breach could be invoked to terminate or suspend the entire treaty or only part of it. According to the commentary, the injured party could choose either possibility. The United States delegation thought it would be helpful to introduce into the article itself a rule that the injured party had no right to make a response disproportionate to the nature of the breach. For example, delay in payment for goods supplied under a treaty could be a material breach, yet it might be disproportionate and unfair to invoke it to terminate the treaty where there were circumstances excusing the delay.

9. The United States amendment was based on a principle which the Committee had already discussed [3] in connexion with the amendments to article 41 submitted by Hungary (A/CONF.39/C.1/L.246) and the United Kingdom (A/CONF.39/C.1/L.257 and Corr.1), which applied the provisions of article 41, paragraph 3, to the injured party's choice under article 57. The Expert Consultant had pointed out various difficulties raised by those amendments,[4] which several delegations had supported. The United States amendment to article 57 would achieve the same purpose—that the response must be proportionate to the breach—without disturbing the balance established by article 57 or changing its relationship to article 41.

10. The United States amendment emphasized two factors relevant in determining a just proportion between the breach and the response to it. The words " considering the nature and extent of the breach" provided criteria for testing the seriousness of the breach. The words " the extent to which the treaty obligations have been performed " were intended to permit evaluation of the breach in the context of past and future operation of the treaty. His delegation was not especially attached to the precise wording it had proposed; if it involved difficulties, he would have no objection to its being revised by the Drafting Committee.

11. His delegation was not seeking to condone or encourage any kind of breach, but it thought the interests of all nations would be served by introducing an element of fairness into an article on which the maintenance of all treaty relations depended.

12. Mr. BINDSCHEDLER (Switzerland) said he thought article 57 was extremely well drafted. The Swiss delegation was prepared to support the article, but wished to propose an oral amendment which it regretted that it had been unable to submit in writing within the prescribed time. For humanitarian reasons, it was anxious that the rule stated in article 57 should not disturb a whole series of conventions relating to protection of the human person. The Geneva Conventions for the protection of war victims [5] prohibited reprisals against the protected persons and were virtually universal, but they were still the subject of some doubts and reservations. Encouragement was given to the conclusion of bilateral or partial agreements or the registration with a neutral intermediary of concordant declarations by States which were not parties to the Conventions, but expressed the wish to observe some of their principles or essential provisions. Such agreements should not be exposed to termination or suspension that would endanger human life. In addition, there were conventions of equal importance concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general; even a material breach of those conventions by a party should not be allowed to injure innocent people. That idea, to which the Swiss delegation attached particular importance, could be expressed in a paragraph 5 added to article 57, which might read:

> " The foregoing rules do not apply to humanitarian conventions concluded with or between States not bound by multilateral conventions for the protection

[2] *Reports of International Arbitral Awards*, vol. II, p. 921.

[3] See 41st and 42nd meetings.

[4] See 42nd meeting, para. 40.

[5] United Nations, *Treaty Series*, vol. 75, p. 2.

of the human person which prohibit reprisals against individuals. Agreements of this kind must be observed in all circumstances."

13. He hoped the Drafting Committee would take that suggestion into consideration.

14. Mr. MENDOZA (Philippines) reminded the Committee that at the 42nd meeting,[6] in his statement on article 41, he had emphasized that the specific mention of article 57 in article 41, paragraph 2, implied that the requirements of separability laid down in article 41, paragraph 3, need not be complied with when a treaty was terminated in part, or its operation was suspended in part, under article 57. The Expert Consultant had confirmed at the time that that was indeed the International Law Commission's intention in explicitly mentioning article 57 in article 41, paragraph 2.

15. On the basis of that interpretation, under article 57 the innocent State would have an unqualified right not only to terminate the treaty or suspend its operation in part, but freely to choose which part of the treaty it wished to terminate or suspend. His delegation had great difficulty in recognizing the correctness of that rule. Although the guilty State under article 57 should probably suffer some onerous consequences for its action, it would be neither reasonable nor practical, if the innocent State elected to terminate the treaty or suspend its operation only in part, to allow it to choose for termination or suspension of operation clauses which were not separable from the rest of the treaty.

16. Consequently he could not accept article 57 unless the right to terminate or suspend the operation of part of a treaty only was made subject to the conditions laid down in article 41, paragraph 3. That was the purpose of the Hungarian amendment (A/CONF.39/C.1/L.246) and the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1) to article 41, which his delegation could support.

17. His delegation would be able to support the United States amendment (A/CONF.39/C.1/L.325) to the extent that it was intended to apply article 41, paragraph 3, to the partial termination or suspension of operation of a treaty. But the text of that amendment would seem to have the effect of giving the innocent party only a limited choice between total termination or suspension and partial termination or suspension of the treaty. It followed from the definition of a " material breach " in article 57, paragraph 3, however, that the " nature and extent " of the breach would always be so serious as to entitle the innocent party to terminate or suspend the operation of the entire treaty if it so desired. The United States amendment appeared to suggest the possibility of a " material breach " not serious enough to constitute a material breach as defined in the article itself. His delegation doubted whether that was compatible with paragraph 3 of the draft article.

18. The Spanish amendment (A/CONF.39/C.1/L.326) and, in particular, the sub-paragraph (*c*) it proposed to add to paragraph 3, might make the concept of a material breach too wide. If the abuse of the rights and faculties granted by the treaty was grave and continuous, it would amount to the violation of a provision essential to the accomplishment of the object and purpose of the treaty. If the acts performed were in obvious abuse of the rights and faculties granted by the treaty, and amounted to the performance of acts not contemplated by the treaty, then the situation might well fall within the scope of paragraph 3.

19. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that article 57 expressed a well-known notion: a party had the right to terminate a treaty or to suspend its operation in the event of a material breach of the treaty by another party. That rule applied particularly to bilateral treaties, but it also held good for multilateral treaties. If a multilateral treaty suffered a material breach or was ignored for so long that it no longer operated, the other parties could consider themselves released from their obligations. Certain multilateral treaties, however, for reasons connected with their particular nature, contained clauses prohibiting the parties from refusing to apply the treaty even in the event of its breach by another party. For example, the Geneva Conventions of 1949 contained an article providing that no party might absolve itself from its liabilities as a result of a breach of the preceding articles. Since the very purpose of those Conventions was to render war more humane, their operation could not be left at the mercy of a breach by one party.

20. In the case of bilateral treaties, the right to terminate a treaty or to suspend its operation existed only when the treaty had been violated gravely, maliciously and deliberately. Breach by inadvertence afforded no grounds.

21. The text of article 57 proposed by the International Law Commission was acceptable and he supported it.

22. His delegation understood the intentions of the Venezuelan amendment (A/CONF.39/C.1/L.318) but could not support it, because it went too far. Nor could it support the United States amendment (A/CONF.39/C.1/L.325) or the Spanish amendment (A/CONF.39/C.1/L.326).

23. The amendment just proposed orally by the Swiss representative seemed unnecessary. Many treaties prohibited denunciation even in the event of a breach. Furthermore, article 57, paragraph 4, reserved the rights of the parties under any provision in the treaty applicable in the event of a breach.

24. His delegation would support the Finnish amendment (A/CONF.39/C.1/L.309), which improved the text.

25. Mr. PHOBA (Democratic Republic of the Congo) said that the text of article 57 proposed by the International Law Commission was concise, clear and accurate; it stated the problem well and should be supported.

26. In paragraphs 1 and 2 it would be advisable to replace the word " entitles " by the words " may entitle ", so as to make the right conferred on the parties less than absolute. That expression would be in keeping with the ideas expressed in paragraph (1) of the commentary, which used the words " may give rise ". The Drafting Committee might consider making that change.

27. In paragraph 4 it would be better to reverse the clauses so as to make " any provision in the treaty applicable in the event of a breach " the subject of the sentence.

[6] Para. 12.

28. His delegation supported neither the Finnish amendment nor the Venezuelan amendment; both adversely affected the meaning and spirit of the article.

29. In the event of a vote, it would support the text proposed by the International Law Commission.

30. Mr. ALVAREZ TABIO (Cuba) said he thought article 57, which was very important, was beyond reproach in substance, but open to improvement in wording.

31. His delegation supported the Spanish amendment (A/CONF.39/C.1/L.326), which made the text more satisfactory as to terminology and legal technique. The doctrine of the abuse of a right was universally accepted. Sub-paragraph 3 (*c*) in that amendment was a necessary confirmation of sub-paragraph 3 (*b*). The obligations created by the treaty must be fulfilled in good faith in accordance with the object and purpose of the treaty, and, similarly, the rights and faculties granted by the treaty must be exercised in a manner which was not contrary to the object and purpose of the treaty.

32. The United States amendment (A/CONF.39/C.1/L.325) contained some new elements which his delegation did not find acceptable. In the first place it stated characteristics of a material breach in paragraph 1, whereas such a breach was defined in paragraph 3, and the idea that the nature and extent of the breach must be considered was already implicit in paragraph 3 (*b*). Furthermore, the extent to which the treaty obligations had been performed was a criterion which must be taken into account, not in order to determine the existence of a breach, but in order to determine its legal consequences —a matter dealt with in article 66.

33. For the reasons already given, the Finnish amendment was less comprehensive than the Spanish amendment.

34. The word "*recusación*", in the Spanish text of paragraph 3 (*a*), did not seem ill-chosen, but it could be replaced by the word "*rechazo*", which was used in the Venezuelan amendment.

35. Mr. JACOVIDES (Cyprus) said he approved of the principle underlying article 57. His delegation agreed with the International Law Commission that, to justify denunciation of a treaty, the breach should be of a serious character. His delegation accepted the expression "material breach", but thought the notion would be better defined if the Finnish amendment (A/CONF.39/C.1/L.309) was adopted.

36. The Spanish amendment (A/CONF.39/C.1/L.326) expressly added an important and pertinent element which, in his delegation's opinion, was already implicit in the text; that would serve to remove any doubts which might remain, and his delegation therefore supported the amendment.

37. Mr. JIMENEZ DE ARECHAGA (Uruguay), said that he approved of article 57, but it raised two difficulties, to which some of the amendments drew attention.

38. One of those difficulties arose in paragraph 1: it concerned the relationship between article 57 and article 62. A party which invoked a ground for the application of article 57 must do so by the procedure laid down in article 62. His delegation acknowledged the need for that procedure: there must be agreement between the parties that a ground existed for terminating the treaty or suspending its operation. But it was difficult to accept the procedure laid down in article 62 with regard to the application of article 57. A State which alleged a breach of a treaty by other States would normally do so in good faith; it would really be the victim of a breach of the treaty by another party. It could not, however, immediately cease to apply the treaty; it would have to initiate the procedure laid down in article 62 and await the result before being relieved of its obligations. That arrangement was not satisfactory, for it disregarded the principle *inadimplenti non est adimplendum*. The Venezuelan amendment (A/CONF.39/C.1/L.318) was designed to solve that problem, but it was too drastic. Both the possible cases must be taken into account: that in which the allegation of a breach was made in good faith, and that in which it was disingenuous. Perhaps the Committee would be able to settle that point when it took up article 62.

39. The second difficulty related to paragraph 3 (*b*): the rule laid down was unduly restrictive. For example, where a treaty contained an arbitration clause, if one party ceased to apply that clause, the other party would be unable to invoke a violation of "a provision essential to the accomplishment of the object or purpose of the treaty"; yet it was a grave breach which ought to come under the rule in article 57. The Spanish amendment (A/CONF.39/C.1/L.326) and the Finnish amendment (A/CONF.39/C.1/L.309) were designed to remedy that defect.

40. His delegation approved of the text proposed by the International Law Commission, but hoped that the Conference would endeavour to overcome those two difficulties, perhaps on the basis of the amendments submitted.

41. Mr. RATTRAY (Jamaica) said he shared the view of the International Law Commission that a material breach was a ground that could properly be invoked for terminating a treaty or suspending its operation. He also thought the Commission had been right to deal with bilateral treaties and multilateral treaties separately.

42. With regard to bilateral treaties, however, his delegation considered that a material breach according to the definition contained in paragraph 3 of the article was predicated upon circumstances which could only have the effect of giving the right to wholesale termination or suspension of the treaty. According to the régime provided for in article 41, however, separability was denied when the essential basis of the treaty was affected. How then according to article 57 could an injured party consistently be given the right to terminate or suspend the treaty in part only when the material breach affected a provision "essential to the accomplishment of the object and purpose of the treaty"?

43. If those provisions of the convention were to be consistent, the definition of a material breach should at least be freed from the words "essential to the accomplishment of the object or purpose of the treaty". His delegation would welcome an explanation from the Expert Consultant as to how the Commission had harmonized the notion of invoking a material breach of a bilateral treaty as a ground for terminating a part only of the treaty, in the light of the definition of material breach contained in article 57 of the convention.

44. In its vote on the amendments, his delegation would be guided by the explanations given during the debate.

45. Sir Francis VALLAT (United Kingdom) said he thought that article 57 would be difficult to improve. The doctrine of termination or suspension of operation of a treaty as a consequence of a material breach was based on the practice of States and customary international law; thus article 57 codified existing law. His delegation could not accept the amendments that tended to weaken that article. In particular, it could not support the amendments submitted by Finland (A/CONF.39/C.1/L.309) and Spain (A/CONF.39/C.1/L.326), which added new grounds for termination or suspension of the operation of a treaty.

46. He did not know why, in paragraph 2 (*b*) of the article, the Commission had used the expression "A party specially affected by the breach ", whereas in paragraph 2 (*c*) it had referred to a breach which " radically changes the position of every party ". The latter formula seemed more specific and clearer, and on the whole, preferable. That point could be brought to the attention of the Drafting Committee.

47. Another point was that separability was provided for in paragraph 1 and in paragraph 2 (*b*), whereas it was not provided for in paragraph 2 (*a*). As it had already said in connexion with article 41, his delegation saw no reason why the conditions set out in article 41, paragraph 3 should not also apply to article 57, and thought that the reference to article 57 in article 41, paragraph 2, was inappropriate.[7] Those points, together with the United States amendment (A/CONF.39/C.1/L.325), should be studied in conjunction with the questions raised concerning article 41 which had not yet been settled. His delegation would therefore prefer that the amendments to article 57 should not be put to the vote at that stage.

48. He stressed the importance of article 57, paragraph 4, but pointed out that the article could easily lead to abuses. Hence its application, like that of other articles in the draft, particularly those in Part V, called for appropriate safeguards. That point could be considered in connexion with article 62 on procedure.

49. The United Kingdom delegation supported article 57 as a whole, as drafted by the International Law Commission, with certain reservations regarding procedure.

50. Mr. MAKAREWICZ (Poland) said that the rule stated in article 57 was generally recognized, but it raised two questions: first, the extent of the rights of innocent parties and the conditions for the exercise of those rights, and second, the nature of the breach entitling innocent parties to act.

51. With regard to the first question, his delegation approved of the International Law Commission's rejection of the idea that a breach, however serious, could *ipso facto* put an end to a treaty. The commentary to the article gave convincing reasons for not recognizing the right to terminate a treaty arbitrarily. Consequently, his delegation could not support the Venezuelan amendment (A/CONF.39/C.1/L.318), which followed the opposite course. Among other arguments against that amendment, it could be said that the innocent party might not be interested in terminating the treaty, but in securing its proper performance.

52. As to the second question, the International Law Commission had rightly taken the view that it was only material breach that entitled innocent parties to invoke the breach as a ground for terminating or suspending the treaty. His delegation thought that the Commission had given a satisfactory definition of a " material breach of a treaty ".

53. The Spanish amendment (A/CONF.39/C.1/L.326) did not seem to add anything to the definition. The other amendments appeared to deal mainly with points of drafting and could therefore be referred to the Drafting Committee.

54. His delegation had listened with interest to the Swiss representative's suggestion concerning treaties of a humanitarian character: it deserved careful consideration.

55. Mr. KEARNEY (United States of America) said it had been asked whether a material breach of a treaty should not always give the injured party the choice between total termination or suspension of the treaty and partial termination or suspension. His delegation thought that the question should be settled according to each individual case and that it was practically impossible to lay down a strict rule which would allow complete freedom of choice. That was why the United States delegation had submitted its amendment (A/CONF.39/C.1/L.325). In its opinion, a decision should be taken in each case that was fair to both parties to the treaty

56. With regard to the suggestion made by the United Kingdom representative, his delegation recognized that its amendment was linked with the question of separability and had no objection to its being considered in connexion with article 41 if the Committee of the Whole so desired.

57. Mr. WERSHOF (Canada) said he could not support the Venezuelan amendment (A/CONF.39/C.1/L.318).

58. He was aware of the distinction made in article 57 between the right of all the parties, if in unanimous agreement, and the right of a party specially affected by the breach, but he thought there were good reasons for giving the former greater rights, namely, the choice of either terminating the treaty or suspending its operation.

59. The Venezuelan amendment proposed several changes liable to weaken the *pacta sunt servanda* rule. Instead of the right to invoke a breach as a ground for terminating a treaty, which clearly brought in the procedure prescribed in article 62, it seemed to grant the innocent party an absolute right to terminate or suspend the treaty. Moreover, the replacement of the word "radically" by the word " substantially " in paragraph 2 (*c*) wrongly relaxed the conditions for the application of that subparagraph.

60. On the other hand, his delegation was in favour of the United States amendment (A/CONF.39/C.1/L.325), which, by introducing the idea of proportionality of the response to a breach, could strengthen respect for treaty relationships. Otherwise, his delegation supported the International Law Commission's text.

61. Mr. MARESCA (Italy) said that the International Law Commission deserved great credit for having given suitable form to the very old principle that a party to

[7] See 41st meeting, para. 13.

a treaty was not bound to apply it with respect to another party which did not do so itself. That principle had been recognized in State practice and international law; but, naturally, it could not be applied automatically and radically, and the Commission had rightly specified that there must be a material breach. The notion of a material breach needed clarification, which was provided by some of the proposed amendments to article 57. The Finnish amendment (A/CONF.39/C.1/L.309), for example, would add the idea that the breach must be " of a serious character "; a similar expression was used in the Geneva Conventions. The formula proposed in the United States amendment (A/CONF.39/C.1/L.325) might also be worth adopting. The Venezuelan amendment (A/CONF.39/C.1/L.318) made the text of the article more systematic; in paragraph 2 (*a*) it deleted the clause which was tantamount to granting a right of veto inadmissible in multilateral treaties, and in paragraph 3 (*a*) it replaced the words " repudiation of the treaty not sanctioned by the present articles " by the words " unjustified repudiation of the treaty ", which was an improvement. Those amendments should be taken into consideration by the Drafting Committee.

62. His delegation was in favour of the Spanish amendment (A/CONF.39/C.1/L.326); the two criteria it introduced would make a useful contribution towards a better definition of the complex notion of a material breach of an international agreement. The amendment which deserved the most careful attention and came closest to the Italian delegation's viewpoint was that submitted orally by the Swiss representative. There were conventions to which the general principle he had mentioned at the beginning of his remarks could not be applied, and they must be observed by the parties even if another party failed to observe them. The Geneva Conventions and the 1961 Vienna Convention on Diplomatic Relations [8] were examples. He hoped therefore that the oral amendment proposed by Switzerland could be taken into consideration.

63. Mr. HARRY (Australia) said his delegation approved of article 57 on the whole and preferred the International Law Commission's wording to the proposed amendments.

64. He would like some clarification on one point. Paragraph 2 was confined to a material breach by one of the parties. As it explained in paragraph (7) of the commentary to article 57, the International Law Commission had " considered it necessary to distinguish between the right of the other parties to react jointly to the breach and the right of an individual party specially affected by the breach to react alone ". That implied that it was always possible to distinguish clearly between the " other parties " whose unanimous agreement was required under paragraph 2 (*a*), and the party which had committed the material breach; but in fact several parties might be guilty of a material breach of a treaty at the same time and there might be some collusion in the material breach of a multilateral treaty. His delegation would like to know whether the Commission had considered that possibility. Perhaps the point should be taken up in connexion with article 62.

65. Mr. DE CASTRO (Spain), replying to the point raised by the Philippine representative concerning sub-paragraph (*c*) of the Spanish amendment (A/CONF.39/C.1/L.326), said that the purpose of the amendment was to reaffirm the principle of good faith and specify the conditions under which a contracting party could seek the termination of a treaty on the ground of its breach by another party. His delegation considered that the breach must be material, unlawful and have the effect of upsetting the balance between the obligations established by the treaty, either because one party had not fulfilled the obligations assumed or because it had exercised the facilities conferred on it by the treaty in a manner contrary to the letter and spirit of the treaty.

66. The Spanish amendment was not intended to destroy the principle stated in article 57, but simply to give it the desired scope. The aim should be that the treaty could not be used as a pretext for interfering with the freedom and independence of a contracting party. The Spanish delegation believed that a party committed a material breach not only when it ceased to apply the provisions of a treaty, but also when it applied them unjustifiably.

67. Mrs. ADAMSEN (Denmark) said her delegation fully supported the oral amendment proposed by the Swiss representative, which would add to article 57 a new paragraph 5 concerning humanitarian conventions. Some speakers had maintained that the inclusion of such a provision was not absolutely necessary from the legal point of view. But even if that was so, the Danish delegation believed that the principle was of such fundamental importance that it should be stated in article 57 in any case.

68. With regard to the other amendments, the Danish delegation preferred article 57 as it stood.

69. Mr. DE BRESSON (France) said his delegation was in favour of article 57 as drafted by the International Law Commission. Consequently, it had difficulty in supporting the amendments submitted by Finland (A/CONF.39/C.1/L.309), Spain (A/CONF.39/C.1/L.326) and Venezuela (A/CONF.39/C.1/L.318), which would detract from the precision with which the criteria for determining a material breach of a treaty were defined, and would thus impair the stability of treaty undertakings. With regard to the United States amendment (A/CONF.39/C.1/L.325), the French delegation was not opposed to it in so far as it sought to define more clearly the notion of proportionality between the breach and the response of the injured party; but there must be an assurance that the principle would operate only in the event of a material breach and would not replace the limitation very wisely prescribed by the Commission. Perhaps that was a question of drafting.

70. Sir Humphrey WALDOCK (Expert Consultant) said that the definition of a material breach was one of the fundamental elements determining the acceptability of article 57. As he had already explained, the International Law Commission had had to strike a balance between the need to preserve the stability of treaties and the need to ensure reasonable protection of the innocent victim of a breach. It had tried to define a material breach fairly strictly.

71. The first element of the proposed definition was the repudiation of the treaty specified in paragraph 3 (*a*). One delegation apparently regarded that element as completely pointless on the supposition that the treaty would already be at an end. But if a treaty was repudiated

[8] United Nations, *Treaty Series*, vol. 500, p. 95.

the injured party had the choice of two courses: it could invoke the breach to terminate the treaty or try to assert its right to the performance of the treaty. That point was particularly important if there was a possibility of recourse to an international tribunal; the convention should therefore safeguard the right of the injured party to treat the repudiation simply as a breach.

72. The more general, and hence more important, provision was in paragraph 3 (*b*). It had been proposed during the discussion that new elements should be added to the notion of a material breach; it had also been proposed that the drafting should be improved. The Commission did not claim to have found the perfect formula and would welcome any improvement in the text.

73. With regard to the amendments intended to improve the definition of a material breach, his own feeling was that in so far as those amendments were really acceptable —that was to say, where they did not widen the notion of a material breach excessively—the ideas they expressed were already embodied in the wording of paragraph 3.

74. For example, if sub-paragraph (*c*) of the Spanish amendment was applied to the Vienna Convention on Diplomatic Relations, the results might be too far-reaching. Would the slightest abuse of the facilities, privileges and immunities provided for in that Convention create a right to invoke a material breach? The notion of a material breach must be limited by a reference to the essential purposes of the treaty.

75. Similarly, it was doubtful whether the Finnish amendment (A/CONF.39/C.1/L.309) could be of much assistance, since the " serious character " of the breach would have to be judged in relation to some criterion and that criterion would naturally seem to be the essential object and purpose of the treaty.

76. Every delegation must sympathize with the proposal made by the Swiss representative during the discussion for a new paragraph excluding certain categories of humanitarian conventions from the application of article 57. He was bound, however, to draw attention to certain difficulties in connexion with that proposal. Many of the humanitarian conventions in question, and notably the Geneva Conventions, contained clauses permitting their denunciation merely by giving notice without stating any reason; it might therefore seem strange to exclude any possibility of suspension or termination as a reaction to a material breach. The question of breaches of humanitarian conventions of that kind raised very delicate moral and legal issues. He doubted whether those issues could easily be resolved in the context of the rules regarding the rights arising from breach. The Commission had sought to cover problems of that kind rather in article 40, under which the termination or suspension of a treaty did not in any way impair the duty of any State to fulfil any obligation in the treaty to which it was subject under any other rule of international law. Rules in the treaty which were also obligatory under customary international law and which were rules of *jus cogens* would thus continue to be binding even in the event of a treaty termination on breach.

77. The CHAIRMAN said he would put the proposed amendments to article 57 to the vote, beginning with that part of the Venezuelan amendment (A/CONF.39/C.1/L.318) which related to paragraph 1.

78. Sir Francis VALLAT (United Kingdom) said that the Venezuelan amendment was unacceptable to his delegation. He would therefore vote against each paragraph of it successively.

79. Mr. RATTRAY (Jamaica) said his delegation had some doubts about the exact meaning of the term " material breach ". It would therefore abstain from voting.

The Venezuelan amendment to paragraph 1 was rejected by 52 votes to 4, with 34 abstentions.

The Venezuelan amendment to paragraph 2 was rejected by 51 votes to 3, with 38 abstentions.

The Venezuelan amendment to paragraph 3 was rejected by 48 votes to 5, with 35 abstentions.

The Finnish amendment (A/CONF.39/C.1/L.309) was rejected by 33 votes to 14, with 41 abstentions.

The Spanish amendment (A/CONF.39/C.1/L.326) to *paragraph 3* (b) *was rejected by 56 votes to 10, with 27 abstentions.*

The Spanish amendment (A/CONF.39/C.1/L.326) adding a new sub-paragraph (c) *to paragraph 3, was rejected by 63 votes to 6, with 20 abstentions.*

80. The CHAIRMAN said that the United States amendment (A/CONF.39/C.1/L.325) would be examined in connexion with article 41. The Swiss proposal had not been introduced in writing as required by the rules of procedure, and he asked the Committee what action it wished to take on the matter.

81. Mr. VEROSTA (Austria) said that, despite the difficulties to which the Expert Consultant had referred, his delegation was in favour of adopting the Swiss proposal. The Drafting Committee could perhaps be asked to insert a provision giving effect to it in article 57.

82. Mr. WERSHOF (Canada) said he thought the Committee of the Whole could not take a decision on such an important amendment until it had been submitted in writing. The Committee might perhaps authorize the Swiss delegation to submit its amendment in the proper form, in which case it could be considered at a subsequent meeting.

83. Sir Francis VALLAT (United Kingdom) said he thought most of the members of the Committee were in favour of the Swiss delegation's proposal. It seemed very difficult, however, to find a satisfactory definition of the type of treaty concerned. It would be easy to use the word " humanitarian ", of course, but to what treaties would that description properly apply? Instead of an amendment to article 57, the Swiss delegation might perhaps consider submitting a resolution on the subject in plenary.

84. Mr. RUEGGER (Switzerland) asked whether it might not be possible to instruct the Drafting Committee to examine the question. An alternative would be to authorize the Swiss delegation to submit a draft of a new article, which could be discussed after all the other articles whose consideration had been deferred. The idea was not easy to express, but it would be desirable for it to appear in the convention. The Swiss delegation could also accept the suggestion made by the United Kingdom representative.

85. Mr. FATTAL (Lebanon) said that so far only humanitarian conventions had been mentioned, but he

wondered what the position would be with regard to general multilateral treaties containing principles of *jus cogens*.

86. The CHAIRMAN suggested that article 57 should be referred to the Drafting Committee.

It was so agreed.[9]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

87. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 11, 13, 14 and 15 as adopted by the Drafting Committee.

Article 11 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) [10]

88. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 11 had been adopted by the Drafting Committee:

" Article 11

" 1. The consent of a State to be bound by a treaty is expressed by ratification when:

" (*a*) the treaty provides for such consent to be expressed by means of ratification;

" (*b*) it is otherwise established that the negotiating States were agreed that ratification should be required;

" (*c*) the representative of the State has signed the treaty subject to ratification; or

" (*d*) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

" 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification."

89. No important changes had been made in the article by the Drafting Committee. As in article 10, and for the same reasons, it had deleted the words " in question " after the word " State " in sub-paragraphs (*c*) and (*d*) of paragraph 1. It had found that that change did not alter the substance of the article and removed certain translation difficulties.

90. The Drafting Committee had been unable to accept the amendments submitted by Finland (A/CONF.39/C.1/L.60) and Spain (A/CONF.39/C.1/L.109). The Finnish amendment proposed an order which had been judged less logical than that adopted by the International Law Commission. With regard to the Spanish amendment, the Drafting Committee had thought that ratification, which was a very important means of expressing a State's consent to be bound, should be the subject of a separate sub-paragraph.

91. Mr. BARROS (Chile) criticized the use of the verb " *constar* " in the Spanish text of articles 11-13 because in his opinion it did not have the same meaning as the French word " *établir* " or the English word " establish ". In view of the comments of the Expert Consultant on the meaning of the words " unless it is established " in article 53,[11] not merely a drafting point but a question of substance might be involved.

92. The CHAIRMAN said that the question raised by the Chilean representative would be examined by the Drafting Committee. He invited the Committee of the Whole to approve the text of article 11 submitted by the Drafting Committee.

Article 11 was approved.

Article 12 (Consent to be bound by a treaty expressed by accession)

93. The CHAIRMAN announced that the Committee of the Whole would not discuss article 12 at that meeting, as it was one of the articles whose consideration had been deferred.[12]

94. Mr. BARROS (Chile) said that in sub-paragraph (*c*) of article 12, the Spanish words " *hayan acordado* " and the English words " have agreed " had been duly translated by the words " *sont convenues* ", which was the normal translation, whereas in sub-paragraph (*b*) they had been translated by the words " *entendaient accepter* ". It would be interesting to know whether there was any reason for using the latter expression, which was not to be found anywhere else.

Article 13 (Exchange or deposit of instruments of ratification, acceptance, approval or accession) [13]

95. Mr. YASSEEN, Chairman of the Drafting Committee, said the Drafting Committee had made no change in the International Law Commission's text of article 13. It had rejected the Polish amendment (A/CONF.39/C.1/L.93/Rev.1), which would have introduced provisions making the same stipulations about consent expressed by signature and by exchange of instruments as were made in articles 10 and 10 *bis* respectively. The Drafting Committee thought those provisions were superfluous and would complicate the drafting of article 13 unnecessarily. Although there was some doubt about the time when consent expressed by one of the complicated procedures referred to in article 13 was established, that was not true of consent expressed by signature or exchange of instruments.

96. The Drafting Committee had not thought it appropriate to add the words " or instrument " after the word " treaty " as proposed in the Canadian amendment (A/CONF.39/C.1/L.110).

97. The CHAIRMAN invited the Committee of the Whole to approve the text of article 13 submitted by the Drafting Committee.

Article 13 was approved.

Article 14 (Consent relating to a part of a treaty and choice of differing provisions)

98. Mr. YASSEEN, Chairman of the Drafting Committee, said that, at the 18th meeting, the Committee of the Whole had approved the text of article 14 and had referred it to the Drafting Committee. In view of the opening phrase of the article, referring to the provisions on reservations, the Drafting Committee had decided

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

[10] For earlier discussion of article 11, see 16th, 17th and 18th meetings.

[11] See 59th meeting, para. 45.

[12] See 18th meeting, paras. 28-32.

[13] For earlier discussion of article 13, see 18th meeting.

not to consider it until it had examined articles 16 and 17. After examining those articles, it had decided that the text of article 14 required no change.

99. The CHAIRMAN invited the Committee of the Whole to confirm its approval of article 14.

Article 14 was approved.

Article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force) [14]

100. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 15 adopted by the Drafting Committee read as follows:

"*Article 15*

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

" (*a*) it has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

" (*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

101. The Drafting Committee had made several drafting changes in article 15, all in the introductory part of the article. The Committee of the Whole had decided to delete sub-paragraph (*a*) and in view of that decision the Drafting Committee had thought fit to delete the word " proposed " before the word " treaty ", since without sub-paragraph (*a*) only signed or ratified treaties would be involved. In the French text, the Drafting Committee had replaced the words " *est obligé* " by the word " *doit* " and in the Spanish text it had used the word " *deberá* "; the English words " is obliged " had not been changed. The Drafting Committee had replaced the words " acts tending to frustrate the object of a treaty " by the words " acts which would defeat the object and purpose of a treaty ". It wished to emphasize that that was a purely drafting change, made in the interests of clarity. It had added the word " purpose " to the word " object " because the expression " object and purpose of the treaty " was frequently used in the convention. The absence of the word " purpose " in the introductory phrase of article 15 might lead to difficulties in interpretation. The change in no way affected the substance of the provision and did not widen the obligation imposed on States by article 15.

102. Mr. EVRIGENIS (Greece) said he thought that in the French text it would be advisable, from the drafting point of view, to place the word " *lorsque* " at the end of the introductory phrase, so as to avoid having to repeat it in sub-paragraphs (*a*) and (*b*). That also applied to article 12.

103. Mr. SINCLAIR (United Kingdom) said that his delegation had proposed the deletion of article 15 because it had had some difficulty in accepting sub-paragraph (*a*) and the introductory phrase. Since the Committee of the Whole had deleted sub-paragraph (*a*) and the Drafting Committee had amended the introductory phrase by deleting, *inter alia*, the words " tending to frustrate ", the United Kingdom delegation could now support the article.

[14] For earlier discussion of article 15, see 19th and 20th meetings.

104. Mr. BARROS (Chile) said he regretted that the term " *malograr* " was still used in the Spanish text. It was not employed in its normal sense and corresponded neither to the English word " defeat " nor to the French word " *priver* ". It would be preferable to use the word " *privar* " or " *frustrar* ".

105. The CHAIRMAN invited the Committee of the Whole to approve the text of article 15 submitted by the Drafting Committee, subject to those comments.

Article 15 was approved.

106. Mr. BISHOTA (United Republic of Tanzania) observed that the articles submitted by the Drafting Committee had no titles.

107. The CHAIRMAN said that the Drafting Committee had deferred consideration of the titles of all the articles.[15]

The meeting rose at 6.15 p.m.

[15] See 28th meeting, para. 2.

SIXTY-SECOND MEETING

Thursday, 9 May 1968, at 8.40 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 58 (Supervening impossibility of performance)

1. The CHAIRMAN invited the Committee to consider article 58 of the International Law Commission's draft.[1]

2. Mr. SUAREZ (Mexico), introducing his amendment (A/CONF.39/C.1/L.330), said that in article 58 the International Law Commission had dealt with a particular case of *force majeure*, that of the disappearance or destruction of an object indispensable for the execution of the treaty. The very wide definition of a treaty given in article 2 covered a great variety of treaties, including those of a commercial or financial character, the performance of which might come up against many other cases of *force majeure*. He was thinking, in particular, of the impossibility to deliver an article by a given date owing to a strike, the closing of a port or a war, or of the possibility that a rich and powerful State, faced with temporary difficulties, might be obliged to suspend its payments. In such cases, the law should establish the rights of the parties and not rely on their mutual good will.

3. *Force majeure* was a well-defined notion in law: the principle that " no person is required to do the impossible " was both a universal rule of international law and a question of common sense. Its application had not caused courts any special difficulties and it was

[1] The following amendments had been submitted: Mexico, A/CONF.39/C.1/L.330; Netherlands, A/CONF.39/C.1/L.331; Ecuador, A/CONF.39/C.1/L.332/Rev.1.