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Summary record of the 848th meeting

Topic:
Law of Treaties

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entirely satisfactory text. In his opinion, the Commission should be content with a modest text; every complicated subject had contradictory aspects and the Commission must reconcile itself to drafting a somewhat contradictory text.

89. Many sound and interesting comments had certainly been made. It was true that, in all the textbooks of international and municipal law concerned with the inter-temporal law, a distinction was made between situations where execution was immediate and situations where execution was successive; but could that distinction be usefully discussed at a conference of plenipotentiaries? In any event, he thought that careful attention should be given to the terminology used, in order to ensure that the wording of the article harmonized with that of other articles, such as article 56.

The meeting rose at 5.55 p.m.

848th MEETING

Tuesday, 10 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 53 (Legal consequences of the termination of a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 53.

2. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that the Drafting Committee would have to do a considerable amount of work on articles 52 and 53, which were more difficult to formulate than appeared at first sight. However, perhaps too much had been made of some of the problems, which might disappear if a better draft could be devised.

3. He agreed with Mr. Rosenne's argument that the proviso at the beginning of the article, " Subject to paragraph 3 ", was not well placed because it related only to paragraph 1 (*b*), and although some members had suggested that it be transferred, he would have thought it could safely be dropped, since no such general reservation was strictly necessary in view of the way in which the rest of the article was drafted.

4. To meet another point made by Mr. Rosenne, some such phrase as " or the parties otherwise agree " could be inserted in the introductory sentence after the word " provides ". That addition would correspond to certain provisions in part I.

5. As for the substance of paragraph 1, sub-paragraph (*a*) appeared to have escaped criticism and comment had for the most part been concentrated on sub-paragraphs (*b*) and (*c*). The word " legality " had given rise to the same kind of objections in article 52, where the alternative word " validity, " suggested by some members, was not quite the appropriate term. As far as the English text was concerned, the idea which the Commission had been trying to express in article 52, paragraph 1(*a*) was that the invalidity of a treaty did not deprive of its licit character an act performed in good faith while the treaty was in operation. In article 53, paragraphs 1 (*b*) and 1 (*c*) had been cast in negative form, and some members had shown concern lest the language of the former should be interpreted as establishing acts as legal, which might be impeached for reasons outside the treaty. The criticism was unfounded because that particular issue was left open.

6. It was important to decide what the Commission wished to stipulate in those two sub-paragraphs. In his opinion, two points had to be covered. The first was that, in the circumstances contemplated, there would be no retroactive effects and termination would not deprive acts performed while the treaty was in force of their licit character. Perhaps that point of inter-temporal law had not been made sufficiently clear because of linguistic difficulties. In English, the notion of the licit character of an act not being affected was unfamiliar and the term " legality " was used. That term, however, could have more than one sense, so that its inclusion in the article could lead to misunderstanding in the English text.

7. The second point was the continued validity of acts, rights and obligations arising from the existence of a treaty, and in that respect the wording of paragraphs 1 (*b*) and 1 (*c*) was perhaps not clear. The Drafting Committee would have to scrutinize them both carefully, to make sure that both points were adequately brought out.

8. Some members of the Commission were in favour of dropping paragraph 1 (*c*) altogether. The idea of introducing into the text the concept of vested rights, in the special sense that it possessed in one branch of law, had not been his own and he was uncertain whether the article should cover both ways in which such rights and obligations could arise, namely, by virtue of being vested directly under the treaty, or as a result of acts performed under the treaty régime. As it stood, paragraph 1 (*c*) in his proposed new text dealt with the first category, and more thought would have to be given to the question whether the second category should also be covered. The drafting of paragraph 1 (*c*) was likely to be delicate, because of the difficulty of finding suitable phraseology that could be accurately rendered into all the working languages.

[1] See 846th meeting, preceding para. 58, and para. 58.

9. If the words " including any rights or obligations arising from a breach of the treaty " were dropped, as some members had suggested, a special provision might have to be added somewhere else concerning the legal consequences of termination arising from breach, because in that instance the consequences could not be the same for all the parties.

10. Mr. Rosenne had suggested that the words " becomes operative " should be substituted for the words " takes effect " in paragraph 2, so as to be consistent with other articles. That was a point to be borne in mind when part I was revised, but it must be kept open at present, since the phrase " becomes operative " had not yet been finally adopted and was not perhaps the best that could be found. It might be necessary to include a general provision on the taking effect of notices, because the drafting difficulties had not yet been fully resolved by the Commission.

11. He did not favour the suggestion that paragraph 3 be transferred to article 52. As members were aware from the observations in his fifth report on articles 37 and 45 (A/CN.4/183/Add.1 and 3), and those in his sixth report on articles 52 and 53 (A/CN.4/186), the doctrine of a *jus cogens* rule making a treaty void subsequently had involved serious problems of presentation; that was confirmed by the fact that a number of governments had misunderstood the relationship between articles 37 and 45. In the past, the Commission had deliberately taken the line that the emergence of a new rule of *jus cogens* rendered a treaty in conflict with it void, but for general purposes it had treated that case as being one of termination and consequently to be dealt with in article 53. If paragraph 3 were transferred back to article 52, governments might fail to perceive that articles 37 and 45 dealt with two distinct situations, and injustice might ultimately result from a misunderstanding of the operation of the inter-temporal rule.

12. Termination in the circumstances referred to in paragraph 3 did not result from the will of the parties but by operation of law, and was an instance of a treaty being initially valid and later becoming void. It was much the same as other forms of termination and there was therefore some justification for retaining the provision in article 53. Moreover, that would simplify the task of drafting articles 52 and 53. If the weight of opinion were finally in favour of removing the provision to article 52, it would need to be most carefully worded.

13. He was not unduly alarmed by Mr. Reuter's thesis concerning the contradictions in article 53 and the fact that paragraph 3 appeared to derogate from the provisions of paragraphs 1 and 2. If a rule of *jus cogens* became applicable to a treaty, whatever had occurred in the past the subsequent enjoyment of the rights and obligations resulting from the treaty must be subject to their not being in violation of that rule.

14. The discussion had sharpened Mr. Rosenne's doubts about what was meant by lawful termination and he had pointed out that termination on grounds of obsolescence and desuetude had not been covered. His criticism raised points of both substance and drafting. During the discussion on termination through the definitive execution of a treaty at the second part of the seventeenth session,[2] the consensus of opinion seemed to have been that it should not be regarded as a real instance of termination.

15. In earlier years, the Commission had from time to time given some thought to whether termination by reason of obsolescence and desuetude should be covered more explicitly, but had reached the conclusion that they were covered, at least partly, in the provisions concerning fundamental change of circumstances and in the notion of tacit agreement. The real problem was to decide whether obsolescence was a ground for termination rather than a factual cause of termination which had to be founded on the tacit agreement of the parties to allow the treaty to fall. The point had troubled him in connexion with other articles, and it would be helpful if the Drafting Committee could be instructed to examine and report on it so as to enable the Commission to decide whether more explicit provisions were called for, and if so in what form. The point was of importance because a fairly comprehensive rule had been inserted in article 30, laying down that termination could only come about as a result of the application of the terms of the treaty or of the articles in the draft, and that imposed an obligation on the Commission to ensure that all cases of termination were covered in the articles.

16. Mr LACHS said that if the question whether or not to include provisions dealing with obsolescence and desuetude were referred to the Drafting Committee in connexion with article 53, the Commission might not have an opportunity of discussing it in plenary meeting.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem should be examined as a general one and the purpose of his suggestion was to save time. If the Drafting Committee felt unable to submit a proposal, the matter could be discussed in the Commission itself.

18. The CHAIRMAN, observing that the Drafting Committee's texts were never final, suggested that article 53 be referred to it for examination in the light of the discussion and of the Special Rapporteur's proposal.

It was so agreed.[3]

ARTICLE 54 (Legal consequences of the suspension of the operation of a treaty) [68]

[68]

Article 54

Legal consequences of the suspension of the operation of a treaty

1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

(*a*) Shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

(*b*) Shall not otherwise affect the legal relations between the parties established by the treaty;

[2] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 828th meeting, paras. 65 *et seq.* and 841st meeting, paras. 5 *et seq.*

[3] For resumption of discussion, see 864th meeting, paras. 96–102.

(*c*) In particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.

19. The CHAIRMAN invited the Commission to consider article 54. The Special Rapporteur had proposed the insertion between paragraphs 1 and 2 of a new paragraph reading:

" In the case of the suspension of the operation of a multilateral treaty:

(*a*) with respect to one party, paragraph 1 applies only in the relations between that party and each of the other parties;

(*b*) between certain of the parties, paragraph 1 applies only in the mutual relations of those parties. "

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the brief comments made by governments had been analysed in his report (A/CN.4/186). He doubted whether it was necessary to specify the substantive articles to which article 54 referred, as suggested by the Government of Israel, though it was important to ensure that the drafting of the article was sufficiently clear to indicate which types of suspension fell under its provisions.

21. The assumption by the Government of Israel that the article did not apply to suspension consequent upon severance of diplomatic relations should be considered when the Commission came to review article 64 for the second time. It should be noted that the text of article 54, on which the Government of Israel had commented, had been drafted by the Commission before that of article 64, which provided that the severance of diplomatic relations would not normally affect the relations established by a treaty. The Commission had left open the point that such a situation could render performance of the treaty impossible: the case might be regarded as temporary suspension which, it could be argued, was not covered in the draft. His own opinion was that the position of article 64 would have to be changed. Some governments, while conceding that the means of applying a treaty could disappear with the severance of diplomatic relations, had criticized article 64 as opening the door too wide to claims based on severance of relations as a ground for suspension.

22. The change he was proposing in article 54 was intended to meet the point made by the United States Government that the Commission had failed to take account of the difference between the case in which one party to a multilateral treaty suspended its operation with respect to one other party, and the general case of suspension between all or some of the parties.

23. Mr. de LUNA said that the Special Rapporteur had done well, first, to refrain from expressly mentioning the case covered by article 64, and secondly, to take the case of multilateral treaties into account in view of the pertinent comments of the United States Government. He was not, however, wholly satisfied with the new text proposed by the Special Rapporteur for that purpose.

24. The United States Government's comment served to bring out the two differences between a bilateral and a multilateral treaty in regard to the effects of suspension. First, certain provisions of the treaty might not affect all of the parties, but only some of them. For example, a multilateral peace treaty might include territorial clauses fixing the frontier between State A and State B, but not affecting the other parties. In accordance with the principle of the separability of contractual rights and obligations, international law permitted States A and B to modify those clauses without the participation of the other parties, provided of course that the modifications were not incompatible with the object and purpose of the multilateral treaty as a whole.

25. A fairly recent specific case of application of the principle of compatibility of a multilateral treaty with the modification, agreed between some of the parties, of " individualized " rights and obligations, was the Memorandum of Understanding of 5 October 1954 between Italy, the United Kingdom, the United States of America and Yugoslavia[4]—the States principally concerned with the status of Trieste. By the terms of that Memorandum the provisions of the peace treaty relating to Trieste had been modified without the participation of the other parties, which had not been principally concerned, and without their being subsequently notified. Only the United Nations Security Council, which was responsible for administering the territory of Trieste, had been informed. One of the parties to the peace treaty, the USSR, had merely informed the Security Council that it had taken note of the agreement, without lodging any protest.

26. In another case, however, France, considering it contrary to the object and purpose of the Treaty of Versailles, had protested at the Anglo-German Naval Agreement of 18 June 1935, by which the United Kingdom had renounced the rights conferred on it by the disarmament clauses of the Treaty of Versailles.

27. Secondly, a multilateral treaty differed from a bilateral treaty in regard to the effects of suspension, in that the treaty as a whole might be suspended for one or more of the parties, but not for all of them. That was the problem which the Special Rapporteur, in response to the United States Government's comment, had tried to solve by inserting a new paragraph in article 54.

28. It was true that the effects of suspension were frequently " individualized "—that was to say, restricted to relations between some of the parties, while the treaty continued to apply between the others as if there had been no suspension—and for such cases the wording proposed by the Special Rapporteur was perfectly satisfactory. But there could be another case which was not covered by that wording: that of the treaties which McNair described as " objective ".[5] The suspension of a treaty of that kind for one or more of the parties affected not only that party or those parties, but also, *inter se*, the parties between which the treaty had not been suspended, by reason of its general and objective nature.

29. An example once quoted by Mr. Gros was that of treaties relating to pollution of the sea by oil; other

[4] United Nations, *Treaty Series*, vol. 235, p. 99.

[5] McNair, *The Law of Treaties*, 1961, pp. 260 *et seq.*

examples were the treaties relating to conservation of the living resources of the sea or to nuclear tests. In those cases, it would not be enough to say that the multilateral treaty, if suspended as between some of the parties, remained in force for the others, *inter se*, since an objective interest was involved; the disappearance of certain species of marine life affected all the parties, as did nuclear tests.

30. For the second case, therefore, the new paragraph proposed by the Special Rapporteur was insufficient. He himself would be inclined to follow the wording proposed by the United States Government, and without going into detail, to draft paragraph 1 (*a*) in both simpler and broader terms. He accordingly proposed the following text:

> " Shall relieve the parties specially affected by the suspension from the obligation to apply the treaty during the period of the suspension. "

That wording, which consisted of the United States text, with the addition of the adverb " specially ", taken from article 42, would cover all the cases contemplated by the Special Rapporteur in his proposal, as well as cases in which the suspension of a treaty affected all the parties because of its " objective " character. It would obviate the need for the Special Rapporteur's new paragraph.

31. Mr. RUDA, referring to the comments of governments on article 54, said that with respect to suspension following the severance of diplomatic relations, the Government of Israel had been right to point out that the article did not refer to the consequences of the suspension of such relations on the operation of a treaty. That comment had, of course, been made before the Commission had adopted article 64, which dealt with the effect of severance of diplomatic relations on the application of treaties. The Special Rapporteur had been logical in not adding anything on that subject to article 54, for the problem of the severance of diplomatic relations *per se* had no bearing on the legal consequences of suspension of the operation of a treaty. Article 54 was not concerned with the causes of the suspension, but with its effects.

32. In that connexion, he agreed with the Special Rapporteur's comment on the placing of article 64: it would be better to place it in the section on the termination or suspension of the operation of a treaty than to leave it at the end of the section on the application and effects of treaties.

33. The Government of Israel also suggested that article 54 should specify all the articles relating to the suspension of the operation of treaties. He saw no real need for such an enumeration, which would only encumber the text. The Special Rapporteur had done well not to adopt that suggestion.

34. The United States Government had pointed out that the article did not take account of cases of suspension of a multilateral treaty as between two of the parties to that treaty and had proposed an amendment accordingly. The Special Rapporteur had accepted the comment and proposed his own amendment, but he (Mr. Ruda) preferred the wording proposed by the United States Government or, better still, Mr. de Luna's proposal adding the adverb " specially ". The Drafting Committee could easily find some elegant formula for paragraph 1 (*a*) which would reduce the article to more manageable proportions, while at the same time expressing the ideas both of the Special Rapporteur and of Mr. de Luna.

35. Mr. REUTER said that, from the drafting point of view, it again appeared impossible to retain the three expressions " legality ", " *caractère légitime* ", and " *carâcter licito* ", in paragraph 1 (*c*), which did not have precisely the same meaning.

36. In paragraph 1 (*a*) the Commission had wished to make it clear that the parties' freedom to suspend the operation of a treaty was limited by certain factual considerations, in particular, the period of the suspension. But there might well be other matters that ought to be mentioned or called to mind, if only because other articles provided that the suspension of a treaty could be total or partial; that question brought in the principle of reciprocity, on which the draft as it stood was perhaps rather reticent. If partial suspension were the only problem, he would suggest adding the words " to that extent " between the words " shall " and " relieve ". That addition would make it possible to omit the words " during the period of the suspension ", as the temporal element would be covered by the limitation thus introduced.

37. But Mr. de Luna had just raised some much more far-reaching and important questions which might lead the Commission to reconsider the whole article and to doubt whether it was possible to solve such complex problems in a single text, without introducing numerous distinctions.

38. The United States Government's comment seemed to have convinced many members that it was necessary to deal separately with the case of multilateral treaties. But if the Commission also tried to distinguish between the causes of suspension, as Mr. Rosenne had suggested in connexion with other articles, it would be carried rather far. For certain causes of suspension could have effects very different from those mentioned in article 54. In the case of a multilateral treaty, for instance, the suspension might be a penalty imposed by a competent authority; that case should also be taken into account.

39. Similarly, the proviso at the beginning of paragraph 1 ought to refer not only to the provisions of the treaty, but also to such matters as the nature of the treaty and the obligations binding the parties outside the treaty in question. At that stage of the discussion, he was not convinced that the whole article should be reconsidered with a view to placing it on a much broader basis.

40. The formula proposed by the Special Rapporteur to settle the question of multilateral treaties was interesting, but he doubted whether it went to the root of the problem, as defined by Mr. de Luna.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission should not overlook the existence of article 46, containing general provisions on the separability of treaty provisions, which made express reference to cases of partial suspension.

42. Mr. ROSENNE said that he agreed with the Special Rapporteur's view that an enumeration of the articles to which article 54 applied was no longer as necessary as it had been when the Government of Israel had prepared its comments, because of the way in which the Commission, during the second part of its seventeenth session, had further clarified the concept of suspension.

43. It was, however, necessary to be sure that all genuine cases for which suspension could be contemplated had been properly covered in the substantive articles of part II, and that the Commission had indicated in the draft the extent to which suspension ought to have priority over termination. In most of the articles concerned, termination and suspension seemed to have been presented as alternatives, termination being given priority; but in the case of breach (article 42) priority seemed to have been given to suspension, and that was correct in the case of breach of a multilateral treaty. The problem had special relevance to article 39 and he wondered whether, if articles 30, 39 and 54 were read together, the Commission might not find that it had opened the door to something which it had wanted to avoid, namely, *de facto* denunciation by way of suspension. If that were so, it would be preferable to insert in article 39 some explicit reference to suspension, indicating precisely whether and to what extent it would operate in the circumstances covered by that article.

44. He found acceptable what was implicit in the Special Rapporteur's report—that it would not be correct to introduce the possibility of suspension into article 44 (Fundamental change of circumstances).

45. On the question of partial suspension, the same problem might arise as had arisen concerning partial termination in connexion with article 53, and he wondered whether article 46, dealing with the separability of treaty provisions in relation to the grounds of invalidity, termination or suspension dealt adequately, if taken in conjunction with articles 52, 53 and 54, with the legal consequences of applying separability to the suspension of the operation of a treaty. The answer might be in the affirmative, but he would welcome the Special Rapporteur's views. The point was connected with what Mr. Reuter had said about the need to cover adequately in the draft the principle of reciprocity in treaty obligations. He himself took a less pessimistic view about the way that issue had been handled throughout the draft articles and believed that it had been covered, but the point should be examined.

46. The temporal validity of suspension had been mentioned in the discussion; but problems of territorial application could also arise. Examples could be found in practice of a treaty being suspended in respect of a certain part of the territory of a party. The matter might not need to be mentioned in the article, but it should probably be referred to in the commentary.

47. As for the temporal effect or the duration of suspension, the whole essence of suspension was its temporary character. A close perusal of the relevant articles would reveal the moment from which suspension would begin, but he was not sure that they indicated clearly when it would end. He did not consider that bringing suspension to an end, or suspension itself, could have retroactive effects. That was probably implicit in the idea of suspension, but it might need to be stated in more definite terms.

48. The most important issue raised by article 54 was the as yet unsolved problem of article 40, paragraph 3 (A/CN.4/L.115) proposed by the Drafting Committee during the second part of the seventeenth session, which had not yet been approved by the Commission. Once a decision had been taken on that text, it might be easier to grasp the implications of the addition to article 54 proposed by the Special Rapporteur in order to take account of the United States Government's apparently well-founded comment.

49. Mr. TUNKIN said that he was in general agreement with the proposal submitted by the Special Rapporteur to meet the valid point raised by the United States Government. However, he did not believe that, for that purpose, it was necessary to introduce an additional paragraph dealing with the suspension of multilateral treaties. Paragraph 1 of article 54 referred to treaties in general, not only to bilateral treaties.

50. The interesting point raised by Mr. de Luna should be covered elsewhere; article 54 concerned cases in which a treaty was lawfully suspended: it did not deal with the causes of suspension. The question whether suspension of the operation of a treaty by one or more of the parties might constitute grounds of suspension for another party was a matter which was outside the scope of the article.

51. For those reasons, he suggested that the point raised by the United States Government be dealt with by rewording paragraph 1 of article 54 on the following lines:

> " 1. Subject to the provisions of the treaty, the lawful suspension of the operation of a treaty between all or certain of the parties only:
>
> (*a*) Shall relieve the parties concerned (or " the parties affected ") from the obligation . . . "

52. The CHAIRMAN, speaking as a member of the Commission, said he thought the article could be accepted as it stood, subject to a few drafting changes, with the addition of the new paragraph proposed by the Special Rapporteur. The Commission had already accepted the suspension of the operation of treaties as an institution, but it had not yet defined the grounds and procedures for such suspension, because article 40 had not yet been put into final form. As the principle of suspension had been accepted, it was logical to state the consequences of suspension. As Mr. Tunkin had just pointed out, article 54 dealt only with the consequences and scope of suspension.

53. It was particularly important to determine the consequences and scope of suspension in the case of a multilateral treaty, so the proposal made by the Special Rapporteur to meet the point raised by the United States Government was justified. But it could, perhaps, be improved by condensing the new paragraph so as to eliminate the division into two sub-paragraphs; for there was in fact only one idea to be expressed, namely, that the effect of the suspension was restricted to the parties between which the operation of the treaty was suspended.

54. Mr. AGO said he did not think that article 54 was of major importance. The draft would not suffer much if it were omitted, since what it said was self-evident. Mr. Tunkin had rightly pointed out that the purpose of the article was not to specify when, or between which parties, the operation of the treaty was suspended, but what occurred when the treaty was suspended, between the States for which it was suspended.

55. The text of the article as adopted in 1963 was satisfactory, even without the addition suggested by the United States Government. But if the Commission wished to be very precise and state what happened when the operation of a multilateral treaty was suspended as between some of the parties only, it would be enough to insert the words " between which the operation of the treaty is suspended " after the words " Shall relieve the parties", in paragraph 1 (*a*).

56. Mr. VERDROSS said he agreed with Mr. Tunkin and Mr. Ago. Article 54 dealt only with the consequences of the fact of suspension; moreover, it referred to treaties in general and not to bilateral treaties in particular, so that the addition proposed by the Special Rapporteur was unnecessary.

57. Mr. CASTRÉN said that after listening to the discussion he had come to the conclusion that the Special Rapporteur's proposal was acceptable in substance, but could be simplified by combining the proposed new paragraph with the existing paragraph 1. The Drafting Committee could examine all the suggestions that had been made, in particular those of Mr. de Luna and Mr. Tunkin.

58. Mr. JIMÉNEZ de ARÉCHAGA said he was afraid the Commission was going too far, and that suspension of the operation of a treaty might become a new way of avoiding treaty obligations. The Commission had begun by introducing incidental references to suspension into a number of draft articles dealing with termination. That had been done on the basis that, where termination was permissible, suspension of the operation of the treaty would *a fortiori* also be permissible.

59. But the Commission had gone much further when, at the previous session, it had considered introducing into article 40 a new paragraph 3, which would permit the operation of a multilateral treaty to be suspended as between certain parties only;[6] suspension would thus be permitted in certain circumstances in which termination itself was not permissible. That fact had made it necessary to devise guarantees to avoid suspension being utilised as a means of obtaining the *de facto* termination of a treaty. After a brief discussion the Commission had decided to defer consideration of the whole of article 40,[7] and to re-examine it after it had agreed on the safeguards to be introduced into article 67 on the question of *inter se* modification; it would then consider whether those guarantees would be sufficient, if extended to cover the question of *inter se* suspension.

60. The question of *inter se* suspension arose only when the suspension of the treaty was a consequence of its breach. That question had been dealt with in article 42 as adopted by the Commission at its previous session (A/CN.4/L.115), and paragraphs 2 (*a*) and 2 (*b*) of that article made distinctions which covered the comment by the United States Government. Of course, that comment had been made before article 42 had been adopted by the Commission on second reading.

61. For those reasons, he did not believe it was necessary to add the new paragraph proposed by the Special Rapporteur. If, however, the Commission were ultimately to adopt in article 40, paragraph 3, a provision which would allow *inter se* suspension to have the effect of putting an end to a treaty, the text of article 54 would have to be adjusted accordingly. He therefore suggested that the matter be left open.

62. Mr. BRIGGS said that either Mr. Tunkin's or Mr. Ago's proposal would meet the point made by the United States Government. The article did not deal with grounds of suspension, but only with the legal consequences of suspension.

63. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. de Luna had raised a very broad question. Personally, he agreed with the view that the matter was outside the scope of article 54, which did not deal with the substantive right of suspension. Article 54 was only concerned with the consequences of suspension in those cases in which, under the previous articles, the operation of a treaty was validly suspended. Mr. de Luna's remarks related more to article 40, the decision on which had been deferred.

64. The point raised by the United States Government was a valid one in the light of the 1963 text of the draft articles. Since then, at its last session, the Commission had adopted article 42, which gave a larger place to suspension; in the event of the breach of a treaty, termination was regarded as the last, not the first resort. Consequently, paragraph 2 of article 42, as finally adopted, set forth a number of possibilities in regard to multilateral treaties. It even provided, in sub-paragraph (*c*), for a case in which an individual party could suspend the operation of the treaty with respect to itself, regardless of the attitude taken by the other parties to the treaty. Sub-paragraph (*b*) stated that a party specifically affected by the breach could invoke it as a ground for suspending the operation of the treaty in its relations with the defaulting State; a bilateral situation was thus created in relation to a multilateral treaty. In the light of those complicated provisions, he had believed it safer to meet the point raised by the United States Government by introducing a paragraph which clearly stated the position in the various cases.

65. Either of the solutions put forward by Mr. Tunkin and Mr. Ago was acceptable, but it would probably be necessary to adopt both of them. In particular, the introduction of the adjective " lawful " seemed very necessary.

66. He did not, however, like the expression " parties affected "; a more precise wording such as " the parties in question " would be better.

[6] *Yearbook of the International Law Commission, 1966*, vol. I part I, 841st meeting, paras. 57 *et seq.*

[7] *Ibid.*, para. 90.

67. He accordingly suggested that paragraph 1 be redrafted to open:

" 1. Subject to the provisions of the treaty, the lawful suspension of the operation of a treaty between all or certain of the parties only:

(*a*) Shall relieve the parties in question from the obligation . . . ".

68. The points raised by Mr. Rosenne would require some further reflection and he would rather not commit himself on them at that stage. However, he was inclined to believe that article 46 on the separability of treaty provisions, adopted by the Commission at its last session, covered the question of partial suspension sufficiently, when combined with article 54 as it now stood and the provisions of the various substantive articles.

69. He did not favour introducing any reference to territorial questions into article 54; that would make the article unduly long, which was undesirable for a general provision of that kind.

70. As for the temporal element, it was sufficiently covered by the statement in paragraph 1 (*a*) that the suspension relieved the parties from the obligation to apply the treaty " during the period of the suspension ". The Drafting Committee might consider whether it was necessary to introduce into the draft articles a provision to the effect that suspension came to an end when the cause of suspension ceased, though that seemed to him self-evident. If it was considered necessary to cover the point by means of an express provision, it should be placed elsewhere than in article 54.

71. He suggested that article 54 be referred to the Drafting Committee for consideration in the light of the discussion.

72. Mr. de LUNA said that his views were the same as those of Mr. Tunkin and Mr. Ago. The only difference between his proposal and Mr. Tunkin's was the inclusion of the word " specially " before the word " affected ", and he would not press for that. The reason why he had suggested the use of the expression " specially affected " was that it had been used by the Commission in paragraph 2 (*b*) of article 42. If a different expression were used in article 54, difficulties of interpretation might arise.

73. He fully agreed that article 54 did not deal with the causes of suspension and that the first group of examples he had given did not come within the scope of the article; as to the last group, he was firmly convinced that the prohibition of nuclear tests would soon become a rule of *jus cogens* outlawing such tests as offences against humanity.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the term " affected " was used in article 42 in a different context. To refer in article 54 to the " parties affected " would be unsatisfactory as the term was too vague; there could well be parties affected other than those directly in question.

75. Mr. BARTOŠ said he had already had occasion to raise objections to the institution of suspension. It was true that to suspend the operation of a treaty was less serious than to derogate from it, but as a result of the suspension certain States might find themselves excluded from the benefits of treaties of a humanitarian character. To allege that a State had violated or failed to observe the provisions of a treaty amounted to saying that it did not deserve to have those provisions observed in relation to itself, and the operation of the treaty was suspended where it was concerned. Moreover, suspension of the operation of a treaty might be an expedient to avoid applying the most-favoured-nation clause to a State. For reasons of principle, and out of a desire to safeguard objective treaties and the treaties which shaped the international public order, he warned the Commission against the danger of the institution of suspension, which could be used by a State to disrupt public order by a unilateral decision.

76. The CHAIRMAN, speaking as a member of the Commission, said that the position taken by the Commission on article 54 in no way prejudged the position it would take with respect to the grounds and procedures for suspension. In particular, the Commission had not yet taken a decision on the possibility of suspending the operation of any treaty whatsoever, including treaties of a humanitarian character, to the detriment of certain States. Subject to that reservation, he accepted article 54.

77. Mr. ROSENNE asked whether the Special Rapporteur had any comments to make on the question, raised by Mr. Jiménez de Aréchaga and himself, of strengthening the guarantees to ensure that suspension did not become a concealed means of *de facto* termination of a treaty, especially in the case covered by article 39.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that the point could be dealt with by including in the draft articles a provision to the effect that suspension must terminate when the causes of suspension ceased to exist. Personally, he thought that that went without saying, since the interpretation and the application of the draft articles were governed by good faith. He would give the matter some further thought, however, to decide whether such a provision was necessary.

79. Mr. ROSENNE said he was satisfied with that explanation for the time being.

80. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 54 to the Drafting Committee, as suggested by the Special Rapporteur.

It was so agreed.[8]

The meeting rose at 5.45 p.m.

[8] For resumption of discussion, see 865th meeting, para. 87–99.

849th MEETING

Wednesday, 11 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.