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Summary record of the 697th meeting

Topic:
Law of Treaties

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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.

paragraph had again differed and some members seemed to think that sub-paragraph (ii) went too far and would provide a means for parties to free themselves from treaty obligations which had become too onerous. That provision might either be omitted or made more rigorous. There, perhaps, the objections could be more easily overcome by re-drafting.

9. Turning next to the major problem dealt with in paragraph 6, he said that opinion in the Commission was divided as to whether the application of the doctrine of *rebus sic stantibus* created a right to terminate or a right to seek revision and an obligation on the other party to negotiate in good faith. It seemed to him clear that the majority held to the former opinion, though recognizing that in practice invocation of the doctrine often led to revision. From the practical point of view, the divergence was perhaps not as significant as it might seem at first sight, particularly if the procedural requirements contemplated in articles 23, 24 and 25 were borne in mind. Clearly, if one of the parties alleged a change in circumstances, discussions were likely to ensue on whether revision would be appropriate, and it would only be in the last resort, if the parties failed to agree on the possibility of revision and one of them proved unwilling to accept any kind of independent appreciation of the question, that a unilateral right of termination would become exercisable.

10. The possibility of termination was a necessary element in the doctrine of *rebus sic stantibus*, since to oblige one of the parties to maintain a treaty because it had failed to persuade the other to revise it would be to place one at the mercy of the other's intransigence and would be contrary to the doctrine. However, he agreed with Mr. Tunkin that the application of the doctrine must be properly circumscribed with the necessary safeguards. The difference in the views which had emerged in the Commission should perhaps not cause undue concern, because it might be possible to solve the problems involved when considering the procedural clauses in the subsequent articles.

11. There had been a fundamental disagreement concerning paragraph 3, which some members strongly opposed and others regarded as essential, but an effort should certainly be made by the Drafting Committee to see whether a generally acceptable formula could be arrived at. Some members, notably Mr. Yasseen, had criticized that paragraph for being too absolute and because it would create difficulties in respect of treaties of alliance or similar agreements. That particular problem would not have come up if the Commission had followed his suggestion that article 17 should contain a provision on an implied right of termination for such treaties. It was conceivable that in certain types of treaty a change of policy could be regarded as a change in circumstances affecting the possibility of continued execution.

12. He had been criticized for being unduly influenced in paragraph 4, in the matter of error, by the decision of the International Court in the *Temple of Preah Vihear* case.[2] That was not so, and the provisions contained in paragraphs 4 (*a*) and 4 (*b*) had appeared in his predecessor's draft.[3] Moreover, there was certainly considerable authority for the principle in paragraph 4 (*b*) in the jurisprudence of international and national tribunals, it being recognized that a delay in putting forward a plea of changed circumstances might prejudice the right to do so. The Permanent Court had made it clear in the *Free Zones* case that when, after the change in circumstances had become perceptible, there had been considerable delay before the doctrine was invoked, that must be regarded as a strong indication that the change had not been regarded as an essential change of circumstances or had not been so fundamental as to render the treaty incapable of application. The problem was at bottom the same as that for which provision had been made in article 4 and could perhaps be covered in that article.

13. Objections had been raised to paragraph 4 (*b*) because it might prevent a party from invoking changes in circumstances to which it had perhaps contributed by actions that were perfectly lawful in themselves, even under the provisions of the treaty. Certainly such a situation could arise and there had been some suggestion that it had arisen in the *Free Zones* case. The provision might not perhaps be an essential one to include in article 22; but it would be worth while for the Drafting Committee to try to devise a more acceptable text.

14. He had not anticipated that paragraph 4 (*c*) would be regarded as anything but harmless and had been considerably startled by Mr. Yasseen's contention that such a provision would be contrary to international law because the principle of *rebus sic stantibus* was a rule of *jus cogens* from which the parties could not derogate (694th meeting, para. 59). Personally, he considered that the parties would be well advised to provide for a change of circumstances in the treaty itself, if that could be effectively done, and that such provision would in no way run counter to the doctrine. As far as he could judge, the Commission as a whole did not subscribe to Mr. Yasseen's view.

15. He attached considerable importance to paragraph 5. In drafting the first two sub-paragraphs he had had very much in mind the *Bremen* v. *Prussia* case of 1925,[4] concerning a transfer of territory with certain conditions attached as to its use as a fishing port. In such a situation it seemed unjust to allow a party to retain the territory and reject the special stipulations which had accompanied its acquisition. Some members had contended that paragraph 5 (*b*) went too far and that its content was adequately covered by paragraph 5 (*a*); it had also been suggested that in the latter paragraph the words " or a grant of territorial rights " should be deleted. That solution would be acceptable.

16. On the other hand, he was not at all convinced that the reasons put forward by those who radically opposed paragraph 5 as a whole were valid. They argued

[2] *I.C.J. Reports*, 1962, pp. 6 ff.

[3] *Yearbook of the International Law Commission, 1957*, United Nations publication (Sales No.: 1957.V.5, Vol. II), p. 33.

[4] *Annual Digest of Public International Law Cases, 1925-6*, case No. 266.

that the paragraph was unnecessary because once a treaty had produced its effects nothing could undo the territorial dispositions carried out under its terms. That view might be theoretically correct, but it would be quite illusory to imagine that energetic attempts to reopen the question of such dispositions would not be made on the basis of the doctrine of *rebus sic stantibus*. Mr. Ago's observations on that subject at the previous meeting had been extremely pertinent.

17. Moreover, although a territorial settlement might have been executed under the relevant clauses, such a treaty often contained continuing rights and obligations which would continue to apply; in any case the treaty would retain its importance as a title to the territory. At the same time he wished to make it perfectly clear that it had never been his intention to suggest that a territorial settlement was not in itself susceptible of change — by appropriate procedures.

18. A good deal had been said in that connexion about the principle of self-determination. That principle might be invoked on the political plane as a special and even legal justification for carrying out territorial changes, but it ought not to be introduced as an element in the quite distinct doctrine of treaty law about changes of circumstances affecting the validity of a treaty. There was great force in Mr. Ago's warning about the danger of providing an easy way to disturb existing territorial arrangements, and he agreed with Mr. Tunkin that the issue was just as likely to arise between new States as between new and old States. If too wide an application of the *rebus sic stantibus* doctrine were allowed in such cases, a serious cause of international friction might be created. Perhaps the differences of view to which the paragraph had given rise in the Commission might at least in some measure be met by changes in the wording.

19. Paragraph 5 (*c*) should be omitted from article 22 as he would now be preparing a general provision on the constituent instruments of international organizations.

20. The best course would be to refer article 22 to the Drafting Committee, and he hoped it would prove possible to prepare a new text which would go a long way towards reconciling the opinions that had emerged during the discussion, it being of course understood that no member was yet committed on any provision of the article.

21. The CHAIRMAN suggested that the procedure advocated by the Special Rapporteur should be followed.

It was so agreed.

22. The CHAIRMAN invited the Commission to resume consideration of article 21.

ARTICLE 21 (DISSOLUTION OF A TREATY IN CONSEQUENCE OF A SUPERVENING IMPOSSIBILITY OR ILLEGALITY OF PERFORMANCE) (*resumed from the 693rd meeting*)

23. Mr. PAREDES said that, as he had pointed out at a previous meeting, article 21 dealt with three, or perhaps four, distinct matters, each one of which deserved an article to itself.

24. The extinction of the international personality of one of the parties to a treaty — the subject-matter of paragraph 1 — could take place in different ways. One was where a political entity disappeared without leaving any successor. Such cases, although rare, were not entirely unknown and could occur as a result of a natural catastrophe or of a war which destroyed a whole region and people; in fact humanity was at present threatened with precisely that type of disaster unless nuclear weapons were banned. In the event of physical disappearance, any treaty entered into by the State in question would also disappear without the need for any declaration or claim.

25. Another way in which extinction could take place was when a State disappeared as a result of its incorporation in another State or of its partition among several States. Cases of that type raised grave issues of state succession and related directly to that topic, but those issues should also be considered in connexion with the law of treaties. Incidentally, he noted that no consideration had been given to the question of the rights and duties of the successors of a State that had disappeared — a question bound up with the most important consequences of the event under discussion.

26. With regard to paragraph 2 (*a*), it seemed to him that the complete and permanent disappearance or destruction of the subject-matter of the treaty would involve its termination without any need for denunciation; that would be the case even if the purpose of the treaty was to ensure the maintenance of the subject-matter. Consequently, he could not support the proviso in the paragraph. To take as an illustration the hypothetical case of a treaty by which several States jointly undertook to maintain a maritime station on an island, if the island disappeared under the sea, the obligations under the treaty could not possibly endure.

27. He supported the provisions in paragraph 4 and noted the Special Rapporteur's intention of making them into a separate article. He suggested, however, that the right to call for the termination of the treaty in the case contemplated should belong not only to the parties to the treaty, but to any international person; to make it open to the whole international community to demand the termination of a treaty which violated a rule of *jus cogens* would be consistent with present-day aspirations towards international co-operation.

28. Mr. TABIBI said that article 21 was in every respect as important as article 22. Like that article, it dealt with a question of determination arising from events outside the treaty itself and completely independent of the will of the parties.

29. It was important to retain the provisions of article 21 in the draft, because such events as the supervening illegality of a treaty, a change in circumstances which made performance impossible, and the disappearance of a regime were daily occurrences.

30. From an examination of the commentaries prepared by the present and the previous special rapporteurs, it was clear that both agreed that a change of circumstances established a juridical basis for the termination of a treaty.

31. With regard to the various provisions of the article, paragraph 1 should be retained, although it dealt with the succession to treaties. It was not always possible to draw a clear distinction between the law of treaties and state succession; in fact, many writers did not separate the two. The Commission itself, when it came to examine the topic of state succession, might find that many of the articles it had considered on the essential validity of treaties could be incorporated in the law of state succession.

32. Paragraphs 2 and 3 constituted the core of the article and should be retained subject to certain modifications. Like Mr. Briggs and Mr. Castrén, he disliked the expression " to call for the termination "; nor did he like the expression " after its entry into force ", because some treaties did not come into operation until some time after their entry into force.

33. In connexion with paragraph 2 (*b*), Mr. Rosenne had drawn an analogy with the judgement of the International Court of Justice in the *South-West Africa* cases.[5] In fact, while it was the League of Nations and not the United Nations that had been a party to the original mandate agreement with the Government of the Union of South Africa, the relevant fact was that the League of Nations had acted on behalf of a community of nations. That community had endured, notwithstanding the disappearance of the League, which was the formal party to the agreement. Hence no analogy could be drawn between that case and the disappearance of a party to a treaty.

34. Lastly, he fully agreed with the content of paragraph 4, dealing with *jus cogens*, but did not think it should be retained in the context of article 21. It could be omitted without affecting the scope of article 21, and the Drafting Committee should be invited to incorporate the idea it contained in article 13, which was the appropriate place.

35. He approved of the cautious wording of paragraph 3, which was intended to safeguard the stability of treaties. In the absence of a general system of compulsory jurisdiction, it was not advisable to permit the annulment of a treaty solely on the basis of an allegation by one of the parties that performance had become impossible.

36. Mr. VERDROSS, referring to his earlier comment on the last two lines of paragraph 1 (*a*) (693rd meeting, para. 52) said that it was not really correct to speak of the extinction of a party to a treaty by means contrary to the provisions of the Charter of the United Nations, for a State which had been annexed in breach of the Charter remained in existence, inasmuch as the annexation was void. If the Commission wished to retain the idea for practical reasons, it would be better to say " provided always that the *occupation* and *annexation* of such party were not brought about by means contrary to the provisions of the Charter of the United Nations."

37. Secondly, the case contemplated in paragraph 1 (*b*) was not really one of impossibility of performance, but one in which the *rebus sic stantibus* clause was obviously applicable. He agreed with the Special Rapporteur that article 21 should be separate from article 22, but that being so, article 21 should deal only with cases in which performance of a treaty was impossible, not with those in which it was possible, but would have serious or even dangerous consequences.

38. It was not enough to state in paragraph 2 that, if performance of a treaty had become impossible, it was open to any party to call for its termination; for the treaty ceased to exist immediately by reason of the absolute impossibility of performance.

39. He fully approved of paragraph 3, but thought that paragraph 4 was open to the same criticism as paragraph 2. If the establishment of a new rule of international law having the character of *jus cogens* rendered the performance of a treaty illegal, in that case too, the treaty came to an end as soon as the new rule was established, by virtue of the rule *lex posterior derogat priori*. That being so, it could not be said that it was open to any party to call for termination of the treaty.

40. Mr. LACHS said that, in view of the discussion on article 22, he would not press his suggestion for the amalgamation of articles 21 and 22; he would, however, preface his remarks with an observation on article 22.

41. The discussion on that article had shown that the approach to the doctrine of *rebus sic stantibus*, both in legal writings and in state practice, had hitherto been rather confused. In order, therefore, to confine that doctrine to its true function, it was essential to formulate all the other articles in the most precise and specific terms, so as to safeguard the rights of the parties to the utmost.

42. With regard to article 21, he shared the views of those members who were in favour of deleting paragraph 1, the provisions of which were really part of the law of state succession. Article 21 should deal only with impossibility of performance.

43. He had some doubts about the reference to the " disappearance of a legal arrangement " in paragraph 2 (*b*). It was very difficult to determine whether, in a particular instance, such disappearance was in fact complete and permanent. For example, in 1921 the United Kingdom Government had declared that it considered terminated certain bilateral treaties relating to the suppression of the slave trade, because the slave trade no longer existed. Thirty-five years later, however, at the time of the conclusion of the 1956 Convention on Slavery, the United Kingdom Government had declared that, in pursuance of its obligations under other treaties, it would continue to patrol the Persian Gulf for the purpose of suppressing the slave trade, thereby indicating that it considered the object of those older treaties as not having disappeared.

44. Moreover, it was difficult to say that the disappearance of a legal régime, also referred to in paragraph 2 (*b*), implied the disappearance of the rights and obligations resulting from that régime. In the case of South West Africa, although the question of the succession of the United Nations to the League of Nations had

[5] *I.C.J. Reports*, 1962, pp. 319 ff.

been settled only imperfectly, it could not be alleged that, following the disappearance of the mandates system, the Union of South Africa was freed from all obligations in the matter; those obligations endured. Of course, if the principle of self-determination were applied, the question would have to be viewed in a different light: the new nation would take over all rights and obligations by virtue of state succession.

45. Whatever decision was taken on Mr. Tabibi's proposal to transfer to article 13 the idea contained in paragraph 4, the provisions of that paragraph required to be strengthened. If a new rule of *jus cogens* came into operation and a treaty conflicted with it, the treaty was terminated by the automatic operation of the rule; it was not appropriate to suggest, as was done in paragraph 4, merely that it was open to any party to call for the termination of the treaty. There was a marked difference between that situation and the case of physical impossibility of performance, in which the parties could be allowed freedom of choice. A treaty which became void for illegality was terminated as a result of an objective phenomenon independent of the will of the parties.

46. Mr. ELIAS observed that paragraph 7 of the commentary made it clear that the effect of war on treaties was excluded altogether, not only from the draft articles, but also from the entire report; he thought, however, that a provision on so vital a question should be included in article 21, which dealt with impossibility of performance. Any rule in the matter would be complicated by the number of necessary exceptions and qualifications, but the effort was well worth making.

47. With regard to paragraph 1, he had serious doubts about the advisability of dealing with state succession in an article on impossibility or illegality of performance. Quite apart from the fact that the International Law Commission was to deal with state succession as a separate topic, a change in the parties to a treaty hardly provided an illuminating example of impossibility of performance.

48. The practice of the United Nations in regard to changes, amalgamations and partitions of States clearly showed that such events had not always automatically led to impossibility of performance of treaties. Until the Commission had the provisions on state succession before it, he could not agree to the inclusion of paragraph 1 of article 21.

49. Paragraph 2(*b*) anticipated paragraph 4 to some extent. A change in municipal law often involved a change in the law of contract, and although similar instances were rare in the international field, it was perhaps appropriate to envisage the possibility. The idea contained in paragraph 2(*b*) could perhaps be incorporated in paragraph 4, if that paragraph were retained.

50. The principle of paragraph 3 had received general acceptance, but its formulation needed some adjustment. He did not believe that the relevant question was whether the cause of the impossibility of performance would be permanent; it was a matter of determining the character of the impossibility itself, and whether it was likely to last, regardless of its cause. The cause might cease, but its consequences endure. He was not satisfied with the expression " there is substantial doubt ". It should be made clear whether the doubt had to be entertained by all the parties to the treaty, or by only one of the parties. Another question which deserved attention was who would initiate action in the matter. In the second sentence it should be made clear whether it was for the parties themselves or for the court to determine whether the impossibility of performance was permanent or not.

51. With regard to paragraph 4, Mr. Lachs had drawn a valid distinction between legal and physical impossibility. In the case of physical impossibility of performance, it could be left to the parties themselves to decide whether to end the treaty and make new arrangements. In the case of illegality, the treaty was automatically terminated by virtue of the provisions of earlier articles, especially articles 12 to 14.

52. Mr. ROSENNE, urging the retention of paragraph 1, said that it dealt with problems of treaty law that could arise independently of state succession. The opening words, which made it clear that all questions of state succession were deliberately excluded from the provisions of the paragraph, were necessary.

53. The provisions of sub-paragraph (*b*) were sufficient in themselves to warrant retention of the whole of paragraph 1; they should be read in the light of the last sentence of paragraph 4 of the commentary. Of immediate interest in that connexion was the 1962 judgement of the International Court of Justice in the *South West Africa* cases. In particular the joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice [6] showed that the Court had been faced with the problem of whether a treaty could subsist without parties. Owing to article 37 of its statute, the Court had been required to examine whether the mandate was a " treaty or convention in force " and had found that the obligations of one of the parties continued although the other formal party to the treaty had disappeared. Personally, in the light of that decision he had serious reservations as to whether the disappearance of a party necessarily implied impossibility of performance. He therefore urged that paragraph 1 should be retained, preferably in the form of a separate article.

54. Finally, he wished to repeat the suggestion he had made during the discussion of article 22, that the draft should include at some point a provision on the effect of the severance of diplomatic relations on the implementation and execution of treaties. Severance of diplomatic relations did not contravene the Charter to the same extent as war.

55. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Elias, said that he was not in favour of dealing in the present draft with the effect of war on treaties, which was a question closely connected with such matters as the effects of the provisions of the

[6] *I.C.J. Reports*, 1962, pp. 465-563.

Charter and the legality of war. It was for the Commission to consider whether it wished to include a special section on the effect of war on treaties.

56. Mr. Rosenne's suggestion that the draft should include a provision on the effect of the severance of diplomatic relations on treaties raised difficult questions. At the Commission's next session, he would be submitting a report on the application of treaties, and the question arose whether the matter should not rather be dealt with in that report. Many of the suggestions relating to state of necessity and *force majeure*, made during the discussion on the doctrine of *rebus sic stantibus*, probably belonged to the subject of application of treaties. In fact, the Commission might well not be satisfied with some of the provisions of the present draft until it could see both drafts together. At a later stage of the present session the Commission should consider whether the articles now being discussed ought to be submitted to governments before it had also examined the provisions on the application of treaties.

57. Mr. ROSENNE thanked the Special Rapporteur for his reply and said that he would be quite satisfied if the Commission considered the effect of the severance of diplomatic relations on treaties at its next session.

58. Mr. TUNKIN said that, although he did not think it advisable to retain paragraph 1, he would not press for its deletion. The rules contained in paragraph 1 (*a*) (i) for bilateral treaties, and in paragraph 1 (*a*) (ii) for multilateral treaties, could be provisionally accepted. They were very close to every-day practice and could well be considered as part of international law.

59. The language of paragraph 1, however, should be reconsidered. He could not accept the opening proviso " Subject to the rules governing State succession in the matter of treaties ". A proviso of that kind would make it impossible for the future conference of plenipotentiaries on the law of treaties to consider article 21, because there would not yet be any convention on State succession.

60. He had already suggested that the provisions of paragraph 4 should be transferred to article 13. The effect of new rules of *jus cogens* should be the same as that of pre-existing rules. It was therefore essential that the language of the provisions concerning old and new rules should be the same and that the consequences stated should be the same. Article 13 made it clear that any treaty which came into conflict with a new rule of international law having the character of *jus cogens* would be void for illegality.

61. Mr. AGO said he maintained his view concerning paragraph 1; it did not lay down a rule of law but simply stated self-evident facts. The whole value of that paragraph lay in the phrase " Subject to the rules governing State succession in the matter of treaties ", which Mr. Tunkin thought should be deleted. It might indeed be interesting to see what would be left of the rights established by a treaty in the event of succession, but that was a problem relating to State succession, which the Commission would examine in connexion with that topic. The question of the extinction of a State by means contrary to the Charter was also foreign to the provisions of article 21.

62. On the other hand, the disappearance of the subject-matter and purpose of a treaty, with which paragraphs 2 and 3 were concerned, was really a problem of the termination of treaties. The drafting of those two paragraphs could no doubt be further improved, but the principle they stated was correct.

63. In paragraph 4, the Commission should be careful to avoid inconsistency with the rule it had laid down in article 13, namely, that the establishment of a new rule having the character of *jus cogens* at once voided a treaty embodying provisions conflicting with such a rule, even if the treaty had been concluded before the new rule was established. The statement in paragraph 4 that " It shall also be open to any party to call for the termination of a treaty " might seem ambiguous and was no longer consistent with the provision now adopted in article 13. Hence the text of paragraph 4 should be amended to bring it into line with the rule stated in article 13.

64. Mr. YASSEEN said he agreed with Mr. Ago's remarks on paragraph 1, and especially on sub-paragraph (*a*). Sub-paragraph (*b*) was really not appropriate in that place, since it dealt, not with impossibility of performance, but with change in circumstances; perhaps it could be inserted in article 22.

65. Paragraph 2 filled a need, and he was prepared to accept it, subject to drafting changes. For example, he thought it would be better to say that it was open to any party " to call for a declaration that a treaty was extinguished " rather than " to call for the termination of a treaty ".

66. Paragraph 3 seemed very necessary, for although permanent impossibility of performance should terminate a treaty, temporary impossibility should only have the effect of suspending it.

67. He endorsed the principles set out in paragraph 4, but drew attention to Mr. Verdross's judicious criticism of the drafting: the point was not that a party could call for the termination of a treaty which conflicted with a *jus cogens* rule, but that the establishment of new *jus cogens* rules making a treaty illegal put an end to it immediately. The Drafting Committee should perhaps be left to decide where paragraph 4 could best be placed. Perhaps all the provisions concerning *jus cogens* could be combined in a single article; but it was also possible to distribute them among the appropriate articles.

68. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Ago that it would be preferable to delete the provisions of paragraph 1 entirely, mainly because there were conflicting views as to how the rules of State succession would apply; it was not possible for the Commission to prejudge questions of State succession or to discuss them at the present session. Moreover, as Mr. Ago had pointed out, if the opening proviso were dropped, paragraph 1 would lose all value.

69. With regard to paragraph 2, he agreed that the rule in sub-paragraph (*a*) was necessary. Sub-paragraph (*b*), however, appeared to a civilian lawyer to lack the character of generality necessary for a rule of law. To some extent, the question envisaged in paragraph 2 (*b*) was connected with that dealt with in paragraph 2 (*c*) (i) of article 22, relating to the frustration of the further realization of the object and purpose of the treaty. He therefore suggested that the Drafting Committee should be invited to consider whether the provisions of paragraph 2 (*c*) (i) should be transferred from article 22 to article 21.

70. There appeared to be general consent to the rule embodied in paragraph 2.

71. He noted the general agreement on the substance of paragraph 4 and the suggestion that it should be transferred to article 13. The Special Rapporteur has objected that article 13 referred to the validity of treaties rather than to their termination. His own suggestion was that article 13 and paragraph 4 of article 22 should be replaced by a provision in two parts, the proper place for which would be in section I, immediately after article 4. The provisions in question would thus be in their proper place and the logical difficulties which had been encountered would be overcome.

72. Mr. LIU observed that reference had been made to the case of South West Africa. The records of the San Francisco Conference showed that it had then been envisaged that all mandated territories would be placed under the trusteeship system, and by signing the Charter, the parties thereto had subscribed to that arrangement. In fact, apart from South West Africa, no difficulty had been encountered in carrying out the transfer from one system to another. But the case of South West Africa was not really relevant to the present issue; there was no conflict with paragraph 2 (*b*) because the legal arrangement concerned had been replaced by a new one.

73. Mr. EL-ERIAN said he agreed on the need to retain paragraph 1. He could not altogether subscribe to the Special Rapporteur's approach in paragraph 2 (*b*), however, and considered that Sir Gerald Fitzmaurice had been right to formulate the rule more broadly to cover any case of " supervising literal inapplicability arising from complete disappearance of the field of application of the treaty ";[7] that criterion seemed to him the correct one. As the Chairman had pointed out, the question was connected with paragraph 2 (*c*) (i) of article 22; for the disappearance of a legal arrangement or régime did not in itself result in the termination or dissolution of the treaty, but would do so if the effect of the change was such as to frustrate the further realization of the object and purpose of the treaty.

74. As the International Court had held in the *South West Africa* cases, international accountability had become part of the international legal order and the formal dissolution of the League of Nations in 1946 by no means meant that obligations, rights and duties arising out of agreements to which it had been a party were extinguished. In bringing their cases before the International Court, Ethiopia and Liberia had relied on that view.

75. Mr. TABIBI said that except for the final proviso, paragraph 1 should be retained, because State succession could bring about changes that had a very significant effect upon the purposes of, and obligations arising from, a régime established by a treaty. Mr. Ago's objection that that paragraph had nothing to do with the two that followed was more pertinent to the question whether the extinction of a party in violation of the Charter involved the responsibility of a State. The answer was surely in the affirmative, but the proviso ought to be omitted.

76. He could see no objection, in principle, to analogous provisions appearing in a draft on the law of treaties and in a draft on state succession.

77. Mr. CASTRÉN said he had only one comment to make. Members had spoken of the automatic extinction of treaties whose performance had become impossible, and he fully agreed with that view if the impossibility was real, for in that case the treaty came to an end immediately. There were doubtful cases, however, in which the impossibility might be only temporary and the other party could contest its permanence. In such cases, it should be possible to resort to impartial adjudication and to apply the provisions of article 25.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that he would begin his summing up of the discussion on article 21 by considering paragraph 4. In the light of the Commission's decisions on article 13, it would be agreed by all that paragraph 4 would have to be reworded so as to make its provisions more positive and automatic; the only question which arose was that of the placing of the paragraph. His own view was that if article 13 remained in section II, dealing with the initial validity of treaties, then the provisions of paragraph 4, even if made into a separate article, would have to remain close to article 21 on logical grounds. The question of the termination of a treaty was different in its effects from that of initial validity.

79. The alternative course suggested by the Chairman provided a possible solution. He recalled, however, that when Mr. Rosenne had suggested that the whole matter of *jus cogens* should become a separate article, that suggestion had not been favoured by the Commission because of a reluctance to exaggerate the significance of *jus cogens*.

80. With regard to paragraph 1, there were two conflicting schools of thought concerning its retention. He himself held very strongly that unless it was possible to include a proviso along the lines of the opening words of sub-paragraph (*a*), the whole of the paragraph would become extremely misleading. A reservation of some kind regarding State succession would have to be embodied in sub-paragraph (*a*).

81. With regard to paragraph 1 (*b*), it was perhaps true to say that its contents were more closely connected

[7] *Yearbook of the International Law Commission*, 1957, Vol. II (United Nations publication, Sales No.: 1957.V.5, Vol. II), p. 29.

with the *rebus sic stantibus* doctrine than with the remainder of article 21. However, its provisions properly followed those of paragraph 1 (*a*).

82. He had included paragraph 1 without any great enthusiasm, as he had explained in his commentary. He suggested that the Drafting Committee should be invited to endeavour to work out a formulation less open to objection and when that was submitted to the Commission a decision could be taken on whether to retain the paragraph or not.

83. There appeared to be no serious controversy regarding paragraph 2 (*a*), which envisaged cases that were not frequent in practice. He had included the words " after its entry into force " in the opening sentence of paragraph 2 in order to stress the distinction between a supervening impossibility of performance and an impossibility which had already existed at the time of the treaty's conclusion. An impossibility of performance which, unknown to the parties, had existed at the time of the treaty's conclusion would raise the question of error rather than that of impossibility of performance. But the words " after its entry into force " were admittedly superfluous.

84. In paragraph 2 (*b*), he had had in mind such cases as the dissolution of a customs union. Clearly, in a case of that type, a treaty with such a union would become impossible to perform. In view of some of the difficulties to which that paragraph might give rise, and to which certain members had referred, he suggested that the Drafting Committee should reconsider its provisions in the light of the discussion.

85. Lastly, paragraph 3 appeared to have given rise to no objections apart from points of drafting. Its provisions were rendered necessary by the presence of paragraph 2 (*a*).

86. The CHAIRMAN suggested that article 21 should be referred to the Drafting Committee with the request that it should make a recommendation on the placing of paragraph 4 and redraft paragraph 1 with a view to a final decision being taken by the Commission at a later stage.

It was so agreed.

The meeting rose at 12.55 p.m.

698th MEETING

Wednesday, 12 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 consider article 23 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

SECTION IV (PROCEDURE FOR ANNULLING, DENOUNCING, TERMINATING WITHDRAWING FROM OR SUSPENDING A TREATY AND THE SEVERANCE OF TREATY PROVISIONS)

ARTICLE 23 (AUTHORITY TO ANNUL, DENOUNCE, TERMINATE, WITHDRAW FROM OR SUSPEND A TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the article he had drafted referred back to the provisions of article 4 of Part I and stated that the rules laid down there applied, *mutatis mutandis*, to the authority of a representative to annul, denounce, terminate, withdraw from or suspend a treaty. Since termination by agreement was one of the methods of termination provided for in Section III, it was appropriate to include the provisions of sub-paragraph (*b*) which made the same rules applicable to the authority of a representative to consent to the act of another State annulling, denouncing, terminating, withdrawing from or suspending a treaty.

3. The main problem for the Commission was to decide whether to include in the draft a short article of the kind proposed, which in effect simply referred to article 4 of Part I, or to spell out the authority to annul, denounce, etc. in greater detail.

4. Mr. CASTRÉN said that, for the reasons stated by the Special Rapporteur, it would be useful and logical to include the article in the draft; he would confine himself to two comments of secondary importance.

5. It was right to say that the rules laid down in article 4 of Part I could only be applied *mutatis mutandis* to the cases contemplated in article 23: but perhaps it could be explained, by means of a few examples in the commentary, what that meant in practice.

6. Secondly, the article should perhaps mention not only the authority of representatives, but also that of organs of the State. It was true that article 4 of Part I referred only to representatives; but although the head of State appeared to be included in that category, he was, essentially, one of the principal organs of the State, responsible for performing important acts connected with the termination and suspension of treaties.

7. Mr. LACHS said he believed the reference to article 4 of Part I was fully justified, but he had some doubts regarding the enumeration of the various acts referred to in article 4 and now in article 23. Those acts could be divided into two groups: the first consisted of acts preparatory to the conclusion of a treaty, and comprised negotiation, drawing up and authentication; the second consisted of a series of acts which had definite legal effects, namely, signature, where ratification was not required, ratification, accession, approval and acceptance.

8. Sub-paragraph (*a*) referred to the termination of the treaty and listed a set of acts which had definite effects on the treaty, but none of them corresponded with the three acts preparatory to termination, namely, again, negotiation, drawing up and authentication. Thus, in the article as it stood, sub-paragraph (*a*) had no counterpart in the first part of the article, which referred to article 4.