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Summary record of the 698th meeting

Topic:
Law of Treaties

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with the *rebus sic stantibus* doctrine than with the remainder of article 21. However, its provisions properly followed those of paragraph 1 (*a*).

82. He had included paragraph 1 without any great enthusiasm, as he had explained in his commentary. He suggested that the Drafting Committee should be invited to endeavour to work out a formulation less open to objection and when that was submitted to the Commission a decision could be taken on whether to retain the paragraph or not.

83. There appeared to be no serious controversy regarding paragraph 2 (*a*), which envisaged cases that were not frequent in practice. He had included the words " after its entry into force " in the opening sentence of paragraph 2 in order to stress the distinction between a supervening impossibility of performance and an impossibility which had already existed at the time of the treaty's conclusion. An impossibility of performance which, unknown to the parties, had existed at the time of the treaty's conclusion would raise the question of error rather than that of impossibility of performance. But the words " after its entry into force " were admittedly superfluous.

84. In paragraph 2 (*b*), he had had in mind such cases as the dissolution of a customs union. Clearly, in a case of that type, a treaty with such a union would become impossible to perform. In view of some of the difficulties to which that paragraph might give rise, and to which certain members had referred, he suggested that the Drafting Committee should reconsider its provisions in the light of the discussion.

85. Lastly, paragraph 3 appeared to have given rise to no objections apart from points of drafting. Its provisions were rendered necessary by the presence of paragraph 2 (*a*).

86. The CHAIRMAN suggested that article 21 should be referred to the Drafting Committee with the request that it should make a recommendation on the placing of paragraph 4 and redraft paragraph 1 with a view to a final decision being taken by the Commission at a later stage.

It was so agreed.

The meeting rose at 12.55 p.m.

698th MEETING

Wednesday, 12 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 23 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

SECTION IV (PROCEDURE FOR ANNULLING, DENOUNCING, TERMINATING WITHDRAWING FROM OR SUSPENDING A TREATY AND THE SEVERANCE OF TREATY PROVISIONS)

ARTICLE 23 (AUTHORITY TO ANNUL, DENOUNCE, TERMINATE, WITHDRAW FROM OR SUSPEND A TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the article he had drafted referred back to the provisions of article 4 of Part I and stated that the rules laid down there applied, *mutatis mutandis*, to the authority of a representative to annul, denounce, terminate, withdraw from or suspend a treaty. Since termination by agreement was one of the methods of termination provided for in Section III, it was appropriate to include the provisions of sub-paragraph (*b*) which made the same rules applicable to the authority of a representative to consent to the act of another State annulling, denouncing, terminating, withdrawing from or suspending a treaty.

3. The main problem for the Commission was to decide whether to include in the draft a short article of the kind proposed, which in effect simply referred to article 4 of Part I, or to spell out the authority to annul, denounce, etc. in greater detail.

4. Mr. CASTRÉN said that, for the reasons stated by the Special Rapporteur, it would be useful and logical to include the article in the draft; he would confine himself to two comments of secondary importance.

5. It was right to say that the rules laid down in article 4 of Part I could only be applied *mutatis mutandis* to the cases contemplated in article 23: but perhaps it could be explained, by means of a few examples in the commentary, what that meant in practice.

6. Secondly, the article should perhaps mention not only the authority of representatives, but also that of organs of the State. It was true that article 4 of Part I referred only to representatives; but although the head of State appeared to be included in that category, he was, essentially, one of the principal organs of the State, responsible for performing important acts connected with the termination and suspension of treaties.

7. Mr. LACHS said he believed the reference to article 4 of Part I was fully justified, but he had some doubts regarding the enumeration of the various acts referred to in article 4 and now in article 23. Those acts could be divided into two groups: the first consisted of acts preparatory to the conclusion of a treaty, and comprised negotiation, drawing up and authentication; the second consisted of a series of acts which had definite legal effects, namely, signature, where ratification was not required, ratification, accession, approval and acceptance.

8. Sub-paragraph (*a*) referred to the termination of the treaty and listed a set of acts which had definite effects on the treaty, but none of them corresponded with the three acts preparatory to termination, namely, again, negotiation, drawing up and authentication. Thus, in the article as it stood, sub-paragraph (*a*) had no counterpart in the first part of the article, which referred to article 4.

9. The inclusion of those preparatory acts in sub-paragraph (*a*) might accordingly be justified, for besides being concluded, a treaty was also terminated on the basis of negotiation, before going on to the acts which had definite legal results; alternatively, the list in the first part of the article could be confined to those acts which had definite legal effects, namely, signature, ratification, accession, approval or acceptance.

10. Personally, he preferred the first alternative, because preparatory acts were needed both for the conclusion and for the termination of a treaty.

11. He believed that all that was needed was a drafting change, since the Special Rapporteur must have had all those things in mind.

12. He agreed with Mr. Castrén that it would be wise to include a reference to organs of the State.

13. Mr. ROSENNE said he was in general agreement with the views expressed by Mr. Castrén and Mr. Lachs. But irrespective of whether the list of acts in article 23 were retained or not, he wished to draw attention to the omission of any reference, either in that article or in article 4 of Part I, to one other aspect of the formal treaty-making power, namely, the authority to make objection to reservations.

14. It was possible that, ultimately, article 4 of Part I and article 23 might be combined in a general article governing the formal authority to perform various acts connected with the conclusion and termination of treaties.

15. He suggested that article 5 of Part II, which raised the question of organs of the State, should perhaps be associated with article 23.

16. Mr. de LUNA said he merely wished to remind the Commission that anything relating to the procedure for amendment, denunciation, termination, withdrawal from, or suspension of, a treaty raised exactly the same problem as the constitutionality of treaty-making powers and the international effects of a breach of internal law on that subject. Accordingly, either the article itself or the commentary should say what were the international effects of the national authority exercised by the organs in question.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the connexion with article 5 of Part II raised by Mr. Rosenne would require some thought.

18. The other questions which had been raised were largely matters of drafting and he suggested that article 23 should be referred to the Drafting Committee with the comments made by members.

19. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur.

It was so agreed.

20. The CHAIRMAN invited the Commission to consider article 24 (A/CN.4/156/Add.2).

ARTICLE 24 (TERMINATION, WITHDRAWAL OR SUSPENSION UNDER A RIGHT EXPRESSED OR IMPLIED IN THE TREATY)

21. Sir Humphrey WALDOCK, Special Rapporteur, said that article 24 was largely self-explanatory. It set out the procedure for the exercise of the power of termination in cases where that power was expressed or implied in the treaty itself. The question of the power to terminate a treaty on such grounds as a breach committed by another party, or the doctrine of *rebus sic stantibus*, was deal with in article 25.

22. The object of both articles was to provide a regular procedure for carrying out acts connected with termination. He thought that both in the cases covered by article 24 and in those covered by article 25 it was useful to state the procedure in some detail.

23. Mr. YASSEEN said that article 24 was a useful article which regulated the procedure for giving notice. The Special Rapporteur had wisely provided in paragraph 3 for the possibility of revoking the notice before it had taken effect; that was a safeguard for the stability of treaties.

24. However, the article laid down dispositive rules, but did not prescribe indispensable formalities. In other words, non-observance of its provisions should not have the effect of voiding the notice.

25. Mr. TSURUOKA said he did not favour the provision in paragraph 3; he thought it unnecessary to state the idea expressed there. For example, a treaty might stipulate that on a specified date a party could give notice of its intention to terminate or withdraw from the treaty, such notice to take effect on the expiry of a period of six months. On the receipt of such notice the other party, believing that the treaty would be terminated in six months would make preparations and take appropriate measures. Then, just before the period expired, the State which had given notice of its intention to terminate the treaty might announce that it revoked its notice. All the preparations made by the other party would then have been in vain and it might suffer injury; but since the act was authorized it could hardly claim damages.

26. There was, in that provision, a certain lack of balance in the protection afforded to the legitimate interests of the two parties, and he thought that cases of that kind could be allowed to follow their natural course. The other party would consent to revocation of the notice if it considered that its own interests would benefit from the continued existence of the treaty. Consequently, the stability of the treaty would not suffer if paragraph 3 did not exist.

27. Mr. CASTRÉN said that the article was useful and, on the whole, well drafted.

28. He noted, however, that it contained three references to article 17, paragraph 3; he had already proposed that most of that paragraph should be deleted, and if his proposal were accepted, it would also be necessary to redraft article 24.

29. It was also open to question whether paragraph 1 (*b*) should be retained. It was sufficiently clear that the con-

ditions laid down in the treaty itself concerning the notice must be complied with. In any case, the article might first refer to those conditions and then add that, if the matter was not regulated in the treaty, notice must be given in conformity with the conditions laid down in sub-paragraphs (*a*), (*c*) and (*d*) of paragraph 1.

30. Mr. ELIAS said that article 24 was quite acceptable in principle, but its provisions were unduly elaborate. That applied particularly to paragraph 1; the idea it contained could be expressed much more succinctly.

31. In paragraph 2, he did not believe it was necessary to state that notice must be given through the diplomatic or other official channel. He realized that the Special Rapporteur was anxious to avoid any suggestion that, for example, a mere declaration on the floor of a national legislature had the effect of terminating a treaty, but of course, such a declaration would have no binding effect in international law unless formally communicated to the other party to the treaty.

32. He therefore suggested that paragraphs 1 and 2 should be replaced by the following text, which contained the sense of both paragraphs:

> " Where a treaty expressly or impliedly confers upon a party a right to terminate, withdraw from or suspend it, written notice to that effect specifying the operative date shall be given in due form to the other party or parties to it, either directly or through a Depositary, if there is one."

33. Paragraph 3, which dealt with the right to revoke a notice of termination, withdrawal or suspension before the notice actually came into force, should be retained, but the Drafting Committee should be asked to re-examine its formulation. Personally, he thought that the right to revoke should be implicit in the power to give notice, unless the treaty itself provided otherwise.

34. With regard to the references to article 17, paragraph 3, he agreed with Mr. Castrén.

35. Mr. ROSENNE said he attached great importance to paragraph 3 of the commentary, which provided a guide to the understanding of the article.

36. With regard to the references to article 17, paragraph 3, he suggested that, in the opening sentence of paragraph 1, the words " under article 17, paragraph 3, of this Part " should be replaced by " under these articles or other rules of international law ". Apart from the changes which had been proposed in article 17, paragraph 3, it should be remembered that the convention on the law of treaties would not completely cover all international law on the subject. Grounds for termination or suspension of treaties existed other than those specified in the draft articles; an important one could arise under article 41 of the United Nations Charter.

37. In paragraph 1 (*c*), the words " under article 17, paragraph 3 " should be deleted. As explained in paragraph 2 of the commentary, the purpose of that sub-paragraph was to specify that the notice should indicate legal basis upon which the right to terminate or suspend the treaty was claimed. That legal basis need not necessarily be " under article 17, paragraph 3 ".

38. Mr. de LUNA said that, however paradoxical it might seem, he agreed both with Mr. Tsuruoka's and with Mr. Yasseen's comments on paragraph 3. Notice was a unilateral legal act which began to produce effects as soon as the other party received it. As Mr. Tsuruoka had said, the party receiving the notice would begin to make preparations for the treaty's termination, and might then be surprised to find the other party had unexpectedly reversed its decision. But — and in that respect he agreed with Mr. Yasseen — an occurrence of that kind would not adversely affect the treaty. For apart from very exceptional cases, the parties had the same rights in the matter of denunciation and the party which had received notice could therefore either itself denounce the treaty before the time-limit expired, or choose not to denounce it. For those reasons he thought that paragraph 3 should stand.

39. Mr. TSURUOKA said that Mr. de Luna had misunderstood him in supposing that both parties could denounce the treaty at any time. In the example he had given, one of the parties was unable to denounce the treaty because the time-limit was about to expire. If paragraph 3 were drafted in stricter terms, it would cause the party contemplating denunciation to consider the matter very carefully beforehand.

40. Mr. AGO said that the article laid down conditions that were essentially a matter of form and on the whole he supported them.

41. With regard to the reference to article 17, paragraph 3, which had been criticised by several members, he observed that no decision could be taken on it until the fate of that paragraph had been decided.

42. Apart from that, perhaps the Commission ought to limit the scope of article 24 to cases in which the right of termination, withdrawal or suspension was expressed or implied in the treaty as stated in the title, in which case it would be necessary to change the wording and omit the reference to article 17, paragraph 3.

43. Article 17, paragraph 3, was not in fact concerned with the interpretation of the treaty, but with a kind of presumption in regard to certain treaties, such as commercial treaties, in which the possibility of denunciation was presumed to exist. The power to terminate then existed more by operation of law than by an implied term of the treaty. If article 17, paragraph 3, were adopted as it stood, it would constitute an objective rule of international law which automatically conferred the right to denounce certain treaties. In his opinion, it would be preferable to include only cases in which the treaty itself provided for possible termination or in which that possibility could be inferred by interpreting the will of the parties. The reference to article 17, paragraph 3, would not then be necessary.

44. With regard to the point raised by Mr. Yasseen, he thought that provision should be made for the formalities he had mentioned. But what would happen if those formalities were not complied with ? If they were regarded as necessary, a denunciation which failed to comply with them would be null and void. If, on the other hand, that result was not desired, it remained to be seen what value the rules laid down in the article

would have. They would, in fact, be in the nature of recommendations. It was therefore necessary to be quite clear about what was wanted, both as to the formalities and compliance with them, and as to the effect of non-compliance.

45. Mr. AMADO said he must again remind the Commission of his great concern that it should refrain from giving too much advice to States, which were infallibly guided by their own interest. He had been struck by the very pertinent remarks of the members who had spoken before him, but they all seemed to aim at formulating even the smallest details, and a fresh appeal for caution and moderation might not be out of place.

46. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that it was undesirable that the Commission should appear to be trying to teach States what to do; but at the same time it was essential not to overlook the abuses they had committed. The whole purpose of article 24 was to set out a regular procedure for denouncing treaties.

47. It had been suggested that some of the provisions of article 24 stated the obvious. Often it was appropriate to state what appeared to be self-evident, precisely because it was true. In any event, he noted that, at the previous session, the Commission had not been against incorporating in the draft provisions which were not less self-evident than those under consideration.

48. With regard to Mr. Elias' proposal for paragraphs 1 and 2, he agreed that it would be possible to shorten those paragraphs, but he was not in favour of combining them.

49. The main point of substance in article 24 was that embodied in paragraph 3. Mr. Tsuruoka's comment was based on the same considerations as the proviso included by the previous Special Rapporteur, which would have required the assent to the revocation of " any other party which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position ".[1]

50. The example given by Mr. Tsuruoka of one party giving notice of termination or withdrawal and the other party not being in a position to give such notice under the terms of the treaty, was an extremely unlikely one. If such a case were to occur, the party which had put itself in such a position by subscribing to the treaty, would have only itself to blame.

51. The situation envisaged by the previous Special Rapporteur was a less unlikely one. A party to a treaty upon receiving from another party notification of termination or withdrawal, might have decided that it did not wish to remain a party to the treaty in the absence of the other party and might have taken some steps to withdraw. The previous Special Rapporteur had thought it necessary to provide some protection for the interests of such a party.

52. However, as he had explained in the last sentence of paragraph 4 of his commentary, it was doubtful whether the proviso in question was really necessary, for any other State which had followed the example of the first State in giving notice of termination or withdrawal would equally have the right to revoke the notice. Each party to the treaty had in its own hands the power to protect its interests. The provisions of paragraph 3 really seemed to him to follow inevitably from the fact that the treaty had fixed a period before which the notice of termination was not to be complete, and the discussion had indicated that they should be retained.

53. The point raised by Mr. Rosenne, although perhaps involving a slight element of substance, could be referred to the Drafting Committee with the other points raised during the discussion.

54. Mr. YASSEEN, referring to Mr. Ago's comments, said that conditions were sometimes laid down in law whose non-fulfilment was not necessarily followed by voidance, especially those formulated to ensure greater clarity and to avoid disputes.

55. Sub-paragraph (*a*) of paragraph 1 laid down that the notice must be in writing, which followed from the definition of a treaty already adopted. Sub-paragraph (*b*) required compliance with any conditions laid down in the treaty, and that was a matter which depended on the treaty itself. It might be thought that those two sub-paragraphs laid down peremptory conditions, but it was doubtful whether fulfilment of the conditions stated in sub-paragraphs (*c*) and (*d*) could be required on pain of nullity; for sub-paragraph (*c*) called for specification of the provision of the treaty under which the notice was given and sub-paragraph (*d*) for specification of the date.

56. Mr. TUNKIN said that while he found nothing objectionable in the provisions of article 24, some of them seemed unnecessary.

57. With regard to the question raised by Mr. Ago concerning the consequences of non-compliance, the article itself appeared somewhat vague. The probable reason for its lack of precision was that some of its provisions could hardly be considered as specific rules. Certainly, if the act referred to in paragraph 1 (*a*) were not performed by a competent representative, it would be null and void. As to the rule in paragraph 1 (*b*), it was perhaps already covered by the provisions of article 15 — a point which could be considered by the Drafting Committee.

58. The contents of paragraph 1 (*c*), although logical, were not indispensable in law. It would be an absurd piece of formalism to suggest that a notice of termination was void unless it specified the ground on which it was based.

59. As to paragraph 1 (*d*), it was obvious that the notice should be dated and that it should indicate the date upon which it took effect.

60. The contents of paragraph 2 were equally self-evident, and it was doubtful whether they were necessary. States communicated through official channels and not through private persons. That rule applied

[1] *Yearbook of the International Law Commission*, 1957, Vol. II (United Nations publication, Sales No.: 1957.V.5, Vol. II), p. 34, article 26, para. 9.

to the whole of the law of treaties, not merely to the subject matter of article 24.

61. Paragraph 3 embodied the only rule of significance in the article. It was important to include in the draft a provision on the right to revoke notice of termination, withdrawal or suspension.

62. Mr. AGO said that, like Mr. Yasseen and Mr. Tunkin, he doubted whether non-observance of some of the provisions in paragraph 1 should be regarded as necessarily voiding the notice; that applied even to the provision requiring the notice to be in writing. The four sub-paragraphs of paragraph 1 were preceded by the words " a notice... in order to be effective, must... ". The problem was therefore one of substance, not of form.

63. Mr. LIU said that article 24 was a logical sequel to article 23 and although some of its provisions might appear self-evident and might be already covered by implication in other articles, it had the merit of laying down a regular procedure for terminating or suspending a treaty. The structure proposed by the Special Rapporteur ought to be maintained and little would be left of the article if paragraphs 1 and 2 were omitted.

64. Sir Humphrey WALDOCK, Special Rapporteur, said it was desirable that some of the provisions of paragraph 1 should be made obligatory in order to regularise the procedure for termination, withdrawal or suspension, in the interests of protecting the stability of treaties. There was perhaps a difference between the conditions laid down in sub-paragraphs (*a*) and (*b*) and those in sub-paragraphs (*c*) and (*d*). The last two sub-paragraphs could be drafted in the form of a recommendation.

65. The act of communication being a definite juridical act, he was also strongly of the opinion that the requirements in paragraph 2 should be obligatory. Similar provisions had been laid down in article 19 of Part I in regard to reservation.

66. The CHAIRMAN suggested that article 24 should be referred to the Drafting Committee; the Commission could decide on any outstanding question of substance when it had had a new text before it.

It was so agreed.

67. The CHAIRMAN invited the Special Rapporteur to introduce article 25 (A/CN.4/156/Add.2).

ARTICLE 25 (ANNULMENT, DENUNCIATION, TERMINATION OR SUSPENSION OF TREATY OBLIGATIONS INDER A RIGHT ARISING BY OPERATION OF LAW)

68. Sir Humphrey WALDOCK, Special Rapporteur, said that, having given a full explanation in the commentary, he need not say much by way of introduction. During the discussion of earlier articles, members had clearly linked the application of the rules laid down in them with the procedural requirements set out in article 25. The purpose of the article was to establish a regular procedure for effecting the annulment, denunciation, termination or suspension of a treaty, which was all the more necessary in the present article, where the grounds for doing so were connected with essential validity, breach or a change in circumstances which might require an interpretation of the facts that could give rise to serious controversies.

69. In paragraphs 1 to 3 he had set out the conditions to be fulfilled by the party claiming the right to annul, denounce, terminate or suspend, including that of having to make a full statement of the grounds upon which the claim was based. Paragraphs 4 to 7 dealt with the case in which an objection was raised to the claim, whether on a ground of fact or of law. The right of unilateral action by the claimant party had to some extent been made dependent on the willingness of the other party or parties to have the matter investigated by negotiations between the parties or, failing agreement, by referring the dispute to enquiry, mediation, conciliation, arbitration or judicial settlement. Perhaps those alternative procedures should be further extended so as to cover all the procedures mentioned in Article 33 of the Charter. He had explained in the commentary why he considered it necessary to provide for a wide range of alternative methods of settlement.

70. His purpose had not been to establish some form of compulsory jurisdiction, but to impose certain safeguards against States proceeding arbitrarily to terminate legal relations which they had voluntarily entered into with each other. It would not be unreasonable to regard unilateral annulment, denunciation, termination or suspension as arbitrary if the claimant were unwilling to have the matter considered on its merits. In his opinion, the draft would be incomplete without such a provision.

71. Mr. CASTRÉN said that article 25, though procedural, was a key article, a necessary and even essential complement of several other articles in the draft.

72. The Special Rapporteur had been guided by the writings of the leading authorities and, in particular, had adopted Sir Gerald Fitzmaurice's proposals, which he had tried to improve in certain respects. In many ways his draft constituted a genuine advance, but he had not, perhaps, succeeded in solving the problem entirely. For his ingeniously drafted article suffered from a serious gap, in paragraph 6, which might frustrate all the good intentions of the remainder by opening the door to arbitrary action. If the other party to the treaty chose to submit the dispute to some authority for purposes of enquiry, mediation or conciliation and that procedure failed to bring about a settlement, there would be a deadlock. The answer given by the Special Rapporteur in paragraph 16 of his commentary was not satisfactory because, while recognizing the difficulties which might arise in practice, he did not attempt to resolve them in the article.

73. It was the Commission's duty to propose a solution to meet all eventualities. He therefore suggested that it should be laid down that, if the procedures mentioned failed, the parties should submit the dispute to arbitration or judicial settlement. If the party that wished to amend or terminate the treaty refused to refer the matter to arbitration or judicial settlement, it would be bound

to continue to apply the treaty as it stood. If it was the other party that was obstructive, then the treaty, or the disputed provision, could be denounced unilaterally.

74. So far as the form of the article was concerned, he thought that in paragraph 1, article 17 should be added to the list of articles to which the procedure set out in article 25 applied. Paragraph 1 (*b*) provided that the notice given by a party claiming the right to annul, denounce or terminate a treaty must contain a full statement of the grounds upon which the claim was based and of the provision by which it was said to be justified. That statement should mention, in particular, the relevant provisions, if any, of the treaty in question. In addition a time-limit, perhaps two weeks, should be laid down at the end of the paragraph, for cases of special urgency.

75. Paragraph 2 could be deleted, since the general rule stated more fully in article 24, paragraph 2, was also applicable to the cases contemplated.

76. Similarly, the second sentence of paragraph 3 could be omitted and the introductory sentence of paragraph 4 abridged to read: " If, however, objection has been raised by any party, the claimant party must first . . .".

77. Paragraph 4 (*b*) was not quite clear. The Special Rapporteur had probably intended to say that the State which wished to be released from the treaty obligations must, if the other party objected, offer to submit the dispute to any of the procedures mentioned in that sub-paragraph. As it stood, however, the provision might be interpreted to mean that it was sufficient to propose only one of those procedures.

78. In paragraph 5, the phrase " it shall be considered to have waived its objection " was unnecessary. It would be appropriate at that point, too, to fix a time-limit of less than three months for urgent cases — say two weeks, as in paragraph 1.

79. He did not approve of the provision in paragraph 6 under which performance of the obligations of the treaty could be suspended provisionally in pursuance of a decision or recommendation of the tribunal, organ or authority to which the dispute had been referred; for a recommendation could not have that effect, and the other organs should not be given such great powers as an arbitral tribunal or international court.

80. Mr. TUNKIN said that he wished to raise what might perhaps be regarded as a point of order. Article 25 contained two kinds of provisions: purely formal ones laying down the conditions to be fulfilled by a party wishing to exercise the right of annulment, denunciation, termination or suspension, and more important ones for regulating the settlement of disputes. Without prejudice to his general position concerning that latter question, which was well known, he considered that disputes might arise in connexion with any of the rules already formulated, including those contained in Part I, and those would no doubt appear in the Special Rapporteur's third report. In order to avoid repetitive discussion, it would be advisable to postpone consideration of article 25 and take up provisions concerning the settlement of disputes at the end of the discussion at the next session. An article on that subject would in any case be placed at the end of the draft.

81. Mr. BRIGGS said that in his view it was important that the Commission should take up article 25 without delay; he, for one, had had to reserve his position on a number of earlier articles pending the decision on the structure of article 25. The conditions laid down in article 25 provided important safeguards for the exercise of certain substantive rights that had been discussed under sections II and III. The articles already referred to the Drafting Committee would remain somewhat meaningless unless some tentative conclusion at least were reached on article 25 at the present session.

82. The CHAIRMAN said he had not understood Mr. Tunkin as having formally proposed, on a point of order, that discussion of article 25 should be postponed, so the article was still before the Commission.

83. Mr. de LUNA supported Mr. Tunkin's view. As the Commission had deferred its decision on the final drafting of the articles considered at the present session which were related to article 25, it might just as well postpone consideration of article 25 until the next session, since that article was really general in scope, As Mr. Tunkin had not formally raised a point of order, the Commission could continue to discuss the article, though it would not be able to decide on the final form until it had concluded its examination of the draft convention, since all the previous work would be in vain if article 25 did not really provide a solution for all the problems raised in the draft.

84. Mr. TUNKIN pointed out that if an article on the settlement of disputes was included at all, it was usually placed at the end of a convention. In the present instance it would necessarily have to apply to the draft as a whole and it would therefore be more orderly to take up article 25 last.

85. Mr. TABIBI said it would be helpful to have a preliminary discussion on article 25 without formulating any rule or referring the article to the Drafting Committee; otherwise an incomplete text would have to be submitted to governments for comment and that might complicate matters. The decision on the article could be left till the next session.

86. Mr. GROS said he could hardly speak on the substance of article 25 so long as the Commission was still considering when it should be discussed. Acceptance of Mr. Tunkin's proposal would involve not merely postponing the discussion of article 25, but also deferring any final decision on the articles concerning the validity of treaties, which the Commission had examined and should adopt at the present session. Many members considered that, as the Special Rapporteur had said in paragraph 1 of his commentary, article 25 was a key article and a necessary supplement

to several preceding articles; they would therefore find it difficult to accept those articles as finally adopted if article 25 was not adopted.

87. If the Commission accepted Mr. Tunkin's proposal, some pragmatic means would have to be found of informing governments that the Commission had drafted several articles, but had not adopted them finally because article 25, the key article, was not discussed until 1964. He was in favour of adopting, at the present session, an article on the problems dealt with in article 25, which, like all the others, would be subject to revision.

88. With regard to the substance of the question, he was not convinced by the argument that article 25 was a final clause; it was not solely a matter of the settlement of disputes, for the Commission had studied the validity of treaties — in other words, the conditions under which States could dispute the validity of a treaty — and it had tried not to impair the binding character of treaties, for any weakening of that rule would lead to the right of unilateral denunciation and consequently to a veritable anarchy in international relations.

89. That being so, however, now that the Commission was reaching the end of the essential section on validity, it should suggest some means of preventing such legal anarchy. Article 25 was not a final clause concerning all the problems relating to the interpretation and application of treaties, but the key to certain very specific articles. In an international community which had not yet evolved a hierarchy of authorities, it was necessary to provide some means of avoiding arbitrary action, for the articles already drawn up might appear to some States to justify unilateral decisions that would not be subject to impartial examination by any authority.

90. He would therefore prefer members of the Commission to agree on some means of supervision. He realized that they did not all approve of the Special Rapporteur's text, even though he had provided a range of provisions which should enable every member to support at least some of the means proposed, such as conciliation or examination by an international organization. The Commission should accordingly discuss the substance, and if the majority decided in favour of postponement, it should postpone adoption of the articles on the validity of treaties as well as article 25, and communicate to governments, as a sort of preliminary draft, the articles already drawn up together with a note summing up the discussion on article 25.

91. Mr. PAREDES said he found the provisions of article 25 extremely satisfactory and wholly acceptable. Hitherto there had been great uncertainty as to how a dispute would be settled if a claim to terminate, withdraw from or suspend a treaty were contested by one of the parties, and the Special Rapporteur had made an important contribution to international law by showing a simple way to decide the issue. It might, however, prove necessary to add some further conditions in paragraph 1.

92. On the question of the procedure to be followed by the Commission, he agreed with Mr. Gros that article 25 should be discussed, since it was one of the most important in the Special Rapporteur's second report and must affect the Commission's final conclusions on other articles.

93. Mr. de LUNA said that, after hearing the explanations given by Mr. Gros and Mr. Paredes, he agreed that the Commission should discuss article 25 and approve a provisional text, on the clear understanding that the text would not be finally adopted until consideration of the whole of the draft had been completed.

94. Mr. AGO said that article 25 had a first part which was the counterpart of article 24 and raised no special problem; but the present subject of discussion was the second part, which also related to all the matters concerning validity already considered in connexion with the previous articles and to some extent constituted their conclusion. If that second part were deleted, for example, all the provisions concerning the *clausula rebus sic stantibus* might be left in abeyance.

95. He thought it would be difficult to begin a discussion as Mr. Tabibi had suggested, in the knowledge that it would be purely academic. It would be better not to prejudge the outcome of the discussion.

96. The CHAIRMAN said he agreed with Mr. AGO that the Commission must continue consideration of article 25 without attempting to decide in advance what would be the final outcome of the discussion.

97. Sir Humphrey WALDOCK, Special Rapporteur, said he would be very reluctant to defer consideration of the important matters dealt with in article 25 until the next session, if only for the purely practical reason that the Commission would then be very fully occupied with the matters to be covered by his third report. That report would include, for example, the extremely troublesome question of the effect of treaties on third parties, which was likely to give rise to protracted discussion. It would be most helpful if the Commission could dispose of article 25 at the present session, even if only provisionally.

98. There was also a point of substance at stake. The question whether certain procedural checks, and if so what kind, were to be imposed on the application of the substantive rules laid down in sections II and III was quite separate from the question whether a special section, which would be applicable to the whole draft on the law of treaties, was to be included on the settlement of disputes such as those connected with responsibility and reparation for breach. The object of paragraphs 4-7 of article 25 was not to provide machinery for the settlement of disputes, but to provide procedural checks to prevent the arbitrary termination of treaty relations.

99. Mr. ROSENNE said he did not consider that article 25 could be classed as what was known as a disputes clause, which sometimes appeared in the general clauses of treaties, and of which a good example was article 36 of the Harvard Draft on the Law of Treaties.[2] Such a clause should certainly not be discussed at the

[2] *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, p. 665.

present juncture and perhaps not at all: it was really a matter for political bodies.

100. Article 25 was of an essentially different kind in that it established a special procedure for the termination of an existing treaty, and it accordingly formed an integral part of the sections already discussed by the Commission. Its application was not limited only to cases in which the *rebus sic stantibus* clause was invoked. It should perhaps be framed in a more flexible way and ought not to be concentrated so specifically on disputes.

101. The article was of the same kind as the procedural provisions attached to substantive rules in other drafts prepared by the Commission, for example, the draft convention on the elimination of future statelessness, the articles on the conservation of the living resources of the high seas, and those on the continental shelf. In article 29, paragraph 8, of Part I of the report on the law of treaties, the Commission had inserted a similar provision concerning the settlement of any difference arising between a State and a depositary; the use of the word " difference ", rather than " dispute ", was significant.[3]

102. Article 25 ought certainly to be discussed, but not with any preconceived idea as to what decision would finally be taken. On that point he could not agree with Mr. Tabibi. If the Commission found itself unable to reach a conclusion on article 25 it would have to consider whether it would then be possible to submit to governments for comment an article concerning the *rebus sic stantibus* doctrine, or indeed any of the articles so far discussed at the session. If something on the lines of article 25 did not accompany the other articles, they might give rise to some misconception.

103. It might simplify matters if the different elements in article 25 were taken separately. Paragraphs 1 and 2 could be taken together, and paragraphs 4, 5 and 6; paragraphs 3 and 7 should be dealt with separately.

104. Mr. TABIBI said that Mr. Ago seemed to be under a misapprehension. He (Mr. Tabibi) and Mr. Gros were, in fact, agreed on the need to discuss article 25, but without taking any final decision.

105. The CHAIRMAN pointed out that it was impossible to foresee the outcome of the discussion. In the meantime he proposed that the Commission should continue consideration of article 25.

106. Mr. AMADO proposed that the Commission should disregard previous proposals and discuss article 25 thoroughly. The outcome of that discussion would enable it to see whether Mr. Tunkin's apprehensions were justified and it could then either adopt his proposal or follow the procedure suggested by Mr. Gros.

107. Mr. TUNKIN said he had no objection to article 25 being discussed, after which the Commission could decide how to deal with it.

It was so agreed.

The meeting rose at 12.50 p.m.

[3] *Official Records of the General Assembly*, seventeenth session, Supplement No. 9, p. 28.

699th MEETING

Thursday, 13 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 25 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

ARTICLE 25 (ANNULMENT, DENUNCIATION, TERMINATION OR SUSPENSION OF TREATY OBLIGATIONS UNDER A RIGHT ARISING BY OPERATION OF LAW) (*continued*)

2. Mr. TUNKIN said that the essence of the rule laid down in article 25 was that a party could not exercise the right to terminate or withdraw from a treaty unless it obtained the consent of the other party or parties, or a decision by an arbitral tribunal or the International Court of Justice. The article was intended to cover all types of treaty, including those imposed by force, and the choice of the means of settling a dispute was left entirely in the hands of the party or parties which had not claimed the right to terminate.

3. The essence of a rule of law could not be judged if it were completely removed from the context of its social application and effects, so that two technically similar legal norms in two domestic systems might in fact be different. The content of article 25 must therefore be examined against the background of the contemporary situation.

4. Among the many treaties in existence, there were a number which were a heritage of the colonial system or had recently been imposed by the colonial Powers on new States. As the new States matured and as formal independence was transformed into real independence, the social forces working for peace were bound to rebel against certain treaties concluded earlier. Where subservient governments had given way to strong ones, the effect of article 25 would be to place obstacles in the path of States when they sought to free themselves from onerous and unjust treaties by invoking the rights laid down in some of the articles already discussed. It was hardly likely that the States responsible for having imposed such treaties would be willing to dissolve them. If the claimant State's suggestion of arbitration were rejected, its only recourse would be to bring the matter before the International Count of Justice.

5. His comments should not be taken to mean that he minimised the importance of arbitral procedure or of the International Court; what was objectionable in the article was that it obliged the parties to accept a compulsory jurisdiction in every instance. There was no escaping the fact that barely forty out of 111 States Members of the United Nations had accepted the Court's jurisdiction and many had done so with important reservations. Among the reasons for the unwillingness of