Document:-
A/CN.4/SR.694

Summary record of the 694th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1963, vol. I

paragraphs 2 and 3; for the new paragraph 3 he would prefer the wording proposed by Mr. Castrén.

77. Mr. TUNKIN said that the problems dealt with in article 21 were extremely complicated and it would be wise to give members time for further reflection; in the meantime the Commission could take up article 22.

78. He did not feel able at that stage to express a final opinion on whether the problem with which paragraph 1 was concerned should be dealt with in the draft or taken up later in connexion with state succession.

79. He was in general agreement with paragraph 2.

80. Though he believed that a clause was needed to cover the complete disappearance or destruction of the physical object of a treaty, like Mr. Briggs he was not clear as to the meaning of the phrase " to call for the termination ". The rule stated in paragraph 4 was an important one and would represent real progress; he was strongly in favour of its inclusion.

81. Mr. LACHS said that articles 21 and 22 both dealt with impossibility or extreme difficulty of performance and should be discussed together with a view to their possible amalgamation. Article 21 was concerned with the effects of the extinction of one of the parties, the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty, the permanent disappearance of a legal arrangement or regime established by the treaty, and the establishment of a new rule of international law which rendered the performance of the treaty illegal. Article 22 was concerned with an essential change in circumstances which would frustrate the further realization of the object of the treaty or make performance of the obligations contained in it essentially different from what had been originally undertaken by the parties.

82. The dividing line between what certain writers described as absolute impossibility and relative impossibility of performance was not very clear in either article, but of course the cases that arose in practice varied widely and the whole range of possibilities could hardly be fully covered by the rules to be formulated.

83. In connexion with paragraph 1, the Commission would have to consider, in addition to the question of the extinction of one of the parties, the possibility of the discharge of an obligation leading to self-destruction — a plea that had been made by Turkey in the *Russian Indemnity* case of 1912.[16] On that occasion the plea itself had failed, but it was significant that the Permanent Court of Arbitration had admitted that such a plea could legitimately be advanced. Another question to be considered besides illegality of performance was what the International Court of Justice, in the *South-West Africa* cases, had described as insurmountable difficulties of a juridical nature.

84. In discussing various possibilities envisaged in both articles, the Commission must bear in mind the influence of the time factor and the inevitable changes that it could bring about in the nature of the object originally contemplated by the parties at the time of concluding the treaty.

85. He hoped that the title of article 22 would be changed because of the negative connotation which the doctrine of *rebus sic stantibus* had recently acquired, both for lawyers and laymen.

86. The CHAIRMAN invited members to give their views on the two procedural suggestions before the Commission.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that he preferred Mr. Tunkin's suggestion because, as he had already pointed out, there were juridical reasons for dealing separately with the matters covered in articles 21 and 22, and it might not prove expedient to combine them. On the other hand, if the Commission were first to take up article 22, it might subsequently find it easier to reach a conclusion on article 21.

88. He had used the doctrine of *rebus sic stantibus* as the title of article 22 because it was a convenient label, but he recognized the force of Mr. Lachs' objection and would be prepared to suggest an alternative: he had not used the expression " *rebus sic stantibus* " in the text of the article.

89. The suggestion that paragraph 4 should be incorporated in article 13 of section II did not commend itself to him; he believed that a provision concerning conflict with a rule of *jus cogens* that led to termination must remain in section III and should not be included in article 13 of section II, which dealt with conflict with *jus cogens* as a ground for invalidating the treaty *ab initio*.

90. The CHAIRMAN suggested that, since the Special Rapporteur had given it his preference, the Commission should follow Mr. Tunkin's suggestion and take up article 22, after which it would revert to article 21.

It was so agreed.

The meeting rose at 12.50 p.m.

694th MEETING

Thursday, 6 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Inter-American Juridical Committee

1. The CHAIRMAN welcomed Mr. Gaicedo Castilla, the observer for the Inter-American Juridical Committee.

2. Mr. GAICEDO CASTILLA, speaking at the Chairman's invitation, expressed his pleasure at being able to attend the meetings of the Commission and his keen interest in its work.

[16] *Hague Court Reports*, New York, 1916, Oxford University Press, pp. 297 ff.

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

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

ARTICLE 22 (THE DOCTRINE OF *rebus sic stantibus*)

3. The CHAIRMAN, opening the discussion on article 22, drew attention to the alternative text proposed by Mr. Castrén, which read:

" The validity of a treaty cannot be modified by a change in circumstances unless:

(*a*) The change has taken place with respect to a fact or state of facts which existed when the treaty was entered into;

(*b*) It appears from the object and purpose of the treaty and from the circumstances in which it was entered into that the parties must both, or all, have assumed the continued existence of that fact or state of facts to be an essential foundation of the obligations accepted by them in the treaty;

(*c*) The effect of the change is such as in substance to frustrate the further realization of the object and purpose of the treaty or to render the performance of the obligations contained in the treaty something essentially different from what was originally undertaken;

(*d*) The change does not relate to stipulations of a treaty which:

(i) Effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights; or

(ii) Accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement;

(*e*) The change was not caused, or substantially contributed to, by the acts or omissions of the party invoking it;

(*f*) The change has been invoked within a reasonable time after it first became perceptible;

(*g*) The party concerned has not precluded itself, under the provisions of article 4 of this part, from invoking the change of circumstances;

(*h*) The change of circumstances has not been expressly or implicitly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question; and

(*i*) The procedure laid down in article 25 of this part has been followed."

4. Sir Humphrey WALDOCK, Special Rapporteur, said that article 22 could certainly be simplified to some extent, as had been proposed by Mr. Castrén. His own draft was designed to place a number of specific points regarding the doctrine before the Commission for decision. Paragraph 1 was introductory in character; the main substance of the article was contained in paragraph 2. Paragraph 3 contained a negative proposition and paragraphs 4 and 5 dealt with cases in which it was arguable that essential changes in circumstances should not be capable of being invoked for purposes of termination. Paragraph 6 was concerned with the procedural aspects of the application of the doctrine of *rebus sic stantibus*, which seemed to him very important.

5. In discussing the article, members should keep in mind the procedural provisions of article 25, because a number of authorities were strongly of the opinion — and there was considerable support for it in practice — that the doctrine could only be applied by agreement between the parties, or as a result of some form of independent determination that the proper conditions had been satisfied.

6. He would have no objection to changing the title of the article, which Mr. Lachs had criticized at the previous meeting, because as he had explained in the commentary he did not subscribe to the theory that the doctrine derived from the presumption that the parties had intended to subject the treaty to an implied condition. But the question of the title could not usefully be considered until the Commission had reached a conclusion on the content of the doctrine dealt with in the article.

Mr. Bartoš, first Vice-Chairman, took the chair.

7. Mr. PAL said that the *clausula rebus sic stantibus* had been devised in an attempt to legalize the antinomy between the law's claims to perennial validity culminating in the maintenance of the *status quo* and the historical forces pressing beyond the *status quo* perhaps towards higher forms of human community. Gentilis was generally credited with having introduced the maxim *omnis conventio intelligitur rebus sic stantibus* in the sixteenth century, when he had asserted the existence of a tacit condition in the treaty itself that treaties were binding only if circumstances remained unchanged. In developing that theory he had drawn upon the writings of the civilians, but the theory was in fact older still and had originated in canon law, which had sought to temper the rigour of Roman private law with considerations of equity. Suarez had also recognized the doctrine of *rebus sic stantibus*.

8. In the seventeenth century the theory had been rejected by Grotius, who had emphasized the importance of good faith in maintaining treaties and pointed out that they differed from contracts in as much as their repudiation raised more complex problems. According to Suarez they remained binding on the successors of the princes who had originally concluded them. He had later qualified his position, however, by admitting that where there was absolute certainty that the continuance of the existing circumstances was the very reason for the conclusion of the treaty, a change would excuse repudiation. In the eighteenth century, Bynkershoek had also rejected the doctrine of the existence of a tacit *rebus sic stantibus* clause, but had created a new loophole by maintaining that a sovereign could be absolved from a promise which it was no longer in his power to keep. He had introduced the requirement of some kind of third-party determination in the matter. Later in the same century Vattel had admitted the possibility of a vital change in circumstances which might affect the application of a treaty.

9. In discussing the doctrine of *rebus sic stantibus* many modern writers had looked to the principles of supervening impossibility of performance in municipal law governing contracts. The fundamental rule was that a party to a contract, the terms of which were absolute and not subject to any condition whether expressly stated or implied, must carry out its obligations or pay damages for failure to do so, even though for unforeseen reasons those obligations might become unexpectedly burdensome or even impossible to fulfil. However, the parties could expressly make the obligation to perform conditional upon its continued possibility, and there could be cases in which such a condition would be assumed to exist by implication, even if not expressly laid down.

10. In municipal law, the courts proceeded on the footing that they had no power to release the parties from their contractual obligations, but had to construe the meaning of a particular contract in terms of what the parties as reasonable men should have intended. The purpose of interpreting the contract was not to modify the agreement, but to find out and give effect to the real intention of the parties.

11. An analysis of the various decisions on the subject would show that the theory of the implied condition was used in two different senses. Sometimes it was taken to mean a condition which, although the parties had not expressed it, the Court could read into the contract, not in order to modify their agreement, but in order to give effect to it regarded as their real intention. It was thus taken as a genuine condition. At other times it was taken to mean a condition which, in the circumstances that had arisen, a positive rule of law required the Court to impute to the parties from the outside, irrespective of their intention. It was then only a fiction — something really added to the contract by law. In certain types of case the courts readily inferred an implied condition in the contract to the effect that the disappearance or destruction of its subject-matter or of certain persons could put an end to the obligations. That principle had been extended to include changes in a particular state of affairs or an event not taking place, when they formed the inducement for the parties to enter into the contract, as distinct from the basis of the contract; it was also applied in cases of incapacity to perform personal services. In commercial contracts it was based on the doctrine of frustration of the venture.

12. Another recognized ground for impossibility of performance was changed in the law or in its operation by reason of new facts such as the outbreak of war.

13. With regard to the modern application of such rules to treaties, he wished to draw attention to Oppenheim's views that:

> " Although, as just stated, treaties concluded for a certain period of time, and such treaties as are expressly or impliedly made for the purpose of setting up an everlasting condition of things, cannot, in principle, be dissolved by withdrawal of one of the parties, there is an exception to this rule. Vital changes of circumstances may be of such a kind as to justify a party in demanding to be released from the obligations of a treaty which cannot be abrogated by unilateral notice." [1]

14. The same writer considered that the *clausula rebus sic stantibus* embodied a general principle of law as expressed in the doctrines of frustration, or supervening impossibility of performance or the like, and had said that in that sense " every treaty implied a condition that, if by any unforeseen change of circumstances an obligation provided for in the treaty would imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned ". That vital point had not been taken into account in article 22, which might even run counter to it.

15. The modern doctrine thus seemed to embody the same principle as the law of various countries which recognized a vital change of circumstances as a ground for the dissolution or discharge or unenforceability of a contract. But the *clausula rebus sic stantibus* did not give a State " the right, immediately upon the occurrence of a vital change of circumstances, to declare itself free from the obligations of a treaty; it was only entitled to claim to be released from them by the other party or parties.

16. The general principle of the inviolability of treaty obligations had been upheld by a number of States in the 1871 Declaration of London; [2] but that Declaration had been almost immediately contravened by many, which was indicative of the difficulty some States seemed to have experienced in fully respecting such a rule. He hoped it would prove possible so to frame article 22 as to make it unnecessary for States injustifiably to disregard certain obligations as they had in the past. Of course no rule could be perfect and it would hardly be possible to devise a permanent and final rule. But since he preferred to assume that statesmen were actuated by good will, he was not for suspecting bad faith everywhere; it was not to be supposed that the reins of government would suddenly be taken over by persons unwilling to respect the law though lack of moral sense. If States consistently disregarded that duty, the reason was that it conflicted with another and perhaps higher obligation to consider the practical consequences of actions which might affect their nationals. Perhaps the rule proposed by the Special Rapporteur would serve to reconcile political and legal considerations, thereby enabling governments to observe it without disregarding their political responsibilities.

17. The tragic events of recent times might provide some insight into the issues involved and encourage changes in a theory which had been developed in the course of past centuries. States could now be expected to be alive to the new responsibilities implied in their existence by the growing interrelationship of the international community and to reconsider the whole concept of sovereignty, the exercise of which was necessarily becoming dependent on the rule of law and not on

[1] *International Law* (8th edition, 1955), paragraph 539.

[2] *British and Foreign State Papers*, Vol. 61, p. 1198.

physical capability. One of the tasks which faced modern States was to establish, in co-operation with one another, an international order as an extension of the growing institutional functions being assumed internally, as a result of which States were assuming ever wider obligations to protect the welfare and security of the individual. In so far as any function of a State could now be exercised only in co-ordination with other States, its organizational supremacy was bound by the laws of interstate functional co-operation. The law-giver, on the other hand, must be alive to the increasing possibility of supervening difficulties in the performance of treaty obligations undertaken perhaps under quite different circumstances.

18. Mr. TSURUOKA said he approved of the general lines of the Special Rapporteur's draft of article 22; it introduced a certain flexibility into the *rebus sic stantibus* clause with the object of diminishing the dangers which the clause presented for the stability of the international legal order. It was better to base the rules on the theory of unforeseen circumstances than on that consent. It would also be preferable to lay down strict limits to the efects of the *rebus sic stantibus* doctrine by providing that the parties to a treaty did not possess a unilateral right of denunciation or the right to regard the treaty as having terminated automatically when one of the parties was able to plead a material change of circumstances. The right of either party to request negotiations for the revision of the treaty should be recognized, and if those negotiations failed the party concerned should be required to accept the decision of some international authority, such as an international court.

19. With regard to the individual provisions in the draft article, he thought paragraph 1 (*a*) should be retained. In view of the controversies and abuses to which the application of the *rebus sic stantibus* doctrine had given rise, it was well to stress at the outset that the article dealt with an exception to the principle *pacta sunt servanda*. Paragraph 1 (*a*) could be followed by paragraph 3, which might possibly require a few drafting amendments, though he believed that the idea expressed in it should be retained.

20. A more appropriate place for paragraph 1 (*b*) would be in paragraph 2, to which it would serve as an introduction. He approved of paragraph 2, which provided a safeguard against possible abuses.

21. Paragraph 6 also seemed to him to be essential. Perhaps sub-paragraph (*b*) should specify the steps which a State must take in the case of an essential change of circumstances, whose effect in law would comprise two stages. First, States would be given the right to request the revision of the treaty. Secondly, the party concerned would be invited to apply to an international court, which would probably order the revision of the treaty in order to bring it into line with the changed circumstances. The Commission should exercise great caution and avoid opening the door to abuses, but it should not fail to recognize the rights of the party to which a change of circumstances might be unduly prejudicial.

22. Mr. CASTREN said that article 22 dealt with an important, very delicate and controversial matter. Although most modern writers admitted the existence of the *rebus sic stantibus* principle in international law, they also rightly stressed that its scope should be limited and that the circumstances in which it could be invoked should be defined. The doctrine was widely accepted in customary law too, but with considerable limitations. For example, it was generally held that a party to a treaty was not free to denounce it unilaterally, even if it claimed that an important change of circumstances had occurred. As the Special Rapporteur had noted in paragraph 5 of his commentary, the Secretary-General of the United Nations accepted the *rebus sic stantibus* clause only in exceptional cases.

23. There were various theories regarding the legal foundation of the *rebus sic stantibus* doctrine: they should be carefully examined, for a great deal might depend on the point of departure chosen. The Special Rapporteur had chosen the so-called " objective " theory, which seemed the best from the practical point of view, and the reasons he had given for his choice carried conviction. He agreed with the Special Rapporteur's views on the application of the clause to treaties of limited duration as well as " perpetual " treaties, and believed the solutions he had proposed to be the best. In setting limits to the *rebus sic stantibus* doctrine the Special Rapporteur had, for the most part, followed the practice or case-law of States, which could be generally accepted.

24. The principal object of his own proposal for article 22 (para. 3 above) was to simplify the text. To avoid repetition, he had grouped together in a single paragraph all the conditions necessary for application of the *clausula rebus sic stantibus*. The paragraph was drafted in negative terms in order to emphasize that the clause was applicable only as an exception.

25. Paragraph 1 in the Special Rapporteur's draft should be deleted; its essence was reproduced in the single paragraph he (Mr. Castrén) had proposed. He had dropped the Special Rapporteur's paragraph 3, as it seemed quite clear that the motives referred to in it could not affect the validity of a treaty. He had retained paragraph 5 (*b*) as sub-paragraph (*d*) (ii) of his own proposal, though very reluctantly, because it was a rather special case, which was probably already covered by paragraph 5 (*a*). On the other hand, he had omitted paragraph 5 (*c*). The Special Rapporteur had justified that provision in paragraph 17 of his commentary by stating that the dissolution of an international organization and the withdrawal of a member from it were matters to be settled by the organization itself. The constituent instrument of an international organization, however, might make no provision for withdrawal, as in the case of the United Nations Charter, but it was generally considered that the right of withdrawal existed. The Special Rapporteur himself took that view, as he had explained in his commentary on another article of the draft. If an organization's constitution was silent on the right of withdrawal, a member wishing to withdraw would probably rely in the first place on the plea

of a change in circumstances. Provided the general conditions were fulfilled, there seemed to be no reason for rejecting that plea.

26. He had also deleted paragraph 6 (*a*), because the parties to a treaty were obviously free to amend it by a subsequent agreement. That matter was already covered by articles 18 and 19, and it was hardly necessary to refer to those articles in article 22.

27. Above all, a State which wished to relieve itself of the obligations it had assumed under a treaty must not be given the right to act unilaterally; it must be required to follow the procedure laid down in article 25. That rule was stated in paragraph (i) of his text, which corresponded to the Special Rapporteur's paragraph 6 (*b*).

28. As to the title of the article, Mr. Lachs' objection might be met by substituting the words " change in circumstances ".

29. Mr. TABIBI said he was in favour of combining articles 21 and 22 so as to cover in one article the various grounds for dissolution of a treaty because of supervening impossibility of performance. The provisions were no less important than those on essential validity in section II. The whole question was of special importance to countries in Asia and Africa which were unable to discharge their obligations under certain treaties because of the disappearance of the object or of a vital change in circumstances.

30. He hoped that, in discussing article 22, the Commission would keep article 21 in mind. He could not agree with the view that paragraph 1 of that article should be dropped; it was vitally necessary to state that any treaty, whether bilateral or multilateral, came to an end if one of the parties disappeared; but it did not seem desirable to retain the proviso at the beginning of the paragraph, as the rules governing state succession had not yet been formulated. He agreed with Mr. Ago that the last phrase of the paragraph should be dropped because it might give rise to difficulties; in any case it was unnecessary, since the extinction of a party brought about by means contrary to the Charter would lead the United Nations to take appropriate steps, especially if such an event were to constitute a threat to peace.

31. Paragraph 3 of article 21 must certainly be retained as there were instances of treaties being suspended without being terminated.

32. To return to article 22, the basic idea in paragraph 2, which formed the core of the article and referred to doctrine, could be retained, but it should be drafted more clearly.

33. On the other hand he had some doubts about the wording of paragraph 4, which might be prejudicial to small and weak States, since they were the most likely to neglect to invoke an essential change in circumstances for the purpose of withdrawing from a treaty.

34. He had strong objections to paragraph 5, which was inconsistent with the principle of self-determination and should be deleted.

35. Mr. VERDROSS said that articles 21 and 22 related to very different matters. Article 21 dealt with cases in which performance of a treaty became impossible, whereas in the situation envisaged in article 22 there was nothing to prevent performance, but a State party to the treaty could ask to be relieved of its obligations for special reasons.

36. He well understood why the Special Rapporteur had hesitated to include in his draft an article based on the theory of *rebus sic stantibus*, which had given rise to abuses not only in practice, but also in doctrine. He had overcome his hesitation, however, because there were cases in which the principle could genuinely be applied.

37. The essential point was to specify clearly that the cases covered by article 22 were exceptions to the rule *pacta sunt servanda*. It was obvious, and no one disputed that, as was stated in paragraph 1 (*a*), a change in circumstances did not in itself affect the continued validity of a treaty, for in international life circumstances were changing all the time. He would prefer a positive statement of the exceptional cases in which the *rebus sic stantibus* clause was applicable.

38. But the main problem arose in connexion with paragraph 2 (*b*), concerning the case in which the parties must have assumed the state of facts existing when the treaty had been entered into to be an essential foundation of the obligations accepted by them in the treaty. If the parties had contemplated the possibility of a change in the circumstances, they had surely done so because they agreed that the treaty was valid only in certain circumstances. The *rebus sic stantibus* clause was then unnecessary, for it could be concluded, by interpretation, that the treaty was incapable of performance. The *rebus sic stantibus* clause applied only if the parties had made no provision on the subject, but it could reasonably be assumed that they would not have concluded the treaty if they had expected the essential change which had occurred after its conclusion. That view was illustrated by a case already referred to at a previous meeting, namely, the denunciation of the optional clause of the Statute of the Permanent Court of International Justice by France and the United Kingdom after the beginning of the second world war, in order to avoid proceedings against them by a neutral State in a prize case, which had not been foreseen at the time of accepting the optional clause.

39. Paragraph 5 (*c*) precluded the application of the *rebus sic stantibus* clause in the case of a treaty which was the constituent instrument of an international organization. The records of the San Francisco Conference, however, might be held to support a contrary opinion. The United Nations Charter contained no denunciation clause, but the parties had agreed to provide that if a radical change, such as amendment of the Charter, took place, States which did not accept that change would be able to withdraw.

Mr. Jiménez de Aréchaga resumed the Chair.

40. Mr. LACHS said that the discussion had shown the complexity of the subject. The doctrine of *rebus*

sic stantibus had been a matter of continued concern to lawyers. The history of international law and international relations showed that it had been frequently abused for purposes in direct conflict with the very essence of the doctrine, so that it had tended to become discredited in the eyes of lawyers and laymen alike. The Commission should not dispense with what was an essential element of treaty law on that account, however.

41. He fully concurred with the view expressed by the Special Rapporteur in paragraph 8 of his commentary that " the *rebus sic stantibus* doctrine is an objective rule of law rather than a presumption as to the original intention of the parties to make the treaty subject to an implied condition ". He commended the Special Rapporteur for his efforts to detach that doctrine from the question of the original intention of the parties and for formulating an objective rule in the matter, and he supported the formula embodied in paragraphs 1 (*a*) and 2 of the article.

42. With reference to Mr. Verdross' comments he pointed out that there were cases in which a treaty made explicit provision for the contingency contemplated in article 22; for example, article 43 of the International Sugar Agreement signed in London in 1956 provided that:

" (1) If circumstances arise which, in the opinion of the [International Sugar] Council, affect or threaten to affect adversely the operation of this Agreement, the Council may, by a Special Vote, recommend an amendment of this Agreement to the Participating Governments." [3]

Paragraph (3) of the same article then laid down that the consent of all participating governments to the amendment was necessary, and the following paragraphs went on to state the position which would obtain following the acceptance or non-acceptance of an amendment by the governments of countries holding 75 per cent of the votes. Paragraph (5) of the article contained an interesting provision, which read:

" (*ii*) The Council shall determine forthwith whether the amendment is of such a nature that the Participating Governments which do not accept it shall be suspended from this Agreement from the date upon which it becomes effective. . . ." [4]

43. With regard to the question of the definition of " an essential change in the circumstances ", the reference in paragraph 2 (*a*) to a change " with respect to a fact or state of facts which existed when the treaty was entered into " was not exhaustive. Changes of law could be equally relevant from the point of view of article 22; he was thinking in particular of changes of law which affected the validity or the binding force of the treaty and which, without making it illegal, made its performance impossible. A change in régime — referred to in article 21 — could also be relevant.

44. The whole situation envisaged in article 22 was very close to that of impossibility of performance dealt with in article 21. As had been pointed out by one of the governments which had replied to the questionnaire of the Preparatory Committee for the 1930 Conference for the Codification of International Law, there was a limit to what a State could be expected to perform. The case could be described as one of quasi-impossibility of execution. The text proposed by the previous special rapporteur and quoted in paragraph 13 of the commentary clearly showed how difficult it was to draw the line between the impossibility of performance envisaged in article 21, and the situation contemplated in article 22. For those reasons, he felt that it should be possible to combine the provisions of articles 21 and 22.

45. A further point arose in connexion with article 22: the contemporary international scene was characterized by the existence of many out-moded treaties which needed to be replaced by new ones. Certain jurists believed that the later the law the better it was, and a German jurist had aptly pointed out that " what was enough yesterday was not enough today ". It was therefore appropriate for the Commission, while putting forward its recommendations, to encourage States to revise out-moded treaties and bring them up to date.

46. With regard to paragraph 6, which referred to the procedures envisaged in articles 18 and 19 and in article 25, he pointed out that article 25 had a much wider scope, in that it offered negotiation as an alternative to termination. It would be wise to leave the door open for negotiations between States, since it was better to renegotiate a treaty than to terminate it.

47. He found Mr. Castrén's text acceptable, though an effort should be made to combine the contents of articles 21 and 22. He also agreed with Mr. Tsuruoka's suggestion that paragraph 3 should be moved higher up in the article; alternatively, it could be omitted altogether.

48. In paragraph 5, he agreed with the exception of " stipulations of a treaty which effect a transfer of territory " or " the settlement of a boundary ", but could not agree to the exception of stupilations effecting " a grant of territorial rights ". A reference to any such rights was inappropriate. A leader of one of the African States had recently observed very appositely that a lease of land in perpetuity in his State was incompatible with the sovereignty of the State.

49. Mr. ROSENNE said he had been much impressed by the Special Rapporteur's commentary and the conclusions he had embodied in article 22, and particularly by his survey of the various theories of the doctrine of *rebus sic stantibus* and their possible consequences. He would therefore refrain from discussing those theoretical issues.

50. He found the Special Rapporteur's conclusions generally acceptable, and also approved of the formula put forward by Mr. Castrén, which was similar in substance. One principle which ran right through all the provisions of the article and the statements in the commentary was that the doctrine of *rebus sic stantibus*

[3] *United Nations Sugar Conference, 1956, Summary of Proceedings* (United Nations publication, Sales No.: 57.II.D.2), p. 71.

[4] *Ibid.*, p. 72.

did not apply automatically to terminate a treaty; there must be some control over its invocation and application.

51. Like Mr. Lachs, he had been most impressed by the commentary, and particularly by a passage in paragraph 6, which read:

> "... if the other party is obdurate in opposing any change, the fact that international law recognizes no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties may impose a serious strain on the relations between the States concerned."

It was clear from that passage that the rule in article 22 provided a residual guarantee to cover the case in which negotiations failed owing to the obduracy of one party: the article thus constituted a contribution to the regulation of peaceful change.

52. He was gratified to note that the provisions of article 22 were based squarely on an objective rule of law and had not been made dependent on any legal fiction. At the present time, any reliance on legal fictions should be viewed with suspicion.

53. He had some comments to make on the structure of article 22, which arose out of the discussion of the previous articles. Section III was entitled "The Duration, Termination and Obsolescence of Treaties". The discussion had shown the difficulties to which the concept of duration could give rise and had revealed a tendency to shift the emphasis from duration to termination. Consideration might accordingly be given to drafting the provisions of article 22 on the basis of the assumption that a treaty would always continue in force until it was terminated.

54. With regard to paragraph 2 (*b*), although he had no objection of principle to its provisions, he thought that as drafted it was somewhat close to the earlier articles which dealt with error. But it was not the function of the *rebus sic stantibus* doctrine to supply a supplementary rule for a situation that was close to error; it should rather, by supplying an objective rule, constitute a point of departure for renegotiating an out-of-date treaty.

55. He assumed that paragraph 5 (*c*) would be dropped and its contents transferred to the new general article the Special Rapporteur proposed to introduce on treaties which were the constituent instruments of international organizations.

56. He suggested that in paragraph 1 of the commentary, the reference in the third sentence to "the absence of any general system of compulsory jurisdiction" should be replaced by wording similar to that adopted by the Commission at its previous session with regard to reservations: "... in the absence of any tribunal or other organ invested with standing competence to interpret the treaty..."[5] In paragraph 5 of the commentary, he could not accept the reference to the study, prepared by the Secretary-General at the request of the Economic and Social Council, of the present legal validity of the undertakings relating to the protection of minorities placed under the guarantee of the League of Nations.[6] As he had the strongest reservations with regard both to the passage quoted and to the conclusions reached in the secretariat study, he hoped the passage would be dropped and that consideration would also be given to the fact that the whole of paragraph 5 of the commentary was of a controversial character.

57. It had been suggested by some members that articles 21 and 22 dealt with very similar matters and should therefore be merged, but he agreed with Mr. Verdross that they dealt with completely different matters. Article 21 dealt with actual impossibility of performance, but article 22 was intended to give legal recognition to a situation in which further performance was obviously undesirable rather than impossible. The consequences and implications of the two situations could be altogether different, and he therefore considered that the two articles should be kept separate, though it was not a major question of principle. He recognized, of course, with Mr. Lachs, that the line of demarcation between the two articles was difficult to draw in many cases, but from the legal point of view he saw no reason why a given situation should not come under more than one article.

58. Lastly, he differed from Mr. Verdross with regard to his example of the communications made by the United Kingdom and France in September 1939 to the Secretariat of the League of Nations concerning the application during the War of their acceptances of the compulsory jurisdiction of the Permanent Court of International Justice. As he had already pointed out on another occasion, it would be dangerous to draw analogies from that type of declaration for the purposes of the general law of treaties; the obligations arising out of such a declaration were not completely analogous to those arising out of a treaty. Moreover, a declaration was not drawn up by a process of negotiation, which, as the Commission had recognized in 1962, was essential to the formation of a treaty. As far as the particular example was concerned, when the United Kingdom Government has accepted the compulsory jurisdiction of the Permanent Court of International Justice in 1929, it had published a well-known memorandum explaining the circumstances in which that acceptance would operate.[7] In that memorandum, it had clearly foreseen the situation which later arose in 1939 and had given the reasons why the Permanent Court would not, in its view, be competent to deal with the cases of prize law to which Mr. Verdross had referred. The case had not been one of changed circumstances, but of a unilateral declaration which had been drawn up from the start on the basis of a clearly defined position.

59. Mr. YASSEEN said that the principle of *rebus sic stantibus* existed in international law. It was imposed by

[5] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 21, para. 10.

[6] E/CN.4/367.

[7] *Command Papers*, London, H.M. Stationery Office, Misc. No. 12 (1929), Cmd. 3452.

the very nature of written law and by the constant changes in the international community; it canalized the revolt of facts against texts; conventional rules could not be adapted *ad infinitum*. In his view it was not a clause, but an objective rule of *jus cogens* from which derogation was not possible by express provision. With regard to the applicability of the principle, treaties of specified duration could not be excluded; such treaties should be subject to it, for changes could occur before they expired.

60. The Commission should endeavour to clarify the law on the question and to lay down criteria, for not all changes led to the revision or termination of a treaty.

61. The definition given in paragraph 2 was both reasonable and practical; it could limit the application of the principle. On the other hand, the exception stated in paragraph 3 might conflict with the facts of international life, for whether the political change had been brought about by revolutionary or by democratic means, it could not be excluded from the sphere of application of the principle of *rebus sic stantibus*. If a State had concluded a treaty of alliance with another Power, and if, thereafter, a revolution took place, one of the main objects of which was to secure the country's non-alignment, it was hardly conceivable that the new state of affairs would permit of maintaining the treaty of alliance in force. Similarly, if a political party won an election and changed the foreign policy of the State, would it be possible to maintain an earlier treaty of alliance in force ? Accordingly, he was not in favour of the exception made in paragraph 3.

62. The Special Rapporteur had taken the view that the *rebus sic stantibus* doctrine was an objective rule of law, but he had departed somewhat from that view in paragraph 4 (*b*). The fact that a State had failed to invoke the change within a certain period should not debar it from doing so later.

63. Subject to those comments, he approved of the text proposed by the Special Rapporteur. Mr. Castrén's proposal would be useful when it came to drafting the final text.

64. Mr. AMADO said he had no wish to criticize the development of law; on the contrary, the elevation of the *rebus sic stantibus* clause to the rank of an established principle of international law was a matter for satisfaction. The voluminous literature on the subject and the lively discussions devoted to it even by students reminded him of Edouard Herriot's remark that culture was what remained after one had forgotten everything else. It might also be asked what remained of the *rebus sic stantibus* clause after all that had been said and written about it. What remained was the principle that treaties were inviolable, but not for ever.

65. Confronted with that clause, which was now an objective rule, the jurists of his generation felt that they should advise caution, because of its exceptional character. Those who had been brought up to believe in the sanctity of the maxim *pacta sunt servanda* and in the inviolability of treaties were always inclined to adopt a defensive attitude to the insidious wiles of that serpent of the law, the *rebus sic stantibus* clause. In their eyes it represented an element of mobility as against perpetuity and treaties made to last.

66. The Special Rapporteur had introduced an innovation by providing that treaties of limited duration might also be subject to the *rebus sic stantibus* rule. He was glad to note that the majority of the Commission appeared to support that innovation.

67. He had some doubts about the beginning of the article, the wording of which was rather too much like that of a law-book, and about the enumeration of contingencies. He would refrain from criticism, however, as several other members had not yet given their views, and would confine himself, for the moment, to saying that he did not like the idea of giving States a lesson on things they were supposed to know in any case. It was obvious that States were guided only by their own interest; to listen to anyone who thought they might be idealistic was a waste of time.

68. Mr. PESSOU observed that one of the grounds for the extinction of a treaty under article 21 was the state of necessity. Although the plea of necessity was controversial, Sir Gerald Fitzmaurice had included its main application in his fourth draft.[8] The ensuing discussions had brought out the ambiguities inherent in that concept.

69. The state of necessity had been defined as an objective situation in which a State was threatened by a present or imminent danger imperilling its existence, territorial status or independence, from which it could escape only by infringing foreign interests protected by international law, and in which it would suffer serious prejudice if it executed the treaty to the letter.

70. Some authors seemed to have confused necessity with *force majeure*, which was irresistible pressure on a State, depriving it of the ability to choose between execution and breach of the treaty. The rule of necessity had also sometimes been confused with the *rebus sic stantibus* clause. That clause was applied primarily according to the terms of the treaty, whereas necessity dictated that the first consideration must be the situation and particular competence of each party. The two questions were quite different, and he considered that the Special Rapporteur's articles 21 and 22 should be kept separate.

71. In the present crisis in the international community, necessity could not, of course, be accepted as a rule of law, since it was bound up with fundamentally contradictory claims. But it could not be totally disregarded on that account; every situation must be considered on its merits, subject to certain conditions: first, the necessity must be real and pressing and must leave the State only a choice between executing the treaty and relinquishing its prerogatives or breaking the treaty and preserving its prerogatives; secondly, the incompatibility between execution of the treaty and the exercise of the powers of the State must not have been expressly foreseen; thirdly, the plea of necessity should operate to suspend the State's treaty obligations without terminating the

[8] *Yearbook of the International Law Commission, 1959* (United Nations publication, Sales No.: 59.V.1, Vol. II), Vol. II, pp. 44-45.

treaty itself; fourthly, the plea of necessity, if accepted, should not suffice in itself to exonerate the State from all responsibility. That was understandable in a situation in which a State was in immediate military or physical danger or needed to take measures in the public interest to ensure the proper functioning of its institutions or to protect the vital interests of its nationals.

72. His position would depend on the particular circumstances of the case considered, but he also hoped to be guided by the views of the other members of the Commission.

The meeting rose at 12.55 p.m.

695th MEETING

Friday, 7 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 22 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 22 (THE DOCTRINE OF *rebus sic stantibus*) (*continued*)

2. Mr. AGO congratulated the Special Rapporteur on his commentary on article 22, which constituted a complete survey of the question and an excellent analysis of practice, and also contained a number of theoretical considerations of great interest.

3. With regard to the title, he thought it would be preferable to speak of the " clause " or " principle " of *rebus sic stantibus*, for the Commission was called upon to codify rules, not theories.

4. As to the basis of the principle, the Special Rapporteur had expressed a clear preference for one of the theories mentioned, but had fortunately rectified it in certain respects; for to adopt the theory in question exactly as it stood might be unrealistic. Although it seemed to be true that international law contained a rule of objective law under which a change in the external circumstances could, in certain exceptional cases, bring about the termination of a treaty, and although the rule providing for the operation of the *rebus sic stantibus* clause could be called a customary rule, nevertheless it was important not to carry the objective theory too far and completely ignore the will of the parties, which was the essential basis for the validity or termination of a treaty.

5. As the Special Rapporteur had pointed out, a change in the circumstances existing when a treaty had been concluded could not be regarded as a ground for termination unless it was clear that at that time the parties had considered those circumstances to be an essential condition of their consent. If, on the other hand, it appeared that the treaty would have been concluded if the circumstances had been different, and even if the situation had been as it became later, then there could obviously be no question of applying the *rebus sic stantibus* principle or of termination by reason of the change in circumstances. That was the only respect in which he thought the objective theory should be rectified. Once the principle was clearly understood, the terms of article 22 could readily be accepted.

6. As usual, the Special Rapporteur had submitted a very detailed text in order to elicit opinions and arrive at a more representative and concise text. Instead of examining the text, the Commission could therefore confine itself to approving the principle, subject to later drafting improvements. To consider the provisions in excessive detail might lead to unnecessary discussion and uncertainty. That was one of the dangers of the detailed enumerations in paragraphs 4 and 5. For example, was it certain that the *rebus sic stantibus* clause could never operate in the circumstances referred to in paragraph 5 (*b*) ? Some latitude should be left for interpretation and practice.

7. The real fear which seemed to be inspired by the *rebus sic stantibus* clause was not unfounded, because it could provide a means of avoiding the execution of a treaty. However, the Special Rapporteur had rightly said that the clause was a safety-valve established by international custom, and like the Special Rapporteur, he thought that the rule should apply not only to perpetual treaties, but to fixed-term treaties as well. It could be noted from practice that, when a State invoked the *rebus sic stantibus* clause, the other State generally declared that it acknowledged the existence of the principle, but that it was not applicable to the case in point.

8. With regard to paragraph 6, caution should be exercised in regard to procedure. No State could be the judge in its own cause and decide unilaterally that a treaty had lapsed by reason of changed circumstances. The agreement of both parties to an objective procedure must be obtained where possible. But it must not be forgotten that in case of disagreement there was an international dispute in which the positions of the two States concerned were equally valid. In such cases recourse should be had to the usual means of settlement. The procedures applicable did not differ from those generally appropriate.

9. Mr. EL-ERIAN said that there was an organic relationship between articles 21 and 22 in that both were concerned with supervening events relating to the execution of a treaty and outside the control of the parties, which called for revision by subsequent treaty. There was therefore a strong case for combining the provisions on impossibility and illegality of performance in article 21 with those of article 22, which dealt with what Mr. Lachs had aptly termed " quasi-impossibility of execution " — the case in which changed circumstances made continued execution burdensome for a contracting party.