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Summary record of the 695th meeting

Topic:
Law of Treaties

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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.

10. The theory of *imprévision* had been evolved by the highest administrative court of France, the *Conseil d'Etat*, in its decision of 1916 in the *Compagnie du Gaz de Bordeaux* case. That decision had had a considerable influence in many Roman-law countries, and it was significant that it took the form of a corollary to the rule on impossibility of execution.

11. The admirable commentary by the Special Rapporteur and the observations of members showed that there was general support for the view that discarded the old theory of an implied *clausula* and regarded article 22 as expressing an objective rule of international law. The fiction of the *clausula rebus sic stantibus* had served its purpose as a basis for legal thinking in the early stages of development of the rule, but it should now be dispensed with, just as in its draft articles on diplomatic intercourse and immunities¹ the Commission had discarded the old theory which based diplomatic privileges and immunities on the fiction of extra-territoriality and had adopted instead, as the basis for the rules on diplomatic relations, the more objective theories of the representative character of diplomats and of functional necessity.

12. He supported the suggestion that the title of the article should be changed, the words "doctrine of *rebus sic stantibus*" being replaced by some formula which referred to changed circumstances; that amendment would solve the problem of what might be called a certain allergy to the doctrine of *rebus sic stantibus*. For when the Egyptian delegation had consulted the late Professor Hudson about the 1947 proceedings in the Security Council on the continued validity of the Anglo-Egyptian Treaty of 1936, that eminent jurist had advised against using the words "*rebus sic stantibus*" and had preferred to say that the treaty had "outlived its purpose". It had been pointed out by Mr. Briggs, however, in an article written about that time,² that, although use of the words had been avoided, the doctrine of *rebus sic stantibus* constituted the whole foundation of the Egyptian case.

13. Article 22 dealt with the effect of changed circumstances on the continuity of treaties. In approaching that problem, the Commission should bear in mind the need to base the law of treaties on secure foundations; at the same time, as it had done in preparing its drafts on diplomatic and consular relations, it should give due weight to the consideration that the development of appropriate rules on the subject should contribute to increased harmony in the relations between States.

14. He welcomed the statement by the Special Rapporteur that state practice in the matter was often expressed in diplomatic notes and claims. Although courts had frequently avoided expressing an opinion on the merits of the *rebus sic stantibus* doctrine itself, many cases could be cited from the practice of States. For instance, the Government of Norway had announced on 22 August 1922 that it felt obliged to denounce the treaty of 2 November 1907 between Norway on the one

hand and France, Germany, Great Britain and Russia on the other, because, among other reasons, it considered that "the events of recent years had produced such changes in the realm of foreign politics that the international situation was now quite different from what it had been when the treaty was concluded"; it had added that "by reason of those changes the treaty has in reality lost its principal foundation".³ The other parties to the treaty had given their consent.

15. Again, in deciding the case of Rothschild and Sons versus the Egyptian Government, arising out of that government's refusal in 1922 to continue payments to the firm on the grounds that, with the termination on 8 December 1914 of Turkish suzerainty, Egypt was freed from all tribute to Turkey and accordingly from the obligation to continue such payments, the Mixed Court of Appeal of Alexandria had expressed no opinion on the doctrine of *rebus sic stantibus*, thus illustrating once more the fact that courts often did not find it necessary to decide on the merits of that doctrine, but based their decisions on other grounds.⁴

16. With regard to paragraph 5 of the Special Rapporteur's text, which also appeared in the proposal submitted by Mr. Castrén at the previous meeting (para. 3), he fully agreed with the apprehensions expressed by Mr. Tabibi. He could not accept a sweeping provision which removed a whole category of treaties from the scope of article 22. If the intention was to refer to cases in which execution of the treaty had been completed and to the question of the material position created by the treaty, the paragraph should be couched in different terms. The obsolete theory that a state of war between the parties terminated all treaties *ipso facto* had now been superseded by a theory which made the effect of war dependent on the character of the treaty; political treaties were automatically terminated, but certain treaties, such as humanitarian conventions, were actually brought into effect by a state of war, while others were suspended for the duration of hostilities. Certain treaty provisions were not affected because they called for no further execution; the material situation created by the treaty stood, notwithstanding the state of war.

17. Mr. TUNKIN said that the main difficulty over article 22 was that the doctrine of *rebus sic stantibus* had never found expression in a precise rule of international law. The commentary on the article correctly pointed out that opinion on that doctrine was widely divided, ranging from its acceptance as a sort of higher law, to complete denial.

18. He agreed in principle with the Special Rapporteur and with those members who considered the doctrine of *rebus sic stantibus* to be a rule of international law in force. That view was based on state practice accepted, it seemed, as a rule of law, and was supported by the opinion of writers. The essential task of the Commission was to state the rule clearly and describe the circumstances in which it applied. Certain historical considera-

¹ *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, pp. 11 ff.

² *American Journal of International Law*, 1949, Vol. 43, pp. 762 ff.

³ *Revue générale de Droit international public*, 2nd series, 1924, Vol. 6, pp. 299-301.

⁴ *Journal du Droit international*, 1926, Vol. 53, pp. 754-766.

tions which were often invoked in connexion with the doctrine, but which were completely extraneous to contemporary international law, must be discarded; in fact, as Mr. Lachs had suggested, it would be better not to use the phrase "*rebus sic stantibus*" at all.

19. The rule in article 22 was objectively necessary. The development of international law was determined by the laws of development of human society. If a rule of law came into conflict with new social forces, it must give way to those forces. It was therefore clear that the rule in article 22 served a useful purpose by providing one of several legal possibilities for the adaptation of rules of law to the requirements of life.

20. With regard to the relationship between the principles *rebus sic stantibus* and *pacta sunt servanda*, some members considered article 22 as an exception to the latter principle. Personally, he thought it would probably be more correct to consider the two principles as two separate rules, rather than as a rule and an exception. Whereas the principle *pacta sunt servanda* applied to valid treaties, the effect of the doctrine of *rebus sic stantibus* was to invalidate a treaty, so that in respect of such a treaty there could be no question of applying the principle *pacta sunt servanda*.

21. With regard to the text of article 22, the central provision was that embodied in paragraph 2. The Special Rapporteur had indicated that he regarded the rule in article 22 as an objective rule and his view had been supported by many members. Nevertheless, the provisions of paragraph 2 (b) required an investigation of the intention of the parties and laid down a condition based on their will. Those provisions referred to a problem of interpretation of the treaty and did not embody an objective rule. He would have had no objection to the retention of paragraph 2 (b) if it had expressed a separate condition which, by itself, brought the rule in article 22 into operation; but he could not accept the present formulation which required that the conditions stated in sub-paragraphs (a), (b) and (c) of paragraph 2 should exist simultaneously. Such a requirement would mean that the rule would practically never apply.

22. He agreed with Mr. Yasseen that paragraph 3 should be deleted. A change in the policies of a State could take different forms; it could not be excluded *a priori* in the manner proposed by the Special Rapporteur, because it could constitute an essential change in the circumstance forming the basis of a treaty.

23. Paragraph 4 seemed to raise more problems than it solved. For example, in the case envisaged in sub-paragraph (a), if the party concerned had acted lawfully or if the acts in question were not connected with the treaty but there had been an essential change in circumstances, he saw no reason why the party should be precluded from invoking the rule in article 22. Nor could he approve of sub-paragraph (b) as it stood, because it might happen that a State was unable, because of circumstances beyond its control, to avail itself of the right to invoke a change of circumstances, even though it was fully aware of that right. As to sub-paragraph (c), it really dealt with a problem of interpretation.

24. With regard to the consequences of a material change of circumstances, he agreed with the Special Rapporteur that the treaty should be considered voidable rather than void. But the question then arose what was the content of the rights and obligations that might derive from that objective rule of international law. Article 22 made provision for the right either to call on the other parties to the treaty to express their opinion on the change in circumstances, or to institute court proceedings. Personally, he considered that the other parties were under an obligation to enter into new negotiations. He agreed with Mr. Ago that a dispute could arise and that, in that case, all the modes of peaceful settlement of disputes were available to the States concerned. However, he did not feel that the possibility of unilateral termination should be completely excluded, because situations could arise in which no other course was open to the State concerned. That State could have valid reasons for terminating the treaty or withdrawing unilaterally from it, and its right to do so should be recognized.

25. On the question of the relationship between articles 21 and 22, careful consideration should be given to the suggestion by Mr. Lachs that the two articles should be combined. It was true that they dealt with different subjects, but their provisions had much in common. For example, the situation envisaged in article 22, sub-paragraph 2 (c) (i), where the change had the effect of frustrating the further realization of the object and purpose of the treaty, had a great deal in common with that envisaged in article 21, paragraph 2 (a), of the disappearance of the physical subject-matter of the rights and obligations contained in the treaty.

26. With regard to the other provisions of article 21, he observed that paragraph 1 concerned state succession and dealt with the very complicated problem of the extinction of the international personality of one of the parties to the treaty, but without covering the whole subject. The Drafting Committee should consider whether that paragraph ought to be retained provisionally; a final decision could be taken after the Commission had dealt with the report on state succession.

27. Paragraph 4 of article 21 had its proper place in article 13, which dealt with rules of international law having the character of *jus cogens*, but that question could be left to the Drafting Committee. When that article had been discussed in the Commission (683rd-685th meetings), certain members had raised the question of new rules which might emerge after the conclusion of a treaty; it had been explained that, in that event, the new rules would prevail.

28. Mr. BRIGGS said that he had not been convinced by Mr. El-Erian's arguments for combining articles 21 and 22 and was disposed to agree with the Special Rapporteur that impossibility of performance and unwillingness to perform were two sufficiently distinct topics to merit separate articles.

29. He had no objection to the title of article 22, which indicated that the article was concerned with a doctrine and not an implied clause or a rule of international law. The doctrine was a familiar one in treaties and had

been invoked by States before courts and tribunals, though never without being challenged and, to his knowledge, never successfully. Accordingly, he did not regard the principle of *rebus sic stantibus* as a customary or objective rule permitting of the automatic termination of a treaty by the unilateral action of a State, or one which automatically terminated the treaty. The Special Rapporteur, with great skill and wisdom, had sought to reduce a doctrine that had caused so much confusion to a rule of duty in the interests of the common good, which would be capable of judicial application when a decision had to be reached about the consequences to the validity of a treaty of changed conditions or an allegation of changed conditions.

30. He preferred the Special Rapporteur's text to that of Mr. Castrén, who had omitted to deal with the important points covered in paragraphs 1 (a), 3, 4 and 6 (a). Owing to the uncertainty surrounding the doctrine of *rebus sic stantibus*, the rule must be drafted with the greatest precision and there was justification for also indicating the circumstances in which it could not be invoked, as had been done by the Special Rapporteur.

31. The provision contained in paragraph 1 (a) was of capital importance and might be amplified by the addition, at the end, of the words "or entitle a party thereto to terminate or withdraw from the treaty", taken from the beginning of paragraph 6.

32. Paragraph 2, in the restrictive form proposed by the Special Rapporteur, must certainly be retained and was firmly grounded in practice. In that paragraph the Special Rapporteur had reconciled in masterly fashion the various theories as to the nature of an essential change, and he did not share the apprehension that there might be some inconsistency between them.

33. The exception stated in paragraph 3 was worth keeping and he agreed on the important limitations set out in paragraphs 4 and 5, which would provide valuable safeguards against abuse. Contrary to the view expressed by some members, he considered that the limitation contained in paragraph 5 (a) was fully justified, because the doctrine of *rebus sic stantibus* could not be applied to clauses in a treaty which had already been executed, but must be confined to executory provisions.

34. He agreed with the provision in paragraph 6 (a), but wondered whether any reference to the provisions of articles 18 and 19 was necessary. He reserved his position as to whether, as provided in paragraph 6 (b), a unilateral right of termination on the ground of an essential change in circumstances could be exercised under the procedure laid down in article 25.

35. Mr. PAREDES said that a fusion of articles 21 and 22 would be neither easy to achieve nor acceptable, owing to the number and nature of the matters they dealt with which were quite dissimilar. Article 21 alone referred to three or perhaps four separate cases, each of which would be worth a separate article. Paragraph 1 dealt with the effects on treaties of the extinction of one of the parties; paragraph 2 with the complete and permanent disappearance of the physical subject-matter of a treaty; paragraph 3 with the temporary impossibility of performance of a treaty; and paragraph 4 with moral

impossibility of performance because the object of the treaty had become illegal. Those were all very difficult matters on which very different views were held. He would deal with them when the Commission decided to examine article 21; at the present stage he merely wished to stress that the content of that article was substantially different from that of article 22. For whereas article 21 dealt with cases of physical or moral impossibility of performance, article 22 concerned problems arising out of a change in circumstances by which a treaty, though still possible to execute, was rendered far more burdensome than had been supposed at the time of its conclusion, for one of several of the contracting parties or for all of them.

36. To state the position properly, it was necessary to refer to the different kinds of treaty, distinguishing between those which concluded legal proceedings and gave rise to firmly established rights, and those which imposed on the parties certain future conduct or obligations to perform, or to refrain from, certain acts. The latter treaties included some of limited duration and others of no fixed term which remained in force indefinitely.

37. It was to treaties which imposed future conduct that it was necessary to apply the principle of *rebus sic stantibus*, which merely meant that when there was a change in the circumstances in which the relationship had been formed, the obligations of the parties could also change.

38. As had already been pointed out in the Commission, the *rebus sic stantibus* doctrine should be regarded as a correct interpretation of the treaty, rather than as an exception to the principle of the binding force of treaties. For a treaty was concluded in view of the circumstances of the contracting parties as judged by them at the time, and had the circumstances been different they would probably not have concluded the treaty or would have drafted it in quite different terms. And the essence of the *rebus sic stantibus* rule was a material change in the circumstances, not just any change. The importance of such changes could be assessed from the provisions of the treaty itself or the records of the negotiations which had led to its conclusion. For example, a country might have undertaken to supply another country with a certain quantity of goods, at a time when it had sufficient of them for its internal consumption and for the promised exports; then sudden changes, such as exhaustion of its mines or oil wells, might have considerably reduced the quantities available so that it could no longer easily satisfy even its own internal needs. Should that country nevertheless be required to fulfil its treaty obligations? In his opinion it should not; and it was easy to see that if it had foreseen the change it would not have entered into the undertakings it had. In a great many cases the factors which had decided the parties to conclude an agreement were ascertainable and there had been a material change in them.

39. He agreed with Mr. El-Erian that each kind of treaty should be considered differently, the rights created being clearly differentiated to see whether the *rebus sic stantibus* doctrine was applicable to them or not. As

he had said before, it was only applicable to treaties which imposed certain future conduct or obligations to perform, or to refrain from, certain acts, not to treaties which concluded legal proceedings.

40. If those considerations applied to treaties of limited duration, they were much more important in the case of treaties of unlimited duration. No one could enter into an undertaking for ever. That was why, under most systems of municipal law, contracts of service for life were prohibited. The same should apply even more strongly to States, because their life was much longer. Consequently a rule should be established which exempted the parties from being bound indefinitely by an undertaking in spite of changes in all the circumstances; and that was the rule known as *rebus sic stantibus*.

41. With regard to the application of the rule laid down in article 22, he considered that the only consequence should be suspension of the executory provisions of the treaty until the competent authority, whether judicial or of some other kind, had taken a decision on the matter or until the parties reached an agreement constituting a new treaty.

42. The *rebus sic stantibus* principle should be accepted, and the kinds of treaty to which that form of revision was or was not applicable should be properly specified and classified.

43. Mr. ELIAS said that article 22 was one of the most important in the two reports so far submitted by the Special Rapporteur, and the commentary analysed the issues in a particularly illuminating way. The Special Rapporteur had rightly decided in favour of including an article on the doctrine of *rebus sic stantibus* although some of his predecessors had not done so, for the very good reason that its omission might open the door to abuses or violations of international law connected with recent political changes.

44. The Special Rapporteur was to be especially commended for having tried to frame an objective rule from a controversial doctrine which had formerly possessed the status of a mere presumption or implied term. No judicial decision had ever been based on the existence of such a rule, yet the principle of *rebus sic stantibus* must be regarded as one of the fundamental assumptions in public international law, and Mr. Tunkin had been right in asserting that it was an independent rule which did not necessarily conflict with the principle *pacta sunt servanda*.

45. Another signal contribution made by the Special Rapporteur was his decision, in the face of persuasive arguments to the contrary by Sir Gerald Fitzmaurice, to regard the doctrine as applicable not only to so-called perpetual treaties, but also to treaties of limited duration, depending on the circumstances of each case.

46. With regard to the text of article 22, he agreed with Mr. Briggs that the title should be retained, though he would prefer it to be slightly amended to read: "The application of the doctrine of *rebus sic stantibus* to treaties."

47. The subject matter of the article being entirely distinct from that of article 21, he was opposed to the suggestion that the two articles should be combined.

48. Paragraph 1 should be omitted, and the beginning of paragraph 2 might then be re-worded to read: "A party to a treaty is not entitled to modify or terminate it on the ground that an essential change has occurred in the circumstances forming the basis of the treaty, except in the following cases:" Sub-paragraphs (a), (b) and (c), with some drafting changes, would follow. Sub-paragraph (b) might with advantage be re-drafted to bring out more clearly the Special Rapporteur's thesis, stated in paragraph 12 of the commentary, that although the doctrine of *rebus sic stantibus* was properly to be regarded as an objective rule of law, its application in any given case could not be divorced from the intentions of the parties at the time of entering into the treaty.

49. Paragraph 3 should be omitted and the point about a change in the policies of the State claiming to terminate the treaty should be dealt with in the commentary. Obviously, it might be one of the factors that a court would have to consider in adjudicating on a claim.

50. Paragraph 4 dealt with an interesting point and might be retained, though it would require revision. He had some doubts, however, about the wisdom of including sub-paragraph (a), because of the complications that the theory of contributory negligence, already a difficult one in municipal law, might introduce in the international sphere. Sub-paragraph (b) seemed generally acceptable but might need some re-drafting so as to bring out more clearly the distinction between the effects of unreasonable delay and estoppel. Perhaps a more restrictive application of the provisions of article 4 would be needed in the context.

51. Paragraph 5 ought to be deleted; he saw no good reason for excluding treaties concerned with a transfer of territory or boundary settlement from the application of a rule enabling a party to invoke an essential change in circumstances for the purpose of termination. The Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and the District of Gex*⁵ had not laid down that the doctrine was inapplicable to those types of treaties, and its judgement gave no authority for creating a rule of that kind, which would certainly provoke a wide divergence of opinion among States. Of course, the stability of the international order demanded respect for territorial rights and frontiers, but any dispute should be left to judicial decision, and it would be undesirable to try to lay down any general rule. The explanations given in the commentary would be quite sufficient if paragraph 5 were omitted.

52. Consideration of paragraph 6 might be deferred until the Commission took up article 25.

53. Mr. BARTOŠ said that, even though he might be repeating some remarks already made during the debate, he would comment on article 22, because it dealt with an important question which should be settled in the codification of the law of treaties. The Special Rapporteur was to be congratulated on having taken the initiative of introducing the *rebus sic stantibus* doctrine into his draft.

⁵ P.C.I.J., Series A/B, No. 46.

54. He himself had examined the subject in detail when submitting the Yugoslav draft of the declaration on the rights and duties of States to the General Assembly of the United Nations. Despite the dynamism of the life of the international community, he had not altered the stand he had taken thirteen years ago and would maintain the views he had then expressed.

55. It was generally agreed that the point of departure consisted of two rules: *pacta sunt servanda*, which was the foundation of the law of treaties and had been solemnly accepted in the United Nations Charter, and what was known as the *rebus sic stantibus* clause, also a general rule of international public law, which was connected with the former rule and was an integral part of it. In the course of history, there had been a change in the nature of that clause; *rebus sic stantibus* was no longer a clause implied in a treaty, but a fundamental rule, whether the parties had foreseen changes in the circumstances or not. Hence it was neither a clause nor a doctrine, but a rule of *jus cogens* in international law, even if it gave rise to controversy among States or jurists holding different views. In view of the objections to which the application of the *rebus sic stantibus* rule had given rise, when introducing the Yugoslav draft declaration, he had concluded that it had brought about a situation in which various abuses were possible because the rules of law on the subject were uncertain and not firmly established. For purposes of codification, it was necessary to lay down certain minimum rules to prevent abuses.

56. In the first place, the *rebus sic stantibus* rule was necessary in order to avoid insoluble problems which would arise if the *pacta sunt servanda* rule were applied literally and without exceptions. Such application would lead to absurd situations, provoke unnecessary disputes and hamper relations between States if one of the parties insisted on the letter of the treaty contrary to justice, which was the very basis of international relations and international law, even if the circumstances had changed. Such application of the *pacta sunt servanda* rule would lead to impossibilities, whereas its correction by the *rebus sic stantibus* rule would be a step towards a justice that was not abstract, but real, being founded on the elements of international life.

57. To ensure stability in the application of treaties it was necessary to take account of the circumstances, which meant the state of affairs, the general situation in the world and the substance of the relations between the parties; it was necessary to allow for the difference between when a treaty had been concluded and that prevailing when the *rebus sic stantibus* principle was invoked.

58. In addition, the parties must act in good faith; that condition was not only applicable to the *rebus sic stantibus* rule, it was the foundation of law of treaties, and an absolute requirement which could never be dispensed with.

59. A change in the circumstances had to fulfil certain conditions if it was to entitle a State to invoke the *rebus sic stantibus* rule. First, the change had to be an important one; all members agreed with the Special Rapporteur

on that point. Secondly, it had to be an objective change; he supported the view that a party to a treaty could not invoke a change in circumstances which it had itself caused by some arbitrary act. There, however, he differed from the Special Rapporteur; he considered that if application of the *rebus sic stantibus* rule was to be precluded by an act of the party invoking it, that act must be an unlawful one. For if the change was the effect of a lawful act, accepted under other rules of international law, it could not be said that it was not an objective change brought about by acts reflecting the development of international society. Thirdly, the change must seriously affect the position in law of the party invoking the *rebus sic stantibus* rule. A case in point was where the obligations or status of one of the parties became disproportionate and the new state of facts was no longer normal according to the generally accepted understanding of *jus cogens* or international relations, even if the obligations had been reduced or the status perhaps even improved as compared with what had been originally agreed. In such a case he thought that the *rebus sic stantibus* rule was applicable, because the reciprocal obligations of the parties were no longer in balance, or the status of one of them was no longer in keeping with the new order of things.

60. With regard to the effects of application of the *rebus sic stantibus* rule, the view held by the Yugoslav Government, and put forward in his own writings, was similar to that expressed by Mr. Ago, but only partly coincided with that of the Special Rapporteur: it was that the sole effect of the rule was to give a party the right to ask for either the revision or the termination of the treaty, not the right to denounce it unilaterally. If the Commission wished to arrive at an equitable solution, its draft must not allow a party to contravene justice by using a change of circumstances to evade its obligations entirely if the other party offered to renew the treaty on an equitable basis and was willing to accept any arbitral award made in the case. To the right of one party to ask for application of the *rebus sic stantibus* rule corresponded the duty of the other party to accede to a request for revision if it was well grounded. If the negotiations failed and there was a dispute, he thought revision of the treaty was to be preferred, but a right to terminate it could be recognized if it became impossible to execute or created an illegal situation. He was not in favour of regarding the *rebus sic stantibus* clause as justifying termination in every case, and would prefer to offer a choice between revision, which did not constitute termination of the treaty, and termination itself.

61. With regard to the draft of article 22 proposed by the Special Rapporteur, he thought the Commission should accept as a general principle that the *rebus sic stantibus* rule could be invoked to terminate a treaty. He agreed with the Special Rapporteur that a change in circumstances did not, as such, affect the continued validity of a treaty, and he approved of paragraph 1 (a). That idea was stated more explicitly in paragraph 6 (b), which laid down a procedure for invoking a change in circumstances, and provided that the procedure

could only be carried out at the request of the parties concerned.

62. On the other hand, he was entirely opposed to the idea expressed in paragraph 3. To say that a change in the policies of the State claiming to terminate a treaty did not constitute an essential change in circumstances would be going against history. Not only a revolution proper, but far-reaching changes in certain key sectors, could bring about political changes which really amounted to an essential change in circumstances, but one due to the very nature of things, and which could not be regarded as due to any fault committed by the State in which the change had occurred. It would, moreover, be contrary to the provisions of the United Nations Charter, which recognized the right of peoples to self-determination and, consequently, their right to make any political changes they pleased, even if they caused profound changes in circumstances. Hence he could not accept paragraph 3, and he did not even think, like Mr. Elias, that the idea should be mentioned in the commentary.

63. He doubted whether paragraph 4(a) was justified. It could be contended that a change which was caused by the acts or omissions of the party invoking it could be taken into consideration — for example, in the case of an agricultural country in process of industrialization, which wished to withdraw from certain trade treaties, if at the time of their conclusion the parties had had the agricultural nature of the country in mind. With regard to paragraph 4(b), he did not share the opinion of the Special Rapporteur. To refuse a party the right to invoke changes, even after a certain time had elapsed since their occurrence would, in his view, be to penalize the party which had acted in good faith by endeavouring to go on applying the treaty even after the circumstances had changed. As to paragraph 4(c), he had already put forward views contrary to those of the Special Rapporteur on that point; *rebus sic stantibus* was not now regarded as an implied clause which could be set aside by the parties, but a general rule supplementing the *pacta sunt servanda* rule. Otherwise the stronger State would always exert pressure to secure the inclusion of a clause such as that referred to in paragraph 4(c).

64. He hesitated to accept the Special Rapporteur's text of paragraph 5. He could not accept sub-paragraph (a), for it would mean recognizing that a treaty effecting a transfer of territory need take no account of future changes resulting from the application of the principle that peoples possessed the right of self-determination. Moreover, as was shown by certain recent treaties on frontier delimitation, a particular boundary line might have been adopted in view of circumstances existing at the time when the treaty had been concluded, but which had since changed (e.g., shortage of water or communications). Lastly, where cession of territory was concerned, a State might have ceded bases as the price of its independence; must that be regarded as a perpetual title if changes subsequently occurred which caused the ceding State to request that the transfer be revoked? He was also opposed to sub-paragraph (b), since it followed from sub-

paragraph (a). Sub-paragraph (c) was out of place in paragraph 5.

65. In conclusion, he stressed that he was opposed to paragraphs 3, 4 and 5, and proposed that they should be deleted. On the other hand he could accept paragraph 6 in principle, though it should be reviewed when the Commission had settled the question arising out of article 25.

66. The CHAIRMAN, speaking as a member of the Commission, said that a provision concerning an essential change in circumstances was certainly necessary. He had no strong feelings about the title of the article, but if the present title were rejected it might be replaced by the wording used by the Permanent Court, namely, the "principle of a change of circumstances determining the lapse of a treaty".

67. Paragraphs 1(a) and 1(b) might perhaps be combined in an introductory sentence of the kind proposed at the beginning of Mr. Castrén's text. That text, however, made no mention of one necessary requirement, namely, that the change itself must be of an essential or fundamental nature.

68. Apart from drafting, he had no objections to paragraphs 2(a) and (b). In order to give more objective expression to the underlying idea of the latter, it might perhaps be re-drafted to read: "It appears from the object and purpose of the treaty or from the circumstances in which it was entered into that the continued existence of that fact or state of facts was a determining factor for both or all of the parties in concluding the treaty." The Permanent Court had indicated in the *Free Zones* case⁶ that the historical background and circumstances surrounding the conclusion of the treaty would need to be examined in order to establish whether the conditions which had changed had been viewed by both or all of the parties as determining the conclusion of the treaty. It was in that respect that the original intention of the parties became significant.

69. He had serious doubts about the desirability of retaining paragraph 2(c); it would be wiser to follow the Harvard Draft and the Havana Convention on Treaties,⁷ and not to include a provision concerning the effects of a change in facts, important thought that subject was in an academic exposition of the doctrine of *rebus sic stantibus*. He had even more serious objections to sub-paragraph 2(c)(ii), which might encourage claims to terminate a treaty merely because the execution of obligations had become more onerous, because the value of the other party's execution has diminished or because events had supervened to render the treaty no longer advantageous to one of the parties. If the principle of *rebus sic stantibus* was extended in that manner, it might prove destructive of the principle of maintenance of treaty obligations.

70. There seemed to be no reason to exclude a change in the policies of a State from qualifying as a change in circumstances within the definition laid down in paragraph 2, when certain policies might have been

⁶ P.C.I.J., Series A/B, No. 46.

⁷ Hudson, *International Legislation*, Vol. 4, pp. 2378 ff.

assumed by the parties to be an essential foundation or a determining factor in the conclusion of the treaty, especially as changes in economic circumstances, for example, seemed to be admitted. Perhaps it had not been the Special Rapporteur's intention to exclude changes in policy, in which case paragraph 3 would merely require re-drafting.

71. The matters dealt with in paragraph 4 could probably be adequately covered by article 4, sub-paragraph (c), if suitably re-drafted, though paragraph 4 (c) of article 22 could be dispensed with if the words "and unforeseen" were inserted at the beginning of paragraph 2, after the word "essential".

72. He agreed with Mr. El-Erian that paragraph 5 was concerned not with treaties as such, but with a situation created by their execution, and the case thus seemed to be covered by the provision in article 28, paragraph 1 (b) (A/CN.4/156/Add.3). Clearly, territorial rights established by a treaty would not be affected by the doctrine of a change in circumstances, because the parties would have no further interest in securing the termination of a treaty already executed. The point made by Mr. Bartoš was an entirely separate one concerning the possibility of revision or adjustment of treaties, or as some called it, the question of peaceful change. For those reasons, he considered that paragraph 5 could well be omitted.

73. He was in favour of paragraph 6, but it ought to be discussed in conjunction with article 25.

74. Mr. LIU said that the right to terminate or modify a treaty, whether on grounds of breach, impossibility of performance or a change in circumstances, must not be exercised lightly and must be hedged about with adequate safeguards.

75. He approved of the way in which the Special Rapporteur had circumscribed the application of the doctrine of *rebus sic stantibus* in formulating a precise and workable rule. All the points covered in his text deserved to be retained. He doubted whether the kind of simplified provision in which all the conditions were placed on the same footing without any distinction, as proposed by Mr. Castrén, would prove acceptable.

76. The question of combining articles 21 and 22 was perhaps, in essence, a drafting matter, and he held no strong views on it.

The meeting rose at 1 p.m.

696th MEETING

Monday, 10 June 1963, at 3 p.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. PAL said that having already made his general observations on the article, he would confine his remarks to how it ought to be formulated.

3. He was not in favour of amalgamating article 22 with article 21, because the two dealt with quite distinct subjects.

4. He fully subscribed to the conclusion reached by the Special Rapporteur in paragraph 8 of the commentary that the theory of an implied term should be rejected and that the doctrine of *rebus sic stantibus* should be formulated as an objective rule of law by virtue of which, on grounds of equity and justice, an essential change of circumstances radically affecting the basis of a treaty entitled a party to call for its termination. Clearly the article must be carefully drafted so as to be fully consonant with that thesis. Paragraph 2 (b) would have to be framed as an objective rule and not in terms of the intention of the parties or of an implied condition to be found in the treaty itself.

5. The rule should also be extended to cover a point brought out by Oppenheim, namely, that "if by an unforeseen change of circumstances an obligation provided for in the treaty should 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."¹

6. For the reasons given by Mr. Bartoš, Mr. Tunkin and Mr. Yasseen, he found paragraph 3 unacceptable and also felt some hesitation about paragraph 4, more especially its sub-paragraph (a), because it seemed to imply that the doctrine of *rebus sic stantibus* could only be relied on when there had been a change for the worse. That view was quite untenable; the doctrine applied whenever an essential change had taken place, whatever its nature.

7. He concurred in the arguments put forward by Mr. Bartoš, Mr. Tunkin and Mr. Yasseen against paragraph 5.

8. Mr. PESSOU said that in an earlier statement (694th meeting, para. 68) he had pointed out the fundamental difference between the circumstances in which the principles of necessity and *force majeure* were applied as possible grounds for the termination or suspension of a treaty. It was not possible, without danger of confusion, to assimilate those two principles to the *rebus sic stantibus* clause.

9. Several speakers had said that articles 21 and 22 should be combined. He did not agree. It was true that in some of the cases considered in article 21 there was also a change of circumstances, but that change did not itself play a decisive part.

10. In defining the *rebus sic stantibus* clause, it had been said that it applied to a change in circumstances which made realization of the objects of the treaty

¹ *International Law*, 8th edition, 1955, paragraph 539.