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Summary record of the 699th meeting

Topic:
Law of Treaties

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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

so many States to accept the Court's jurisdiction was the uncertainty surrounding many rules of international law and their objections to the present composition of the Court. Yet article 25 would have to be applied to cases in which, for good reasons, the injured party had not accepted the compulsory jurisdiction of the Court.

6. The insertion of such an article, on the ground that without it no draft convention on the law of treaties could be drawn up, would be detrimental to the development of international law and would create new sources of international tension. No-one could be unaware of the reasons why the Commission's draft Convention on Arbitral Procedure was reposing in the archives of the United Nations. To give more recent examples, the compulsory jurisdiction clause had not been included in the Vienna Convention on Diplomatic Relations, but had been embodied in a separate protocol, and the same course had been followed with the Convention on Consular Relations. Admittedly, articles on compulsory jurisdiction had been included in the Convention on Fishing and Conservation of the Living Resources of the High Seas [1] in the teeth of strong opposition, but the ultimate fate of that Convention was still unknown and the inclusion of those articles had certainly been instrumental in deterring many States from ratifying it.

7. The settlement of disputes was an entirely separate branch of international law which certainly needed to be developed, and there were means of doing so, but it must be dealt with separately. The codification and progressive development of other branches of law should not be made dependent on the acceptance by States of compulsory jurisdiction.

8. Mr. AGO said he fully understood Mr. Tunkin's position, although he himself was a firm supporter of the compulsory jurisdiction of the International Court of Justice. It would indeed be unrealistic to expect the Commission to make codification of the law of treaties depend on acceptance of that jurisdiction. When the Commission came to consider means for the settlement of disputes arising over the application of the rules constituting the body of treaty law, it would probably have to resort once again to a separate optional protocol.

9. In the case of article 25, however, the problem was somewhat different; the Special Rapporteur did not recommend recourse to the compulsory jurisdiction of the Court. Mr. Tunkin was quite right in thinking that, in the matter of the validity of treaties, no loophole should be left for the State wishing to maintain the treaty. Having adopted a rule such as that of the nullity of a treaty obtained by force or fraud, the Commission should certainly not approve a provision which would keep a treaty in force for the sole reason that the State wishing to maintain it would not yield. But it should not take the opposite course either, for the party asking for termination was just as likely to be in the wrong.

10. If he had correctly understood the system proposed by the Special Rapporteur, the State wishing to end a treaty began by notifying the other party of its intention; the other party might either not reply — in which case the notice automatically took effect — or formulate an objection. In the latter case, the State which wished to end the treaty entered into negotiations and, if no agreement was reached, offered to submit the dispute to some means of pacific settlement agreed by the parties. There was no question of recourse to the International Court of Justice or of compulsory jurisdiction. If the other party totally refused the offer, its refusal would be deemed to constitute a waiver of its earlier objection.

11. Whether one favoured the system proposed by the Special Rapporteur or not, it could not, in any case, be said to impose the jurisdiction of the Court.

12. Mr. TUNKIN said that, although what Mr. Ago had said was correct in theory, in practice the States interested in keeping certain treaties in existence would also be in favour of submitting disputes to the International Court. The procedure proposed in article 25 must be examined in the light of how it would operate.

13. Mr. GROS said that, if his interpretation was correct, the provisions of paragraph 4 (*b*) gave the claimant State an absolutely free choice among the various procedures listed — inquiry, mediation, conciliation, arbitration or judicial settlement. Since those were neither cumulative nor successive procedures, the claimant State might propose only conciliation. But conciliation entailed no obligation. In the hypothetical case considered by Mr. Tunkin, in which a State wished to maintain an unjust treaty, that procedure would lead to a report on the situation as a whole, which would not be binding on either party. Consequently, it seemed that the Special Rapporteur had left a kind of loophole there, which was causing Mr. Tunkin concern, but that there was no provision for compulsory jurisdiction in article 25.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Gros had correctly interpreted his intention that the injured State, on behalf of which Mr. Tunkin had spoken, should be free to choose the procedure it proposed for the settlement of a dispute. Among the procedures contemplated in paragraph 4 (*b*) were conciliation and reference of the dispute to the Security Council or the General Assembly.

15. One object of article 25 was to put the *bona fides* of the claimant State to the test, for history was full of examples of the rights laid down in sections II and III of the draft being seriously abused by States seeking to release themselves, on flimsy grounds, from obligations which had become inconvenient.

16. He had made it very clear in the commentary that he was not proposing any kind of compulsory jurisdiction clause, and he was certainly not proposing to insert one in his third report, which was to be discussed at the next session, for the very reason given by Mr. Tunkin, namely, that such a course would not be practicable at the present stage of codification of international law. A similar consideration had guided the Commission at its previous session.

17. On the other hand, he had taken the view that article 25 was concerned with the special case of a State

[1] United Nations Conference on the Law of the Sea, Geneva, 1958, *Official Records*, Vol. II, pp. 139-141.

which had established, in most cases voluntarily, a legal relationship with another State by treaty, but subsequently asserted that the relationship no longer existed or declared its intention to terminate the treaty. In such a situation there was a pre-eminent need, first, for consultation between the parties, and then, if there was a difference of view between them, for some procedure to resolve that difference before unilateral action was taken. The system he was proposing was certainly not intended to place in an impasse the claimant State with a genuine case for terminating or annulling a treaty on any of the grounds laid down in sections II and III.

18. The article called for careful drafting as the matter was a delicate one, and his text was perhaps not fully adequate. Possibly in paragraph 4 (*b*) he should have followed more closely the language of Article 33 of the Charter. But he did regard it as vitally important to lay down certain procedural checks on the exercise of the rights in question.

19. Mr. VERDROSS said he did not quite understand Mr. Tunkin's concern. Paragraph 4 (*b*) did not recognize the principle of compulsory jurisdiction, but only dealt with the choice between various means of pacific settlement, among which were arbitration and judicial settlement. It did no more than repeat the rule in Article 33 of the Charter, which required the parties to any dispute, the continuance of which was likely to endanger the maintenance of international peace and security, to seek, first of all, " a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice ". In order to allay Mr. Tunkin's anxiety perhaps it should be provided that, failing agreement, the dispute should be submitted to one of the bodies referred to in Article 33 of the Charter.

20. Mr. TUNKIN said he welcomed the Special Rapporteur's assurance that he had not intended to introduce into article 25 any requirement to submit a dispute to compulsory jurisdiction, either of the International Court or of any other body. That being so, the Commission was faced with a much less serious problem, namely, the redrafting of the article.

21. Mr. ROSENNE said that, in view of the turn which the dicussion had taken, he would not touch on certain general problems arising out of article 25, but would confine himself to commenting on the text itself.

22. As he had already urged at the previous meeting, article 25 should be retained so as to lay down a procedure for changes that were almost inevitable in treaty relations between States. It was also needed because the Commission was not solely engaged on codification, but was also proposing a number of rules *de lege ferenda*. Without such an article he doubted whether it would be possible to transmit the articles so far discussed at the present session to the General Assembly and to governments.

23. He had three general criticisms to make of the Special Rapporteur's text. First, it placed too much emphasis on the possibility of disputes; the technical definition of a " dispute " carried a pejorative tinge and it would be inappropriate for the Commission to assume *a priori* that every situation in which a claim was made to annul, denounce, terminate, withdraw from or suspend a treaty would give rise to a formal dispute between the parties.

24. Secondly, the obligation on all the parties to negotiate with each other in good faith in the event of such a right being invoked was not sufficiently emphasized in paragraph 4 (*a*), as the most appropriate point of departure for a settlement. That obligation was implicit in many of the articles already discussed; the provisions of article 25 were intended to reinforce it and to prevent one party from being placed at the mercy of others unwilling to comply with the requirements laid down.

25. Thirdly, the article had been formulated in excessively rigid terms and ought to be more supple. The proposal by Mr. Verdross concerning paragraph 4 (*b*) deserved serious consideration.

26. Without having any strong views on the matter, he wondered whether it was desirable to restrict the application of paragraph 1 to the provisions of the articles mentioned. He would have thought that its application extended to all cases in which the voidability of a treaty was at issue, and it might only be possible to determine whether a treaty was void by more direct reference to the general law on the pacific settlement of disputes.

27. Paragraph 1 (*b*) seemed to have been too much inspired by certain of the Rules of the International Court, yet without wholly following them. In its present form it was too formal; it could be simplified and confined to a requirement that the notice should state the grounds on which the claim was being made.

28. It was premature to anticipate in paragraph 1 (*d*) that the right of the claimant State would be contested; it would suffice if the other party were required to specify within a reasonable period what its attitude would be towards the action proposed.

29. In paragraphs 3 and 4 the expression " claimant party ", drawn from the language of litigation, was inappropriate and some better term should be found.

30. In paragraphs 4 (*b*), 6 and 7, the word " difference " should be substituted for the word " dispute ".

31. It was paragraph 7, however, that caused him most concern. As he saw it, there were three possible cases. The first was that mentioned in paragraph 7, in which the treaty itself contained a clause on the settlement of disputes. Such a clause could, however, refer to methods of settlement other than arbitration or submission to the International Court of Justice; in fact, he knew of a number of treaties which contained disputes clauses providing for other methods of settlement. The article to be adopted should not impair the efficacy of such clauses.

32. The second case was that in which both parties had recognized the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of its Statute, which specifically referred to " all legal disputes concerning the interpretation of a treaty ". In order to cover that case, at least the commentary should say whether priority ought not to be given to the jurisdiction of the

International Court of Justice, which the parties had already recognized under Article 36 (2).

33. The third case was that in which the two parties were bound by a treaty for the pacific settlement of bilateral disputes. In that case also, the commentary should make it clear that such a treaty would apply to the settlement of the dispute if negotiations failed.

34. He could not subscribe to the view that a dispute relating to the application or interpretation of a treaty was inherently different from any other dispute, or that it was in some way more amenable to judicial settlement. That view appeared to have attained considerable prominence at the Hague Conference of 1907. It was essential to consider the realities underlying a dispute; most disputes could be reduced to a question of interpretation of treaties, but that did not make them any more amenable to judicial settlement.

35. He shared Mr. Tunkin's view regarding the present fairly general hesitation to resort to the International Court of Justice. Whatever the outcome of the present discussion, he for one would not be able to support a clause providing for the compulsory jurisdiction of the International Court to the exclusion of other methods of settlement. Such a provision would not be in line with the Charter, which only imposed an obligation to settle disputes by peaceful means.

36. The CHAIRMAN, speaking as a member of the Commission, observed that, according to Mr. Gros, the claimant State was entitled to choose the particular means of peaceful settlement to be employed. That would result in an undue advantage to the claimant State, which might propose a method of settlement unacceptable to the other party. Following that party's refusal of the method proposed to it, the claimant State would then assert that it had the right to denounce the treaty unilaterally. Such a result should follow only if the other party refused to agree to any of the methods of settlement and not merely to the particular method selected by the claimant State.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficult question raised by the Chairman recalled the historic differences regarding arbitration and judicial settlement and the problem of agreeing on a tribunal to adjudicate a dispute.

38. Paragraph 4 (*b*) perhaps needed redrafting in order to bring it into line with the language of the Charter, but the intention had been that, if the claimant party proposed a form of conciliation, say by a United Nations organ, and the other party rejected it out of hand, the claimant party would be entitled to release itself unilaterally from its obligations under the treaty. It was important to note the adjective " impartial " which appeared before the words " tribunal, organ or authority "; the intention was that there should be a proper offer of an impartial method of settling the question.

39. He agreed with Mr. Rosenne that it would be better to refer to a " difference " than to a " dispute ".

40. The CHAIRMAN, speaking as a member of the Commission, pointed out that when the claimant State offered conciliation, the other party might refuse that method of settlement but express its willingness to submit the matter to the International Court of Justice. Would it then be possible for the claimant State unilaterally to release itself from its obligations ?

41. Mr. BARTOŠ said that, although he was in favour of the compulsory jurisdiction of the International Court of Justice, he thought that to provide for such an obligation in the draft would be going beyond the provisions of the Charter, of which the Statute of the Court was an integral part. A distinction should be made between a general compulsory jurisdiction clause or an optional jurisdiction which had become compulsory because it was embodied in a treaty, and the procedural rules governing the application of instruments. Paragraph 4 (*b*) was based on the principle that all disputes should be settled by peaceful means, as recommended in several passages in the United Nations Charter. There was no reason, therefore, why the article should not provide that States had a duty to resort to amicable settlement, even if they had not ratified the Revised General Act.[2]

42. He agreed with Mr. Tunkin, however, on the need to find a formula which would remove all ambiguity concerning compulsory jurisdiction. Provided that the Drafting Committee could manage to work out such a formula, he was in favour of including it in the draft at the present session, rather than deferring the matter until 1964.

43. The Drafting Committee might also consider whether the procedure laid down in article 25 ought not to be followed where a treaty might be regarded as void under one of the provisions of articles 10, 15, 16, 17 or 18. That question also arose in connexion with all the other articles. A State must not be granted a right of unilateral denunciation or be entitled to adjudicate its own case; the other party must be given adequate guarantees.

44. In addition, paragraph 1 should specify whether the notice of the claim must always be in writing or whether oral communication by an authorized representative would suffice. At all events, it was common practice to make such a communication by an oral declaration, which was always followed by a memorandum in writing.

45. Continental jurists would be reluctant to accept the formula in paragraph 2, which was peculiar to British diplomatic practice. The paragraph should therefore be amended.

46. So far as the rest of the article was concerned, the main problem was that of the period during which the various phases of the procedure — often very lengthy — were being carried out. During that period, was a State which claimed the right to annul a treaty bound to regard it as being in force *in toto* and to apply it, or could it consider the treaty as provisionally suspended while the procedure was being carried out ? He could accept the proposed text only if it included a provision for the treaty's provisional suspension *ipso jure* during the procedure.

47. If one party had proposed a method of peaceful settlement and the other party had rejected it but proposed

[2] United Nations *Treaty Series*, Vol. 71, pp. 102 ff.

another method, that could hardly be regarded as outright rejection, since the other party had already entered into negotiations.

48. During the negotiations between the parties to choose a means of settlement, the treaty should be suspended *ipso facto*. If the negotiations came to nothing and the parties failed to agree before the expiry of the specified period, they should be bound by a clause providing for judicial settlement. But if it proved impossible within a further period, fixed in advance by the general rule, to find a jurisdiction which both parties recognized, the treaty must be regarded as terminated. That might seem an unduly radical solution, but unless it was adopted, the treaty would have to be regarded as suspended indefinitely, a solution which had little to recommend it.

49. On the whole, the principles on which article 25 were based seemed acceptable, subject to substantive changes in the text proposed.

50. Mr. AGO, reverting to the very pertinent question raised by the Chairman, said he thought the only solution lay in a compromise. If one party proposed conciliation when the question did not lend itself to that method of settlement at all, and the other party offered to accept any method of judicial settlement, it could not be held that there had been a rejection. On the other hand — and he well understood the concern of some members of the Commission — the other State could not be allowed to reject any procedure other than recourse to the International Court of Justice, for that would amount to introducing the idea of compulsory jurisdiction, which was precisely what the Commission wished to avoid for the time being. It should be specified that one of the parties should offer the other recourse, not to one means of pacific settlement only, but to a choice of different means, and that the other party should adopt the same attitude.

51. The Drafting Committee could easily solve that problem and also deal with the questions raised by Mr. Bartoš. It would be better not to prolong a theoretical discussion on article 25, but to make a practical examination of the solutions that could be accepted.

52. Mr. de LUNA said he was in favour of universal compulsory jurisdiction but he had no illusions on the subject, even if it proved possible to change certain aspects of the present situation referred to by Mr. Tunkin, namely, the membership of the International Court and certain rules of international law. Evolution towards compulsory jurisdiction was like an exponential curve, which constantly approached a straight line without ever reaching it. Apart from the bad conscience of certain States in particular cases, such as war, there were, as Mr. Rosenne had rightly pointed out, political problems in international disputes. When a dispute was political, what was sought was not the application of the law, but a change in it.

53. In the case of article 20, however, it was important that a solution should be found. The procedure proposed by the Special Rapporteur, with the points added by Mr. Ago and Mr. Gros, seemed to offer an equitable solution, and indeed the only possible one if the alternative of automatic unilateral denunciation was to be avoided. But what would happen if, in conformity with article 25, the parties agreed to an inquiry or submitted their difference to some international authority ? The Special Rapporteur did not mention what would happen then, but it was obvious that arbitration proceedings would follow. A solution would not be provided by the inquiry, which would only produce a report on the facts.

54. It was therefore necessary to specify, for example, that preference would be given to the party willing to conform to the decision of the mediator or the recommendation of the body seized of the matter; the reference to " inquiry " should be deleted. Like Mr. Ago, he favoured a compromise solution.

55. Mr. TABIBI said that the cautious language of article 25 was intended to prevent the security of treaties from being upset by unilateral denunciation. The Commission must remember that the provisions of the article were based on Chapter VI, and in particular Article 33, of the Charter, by which all States Members of the United Nations were bound.

56. But like Mr. Tunkin, he was concerned about the way the proposed procedure would work in practice. A number of provisions had already been adopted by the Commission for the purpose of safeguarding the rights of injured parties to treaties, particularly the *jus cogens* provisions of article 13. The provisions of article 25 might be used to disrupt the rules and detract from the safeguards for injured parties contained in other articles.

57. One matter of great importance in the whole process of termination and denunciation of treaties was the time factor. For instance, the treaties concluded by Afghanistan during the nineteenth century with a number of other countries, including the United Kingdom, had been entered into by the then rulers of Afghanistan at a time when the country was occupied by British troops and the people were not even aware of what was being done. Afghanistan had attempted to revise its treaties with the United Kingdom by negotiation, but some forty years of negotiations had, for political reasons, led to no result, despite India's attainment of independence in 1947.

58. The provisions of paragraph 1 allowed three months for a reply to the claimant State, but no time-limit was set for negotiation. Experience had shown that it took an extremely long time to agree on a mode of settlement in such cases. In fact, if the parties were unable to agree on a mode of settlement, the only remedy was resort to the International Court of Justice.

59. Personally, he strongly supported the compulsory jurisdiction of the International Court. Judicial machinery was essential to the implementation of international law. But it must be recognized that there was a certain reluctance to submit cases to the International Court. He had the greatest respect for the personal merits of the judges, but the present composition of the Court was naturally not acceptable to a great many countries. The election of the judges was not consistent with the

Statute of the Court, which did not provide that the five permanent members of the Security Council were entitled to permanent seats on the International Court as well. Another serious deficiency was the over-representation of Europe and the under-representation of Asia and Africa, to which the injured parties generally belonged. The fact that the European judges were men of outstanding qualifications in international law was acknowledged by all, but it was also essential that judges of the International Court should be aware of the feelings of peoples in all the regions of the world and understand the background of the situations with which they had to deal.

60. There again the time factor was important. To take one example, Liberia and Ethiopia had initiated proceedings in the International Court concerning South West Africa, but the cases were likely to continue for many years.

61. The deficiencies of the Court were so apparent that the question of revising its Statute had been before the General Assembly for some time, but unfortunately, because the Statute was part of the United Nations Charter, its revision would prove difficult.

62. In the last analysis, the provisions of article 25 implied the compulsory jurisdiction of the International Court of Justice, because the other means of settlement mentioned in the article were not compulsory; and when those other means failed, there was no remedy left but resort to the International Court.

63. It was essential to reconcile the need to ensure the stability of treaties with the need to safeguard the rights of injured parties. Those rights were protected by other articles of the draft, with which the provisions of article 25 should not conflict.

64. He agreed with Mr. Bartoš that the machinery of provisional suspension provided in paragraph 6 could offer a remedy where negotiations failed. If the treaty were regarded as provisionally suspended following the failure of negotiations, the rights of the injured party would be protected pending settlement of the issue.

65. Another advantage of that remedy was that it would force the parties to come to terms quickly; the party that was in the wrong would be induced to do so by the suspension of the treaty pending recourse to some means of peaceful settlement. Experience showed that the offending party would not readily admit that it had been at fault. For instance, years after the 1956 invasion of Egypt, the aggressors still would not admit that they had been in the wrong.

66. Mr. YASSEEN said that the formulation of principles should not be subordinated to acceptance of the compulsory jurisdiction of the International Court. The settlement of disputes was a separate problem, which should not hold up the development of normative rules of international law.

67. However, there was a deadlock in regard to article 25, for it dealt with the annulment of treaties when there were conflicting interests. To allow unilateral denunciation or annulment would be to favour the claimant party over the other party. What then should be done ? To require the agreement of both parties for termination or annulment would be to place the claimant party at the mercy of the other party, and that would be equally arbitrary.

68. It therefore became necessary to bring in a third party, as an impartial body to which the dispute could be referred. But while the settlement should not be arbitrarily made to depend on one or other of the parties, the Commission should not on that account take another arbitrary course by making it depend on the acceptance of compulsory jurisdiction. He was not opposed to the Court's jurisdiction — quite the contrary; but he must point out that in the present state of the international order, the majority of States did not seem willing to accept the compulsory jurisdiction of the International Court of Justice.

69. He would not go into detail, but there were sound reasons why most States did not accept the jurisdiction of the Court and why most of those which had accepted it had made reservations that were tantamount to non-acceptance. There was a psychological problem involved; the establishment of precise rules of international law and a more judicious allocation of seats on the Court might facilitate its solution. For example, Iraq had signed the optional Protocol concerning the compulsory settlement of disputes adopted at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities, although it did not generally accept the compulsory jurisdiction of the Court. It was the formulation of clear and precise rules on diplomatic relations which had made it possible for Iraq to accept that jurisdiction in a particular field.

70. In the present circumstances, the Special Rapporteur's draft was preferable to that of his predecessor, which had made the application of the corresponding articles dependent on the acceptance of arbitration or judicial settlement. The present Special Rapporteur suggested recourse to all the means of pacific settlement of disputes mentioned in Article 33 of the United Nations Charter. Inquiry, too, could sometimes be useful, since facts showing coercion or error might be found, and the findings could be used for the benefit of the injured party.

71. He endorsed the Chairman's objection that the machinery provided for in article 25 might in some cases involve imposing the compulsory jurisdiction of the Court, but it was satisfactory to note that the Special Rapporteur had no wish to do so.

72. The Drafting Committee would have the difficult and important task of reconciling three requirements: the solution must not depend on the claimant State; it must not depend on the party interested in preserving the treaty; and compulsory jurisdiction must not be imposed on the parties for the settlement of the dispute.

73. Mr. AMADO said that as the discussion had ranged so far afield, he would like to remind the Commission that, although everyone desired the establishment of a compulsory jurisdiction by which all disputes could be settled, perfection was not of this world.

74. Mr Tunkin had opened the debate with some very judicious comments on a peculiarly difficult aspect of

the problem. He himself had been extremely interested to hear an exposition of the general principles which mankind rightly aspired to enforce; but the Commission had to solve an urgent problem.

75. Mr. Verdross had shown the way, which was that laid down in the Charter. Article 33 provided that " the parties to any dispute... shall... seek a solution...". But in article 25, paragraph 4 (*b*) of the Special Rapporteur's draft, the search was abandoned in favour of an offer to refer the dispute to " an impartial tribunal, organ or authority." He therefore proposed that paragraph 4 (*a*) should be amended to read:

> " seek to arrive at an agreement with the other party or parties on the measures specified in the notice or on the means of reaching a settlement of the dispute."

76. Mr. BRIGGS said that he interpreted the provisions of paragraph 4 (*b*), which were probably the key provisions of the whole article, in the same manner as the Special Rapporteur.

77. Article 25 fell far short of establishing compulsory jurisdiction and to him that was a matter for regret. His own preference would have been for a system like that proposed by the previous Special Rapporteur, under which the State claiming the right to annul, repudiate, denounce or suspend a treaty must offer to submit the matter to an appropriate tribunal to be agreed upon between the parties or, failing such agreement, to the International Court of Justice.[3]

78. The present Special Rapporteur, however, had not put forward any such system of compulsory jurisdiction, but had included in his article the requirement that the claimant party must show good faith by expressing a willingness to submit the matter to some means of peaceful settlement.

79. He attached great importance to the retention of article 25, even in the absence of a provision for the compulsory jurisdiction of the International Court, since without such an article, the draft on the law of treaties would be of little value and hardly worth submitting to governments.

80. As Mr. Rosenne had pointed out, many of the provisions of the draft articles were in the nature of progressive development rather than codification of international law. In some instances, the draft articles conferred rights of denunciation and unilateral release from treaty obligations which did not at present exist in international law. It was essential that those innovations should be hedged about with safeguards, and that was the purpose of article 25.

81. He was much concerned about the point made by the Chairman, that if a claimant party proposed conciliation the other party could reply that, since the dispute concerned a legal question, it was not willing to accept that mode of settlement, but was fully prepared to submit the dispute to the International Court of Justice. Was that a rejection of an offer ? Would a right of unilateral action by the claimant State follow from such a disagreement on methods of settlement ? Some light had been thrown on that difficult question by Mr. Bartoš and Mr. Ago, but one of the main difficulties was the time factor, since negotiations for a settlement might drag on for a very long time.

The meeting rose at 12.45 p.m.

700th MEETING

Friday, 14 June 1963, at 9.30 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. EL-ERIAN said the replies given by the Special Rapporteur to the question put by members had made it possible to isolate those general problems which could only complicate the Commission's work on article 25. It was now agreed that the Commission was not discussing the general question of the settlement of disputes or a final clause on that subject, such as it had discussed in connexion with the draft on arbitral procedure and certain other drafts. Article 25 related to the question of unilateral denunciation of treaties. Some check on unilateral denunciation had to be provided, but in so doing it was essential to avoid getting involved in the question of compulsory jurisdiction by establishing too rigid a procedure for the settlement of disputes.

3. The article was formulated in very general terms. Its provisions applied not only to the unilateral denunciation of a treaty by one of the parties on the ground of a change in the circumstances or a breach by another party, but also to annulment, suspension, and withdrawal on constitutional grounds, fraud, error, coercion, illegality *ab initio* and supervening illegality. The wide range of those provisions made it essential that the rule established should be a flexible one.

4. As he had already had occasion to point out, there was a close relationship between the development of substantive rules of international law and that of methods of pacific settlement of disputes. Neither should be subordinated to the other; the adoption of substantive rules of international law should not be made dependent on a certain formula for the settlement of disputes. But the converse was also true; the settlement of disputes

[3] *Yearbook of the International Law Commission*, 1958, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 29, article 23, para. 3.