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Twenty-first plenary meeting

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

treaty ". That particular element did not appear in the International Law Commission's text of the article; it had been originally inserted at the 59th meeting of the Committee of the Whole by the narrow vote of 26 to 25, with 37 abstentions. It had been proposed as an amendment (A/CONF.39/C.1/L.311) by the United Kingdom delegation, which had argued that a broadening of the availability of implied denunciation would lessen the likelihood of resort to the more drastic grounds of termination set forth in Part V. Having reflected on the matter, the Australian delegation doubted whether that in itself was a good reason for inserting a ground of termination in Part V. It now considered that the better approach was the one adopted in the original text, under which implied termination or denunciation depended upon the implied intention of the parties. The character of the treaty was only one of the elements to be taken into account. The Australian delegation therefore requested a separate vote on sub-paragraph 1 (*b*) of article 53.

84. Mr. DE LA GUARDIA (Argentina) said that he had consulted a number of Spanish-speaking delegations regarding the use of the word " *retirada* " in the Spanish version of articles 51 and 53. They had agreed that it would be better to say " *retiro* ", as had been suggested by the representative of Ecuador at the 16th plenary meeting in connexion with article 40.

85. The PRESIDENT said that the Drafting Committee would take note of the Argentine representative's observation.

86. Mr. ALVAREZ TABIO (Cuba) said his delegation opposed the motion for a separate vote on sub-paragraph 1 (*b*) of article 53. The article struck a proper balance between the subjective and objective elements involved in setting a term to treaties which contained no provision regarding termination, denunciation or withdrawal. Article 53, considered as a whole, made a positive contribution to the progressive development of international law by curbing the abusive practice of perpetual treaties, the purpose of which was to impose a policy enabling the strong to dominate the weak. A treaty of indefinite duration could now be brought to an end by application of the *rebus sic stantibus* clause implicit in all such treaties. History showed how circumstances could change fundamentally in a comparatively short period of time. Again, the right to withdraw from a treaty was a factual matter which was necessarily governed by the circumstances of each particular case, especially by reference to the character of the treaty.

87. At the first session, the Committee of the Whole had considered an amendment submitted by Spain, Venezuela and Colombia (A/CONF.39/C.1/L.307 and Add.1 and 2), which provided that " when a treaty contains no provision regarding termination, denunciation or withdrawal, any party may denounce it or withdraw from it unless the intention of the parties to exclude the possibility of denunciation or withdrawal appears from the nature of the treaty and the circumstances of its conclusion ". It had decided instead in favour of a United Kingdom amendment (A/CONF.39/C.1/L.311) under the terms of which, subject to reasonable notice of intent, the right of denunciation or withdrawal might be implied from the treaty. The treaties in question were by their very nature temporary. Neither the intention of the parties nor the *pacta sunt servanda* rule could affect the real position, and it was illogical and unnatural to deny the temporary character of certain types of treaties. If sub-paragraph 1 (*b*) were deleted, the right of denunciation or withdrawal would have to be inferred from a presumption based on circumstances which were not defined, which might include the nature of the treaty. If it was accepted that a presumed intention to terminate the treaty could be inferred from its nature, why not simply admit that some treaties were by nature temporary and that consequently the presumed intention of the parties to accept denunciation or withdrawal could be inferred from their temporary character?

88. He would remind the Conference that a separate vote on sub-paragraph 1 (*b*) had been requested at the 81st meeting of the Committee of the Whole. The sub-paragraph had then been adopted by 56 votes to 10, with 13 abstentions, and the article as a whole by 73 votes to 2, with 4 abstentions. The Cuban delegation therefore opposed the motion for a separate vote on sub-paragraph 1 of article 53 and requested that the motion be put to the vote.

The meeting rose at 6.20 p.m.

TWENTY-FIRST PLENARY MEETING

Tuesday, 13 May 1969, at 10.50 a.m.

President: Mr. AGO (Italy)

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

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

Article 53 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal) *(continued)*

1. The PRESIDENT invited the Conference to continue its discussion of article 53. The representative of Australia had asked for a separate vote on article 53, paragraph 1 (*b*) and the representative of Cuba had opposed that request.

2. Mr. BRAZIL (Australia) said that, in his delegation's view, a separate vote on article 53, paragraph 1(*b*) would be reasonable; but since it was apparent that the majority of representatives at the Conference wished the sub-paragraph to be retained, the Australian delegation would not press for a separate vote on it so as not to hold up the Conference's work.

3. His delegation would abstain from voting on article 53 as a whole, since it preferred the original text submitted by the International Law Commission. Incidentally, the retention of sub-paragraph 1(*b*) would increase the importance of the question of the settlement of disputes occasioned by the application of the article. The Conference would recall the comments of the Expert Consultant in the final paragraph of document A/CONF.39/L.28 on the question whether " denunciation " should be mentioned in article 62. His delegation thought it would be better to state clearly that any dispute arising from the application of article 53 should be settled in accordance with the procedures laid down in articles 62 and 62 *bis*. The Conference might revert to that point when it came to consider those two articles.

4. Mr. MATINE-DAFTARY (Iran) introduced his delegation's amendment (A/CONF.39/L.35), to add at the end of paragraph 1(*b*) the words " or by all the circumstances involved ". In paragraph (4) of its commentary to article 53 the International Law Commission had pointed out that some of its members took the view that the existence of the right of denunciation or withdrawal was not to be implied from the character of the treaty alone. In the same paragraph the Commission stated: " According to these members, the intention of the parties is essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission ". It was not clear, therefore, why only the nature of the treaty was mentioned in paragraph 1(*b*). The words " or by all the circumstances involved ", should be added in order to take account of the Commission's views.

5. Mr. MARESCA (Italy) said that the provision in paragraph 1(*b*) enabling a party to invoke the nature of a treaty in order to denounce it or to withdraw from it held a danger for the stability of treaties. The provision was incompatible with the *pacta sunt servanda* rule.

6. Mr. MENDOZA (Philippines) said he had been ready to support the Australian representative's request for a separate vote on paragraph 1(*b*), not because of the actual wording of the sub-paragraph, but because he believed that in the ordinary way, and unless there was some really serious reason to the contrary, every delegation was entitled to request a separate vote.

7. Mr. DE CASTRO (Spain) said he supported the Iranian proposal, since the nature of the treaty and the circumstances of its conclusion had been mentioned in the amendment to article 53, paragraph 1, submitted in the Committee of the Whole by Spain, Venezuela and Colombia (A/CONF.39/C.1/L.307 and Add.1 and 2) as means of determining the intention of the parties.

8. The PRESIDENT invited the Conference to vote on the Iranian amendment.

The result of the vote was 31 in favour and 23 against, with 43 abstentions.

The Iranian amendment (A/CONF.39/L.35) was not adopted, having failed to obtain the required two-thirds majority.

Article 53 was adopted without change by 95 votes to none, with 6 abstentions.

9. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation had voted for article 53 on the understanding that the term " denunciation " as interpreted and applied by the Soviet Union related only to cases where clear provision was made for it and where it took place in conformity with the terms of the treaty itself. According to Soviet treaty practice, the provisions of article 53 related to other cases of unilateral termination of a treaty, namely abrogation and annulment.

Article 54 [1]

Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties.

10. Mr. TALLOS (Hungary) said that his delegation had submitted its amendment (A/CONF.39/L.30) to bring article 54 into line with article 51. At the 58th meeting of the Committee of the Whole, during the Conference's first session, the representative of the Netherlands, introducing his amendment to article 51 (A/CONF.39/C.1/L.313), had pointed out that some treaties provided for quite a long period, sometimes up to twelve or eighteen months, after the date of ratification or accession before the treaty entered into force for the ratifying or acceding State. A State which had given its consent to be bound by the treaty should not be treated as a third State, for it had expressed a definitive wish to establish treaty relations with the other parties. The parties to the treaty should therefore not be able to negotiate the termination of the treaty without allowing the participation in those negotiations of all the contracting States.

11. Those considerations also applied to the case mentioned in article 54. The legal effects of the suspension of the operation of a treaty were, for the period of the suspension, the same as those of definitive termination. The Hungarian delegation therefore proposed that article 54, sub-paragraph (*b*) should be brought in to line with article 51, sub-paragraph (*b*) by adding the words " after consultation with the other contracting States ".

The Hungarian amendment (A/CONF.39/L.30) was adopted by 66 votes to 4, with 29 abstentions.

Article 54, as amended, was adopted by 101 votes to none.

[1] For the discussion of article 54 in the Committee of the Whole, see 59th and 81st meetings.

An amendment was submitted to the plenary Conference by Hungary (A/CONF.39/L.30).

Article 55 [2]

Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) The possibility of such a suspension is provided for by the treaty; or

(*b*) The suspension in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

12. Mr. DENIS (Belgium) observed that article 37, which dealt with modification by *inter se* agreements was akin to article 55, which dealt with *inter se* suspension of the operation of treaties. A change had been made in the French text of article 37, where the words " *accomplissement de leurs obligations* " had been replaced by " *exécution de leurs obligations* ". The same change should probably be made in article 55 and the two texts brought into line.

13. The PRESIDENT said that the Drafting Committee would consider the point.

Article 55 was adopted by 102 votes to none.

Article 56 [3]

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 56 was adopted by 104 votes to none.

Article 57 [4]

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

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

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

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

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

(ii) As between all the parties;

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

(*c*) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

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

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

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

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

14. Sir Francis VALLAT (United Kingdom) said that his delegation supported article 57, but it wished to revert to two points which had been raised in the Committee of the Whole, when there had not been time to deal with them adequately. The first concerned the significance of the expression " invoke as a ground " and the second the question of separability involved in the expression " in whole or in part ". On both points, the various parts of article 57 contained discrepancies. His delegation had searched the records, particularly the report of the International Law Commission and the official records of the first session of the Conference, but had found no satisfactory explanation. Yet in its commentary to paragraph 1, the International Law Commission had itself emphasized the importance of the expression " invoke as a ground ", which it saw as " intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated ".

15. One of the changes proposed by the United Kingdom in its amendment (A/CONF.39/L.29) involved the insertion of the words " invoke the breach as a ground " in paragraphs 2(*a*) and 2(*c*). That would bring the text of those sub-paragraphs into line with paragraphs 1 and 2(*b*) and take away from the present text the implication that the parties or party should have a right to act " arbitrarily ".

16. It seemed clear, with regard to paragraph 2(*c*), that a party should not be entitled to suspend the operation of a treaty " arbitrarily ". It might be thought that different considerations applied to paragraph 2(*a*), which dealt with the case where the other parties acted by unanimous agreement. Experience showed, however, that there might be a difference of view between one party and all the other parties to a multilateral treaty. The other parties might be wrong, and there was no

[2] For the discussion of article 55 in the Committee of the Whole, see 60th, 86th and 99th meetings.

[3] For the discussion of article 56 in the Committee of the Whole, see 60th and 81st meetings.

[4] For the discussion of article 57 in the Committee of the Whole, see 60th, 61st and 81st meetings.

Amendments were submitted to the plenary Conference by the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/L.29) and Switzerland (A/CONF.39/L.31).

reason why they should be given the power to act " arbitrarily " under paragraph 2(*a*). That was especially true where the number of parties was small. Quite often the position under a multilateral treaty was very much like that under a bilateral treaty. It was principally for those reasons that his delegation was asking the Conference to rectify the text by inserting the phrase " invoke the breach as a ground " in paragraphs 2(*a*) and 2(*c*).

17. The second point also related to paragraphs 2(*a*) and 2(*c*), which again differed, for reasons which it was difficult to understand, from paragraph 1 and paragraph 2(*b*). In the latter paragraphs, separability was permitted, whereas in paragraphs 2(*a*) and 2(*c*) it was not. Yet separability might be just as desirable, indeed as essential, in the latter cases as in the former. There was no distinction of principle or substance involved, as article 41, paragraph 2 adopted a few days previously confirmed. Article 41 expressly prohibited a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty from being invoked otherwise than with respect to the whole treaty, except as provided in article 41, paragraphs 3 to 5, or in article 57. If two provisions in article 57 provided for separability by using the words " in whole or in part " and two others did not use those words, the conclusion seemed inescapable that separability would not be permissible in the case of the latter two provisions.

18. The United Kingdom delegation hoped that the Conference would approve the changes it had proposed. It did not claim that they were perfect in form, but if they were approved in principle they could be referred to the Drafting Committee.

19. His delegation supported article 57, but regarded it as an article which depended on the adoption of satisfactory procedures. As already explained in connexion with article 45 and other articles, it would abstain in the vote on article 57 and, for similar reasons, in the vote on articles 59 and 61.

20. Mr. RUEGGER (Switzerland) said that although his delegation supported article 57, as it had done in 1968, it was proposing an addition (A/CONF.39/L.31) which it thought essential. The Swiss delegation had submitted an oral amendment to that effect at the first session.[5]

21. His delegation had already urged in the discussion on article 50 that conventions relating to protection of the human person should be sacrosanct. Its amendment to article 57 was based on a number of considerations. First, the 1949 Geneva Conventions, which were virtually universal and, in his delegation's view, formed part of the general law of nations, prohibited reprisals against the persons protected. Second, in the spirit of those Conventions, encouragement was given in certain circumstances to the conclusion of *ad hoc* bilateral agreements expressing the wish of States not yet parties to the Geneva Conventions to observe some of their basic principles, including the prohibition of reprisals against the persons protected. Lastly, there were other equally important conventions concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general, and in no event should their violation by one party result in injury to innocent people.

22. Consequently, his delegation though it necessary to put a curb on the harmful effects which the provisions of article 57, paragraphs 2(*b*) and 3(*b*), could have on individuals. The absence of a proviso on the fundamental rules for the protection of the human person would be dangerous. The Swiss delegation therefore proposed that the Conference should adopt an additional paragraph for article 57, which would simply be a saving clause to protect human beings. If the Conference accepted the principle of such a clause, he would ask for paragraph 5 to be referred to the Drafting Committee, which had not so far considered the proposal in writing.

23. Mr. DIOP (Senegal) said he wished to make a suggestion affecting the terminology, which could be referred to the Drafting Committee. In paragraph 3(*a*) the term " *rejet* " in the French version should be replaced by the term " *dénonciation* ". Section 3, which contained article 57, was entitled: " Termination and suspension of the operation of treaties "; consequently, that section was concerned with treaties in force which were to be terminated or suspended. Article 57 laid down the procedure for the withdrawal from or denunciation of a treaty, and not, properly speaking, for repudiating it. Moreover, paragraph (9) of the International Law Commission's commentary to article 57 showed that those provisions clearly referred to denunciation.

24. The PRESIDENT pointed out that the Senegalese representative's oral amendment affected all the versions of article 57, not merely the French text.

25. Mr. DENIS (Belgium) said he supported the amendment by Senegal: technically, a treaty could only be " repudiated " by " denunciation ".

26. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation supported the United Kingdom amendment (A/CONF.39/L.29) and the Swiss amendment (A/CONF.39/L.31) to article 57.

27. Mrs. ADAMSEN (Denmark) said that at the 61st meeting of the Committee of the Whole, her delegation had supported the Swiss amendment to add to article 57 a paragraph concerning humanitarian conventions. She realized that from a strictly legal point of view it might be questioned whether such an addition was absolutely necessary, but her delegation considered that the principle concerned was of such fundamental importance that it should in any case be included in the convention on the law of treaties. Her delegation would therefore vote for the Swiss amendment.

28. The Danish delegation would also vote for the United Kingdom amendment (A/CONF.39/L.29), with which it was in full agreement.

29. Mr RATTRAY (Jamaica) said that, at the 61st meeting of the Committee of the Whole, his delega-

[5] See 61st meeting of the Committee of the Whole, para. 12.

tion had supported the principle in article 57 that a material breach of a treaty should be a ground that could be invoked for terminating the treaty or suspending its operation. But, in view of the fact that a material breach was defined in article 57, paragraph 3, as consisting in, *inter alia,* the violation of a provision essential to the accomplishment of the object or purpose of the treaty, and that article 41 of the convention, as approved, prohibited separability if the ground invoked for terminating or suspending the operation of a treaty related to essential clauses of the treaty, his delegation found it difficult to understand how it could logically be stated in article 57 that a material breach of a treaty could be invoked as a ground for terminating it in part only. Since the breach related to a provision essential to the accomplishment of the object or purpose of the treaty, the very basis of the treaty relationship, namely consent to the treaty, would have been removed.

30. His delegation had not received any satisfactory reply to that question of substance. Nothing in the new amendments which had been submitted (A/CONF. 39/L.29 and L.31) dispelled the doubts which were still felt by his delegation. Accordingly, it would be obliged to abstain on article 57, as it had already done in the Committee of the Whole.

31. Mr. NASCIMENTO E SILVA (Brazil) drew the attention of the Drafting Committee to the fact that the English version of article 57, paragraph 3, should refer to " this article " rather than " the present article ", since the word " present " was used only in the expression " the present Convention ".

32. His delegation supported the United Kingdom amendment (A/CONF.39/L.29), which would contribute to the stability of treaties. It also supported the Swiss amendment (A/CONF.39/L.31), which should be generally acceptable.

33. Mr. ESCUDERO (Ecuador) said he welcomed the Swiss delegation's initiative (A/CONF.39/L.31), but found the idea of " reprisals " too narrow. As a suggestion to be put before the Drafting Committee, he proposed that there should be a reference to a broader notion as well as to " reprisals ". For example, the passage might read: " . . . in particular, to rules prohibiting any form of persecution and reprisals against protected persons ".

34. Mr. ROSENNE (Israel) said he wished to comment on the United Kingdom amendment (A/CONF.39/ L.29). The first part of the amendment to paragraph 2(*a*) proposed the inclusion of the words " to invoke the breach as a ground ". In his view, invocation of a ground for suspending the operation of a treaty or for terminating it under Part V was in the nature of things a unilateral step, and he did not see how it would work on a multilateral basis. The words " by unanimous agreement " in that paragraph, an expression deliberately used by the International Law Commission and retained in the text before the Conference, seemed to him to provide adequate guarantees against arbitrary action.

35. On the other hand, the second part of the amendment to paragraph 2(*a*) — the addition of the words " in whole or in part " — improved the text. He therefore wished to know whether the United Kingdom representative would agree to a separate vote on his amendment: paragraph 1 of the amendment would then be treated as two quite distinct amendments, one of which would read " . . . to invoke the breach as a ground for suspending the operation of the treaty of for terminating it ", while the other would cover the addition of the words " in whole or in part ". Those two amendments would be put to the vote separately.

36. With regard to the expression " in whole or in part ", he said that in his opinion it did not refer to the principle of separability stated in article 41. On the contrary, it had been made very clear in the discussions in the International Law Commission that in cases of breach the injured State had complete freedom of action in deciding, when it invoked the breach as a ground for suspending the operation of the treaty or terminating it, what provisions of the treaty were to be terminated or suspended in operation.

37. His delegation supported paragraph 2 of the United Kingdom amendment, relating to paragraph 2(*c*).

38. He would be glad to support the Swiss amendment (A/CONF.39/L.31) in principle, subject to scrutiny by the Drafting Committee.

39. Sir Francis VALLAT (United Kingdom) said he had no strong views about how his delegation's amendment should be put to the vote; it would be for the President to decide.

40. In reply to the representative of Israel's point about the safeguards provided by the words " by unanimous agreement " in article 57, paragraph 2(*a*), he said that even when the parties acted by unanimous agreement, they might very well be guilty of an arbitrary act. The fact of their agreement was not a guarantee that their action was justified.

41. His delegation had not been referring to the principle of separability in article 41 in proposing the insertion of the words " in whole or in part " in article 57, paragraph 2(*a*); its reason for proposing that addition was that article 41 left it to article 57 to clarify the point, and it was therefore necessary to be especially precise in article 57.

42. Mr. CASTRÉN (Finland) associated his delegation with those which had supported the United Kingdom amendment and the Swiss amendment. The latter was especially important for the reasons explained by the representative of Switzerland.

43. Mr. EUSTATHIADES (Greece) said he supported the United Kingdom amendment, which added a valuable clarification to article 57. He was also in favour of the Swiss amendment and congratulated its sponsor on his initiative in submitting it. He had two comments to make on that particular amendment, which presumably had still to be referred to the Drafting Committee. In the first place, he recalled the proviso in article 40 of the convention reserving the general rules of international law; since many of the provisions of conventions of a humanitarian character formed part of general international law, article 40 already safeguarded a number of those conventions. But the con-

ventions in question, particulary the Geneva Conventions, went further and it was precisely in their case that the Swiss amendment was sound and necessary.

44. His second comment concerned a point of drafting. The Swiss amendment, which provided that " the foregoing paragraphs do not apply to provisions relating to... ", might be taken to mean that the denunciation procedure laid down in the Geneva Conventions, by which a treaty could be denounced without any specific reasons being given, was to be suppressed, whereas denunciation authorized under the Geneva Conventions might derive from considerations other than those connected with article 57. In order to clear up any misunderstanding on that score, it might be well to replace the phrase " The foregoing paragraphs do not apply to provisions... " by some such wording as " The provisions... contained in conventions... of a humanitarian character... shall be reserved ".

45. Mr. JAGOTA (India) said that his delegation preferred the Drafting Committee's text of article 57 to the text proposed by the United Kingdom. The United Kingdom representative had emphasized the distinction drawn in article 57 between paragraph 2(*a*) and 2(*c*), on the one hand, and paragraph 1 and paragraph 2(*b*) on the other. In the one case, a material breach was invoked as a ground for terminating a treaty or suspending its operation, whereas in the other it was not mentioned as a ground to be invoked for the same purpose. That distinction was not an oversight on the part of the International Law Commission but had been made advisedly for the reason stated in paragraphs (7) and (8) of the Commission's commentary to article 57. Where there was a material breach of a provision of a multilateral treaty the other parties would be entitled, as indicated in paragraph 2(*a*), by unanimous agreement either to suspend the operation of the treaty in its entirety or terminate it, taking such decisions for themselves and the defaulting State, or for all the parties to the treaty. Thus the distinction was duly specified between the case where one party invoked a material breach as a ground for terminating the treaty and the case where all the other parties exercised by unanimous agreement their right to terminate the treaty. There was no need to amend paragraph 2(*a*) and 2(*c*) of article 57 as drafted by the International Law Commission.

46. On the other hand, the second part of the United Kingdom amendment, proposing to add the words " in whole or in part " was acceptable to the Indian delegation, but only partly so. The words might conveniently be added in paragraph 2(*a*), but not in paragraph 2(*c*), which referred to special types of treaties, as pointed out in paragraph (8) of the Commission's commentary. He therefore supported the proposal for a separate vote on the two parts of the United Kingdom amendment.

47. The Swiss amendment was acceptable in principle. However, the Drafting Committee should consider the various suggestions which had been made, those by the representative of Greece in particular.

48. Mr. REDONDO-GOMEZ (Costa Rica) said he supported the Ecuadorian representative's suggestion.

49. Mr. ANDERSEN (Iceland) said he was in favour of the amendments to article 57.

50. Mr MARESCA (Italy) said the United Kingdom amendment considerably improved the text of article 57.

51. His delegation supported the Swiss amendment, since it fully recognized the overriding validity of humanitarian law.

52. The oral amendment by Senegal had certain advantages from the point of view of diplomatic style.

53. Mr. SEATON (United Republic of Tanzania), referring to paragraph 2(a), said that since the parties could decide unanimously on the measures to be taken, there was no need to state that they could invoke breach as a ground for suspending the operation of a treaty or terminating it. The United Kingdom amendment to paragraph 2(*a*) therefore introduced something that was unnecessary and did not improve the wording. That also applied to the amendment to paragraph 2(*c*).

54. Paragraphs 2(*a*) and 2(*c*) differed from paragraph 2(*b*) in that, in the case of paragraph 2(*b*), it was the party specially affected by the breach which would be able to invoke it as a ground for suspending the operation of the treaty and it was therefore that party which would perhaps have recourse to an arbitral tribunal or to adjudication; consequently, the party specially affected by the breach would act alone and would not have to take measures in agreement with the other parties.

55. With regard to the words " in whole or in part " in the United Kingdom amendment, he thought it would be rather unwise to provide that a party might consider the operation of a treaty to have been suspended in part in the event of a material breach of the treaty consisting, according to paragraph 3, in " a repudiation of the treaty not sanctioned by the present convention " or in " the violation of a provision essential to the accomplishment of the object or purpose of the treaty ".

56. His delegation would therefore vote against the United Kingdom amendments.

57. With regard to the Swiss amendment (A/CONF.39/L.31), his delegation appreciated the Swiss delegation's suggestion but wondered whether the amendment really served the purpose. If a party which violated a humanitarian treaty knew that the other parties would apply its provisions to its nationals, it might perhaps be encouraged to violate the treaty, believing itself to be protected against any sanction. Besides, the drafting of the Swiss amendment was vague; what was meant by the expressions " conventions and agreements of a humanitarian character " and " rules prohibiting any form of reprisals against protected persons "?

58. His delegation supported the Senegalese oral amendment.

59. Mr. GALINDO-POHL (El Salvador) said that the United Kingdom amendment brought paragraphs 1 and 2 of article 57 into balance and applied to multilateral treaties the system established in paragraph 1 for bilateral treaties.

60. His delegation supported the Swiss amendment, which was consistent with the humanitarian development

of international law, but it considered that the Ecuadorian representative's suggestion should be borne in mind.

61. The PRESIDENT put to the vote the phrase " in whole or in part " which the United Kingdom amendment (A./CONF.39/L.29) proposed to insert in paragraph 2(*a*).

That phrase was adopted by 56 votes to 6, with 33 abstentions.

62. The PRESIDENT put to the vote the remainder of the United Kingdom amendment to paragraph 2(*a*).[6]

The result of the vote was 42 in favour and 24 against, with 32 abstentions.

That part of the United Kingdom amendment was not adopted, having failed to obtain the required two-thirds majority.

63. The PRESIDENT called for a vote on the United Kingdom amendment to paragraph 2(*c*).

The United Kingdom amendment to paragraph 2(c) *was adopted by 45 votes to 17, with 34 abstentions.*

64. The PRESIDENT said that the suggestions regarding the Swiss amendment (A/CONF.39/L.31) referred to points of drafting. He thought the Conference should take a decision on the principle underlying the amendment and refer it to the Drafting Committee for modification in the light of the suggestions put forward during the discussion.

65. Mr. RUEGGER (Switzerland) said that he too thought that the Drafting Committee might study the various suggestions made with regard to his delegation's amendment. The Swiss delegation recognized the force of the Greek representative's argument concerning the application of article 40, but even something which was self-evident was better stated.

66. With regard to the comment about the possibility of a denunciation, his delegation wished to point out that some time might elapse between the performance of an act which provoked reprisals and the time when the denunciation could take effect.

67. The point raised by the representative of the United Republic of Tanzania had been considered by the 1949 Geneva Conference, which had concluded that reprisals against war victims should be entirely prohibited; moreover if the dangerous path of reprisals were followed, serious consequences might quickly ensue.

68. The PRESIDENT invited the Conference to vote on the principle embodied in the Swiss amendment (A/CONF.39/L.31).

The principle was adopted by 87 votes to none, with 9 abstentions.

69. Mr. STEVENSON (United States of America) said he was opposed to the oral amendment suggested by the Senegalese delegation. The Expert Consultant had indicated in his letter to the Chairman of the Drafting Committee (A/CONF.39/L.28) that in article 53 the term " denunciation " was used in the narrow sense of termination with the express or implied agreement of the parties.

70. If the Conference wished to replace the term " repudiation ", a word with a wider meaning, such as " termination ", would be preferable. But his delegation would vote in favour of retaining the word " repudiation ", so as to exclude the possibility of a problem of interpretation.

71. Mr WERSHOF (Canada) said that the Senegalese amendment seemed to concern a drafting point. It could therefore be referred to the Drafting Committee.

72. His delegation was nevertheless in favour of keeping the word " repudiation ".

73. The PRESIDENT said that the International Law Commission had considered the point and decided that the term " repudiation " was preferable to " denunciation ", since it considered that emphasis should be laid on a material rather than a formal act so as to cover all the means available to a State attempting to free itself of obligations under a treaty. The Commission had thus used the word " repudiation " quite intentionally.

74. Mr. YASSEEN (Iraq) said he wished to confirm what the President had said. It was difficult to talk of " denunciation of the treaty not sanctioned by the present convention ".

75. Mr. JAGOTA (India), said that, in the Expert Consultant's letter, it was stated that the term " denunciation " was used in article 53 only where the right to denounce arose from the agreement of the parties. Nevertheless, he would point out that the words " denunciation " or " denouncing " were used several times in the commentary to article 57, in respect of cases where one party decided to invoke a breach of the treaty as a ground for terminating it, and not in respect of cases where the parties decided by unanimous agreement to terminate a treaty.

76. His delegation agreed with the representatives of Iraq, Canada and the United States of America that the word " repudiation " should be retained in paragraph 3 (*a*).

77. Mr. SINHA (Nepal), explaining his delegation's vote, said that the United Kingdom amendment would have diluted the force of article 57, which provided a sanction if there was a material breach of a multilateral treaty. The requirement of the unanimous agreement of the parties for suspending the operation of a treaty or terminating it showed that the International Law Commission had wished to provide for a strong sanction by laying down that the operation of the treaty would be suspended in its entirety or the treaty terminated. His delegation had therefore abstained from voting on the first part of the amendment and had voted against the second part.

78. His delegation welcomed the Swiss amendment, which would establish a proviso with regard to con-

[6] See above, para. 35.

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

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

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

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

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

The meeting rose at 1.10 p.m.

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

TWENTY-SECOND PLENARY MEETING

Tuesday, 13 May 1969, at 3.20 p.m.

President: Mr. AGO (Italy)

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

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

Article 58 [1]

Supervening impossibility of performance

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

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

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

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

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

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

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

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

Article 58 was adopted by 99 votes to none.

Article 59 [3]

Fundamental change of circumstances

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

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

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

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