

**Joint Consultative Group**  
**682nd Plenary Meeting**  
Agenda item 2(b)  
December 9, 2008

**STATEMENT BY**  
**THE DELEGATION OF THE UNITED STATES OF AMERICA TO**  
**THE**  
**JOINT CONSULTATIVE GROUP**

Thank you, Mr. Chairperson,

On December 12, 2007, the Russian Federation ceased observing its obligations under the Treaty on Conventional Armed Forces in Europe (the CFE Treaty), claiming the right to unilaterally suspend its observance of the treaty. We have noted on several occasions — including in our December 17, 2007 Note Verbale to the Depositary — that the CFE Treaty and associated documents contain no provision that allows a State Party to carry out such a suspension and that such a suspension is not justified under customary international law under the circumstances cited by the Russian Federation. Russia's action last December therefore lacked legal justification.

Ten months later, on October 14, 2008, the Russian Federation presented a legal argument to justify its ongoing “unilateral” “suspension,” citing: the withdrawal provision of the CFE Treaty (Article XIX); Articles 31 and 57 of the Vienna Convention of the Law of Treaties; the legal concept of *in plus stat minus* (“the greater includes the lesser”); and even the “article-by-article” analysis of the CFE Treaty prepared by the U.S. Government.

My Government is of the view that the sources cited by the Russian Federation in its statement to the JCG do not support Russia's argument or justify its failure to observe its CFE obligations. We have prepared a detailed response to Russia's legal argument; I will highlight a few points now from that more complete response, which will be appended to my statement.

We first examined the CFE Treaty itself. Treaty law requires that the terms of a treaty be given their “ordinary meaning” when considered in their context and in light of the treaty's object and purpose. In this case, the ordinary meaning of CFE Article XIX is that it applies only to withdrawal from the Treaty. The CFE Treaty does not mention “suspension” of a party's observance of the Treaty, and neither the context nor the object and purpose of the treaty suggests that the withdrawal provision should be read to include the right to unilaterally suspend. Parties to a treaty are bound only to the extent that they clearly consent to be bound. The Parties to the CFE Treaty did not consent to be bound by a unilateral right of suspension that is noticeably lacking from Article XIX.

As the text of the CFE Treaty itself lacks support for Russia's argument, we then examined Russia's attempt to invoke principles of customary international law to support an interpretation that there is an implied right of unilateral suspension as a lesser included right under the CFE unilateral withdrawal clause. There is no support in international law for such an interpretation.

The Vienna Convention on the Law of Treaties is understood to reflect customary international law on this subject, yet nowhere does the Convention state that unilateral "suspension" is a lesser included right under a treaty provision concerning unilateral "termination" or "withdrawal." Nor does the structure of the Vienna Convention imply such a reading, as the Vienna Convention treats termination, withdrawal, and suspension as separate and distinct concepts.

The Russian statement also attempted to invoke the concept of *in plus stat minus* ("the greater includes the lesser"), which it asserts is a general principle of customary international law applicable to the concepts of withdrawal and suspension. Russia cites the preparatory work of the International Law Commission (ILC) on the Draft Articles on the Law of Treaties. But, the ILC did not view a right to unilaterally withdraw as including an implied right to unilaterally suspend the operation of a treaty. In fact, the Special Rapporteur drew the opposite conclusion; he determined that the right to unilaterally suspend would have to be "specifically envisaged by the parties."

Finally, the Russian statement quoted a passage from the U.S. "article-by-article" analysis (provided to the U.S. Senate at the time the Treaty was considered) that states the basic proposition that the Article XIX "right of withdrawal is in addition to any other rights a State Party has under customary international law regarding termination or suspension of the Treaty, including its rights in the event of material breach of the Treaty." The United States has never disputed that a party may have separate and distinct rights of termination or suspension under customary international law that are in addition to the right of withdrawal provided by Treaty Article XIX. Rather, the United States disputes Russia's claim that an implied right of suspension exists within the CFE Treaty's Article XIX right of withdrawal. As outlined above, treaty law does not support such an interpretation of Article XIX, which addresses withdrawal and only withdrawal. Therefore, this statement in the article-by-article analysis does not support the Russian claim.

Mr. Chairperson,

As my delegation has noted in the past, the analysis presented by the Russian Federation is not supported by the CFE Treaty, its negotiating history, or customary international law. Accordingly, Russia's decision to cease observance of its CFE Treaty obligations was, and remains, unjustified as a matter of law.

Thank you, Mr. Chairperson,

I ask that my statement and the appended reference document be attached to the journal of today's meeting.

## **RESPONSE TO RUSSIAN FEDERATION JCG STATEMENT OF OCTOBER 14, 2008**

On December 12, 2007, the Russian Federation ceased observing its obligations under the Treaty on Conventional Armed Forces in Europe (the “CFE Treaty”), claiming the right to unilaterally suspend its observance of the treaty. On October 14, 2008, the Russian Federation presented a legal argument in an effort to justify its unilateral “suspension” (JCG.DEL/27/08). This statement cites: the withdrawal provision of the CFE Treaty (Article XIX); Articles 31 and 57 of the Vienna Convention of the Law of Treaties (the “Vienna Convention”); the legal concept of *in plus stat minus* (“the greater includes the lesser”); and an “article-by-article” analysis of the CFE Treaty prepared by the United States Government.

The sources cited by the Russian Federation do not support its argument or justify its non-observance of the CFE Treaty. On the contrary, as laid out in the following detailed analysis, neither the ordinary meaning of the CFE Treaty nor customary international law supports a right of unilateral suspension under these circumstances.

### **Ordinary Meaning of the CFE Withdrawal Clause**

- Article 31 of the Vienna Convention requires that the terms of a treaty be given their “ordinary meaning” in their context and in light of the treaty’s object and purpose. In this case, the ordinary meaning of CFE Article XIX is that it applies only to withdrawal from the Treaty. The CFE Treaty does not so much as mention “suspension” of a party’s observance of the Treaty, and neither the context nor the object and purpose of the treaty suggests that the withdrawal provision should be read to include the right to unilaterally suspend.
- Given the precise nature of arms control treaties in general and the extensive attention that has been focused on the standard “supreme interests” withdrawal clause (which is common to most arms control and nonproliferation agreements), the parties to these agreements surely would have provided explicitly for any additional right of unilateral suspension if they had intended the parties to have such a right within the terms of the Treaty. They did not do so.
- Similarly, nothing in the negotiating history of the CFE Treaty suggests that the parties intended the right of withdrawal to imply a right of unilateral suspension. The parties to the CFE Treaty simply did not address suspension.
- Accordingly, we must apply the fundamental treaty law principle that the parties to a treaty are bound only to the extent that they clearly consented to be bound.

The Parties to the CFE Treaty did not express their consent to an implied right of unilateral suspension within the withdrawal clause.<sup>1</sup>

### **Customary International Law**

- As any support for a right of unilateral suspension in either the plain language or the negotiating history of the CFE Treaty is lacking, we then examine Russia's attempts to invoke principles of customary international law to support the existence of such a right.
- Again, however, Russia's arguments find no support in international law.
- The Vienna Convention on the Law of Treaties (the Vienna Convention) treats termination, withdrawal, and suspension as separate and distinct concepts. (The Vienna Convention is generally considered to reflect customary international law on these issues.)
- Nowhere in the Vienna Convention is it stated or implied that unilateral "suspension" is a lesser included right under a treaty provision concerning unilateral "termination" or "withdrawal."
- On the contrary, when the intention is to permit a party to suspend on the same grounds as termination or withdrawal, the Vienna Convention says so explicitly (see Article 62, paragraph 3, regarding "fundamental change of circumstances").
- Furthermore, the rules and standards applicable to these three concepts (termination, withdrawal, and suspension) are not uniform. If suspension were a lesser included right, as Russia contends, every provision concerning termination or withdrawal would cover suspension as well, which would result in conflicts, overlap, and confusion. The drafters of the Vienna Convention clearly did not intend such a result.
- In short, the language and structure of the Vienna Convention do not support the propositions advanced in the Russian statement.
- Russia also cites the concept of *in plus stat minus* ("the greater includes the lesser"), which it asserts is a general principle of customary international law applicable to treaty law and specifically to the concepts of withdrawal and suspension.
- Russia does not explain why such an important concept is not mentioned in the articles on withdrawal and suspension in the Vienna Convention — which, as

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<sup>1</sup> Note that Russia's own actions are not consistent with its theory that the withdrawal clause is applicable in this situation, as it has not suggested that a conference of states parties be convened, as required by Article XXI(4) of the CFE Treaty.

- previously noted, is generally considered to reflect customary international law on these issues.
- Russia refers generally to cases of the International Court of Justice applying the logic of *in plus stat minus* in the context of its decisions: none of these decisions deal with withdrawal clauses or suspension. Instead, these cases relate to the jurisdiction of the Court and interpret optional clause declarations under Article 36(2) of the ICJ Statute. The Court’s jurisprudence thus provides no support for the Russian Federation’s argument.
  - To link this principle to its asserted right of unilateral suspension, the Russian Federation cites the International Law Commission’s preparatory work on the Draft Articles on the Law of Treaties, but it does not indicate how the ILC’s work supports its argument. In our view, the ILC’s preparatory work directly rebuts Russia’s argument:
    - The ILC did not discuss unilateral suspension in the context of a withdrawal provision in a treaty.
    - Rather, the principle of *in plus stat minus* was raised by one member of the Commission in the context of a discussion regarding a draft article on termination and suspension by agreement — not unilateral suspension. The discussion was whether to include in the draft article a provision allowing for *inter se* suspension (suspension by agreement of two or more parties to a multilateral treaty as between each other). The discussion was not related to the concept of unilateral suspension, and the consensus at that meeting of the ILC was that *inter se* suspension was distinct from termination.<sup>2</sup> In fact, the ILC eventually decided to separate the concepts of “termination by agreement” and “suspension by agreement” into two separate draft articles.
    - The Chairman’s comments during this discussion were summarized as follows:

“One point had been established beyond all doubt: there was no connexion between termination and suspension. Suspension was by its very nature temporary; if it were final, it would constitute termination, and as such, would be subject to separate rules.”<sup>3</sup> The Chairman doubted whether suspension should be mentioned in the same context as the case in which a treaty could be terminated.<sup>4</sup>

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<sup>2</sup> Summary Records of the 861st Meeting [1966] 1 Y.B. Int’l L. Comm’n 129, U.N. Doc. A/CN.4/SR.861, available at <http://www.un.org/law/ilc/index.html>.

<sup>3</sup> Id. at paragraph 34.

<sup>4</sup> Id.

More enlightening is the Commission's discussion of unilateral suspension in the context of a draft article relating to termination of treaties containing no provision on termination. In response to one Government's suggestion to add a reference to suspension to this article, as had been done with the reference to *inter se* suspension (then Article 40, paragraph 3), the Special Rapporteur made clear his view that unilateral suspension did not automatically follow a right of withdrawal. He observed as follows:

“The simplicity of this suggestion is, perhaps, a little deceptive. Article 40 does not deal with the intention of the parties regarding the termination or suspension of the operation of a treaty. It deals with the procedural requirements of an agreement to terminate or suspend a treaty's operation and merely provides that the requirements for termination apply also to suspension. In short, not only is the context different in article 40, but there is no question in that article of ‘suspension’ being made an alternative to termination. In the present article it seems doubtful whether parties who intended to admit a right of denunciation or withdrawal can be assumed automatically to have intended to admit a unilateral right to suspend the operation of the treaty as an alternative to termination; for suspension sets up a more complex relation than termination. The Special Rapporteur, in short, thinks that suspension of the operation of the treaty could not be regarded as admissible—unless it appeared that this particular right had been specifically envisaged by the parties.”<sup>5</sup>

— Thus, it is clear that the ILC did *not* view a right to unilaterally withdraw as including a right to unilaterally suspend the operation of a treaty. Rather, there was an acknowledgement that the right to unilaterally suspend would have to be “specifically envisaged by the parties.”

Finally, the Russian statement quotes a passage from the U.S. “article-by-article” analysis that had been prepared by the Executive Branch of the U.S. Government and transmitted to the Senate prior to ratification of the CFE Treaty. This analysis states the basic proposition that the Article XIX “right of withdrawal is in addition to any other rights a State Party has under customary international law regarding termination or suspension of the Treaty, including its rights in the event of material breach of the Treaty.” The United States has never disputed that a party may have rights of termination or suspension under customary international law in addition to the separate and distinct right of withdrawal incorporated into Article XIX. Rather, the United States disputes Russia's claim that an implied right of suspension exists within the Article XIX right of withdrawal. As outlined above, treaty law does not support such an interpretation of Article XIX, which addresses withdrawal and only withdrawal. Therefore, this statement in the article-by-article analysis does not support the Russian claim.

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<sup>5</sup> Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, II Y.B. Int'l L. Comm'n 1, 28 (1966), U.N. Doc A/CN.4/183 and Add.1-4.

In summary, Article XIX of the CFE Treaty does not contain an implied right of suspension. The analysis presented by the Russian Federation is not supported by the ordinary meaning of the terms of the CFE Treaty, its negotiating history, or customary international law. Accordingly, Russia's decision to cease observance of its CFE Treaty obligations was (and remains) unjustified as a legal matter.