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Summary record of the 700th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.

should not be made dependent on agreement on certain substantive rules. Work on the development of both subjects should be parallel.

5. The problem of methods of pacific settlement of disputes was a complex one and all international lawyers looked forward to the establishment of effective machinery for the purpose. Political realities must be considered, however, as well as the present stage of development of the institutions for pacific settlement. The United Nations Charter contained carefully balanced provisions on the subject, of which Article 33 and the optional clause on the compulsory jurisdiction of the International Court of Justice were particularly noteworthy. Any attempt to interfere with that delicate balance could only be harmful.

6. With regard to the various provisions of article 25, the approach adopted in paragraph 1 was satisfactory; it was inspired by the Hague Conventions and by the approach to the problem of the use of force in the League of Nations Covenant.

7. Paragraph 4 set out the checks on unilateral claims. Sub-paragraph (*a*) stated that the parties must seek to arrive at an agreement by negotiation, while in the event of failure, sub-paragraph (*b*) provided that other means of pacific settlement should be tried. The question arose, however, what would happen if no agreement were reached on the choice of method. He did not think it was possible to find a completely water-tight solution; in fact, anything of the kind would probably involve abolishing the right of unilateral denunciation altogether.

8. It had been admitted that, in certain exceptional circumstances, there existed a right of unilateral denunciation after due compliance with certain procedures and with due regard for certain safeguards. If that right were made dependent on agreement by the respondent party, or on adjudication by a particular organ, it would cease to exist for practical purposes.

9. Consequently, he could not accept paragraphs 5 and 6 in their present form and he hoped the Drafting Committee would formulate a more satisfactory text. As the provisions now stood, if matters reached a deadlock, the treaty remained binding — it was not even suspended. During the discussion on the doctrine of *rebus sic stantibus*, Mr. Briggs had suggested provisional suspension subject to definitive judicial determination. In the case of a treaty void for illegality because of a breach of a *jus cogens* rule, paragraphs 5 and 6 as they stood could have the result that the claimant party could not even suspend the operation of the treaty.

10. It would not serve any useful purpose to discuss at great length whether the rule in article 25 constituted an existing rule of law. Both in the Commission and in the two Conferences on the Law of the Sea, there had been an exhaustive discussion on whether the three-mile limit was a rule of international law. The real question was whether it was a good rule or a bad rule, and because the Commission had not settled that question, the task of the Conferences on the Law of the Sea had been rendered more difficult. For the same reason, and particularly because many of the provisions being adopted on the law of treaties constituted progressive development of international law, the emphasis should not be on what the rules were, but on what the rules should be.

11. Mr. ELIAS said that the discussion had centred largely on the question whether compulsory jurisdiction was acceptable or not. Personally, he would have welcomed a detailed discussion on certain other points which seemed to him equally deserving of attention.

12. One was the implications of paragraphs 1 (*c*) and 1 (*d*), while another concerned paragraph 3 and the reasons which, rightly in his opinion, had led the Special Rapporteur to adopt a different approach from that of the previous special rapporteur in the corresponding provision of his draft. A third was the point raised by Mr. Bartoš, to which Mr. El-Erian had also referred, namely, the possible suspension of the treaty pending the settlement of the questions at issue.

13. Paragraph 7 was in the nature of a *sui generis* provision. The principle which it embodied appeared to him unexceptionable, but it would be desirable to examine more closely the proposed formulation, and also the question whether certain qualifications should not be introduced.

14. He noted with concern that important matters of principle were being referred to the Drafting Committee, which was gradually becoming a sort of Executive Committee of the Commission.

15. Mr. TSURUOKA thought it was true to say that all the members of the Commission were in favour of international jurisdiction and recognized the moral and legal principle that no one could take the law into his own hands. He welcomed that unanimity, for a contrary attitude could have disastrous consequences. History offered the example of a case whose consequences had been particularly tragic: the case of Japan, which had formerly been suspicious of any international jurisdiction. Only at the cost of a crushing defeat had it changed its attitude. Since then, Japan had had no distrust of international tribunals, still less of the International Court of Justice. It welcomed, in particular, the permanent presence on the Court of distinguished representatives of the Soviet legal system. It might, moreover, be questioned whether, in the course of their forty years' history, the Permanent Court of International Justice or the International Court of Justice had ever been so partial or incompetent as to warrant distrust. And if they had, it would surely be better to try to dispel such distrust than merely to note it.

16. He agreed with those members who regarded article 25 as the key article of a series of provisions concerning the essential validity of treaties, which offered an effective and at the same time equitable safeguard for the order of conventional international law.

17. He approved of paragraphs 1 and 2, but would make a few comments on them later in connexion with article 24, paragraph 3.

18. He suggested that in the first sentence of paragraph 3, the words " shall be free to carry out ", should be replaced by the words " shall carry out "; that amendment would

have the advantage of avoiding the uncertainty which might arise through indecision or inaction on the part of the claimant party; it would also be justified by the principle of estoppel if article 4 was adopted.

19. With regard to paragraph 4, if recourse to international arbitration was accepted, the question of the compulsory jurisdiction of the Court did not arise — in fact it was excluded. Again, in view of the essentially legal nature of the problem, he would prefer, though he would not press the point, that the " impartial... organ or authority " should be confined to arbitration and the Court.

20. Paragraph 4 made no provision for the case in which the claimant party, after the failure of negotiations, did not offer the other party the possibility of recourse to an impartial authority. In his view, the notice ceased to be valid in such a case.

21. Apart from those points, he approved of the Special Rapporteur's text.

22. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the Special Rapporteur and with the majority of the members on the need for a specific article on denunciation procedure. Without an article offering some guarantee of impartial or third party determination of the grounds on which a State sought to invalidate or denounce a treaty, the Commission's draft would be doomed.

23. Whether the proposed rules constituted *lex lata* or *lex ferenda* it was indisputable that the articles adopted at the present session were enlarging or developing the law on termination and invalidity of treaties. That process would inevitably increase and encourage claims from States which were dissatisfied with certain treaties and wished to be released from them. In some cases, that change would be a useful and healthy development, but at the same time there would also be an increase in claims made in bad faith. It was therefore necessary to provide safeguards in order to prevent unfounded assertions, if the Commission wished to avoid encouraging violations of the principle *nemo judex in causa sua*, which was an existing rule of international law.

24. With regard to the practical provisions to be embodied in the article, he fully agreed with the pragmatic and realistic approach adopted by the Special Rapporteur. He also endorsed the view expressed in paragraph 6 of the commentary that the ideal solution would be to make all cases of invalidity subject either to the compulsory jurisdiction of the International Court of Justice or to compulsory arbitration, but that, having regard to the difficulties which proposals for compulsory jurisdiction had encountered at the Geneva Conference of 1958 on the Law of the Sea, it did not seem possible to adopt that solution. He wished, however, to place on record his own support for the compulsory jurisdiction of the International Court of Justice and compulsory arbitration as the ideal solution.

25. With regard to paragraph 4 (*b*), on which he had put a question to the Special Rapporteur at the previous meeting (para. 40), it was understood that the Drafting Committee would try to find a text which met that difficulty. Personally, he must confess that he had not been satisfied with the answers given. In his view, the answer must be based on the provisions of the United Nations Charter, particularly Articles 11, 33 and 36. Article 33 laid down that the parties to any dispute should seek a solution by peaceful means of their own choice. Thus, the selection of the method of settlement had to be made by agreement between the parties and no party was entitled to impose a particular method of settlement which might give it some special advantage. The claimant State was not entitled, under the Charter, to select a particular method of settlement, and paragraph 4 (*b*) of article 25 should not be interpreted as giving it the right to release itself from its obligations under the treaty if the offer of a particular method were not accepted by the respondent party. On the other hand, neither could the respondent party impose a particular method of settlement which it might regard as more favourable to its own interests. Consequently, the respondent State should not be given, as it was under paragraph 4 (*b*), the right to reject the offer by the claimant State and to confront the claimant State with the alternative of choosing a method of settlement suitable to the respondent State or remaining bound by the treaty; that would be contrary to the principle of equal rights of States, laid down in the Charter.

26. The theory of the Charter was that every dispute must have what Article 26, paragraph 1, termed " appropriate procedures or methods of adjustment "; in other words, the method selected should be adequate to provide a peaceful settlement of the kind of dispute which had arisen. If a disagreement arose over the choice of procedures, there must clearly be a second round of negotiations for the purpose of agreeing on a method of settlement. Failing such agreement, the parties would have to refer the dispute to the General Assembly or the Security Council, or to the appropriate regional body.

27. There appeared to be a gap in paragraph 4 (*b*), for it omitted any reference to regional arrangements. That omission could raise *a contrario* doubts regarding the competence of regional bodies, a result which he was certain was not intended by the Special Rapporteur.

28. Article 36, paragraph 3, of the Charter provided that " legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court ", and of course the kind of dispute that could arise concerning the validity or termination of a treaty would, in the majority of cases, be a " legal dispute ". In making that point he was not trying to introduce compulsory jurisdiction by the back door. Article 36 provided that legal disputes should be referred to the Court in accordance with the provisions of the Statute of the Court; that meant that the jurisdiction of the Court must be accepted voluntarily by an *ad hoc* agreement after the dispute had arisen.

29. If a State started a legal dispute concerning the validity or the termination of a treaty, the least that could be required, to enable it to obtain release from the treaty, was that it should be prepared to accept adjudication of the legal dispute by an impartial third party.

Accordingly, he could not agree with Mr. Ago's reply to the question he had asked at the previous meeting (para. 40) that, if the respondent State offered to submit the dispute to the Court only, the claimant State would be entitled to release itself from its obligations. If such an offer was accompanied by an expression of willingness to have appropriate procedure recommended by a competent organ, which might well be the Court, it should not be considered as a reply releasing the claimant State from its treaty obligations.

30. In his opinion, the offer by the claimant State of a particular mode of settlement should be met by the respondent State with an expression of a willingness to have the dispute submitted to the competent organ — the Security Council, the General Assembly or a regional body — for consideration and recommendation of the most appropriate procedure for settlement. That could not be regarded as a refusal and as entitling the claimant State to release itself from its obligations. Such entitlement should only follow if the respondent party showed itself unwilling to submit the dispute to the appropriate mode of settlement.

31. Mr. CASTRÉN said that he agreed with the judicious observations just made by the Chairman. The reason why he had asked to speak again was that article 25 was of such vital importance; the Commission had to take a position on certain fundamental principles of international law and settle questions of great practical importance.

32. The discussion had shown that there were some gaps in the draft and obscurities which might give rise to different interpretations. Although some members were theoretically in favour of compulsory jurisdiction, they nevertheless thought it necessary to be realistic and avoid introducing that method of settlement into the draft. That attitude was understandable and he therefore wished to draw attention once again to the proposal he had made in his previous statement (698th meeting, para. 73): a solution should be sought which was at the same time capable of application in practice and in conformity with the rule of law.

33. As Mr. Yasseen had pointed out, one of the parties to a treaty should not be favoured at the expense of the others, for it was impossible to tell beforehand whether the parties were acting in good faith. Only a neutral and impartial body was in a position to give an objective reply. As the parties had the right to challenge the findings or to reject the proposals of a commission of inquiry, mediation or conciliation, the claimant party was entitled to propose a more effective method, namely, arbitration or judicial settlement, if it wished to press its claim. The other party was in no way bound to accept that offer, but rejection would give the claimant party the right to denounce the treaty or, in some cases, to declare it void. If the other party accepted the offer, there was no problem.

34. There remained the case in which the claimant party was not prepared to resort to arbitration or judicial settlement. It then had no right to denounce or annul the treaty, for such action could lead to anarchy in international relations. Of the alternatives — unilateral change or maintenance of an existing situation — the *status quo* was to be preferred. That was the position under Article 14 of the United Nations Charter. If the General Assembly itself, the principal organ of the United Nations, could not, against the will of the parties, alter a treaty which had created a situation regarded as unsatisfactory, how could one party to a treaty be given the right to do so ?

35. Again, Chapter IV of the Charter, on the pacific settlement of disputes, only laid down that the parties should seek a solution by negotiation and that if they failed to agree the Security Council should recommend more effective procedures. That system might not be satisfactory, but it was certainly preferable to a resort to force.

36. The Special Rapporteur's commentary on article 22, concerning the *clausu a rebus sic stantibus*, showed that although the clause had not usually been rejected in State practice, States had always reacted very strongly against the unilateral denunciation of treaties.

37. Some members had been critical of judicial settlement. But even though the composition of the International Court of Justice, its Statute and its rules of procedure might not meet everyone's wishes, there always remained the more flexible procedure of arbitration.

38. He accepted Mr. Tabibi's proposal that a time-limit be set for carrying out the various acts provided for in paragraph 4.

39. Mr. GROS said he wished to express his opinion on an important problem which had been raised at the previous meeting and which Mr. Tsuruoka had taken up again at the present meeting, namely, the situation regarding acceptance of the jurisdiction of the International Court of Justice.

40. Various reasons had been put forward to explain why the International Court's jurisdiction was at present accepted by only a small number of States; one of those reasons had been its composition. From a purely legal point of view, in the light of Article 26, paragraph 2, of the Statute of the Court, which provided that the Court might at any time form a chamber for dealing with a particular case and that the number of judges to constitute such a chamber should be determined by the Court whith the approval of the parties, and in the light of Article 28, it seemed difficult to affirm that one respected the competence and impartiality of all the judges, and at the same time to criticise the composition of the Court; for among the judges the States concerned could certainly find at least three to whom such criticism did not apply. States could decide the composition of the chamber as they wished, and if some of them were both advocates of international jurisdiction and uneasy about the present composition of the Court, it was surprising that Article 26, paragraph 2, of the Statute had never once been invoked since the Court existed. He therefore challenged the explanation that the present position in regard to acceptances of international jurisdiction by States was due to the composition of the Court.

41. The Commission might perhaps succeed in remedying the situation by a different approach to the difficulties.

Admittedly, many States were reluctant to accept the Court's jurisdiction, and several had made important reservations. The French Government's reservation, in particular, had been criticized, but it had since been modified. To anyone concerned with the advancement of international law, it was evident that those problems were constantly evolving. Leaving aside the psychological and political reasons for the situation, with which the Commission was not concerned, it could be said that one of the main legal reasons was the existence of some measure of uncertainty regarding the substantive rules; the other was that in relations between States all matters were not necessarily within the competence of the Court. The latter point had been discussed by the Rapporteur to the Institut de Droit International in 1959.[1]

42. That situation was not peculiar to public international law, however. For instance, States had widely different conceptions of day-to-day economic and technical relations, and international commercial arbitration worked satisfactorily between States which managed to agree on the rules of law applicable and the appointment of an impartial judge. The socialist States concluded with foreign firms contracts for the building of factories or supply of goods which included provisions for the settlement of disputes by international arbitral tribunals belonging neither to the socialist State nor to the State of the foreign firm (for example, the tribunals appointed by the Arbitral Institute of the Stockholm Chamber of Commerce). When a dispute was brought before the Stockholm arbitral tribunal it could apply the rules laid down in the contract, and, if there were gaps, the generally recognized principles of commercial law, if the contract referred to them. Thus it was possible to agree both on a judge and on the law applicable in economic relations between States.

43. That was precisely what the Commission was endeavouring to do in public international law for relations between States. It was trying to draw up substantive rules acceptable to all the States in the international community. The first part of the task was to reach agreement on the rules of law. He saw no reason why it should not be possible to make parallel progress on the question of choosing a judge and on that of international commercial arbitration.

44. With regard to article 25, he associated himself with the Chairman's views. It would be inconceivable for a draft by the Commission to go less far than Article 33 of the United Nations Charter. The solution should accordingly be found by bringing article 25 into conformity with the methods of settlement recognized by the Charter.

45. Mr. TUNKIN said that he would not revert to the general problem of compulsory jurisdiction, since it was agreed that there was no intention of introducing it into article 25, whether in the form of compulsory arbitration or of the compulsory jurisdiction of the International Court of Justice. No doubt the Drafting Committee would find a form of words consonant with that idea.

[1] *Annuaire de l'Institut de Droit International*, 1959, Vol. II, pp. 57 ff.

46. Before discussing the provisions of article 25, he wished to refer to the observations made by Mr. Gros. It was sometimes suggested by the advocates of compulsory jurisdiction that they were the real champions of the progressive development of international law, and that those who did not think it advisable to press for compulsory judicial settlement at the present stage of international relations were against such development. But that was not the case. By endeavouring to make the acceptance of judicial settlement a condition for the acceptance of substantive rules of law, the advocates of compulsory jurisdiction, however good their intentions, were acting in a manner detrimental to the progress of international law. Means of peaceful settlement of disputes should be further developed, but the progress of other branches of international law should not be made dependent on the development of that particular branch. Many States did not accept compulsory judicial settlement and had good reasons for that attitude.

47. With regard to the provisions of article 25, it would be an improvement if paragraphs 1 and 2 were shortened. They laid too much stress on such elementary ideas as the requirement that the notice must be in writing.

48. He agreed with the Chairman and Mr. Verdross that paragraph 4 (*a*) should be redrafted on the lines of Article 33 of the Charter.

49. Paragraph 6 certainly needed amendment, perhaps on the lines suggested by Mr. Tabibi, with a time-limit for carrying out the settlement procedure, whichever method might be chosen. He agreed with Mr. El-Erian that after expiry of the time-limit the claimant party should be entitled to take action, since otherwise the other party or parties would have been placed in an unduly favourable position.

50. If article 25 was to be made generally applicable to all the provisions in the draft it would have to be worded with great care. However, he had understood Mr. Rosenne to suggest that its provisions would apply only in cases in which the voidability and not the voidance of the treaty was at issue.

51. With regard to paragraph 7, he agreed that the provisions of article 25 should not apply if the treaty itself provided for the settlement of disputes arising out of its interpretation or application. That would be fully consonant with certain provisions in Part I of the draft.

52. If article 25 were framed in that manner it would include certain provisions *de lege ferenda*, according to which a claimant party would only be able to act unilaterally after failure to settle a dispute by means jointly agreed between the parties. In the absence of such a procedure the Commission would be driven to provide for some form of compulsory jurisdiction which, as he had said, would be both unacceptable and inadvisable at the present stage.

53. Mr. de LUNA said that although he agreed with the substance of Mr. Tsuruoka's view, he did not think that the words " organ or authority " should be deleted from sub-paragraph 4 (*b*). As Sir Hersch Lauterpacht had very aptly observed, even if a compulsory jurisdic-

tion should some day come to be universally recognized, it would probably be an illusion to suppose that that would greatly diminish all danger to peace and international security. Compulsory jurisdiction would not ensure effective settlement of the most serious disputes, which were mostly political. He would, therefore, suggest that the provisions of Article 33 of the United Nations Charter should be added to paragraph 4 (*b*), but that provision should also be made for the settlement of disputes which did not threaten international peace and security, such as a dispute about the termination of a commercial treaty.

54. Sir Humphrey WALDOCK, Special Rapporteur, said there seemed to be general agreement on the need to include in article 25 provisions — though somewhat modified — on the lines of those he had included in paragraphs 4, 5 and 6, but without imposing upon the parties the obligation to refer differences to compulsory jurisdiction. Some members seemed to have come round to that view with regret and would have preferred to go further in the direction of compulsory jurisdiction. As he had explained in the commentary, that had never been his intention, not because he was opposed to the principle, but because the present climate of opinion had to be taken into account. He should also add that his view had not been prompted by any lack of confidence in the International Court of Justice. Admittedly certain international developments might call for changes in the Court, but those were political questions with which the Commission need not concern itself.

55. In seeking to devise procedural checks on a claimant party to prevent arbitrary unilateral denunciations of a treaty, he had been directly inspired by the procedures enumerated in Article 33 of the Charter, but he had not followed that wording exactly because the Article was expressly concerned with disputes likely to endanger the maintenance of international peace and security. His hesitation to do so did not appear to be shared by other members and he was willing to bring paragraph 4 (*b*) more closely into line with Article 33 and also to make a reference to regional bodies, as suggested by the Chairman, though in fact he had not overlooked that point, which was covered by the reference to an authority.

56. In recognition of the fact that the parties could not be forced to accept a particular means of settling their dispute, he had proposed that the choice should be made by agreement between them.

57. In paragraph 4 he had come up against the classical difficulty confronting anyone drafting a provision on the peaceful settlement of disputes: how an international jurisdiction was to be established. Perhaps in some respects the drafting of article 25 had been a little loose, but that had been partly deliberate. Though it was highly desirable that the parties should arrive at a definite settlement if a claim were contested, that might not always prove possible in practice, and rather than aim at the achievement of a perfect system for the settlement of disputes, the Commission should be mainly concerned to go as far as possible in supplying proper safeguards for the application of the rules laid down in the draft, which would prevent unilateral denunciations out of hand.

58. Among the kind of eventualities it was not easy to provide for was a disagreement between the parties occurring after some particular means of settlement had been initiated; for example, they might be unable to agree on the terms of a *compromis*. Or it might be difficult to determine whether an objecting State had in fact declined to follow a particular means of settlement or not.

59. He disagreed with the view that either the claimant or the objecting party would be helpless in the event of failure to reach agreement on a means of settling the dispute, because it was always open to either of them to refer the matter to the Security Council or the General Assembly.

60. Nor was it correct to assume, as had been done by some members, that the claimant would necessarily be the injured party. In fact, the claimant might well be trying to force termination on the other party on invalid grounds.

61. While appreciating the reasons why some members wished to set a time-limit in paragraph 6, he pointed out that the procedure for settlement of a dispute might be lengthy and it would be undesirable to introduce a kind of guillotine whereby, if it had not been concluded within the specified period, the claimant State would be entitled to take unilateral action.

62. Contrary to the opinion expressed by some members, who seemed to favour a more or less general right of suspension, he feared that that might encourage claimant States, after making their notification, to raise difficulties about the procedure to be followed for the settlement of the dispute and then at once resort to suspension, after which the possibility of reaching a settlement would be greatly diminished. In paragraph 6 he had provided for a right of suspension, but only by agreement between the parties or in pursuance of a decision or recommendation by the tribunal or authority to which the dispute had been referred. Mr. Castrén had criticised his reference to a recommendation because it might not have binding effect, but that had been inserted to cover cases in which a dispute was referred to the Security Council or the General Assembly.

63. Mr. Rosenne had raised the question of what should be the scope of article 25 and whether it ought to be made applicable to all the rules stated in sections II and III. In fact, he had specified the particular articles because in some cases article 25 might not be applicable: for example, when termination took place in accordance with a right of notice laid down in the treaty itself, though even in those circumstances disputes could arise if the right to give notice of termination were made conditional on the existence of certain circumstances or the occurrence of an event. It might be argued that article 25 was not applicable when the right to terminate was invoked on grounds that the treaty was in conflict with *jus cogens*, because that would render it automatically void in accordance with the view taken by the Commission on article 13, but even such a case might raise serious issues of law because of a difference of opinion as to what

was or was not *jus cogens*. Perhaps article 25 should be made generally applicable to all the provisions in the draft.

64. He had not commented on all of the important points raised during the discussion, but they would be of undoubted assistance to the Drafting Committee.

65. Mr. EL-ERIAN said he wished to dispel any impression that he had argued in favour of an unqualified right to denounce treaties unilaterally. In fact, he believed that safeguards against abuse were very necessary and agreed with the arguments put forward by the Special Rapporteur in paragraph 5 of his commentary.

66. Mr. ROSENNE said he was strongly of the opinion that it was impossible to generalize by contending that disputes over the interpretation and application of treaties were inherently justiciable, either by the International Court, or by arbitration, nor could he subscribe to the view expressed by some members that the ultimate ideal was compulsory jurisdiction by the International Court over every international dispute.

67. The problems of compulsory international jurisdiction and of the composition of a permanent international judicial organ were very perplexing and had troubled lawyers for many years. The pertinent comments of some members about the composition of the International Court were, of course, directed to the problems facing the Security Council and the General Assembly when electing the judges, and not to individuals.

68. Much had been said about the need to examine article 25 in the context of present-day realities, and when the Commission resumed consideration of the article after it had been revised by the Drafting Committee, it would do well to resist the temptation to classify States in a few groups possessing identical aims. In fact, there were many kinds of treaty concluded between different types of State and States in one or other of the groups, and there was no reason to assume that it would necessarily be only new States which would regard themselves as the injured party and wish to terminate a treaty in accordance with the procedure laid down in article 25. The task facing the Commission was to try to balance rights and duties in a general way so as to serve the needs of the international community in all conceivable circumstances and for a long period of time.

69. Mr. TABIBI said he was anxious that his statement at the previous meeting (paras. 55-65), should not be construed as in any way reflecting on the judges or standing of the International Court, which had already made a great contribution to the cause of peace. A memorandum being submitted by Afghanistan to the Secretary-General of the United Nations testified to his Government's belief that the compulsory jurisdiction of the Court should be extended in the interests of the development of international law. What he had wished to point out was that, as at present constituted, the Court did not include enough judges from the countries most likely to be the injured parties in proceedings, who were familiar both with the social and political background against which the cases must be judged, and with the legal systems applied in those countries. Members of the Commission would not be unaware that the General Assembly had decided to study the position of the International Court.

70. The CHAIRMAN suggested that article 25 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

71. The CHAIRMAN invited the Commission to revert to section I of the Special Rapporteur's second report (A/CN.4/156) and take up article 3.

ARTICLE 3 (PROCEDURAL RESTRICTIONS ON THE EXERCISE OF A RIGHT TO AVOID OR DENOUNCE A TREATY)

72. Sir Humphrey WALDOCK, Special Rapporteur, explained that the purpose of article 3 was to draw the Commission's attention to the fact that procedural provisions were to be laid down in section IV of his report. That had been necessary because section IV had not been submitted at the same time as sections II and III.

73. Mr. YASSEEN said that article 3 could certainly serve as an introduction to the debate on the articles concerned with the validity of treaties, but as the Commission had already adopted, even if only provisionally, the articles dealing with the appropriate procedure, the article was no longer necessary.

74. Mr. CASTRÉN said he agreed with Mr. Yasseen. The procedural restrictions on the exercise of a right to avoid or denounce a treaty were undoubtedly important, but they were clearly set out in section IV, and it must be assumed, or even required, that States applying an international convention would study all its clauses.

75. Mr. de LUNA agreed with Mr. Yasseen and Mr. Castrén.

76. Mr. ROSENNE said that article 3 was unnecessary, but its contents could be transferred to the commentary on article 2.

It was so agreed.

Reply from Mr. Kanga

77. Mr. LIANG, Secretary to the Commission, announced that a reply had been received to the Chairman's telegram asking Mr. Kanga whether he would be taking part in the Commission's deliberations. Mr. Kanga expressed his regret at being prevented from attending the session as a result of the dates of certain international conferences. He asked to be kept informed of the Commission's progress and expressed his keen interest in its work and in its efforts to promote justice and a better understanding between nations.

The meeting rose at 11.50 a.m.