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Summary record of the 696th meeting

Topic:
Law of Treaties

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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.

totally impossible. But the clause operated, not as a condition of the treaty, but as a general principle of law.

11. In his opinion, the practice worked out in the case of the fourteen new African States made it possible to safeguard the freedom of action of the new States, and at the same time to ensure that no legal hiatus was left in international relations on the transfer of powers. To quote only the most recent example, immediately after the proclamation of Algeria's independence the new Algerian State had enjoyed the benefit of the frontier conventions and of the agreements concluded by a small number of States to the advantage of the whole international community. Yet the change had been a fundamental and vital one. What was taking place was, in fact, a development of practice by Africa and France. The new State, by its silence, would be bound by those general conventions to which the former territorial sovereign had been a party; but by a simple notification, and without following the procedures laid down in the treaties, it could announce that it did not accept them.

12. In his view, the transfer to international law of the French legal theory of *imprévision* was the best way to justify the *rebus sic stantibus* clause while keeping it within reasonable limits. The legal ties formed between the metropolitan territory and a former colony when its independence was recognized changed quickly and peacefully. Despite the absence of specific provisions in the agreements establishing the independence of the fourteen African States constituting the African and Malagasy Union, the change had never caused any difficulty. It was presumed that the change was accepted as a condition inherent in the process of decolonization.

13. Accordingly, he approved of the position adopted by the Special Rapporteur and Mr. Briggs. Articles 21 and 22 should be kept separate, but he thought the rule in article 22, paragraph 5, should be made rather more flexible.

14. Mr. ROSENNE said that the general trend of the discussion prompted him to think that his previous criticism of paragraph 2 (b), on the ground that it was not the function of the *rebus sic stantibus* doctrine to supply a supplementary rule in regard to a situation which was close to error, had been too mild. It had since become apparent that the Commission must satisfy itself that paragraph 2 (b) in its existing form was in fact consistent with the objective rule that was being formulated. What must be clearly brought out there was that the doctrine of *rebus sic stantibus* was applicable not so much when there had been an essential change in the circumstances assumed by the parties to have existed, as when there had been an essential change in the actual circumstances leading to a real change in the character of the obligation itself and in its execution.

15. He had not been convinced of the need to drop paragraph 2 (b) altogether, as advocated by Mr. Tunkin, though it would certainly have to be re-worded

and shorn of its subjective element; it remained to be seen whether that could in fact be done.

16. Paragraph 2 (c) must not be made entirely dependent on the will of the parties. Except in those cases in which it was obvious that an essential change had taken place, the rule should require some experience of executing the treaty in the changed circumstances to have been gained, which demonstrated objectively that the changes had altered the character of the obligation itself. That notion seemed to have been introduced by the Special Rapporteur in paragraph 4 (b), where he referred to the essential change becoming perceptible, but it ought to be reflected in paragraph 2 (c) as well.

17. If he had understood him correctly, Mr. Tunkin had stressed the need — speaking of it almost as an obligation — to make a genuine attempt to re-negotiate a treaty which had become inapplicable because of changed circumstances, and regarded that as a consequence of invoking the doctrine of *rebus sic stantibus*. If that principle were accepted, then the proper corollary would be to allow a unilateral right of denunciation in the event of one of the parties refusing to conduct negotiations in good faith, after a reasoned request to do so had been made by the other party, as provided in article 25, paragraph 1 (A/CN.4/156/Add.2).

18. In the long run, a well-regulated limited right of denunciation could facilitate the diplomatic handling of the problems posed by fundamental changes in circumstances and the consequent frustration of the original obligation. In that respect he attached perhaps less importance to article 25, which was an article of last resort, than to the procedural provisions of articles 23 and 24, by virtue of which a distinction could be made between a purely political declaration that a treaty had been denounced and a formal legal act of denunciation. Such procedural requirements would provide a check appropriate to diplomatic techniques, which did not require third-party intervention even for the settlement of disputes.

19. In the course of the discussion, it had been suggested that a close interdependence between substantive and procedural rules was a feature of only one or two systems of law. Without going into the theoretical aspects of the matter he wished to point out that in all systems of municipal law, detailed substantive rules presupposed the existence of regular procedural provisions; whether they were closely interrelated or not was merely a matter of degree. In studying the problem of *rebus sic stantibus*, he had been impressed by the virtual unanimity of doctrine, and perhaps even of state practice, in making recognition of the principle in any form conditional on the existence of certain well-defined procedural requirements.

20. The criticism directed at paragraphs 3 and 4, which were to some extent connected, was not without justification, and they could perhaps be omitted without prejudice to the substance of the article. He would, however, suggest the inclusion, perhaps among the general provisions of Part II, of a rule which he believed to be uncontroversial and generally accepted, namely,

that a mere change of government as such did not affect the continued validity of a treaty.

21. He also considered that a provision was necessary to deal with the effects of a suspension of diplomatic relations on the implementation of treaty obligations. Such an eventuality could come within the meaning of changed circumstances, and a provision might be called for by Article 41 of the Charter.

22. Mr. de LUNA said that the *rebus sic stantibus* principle, like treaty revision, was simply a particular aspect of peaceful change. The doctrine which had grown up from that principle was so closely bound up with the most fundamental questions of international law that the stand taken on it by any writer was a true reflection of his thinking on the nature and function of international law.

23. While it was true that the origins of the *clausula rebus sic stantibus* went back to the School of Bologna and Gentilis, it had been Vattel, with his realistic approach, who had given it currency, mainly because it filled an imperative need of international law by reconciling the antagonism between the static nature of the law and the dynamism of international life. It could, as it were, act as a safety-valve for the law of treaties by mitigating the rigidity of the *pacta sunt servanda* rule.

24. The need for a doctrine of peaceful change was all the greater in modern times because existing international law had been formed during the static periods of international life. Some degree of dynamism had begun to make itself felt in the law of treaties after the 1919 peace treaties, notably in the League of Nations Covenant, in which some provision had been made for the revision, or even the suspension, of treaties. The present trend of socialization and universalization of international law should result in conventional law becoming more flexible, though it should not fall into anarchy on that account.

25. It was in an attempt to provide a solution of that problem which would allow for the necessary balance between the dynamism of international life and the static nature of the law, that he and Mr. Verdross were jointly submitting a draft of article 22, which read:

" 1. The validity of a treaty may be contested if a change in the circumstances, not foreseen by the parties, essentially affects the purpose and object of the treaty and the fundamental balance of the parties and of their obligations and rights under the treaty.

" 2. For a treaty to be terminated by a change in circumstances, the following conditions must apply:

" (a) The change has not been caused, or substantially contributed to, by acts or omissions of the party invoking invalidation;

" (b) Invalidation has been invoked within a reasonable time after the change in circumstances first became perceptible to the party invoking it.

" 3. A party claiming the extinction of a treaty obligation must follow the procedure laid down in article 25 of Part II."

26. He would not embark on a discussion of the doctrine, but would examine the practice. Rules of municipal law analogous to the *rebus sic stantibus* clause had been adopted in different countries to solve the problem posed by the perpetuity of contract where an essential change in circumstances had occurred. That idea was known in French, Spanish and Italian law as the theory of *imprévision*, and in common-law countries as "frustration of contract". International case-law was less conclusive, but apparently admitted the *rebus sic stantibus* principle implicitly; at least it had never expressly rejected it.

27. In their joint proposal he and Mr. Verdross had adopted the Special Rapporteur's thesis that the *rebus sic stantibus* principle was a rule of objective law, but they had couched it in stricter terms to prevent the re-introduction — which might ensue from sub-paragraph 2 (b) of the original draft — of the idea of presumption of the intention of the parties, which was an arbitrary legal fiction. As Mr. Verdross had pointed out, there were only two possibilities: either the will of the parties could be determined by applying the rules of interpretation accepted in international practice, or it could not, because the treaty was silent on the matter. Some means must therefore be found to avoid the application of a treaty which had become inequitable owing to a change in circumstances not foreseen by the parties.

28. A treaty was a legal instrument embodying the common will of the parties. Hence it was only that will, as embodied in the treaty, which should be interpreted. It was different in municipal law, in which a distinction could properly be made between the subjective and the objective will. In international law the method of interpretation had at first been essentially subjective, then it had evolved towards an objective conception which had finally prevailed.

29. The authors of the joint proposal wished to change the title of article 22, by substituting the word "rule" for "doctrine", though personally he would accept the word "principle". It was, in fact, neither a clause nor a doctrine, but a rule which had been introduced into state practice to take account of the possible effects on the contractual obligations of States of a change in circumstances occurring independently of their will. Such a change could alter the objective balance of the treaty relations. The resultant imbalance removed the treaty obligation from the sphere of application of the original rule by virtue of which it existed and transferred it from the sphere of *pacta sunt servanda* to that of *rebus sic stantibus*, or else extinguished the obligation. As the rule to be observed by the parties under a treaty, whether bilateral or multilateral, derived from the agreement of the parties, on abrogation it ceased to be their common will, or if it survived, it was by virtue of a *jus cogens* rule other than *pacta sunt servanda*.

30. The *rebus sic stantibus* rule was a general rule of international law; not only did it not conflict with or weaken *pacta sunt servanda*, but, on the contrary, it was in fact an integral part of that rule, which it complemented and made applicable in practice. It therefore operated not *ope contractus*, as the subjective doctrine

had it, but *ope legis*. The foundation of both rules lay in the concept of *uberrima fides*, which should be taken not in its psychological meaning of the will of the parties, but in its ethical meaning of the will in law.

31. The wording of paragraph 2 of the joint proposal made it sufficiently clear that its authors could accept neither paragraph 3 nor paragraph 5 of the Special Rapporteur's draft. He did not understand why the Special Rapporteur had excluded the application of the *rebus sic stantibus* rule to treaties dealing with the settlement of a boundary.

32. He could not accept the amalgamation of articles 21 and 22 either, for although both were based on the principle of good faith, one dealt with physical and legal impossibility of performance, and the other with moral impossibility.

33. He agreed with Mr. Pessou that the state of necessity was entirely different from the *rebus sic stantibus* concept, since it involved justification of a breach of international law where the object was to protect the vital interests of a State; according to the *rebus sic stantibus* principle, on the other hand, the party injured by the change in circumstances could request the termination of the treaty, but it was required to follow the procedure laid down in article 25. It might be argued that the party's good faith would be hard to establish even before a court. That was true; but to enforce treaties too strictly might encourage their breach.

34. Mr. GROS said that the problem was not one of validity, but of the application of treaties. Private law was being invoked; but a contract concerning which impossibility of performance or *force majeure* was pleaded was not a void contract; it was a contract incapable of being carried out. Similarly, in the case concerning the contract for the supply of gas, in which the *Conseil d'Etat* had developed the theory of *imprévision*, the contract had remained valid, and the *Conseil d'Etat* had never ruled that performance was impossible; it had, in reality, directed the parties to revise the contract by mutual agreement and under its supervision. The relationship between the theory of *imprévision* and international law could only be purely intellectual, for in the case in point the *Conseil d'Etat* had had to judge between the consumers, the public utility concessionaire and the State or the municipalities which had granted the concession. It might have decided in favour of any of those different interests according to its understanding of the general interest. But how, in international law, could the interest of one State be given preference over that of another without violating the principle of the sovereign equality of States?

35. What the Commission was concerned with was the effect in international law of circumstances extraneous to a treaty on the execution of that treaty. It was discussing the case of treaties which, while not incapable of performance, ought to be revised for reasons of equity, an essential change having occurred in the external circumstances which had been taken into consideration at the time of their conclusion. The right method would be to place such exceptional revision on the same footing as normal cases of revision, in other words to provide

for revision by means of another treaty. Most treaties contained either a revision clause or a denunciation clause, so that they did not raise the problem of *rebus sic stantibus*, a doctrine which had formerly been justified by the non-existence of an organized international society and by the defectiveness of the technique by which treaties were concluded.

36. Today, when it became necessary to revise a treaty because of unforeseeable circumstances, the State concerned could first request revision by amicable arrangement. If that were refused, and the interest involved was important, it could apply to an international organization for measures of conciliation or for a recommendation. In most cases, it could invoke safeguarding procedures of the type provided in all recent technical and economic treaties and used for the past fifteen years in all economic unions and organizations (for instance, in the event of fundamental disturbances or "intolerable distortions"). Where political interests were at stake, it could either obtain the other party's consent to negotiation, which solved the problem, or, if negotiation was refused, it could submit the dispute to a regional organization or to the United Nations, as appropriate.

37. It was important to see if and when the *rebus sic stantibus* doctrine was useful in modern society. It was useful as a residuary rule in the case of treaties having no revision or denunciation clause, and between States not members of international organizations, whose function was, precisely, to provide machinery for revision by amicable arrangement. But how could that rule be applied? The reason why practice and case-law offered so little evidence was, no doubt, as the Special Rapporteur had shown, that only imprecise language made it possible to accept a theory of *imprévision* in international law. As soon as a definition was given, as in article 22, two conflicting opinions appeared. One had been stated by Sir Gerald Fitzmaurice and the Special Rapporteur and was admirably set out in paragraph 13 of the commentary on article 22; he saw nothing to add to it. As to the contrary opinion, that some members of the Commission had taken the view that a change in the attitude of one party towards a treaty was sufficient to secure its avoidance, and some had said that a change in the policy of a State should justify recourse to the *rebus sic stantibus* theory. Where did the notion of a change of policy begin, and where did it end? It was not possible to affirm that the rule *pacta sunt servanda* was the basis of treaty law and at the same time propose that a State should be free to revise a treaty at will. If the theory of the change of motives or attitudes prevailed, no State would wish to enter into any treaties except those providing for immediate settlement. As could be seen from paragraph 1 of the commentary, Sir Gerald Fitzmaurice had rejected that theory from the start and he (Mr. Gros) would only add that anyone who cast doubt on the durability of treaties was contributing not to the progress of international law, but to its ruin. That theory could only lead to a regionalization of international undertakings, not to the development of friendly relations between States, for which the Commission was called upon to establish the rules.

38. He had already described the procedure by which, in his opinion, revision in the event of fundamental changes would be successful. Apart from the cases in which revision was possible by virtue of provisions in the treaty itself, or through the good offices of international organizations, it should be recognized that the interested party was entitled to secure *bona fide* negotiation. He pointed out that in its advisory opinion in the case of the *Railway Traffic between Lithuania and Poland*, the Permanent Court of International Justice had held that "the engagement incumbent on the two governments . . . is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements."² It was not enough for a State to consider that it had sound reasons for unilaterally denouncing a treaty, for the other State would probably have equally sound reasons for rejecting its denunciation. The Commission could not adopt such a rule; to do so would be to encourage disputes and to prefer one claimant to another without any legal reason.

39. The text proposed should therefore be retained, and he would suggest only one change, in paragraph 5: if it were thought that the words "territorial rights" might give rise to doubts — though in fact they referred to a boundary settlement or an element of such a settlement — those words could be deleted.

40. Mr. AGO said he wished to make some further comments on various points in the text of article 22. He would not dwell on paragraph 1, since most members considered that sub-paragraphs (a) and (b) could be combined and the paragraph condensed.

41. The essential provisions in paragraph 2 were sub-paragraphs (a) and (b), for they laid down the conditions under which changes in circumstances could adversely affect the permanence of a treaty. He was prepared to accept that the principle *rebus sic stantibus* constituted a general objective rule of international customary law suitable for codification. All the same, there were two elements in the operation of that principle: one objective, the other necessarily subjective and not capable of being wholly eliminated. The first was a real change in the external situation, but the second was a connexion between that change and the treaty, or rather between that change and the "consensus" of the parties. Thousands of treaties survived changes in the external situation; some even remained valid despite the substitution of another State for one of the contracting parties. The objective element of the change could not, therefore, be the sole consideration. Although he agreed with Mr. Rosenne that certain drafting changes might be necessary, he could not consent to the elimination of an essential element; for the *rebus sic stantibus* clause to be applicable the situation when the treaty was concluded must have been an essential element in its conclusion, without which there would have been no treaty. In other words it must appear certain that if the situation which had arisen later had existed when the treaty was being negotiated, the consent of the parties would not have been given. It was therefore absolutely necessary to retain paragraph 2 (b).

42. On the other hand he agreed with the Chairman that sub-paragraph 2 (c) could be deleted; it added nothing essential and probably left some possible cases out of account.

43. With regard to paragraph 3, as Mr. Gros had observed, the essential point was that the change must have been a change in the external circumstances, not depending only on the will of one of the parties. If a change in the policies of one of the parties was to be regarded as adequate grounds for impugning the validity of a treaty concluded by that party when it was following another policy, it would be no use concluding treaties.

44. Paragraph 4 was not entirely necessary. The ideas embodied in it were true enough, but some of them at least could be dealt with in the commentary.

45. In dealing with paragraph 5, as Mr. Gros had said, the Commission should bear its responsibilities in mind. To cast doubt on the transfer of territories and to permit the *rebus sic stantibus* clause to operate in such matters might make all boundary settlements provisional. The many examples even in recent history showed how dangerous it would be to introduce the *rebus sic stantibus* doctrine in such a context.

46. With regard to paragraph 6, which stated the most important point in the article, he agreed with Mr. Gros that a choice must be made between the idea of revision, which was a sound method and preserved the sanctity of treaties, and the principle of the *rebus sic stantibus* clause, which, if admitted, would entail voiding the treaty, not merely the right to propose revision. If the Commission decided in favour of revision — the principle of the right to negotiate revision — the title of the article would have to be altered to "change in situation".

47. Mr. CASTREN noted that all the members who had spoken before him appeared to accept the *rebus sic stantibus* clause, though it had rightly been emphasized that it would be dangerous to allow States to invoke it lightly. Most members had nevertheless proposed deleting several of the conditions which the Special Rapporteur considered necessary to prevent abuses, but the Commission was far from being unanimous.

48. Personally, he was convinced that paragraphs 5 (a) and (b) should be re-drafted to exclude from the scope of the *rebus sic stantibus* clause only those stipulations of a treaty which effected a transfer of territory, the remainder of the enumeration being deleted; paragraph 5 (b) would thus be omitted entirely. He did not wish to go any further, in order not to weaken the principle *pacta sunt servanda* by leaving too much freedom to States.

49. The provision proposed by Mr. Verdross and Mr. de Luna would probably not afford adequate safeguards against abuses. Besides, the somewhat subjective criteria set out in paragraph 1 of their proposal were deemed difficult to accept.

50. Mr. VERDROSS said he wished first to rectify his previous statement (694th meeting, para. 37). He accepted the idea developed by Mr. Tunkin that the *rebus sic*

² P.C.I.J., Series A/B, No. 42, p. 116.

stantibus clause did not constitute an exception to the principle *pacta sunt servanda*; what it involved was really a reasonable interpretation of that principle.

51. It would be better to say, in paragraph 1 (b), that the validity of a treaty might be “contested” by reason of an essential change in the circumstances, rather than that it might be “affected”, for invocation of the clause could not automatically put an end to the treaty; it merely conferred the right to request revision or termination.

52. There was a contradiction between paragraph 1 (b) and paragraph 2 (b); paragraph 1 (b) referred to an objective criterion, an “essential change in the circumstances”, whereas paragraph 2 (b) referred to a “fact or state or facts” considered by the parties. A distinction had to be made; paragraph 2 (b) was based on the idea that both parties had foreseen a change. That situation was possible, but then the *rebus sic stantibus* clause would not be applicable *stricto sensu*. There was a case not covered by that sub-paragraph, however: that in which the change had not been foreseen, but it could reasonably be assumed that the treaty would not have been concluded if the change had been foreseen. It was only in that case that the *rebus sic stantibus* clause applied. Those two cases could be dealt with together; but it would then be necessary to change the title of the article by substituting the words “revision of treaties” for “*rebus sic stantibus*”.

53. If that understanding of the *rebus sic stantibus* principle was accepted, it became possible to place a reasonable interpretation on paragraph 3. There were, of course, political changes which in no way affected a treaty, but there were cases in which it could be said that if the contracting parties could have foreseen the change which had later occurred they would not have committed themselves. The test, therefore, was always whether States would have committed themselves or not. That was the most important problem. If that idea were taken as the starting point, all other solutions became easy.

54. With regard to treaties concerning transfers of territory, reference had been made to changes occurring in international law after the conclusion of a treaty, and to the right of peoples to self-determination; but that had nothing to do with the *rebus sic stantibus* clause; for in such cases the rule applicable was *lex posterior derogat priori*.

55. Mr. TUNKIN said that he could not agree with the view that the *rebus sic stantibus* principle constituted a sort of overriding rule. Life was a continual development, which could be evolutionary or revolutionary, and that development could have the effect of making a treaty out of date. But the *rebus sic stantibus* principle was not the only legal principle which afforded a possibility of changing a treaty; indeed, he agreed with Mr. Gros that it was not the main one and was merely an additional means of revising treaties. All the articles from article 12 to article 19 afforded a possibility of terminating or revising a treaty. Article 12, for instance, rendered void a treaty imposed by the illegal use or threat of force, while article 13 dealt with treaties void

for illegality of their object — under its provisions, if the rules of *jus cogens* changed, treaties which conflicted with the new rules were void for illegality. In fact, it was clear that the field of application of article 22 was limited and that the importance of its provisions should therefore not be over-estimated.

56. Nor could he agree with the view that article 22 was of special importance to the newly independent States. In the cases mentioned during the discussion, the treaties affecting those States would be voided by other and more important articles than article 22. For example, a treaty imposed on a former colony which had since become an independent State would certainly be void for illegality, because it would violate such rules of *jus cogens* as the principle of self-determination and the principle of the sovereignty of States. Unequal treaties had also been mentioned, but they were covered by other articles of the draft.

57. The importance of paragraph 2 (b) had been stressed by Mr. Ago. He could not agree, however, that the provisions of that paragraph should be combined with those of paragraph 2 (c). The fact or state of facts which had existed when the treaty was entered into might continue, but a change might still occur which frustrated the further realization of the object and purpose of the treaty. The change might relate to some entirely new development and have no connexion with the fact or state of facts considered by the parties at the time of the treaty's conclusion. The point raised by Mr. Ago was in fact adequately dealt with in sub-paragraph 2 (c) (i), which stipulated that the effect of the change must be such as “in substance to frustrate the further realization of the object and purpose of the treaty”, and that provision should be retained. It was immaterial, for the purposes of its application, whether the change it envisaged came within the scope of paragraph 2 (b) or related to different matters.

58. He shared the Chairman's views regarding paragraph 2 (c) (ii), the provisions of which were perhaps unduly broad.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that at the next meeting he would sum up the discussion on the main issue of the choice between an objective and a subjective approach to the *rebus sic stantibus* doctrine; for the moment, he would confine his remarks to three points.

60. First, with regard to the suggested amalgamation of articles 21 and 22, although there had been some difference of opinion, the discussion had shown that a substantial number of members were opposed to it. The obvious solution, in principle, was therefore to keep the two articles separate; that solution would not sacrifice any point to which importance was attached by those members who wished to see the two articles amalgamated, whereas if the two articles were amalgamated, it might be difficult for many members to accept their combined provisions. His own view was that the articles should be kept separate, among other reasons because of the serious risk of complicating the already difficult subject of *rebus sic stantibus*.

61. Secondly, with regard to Mr. Rosenne's request for omission of the reference in paragraph 5 of the commentary to a study prepared by the Secretary-General at the request of the Economic and Social Council, he himself had certain reservations concerning that study, as he had meant to indicate in his commentary when referring to the fact that it had been based on a non-contentious examination of the problem of the minorities treaties. The authors of the study had not heard the arguments on both sides of the question. He had mentioned the study in his commentary because he had thought it right to place before the Commission one of the few studies based on an elaborate examination of the *rebus sic stantibus* doctrine in a particular context, but he agreed that there was no need to give it undue prominence in the final report.

62. Thirdly, he noted that there was general agreement in the Commission that, whatever the difficulties of the *rebus sic stantibus* doctrine, article 22 should apply to all kinds of treaties, not only to treaties of indefinite duration. That was a point of importance, because nearly all the previous authorities had confined the *rebus sic stantibus* doctrine to treaties of indefinite duration. The Commission appeared to be unanimous in taking a different stand, and he thought it made the right decision.

The meeting rose at 6 p.m.

697th MEETING

Tuesday, 11 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)

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

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 22 (A/CN.4/156/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission was agreed on the need to formulate the doctrine of *rebus sic stantibus* as an objective rule of law, but there was some difference between what members meant when they spoke of the objective character of the rule. Some members regarded the doctrine as applicable only when the change related to circumstances which had originally constituted an essential foundation of the treaty; others seemed to regard the doctrine as an absolute overriding principle whereby subsequent changes, whether related to the original basis of the contract or not, could be invoked by a party as a ground for dissolution of the treaty. Those two currents of opinion had found their expression in proposals to omit either paragraph 2 (b) or paragraph 2 (c).

3. Some members, including Mr. Verdross, had asserted that paragraph 2 (b) was drafted in a way inconsistent with his aim of laying down an objective rule. He did not agree with that criticism and considered that the paragraph as drafted provided an objective rule requiring that the change must be a change in the circumstances which the parties had assumed to be an essential foundation of the treaty. The highest court in his own country had in recent years adopted the objective theory of the frustration of contracts through supervening changes of circumstances, and in doing so had stated the rule in terms very similar to those used in article 22.

4. Accordingly, while disagreeing with the contention that there was an element of subjectivity in paragraph 2 (b), he recognized that the wording might be misunderstood and should therefore be modified. Perhaps the necessary clarification could be achieved by combining paragraphs 2 (a) and 2 (b) in some such wording as:

“(a) a change has taken place with respect to a fact or a state of facts which existed when the treaty was entered into and was an essential foundation of the obligations accepted by the parties to the treaty.”

Even with such wording it would remain the fact that that object and purpose of the treaty would still have to be examined in order to discover whether the circumstances in which a change had occurred had formed an essential foundation of the treaty.

5. The divergence of opinion on paragraph 2 might be at least partially bridged by re-drafting, after which certain points of difference might appear less significant than before. If the new text failed to command general acceptance, the controversial issues would have to be put to the vote.

6. He was bound to observe that the Drafting Committee's task might not be easy, as precisely what members had in mind when speaking of the objective character of the rule was somewhat obscure. For instance, there had been a difference of opinion between the Chairman and himself. The Chairman had suggested that paragraph 2 (b) would be more objective if the circumstances were defined as having been a determining factor in persuading the parties to enter into the treaty. In his submission, such a formulation would be a more subjective way of expressing the idea than the original draft and would mean having to refer back to the subjective intentions of the parties.

7. In paragraph 2 (b) he had sought to reflect the traditional theory, reaffirmed in most modern statements of the doctrine and apparently taken for granted by the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* case,¹ that, for the doctrine of *rebus sic stantibus* to apply, the change must have occurred in circumstances which formed part of the original basis of the treaty. The question of how substantial or radical the change must be was a different one and was expressed in the word “essential” at the beginning of paragraph 2.

8. In paragraph 2 (c) he had attempted to give further definition to an “essential” change. Views on that

¹ P.C.I.J., Series A/B, No. 46.