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Summary record of the 834th meeting

Topic:
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82. With regard to Mr. Castrén's proposal about the word "fundamental", the article was concerned only with a fundamental change in circumstances. In his opinion it should be made plain that no mere change of circumstances entitled a party to terminate or withdraw from a treaty.

83. The second reason why the text was inadequate was that it contained no provision for adjudication, a gap on which seven governments had commented. When he had drawn attention to a similar gap in other articles, he had been told that the Commission was engaged in drafting substantive rules and not with their procedural application or institutional development. But he agreed with Mr. Verdross that procedure could in some cases be a condition of formulating the rule itself, and judicial determination could become a part of the substantive rule. In the present instance, a rule that would allow States to invoke a fundamental change of circumstances must contain an integral provision requiring them to try to seek a settlement first, and he could not agree with Mr. Castrén that, for that purpose, article 51 would suffice.

84. For those reasons he considered that even the Special Rapporteur's new version was dangerously vague and difficult to accept, unless considerably modified. An example of the kind of danger he had in mind was provided by the fact that certain elements of the 1963 draft, although it was known to be provisional, had been invoked by Panama against the United States without any reference whatever to the procedural devices set out in article 51.

The meeting rose at 12.40 p.m.

834th MEETING

Wednesday, 19 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 44 (Fundamental change of circumstances)
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 44.

¹ See 833rd meeting, after para. 48, and para. 49.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been reminded of a proposal by the Pakistan Government that a provision should be incorporated in article 44 stipulating that a party which had substantially contributed to the change of circumstances could not invoke that fact as a ground for termination or withdrawal from the treaty. That proposal might be examined in conjunction with his proposal that the Commission consider the inclusion in the article of an additional paragraph concerning breach.

3. Mr. RUDA said he agreed with those who, in 1963, had doubted whether the principle *rebus sic stantibus* was recognized as a rule of modern international law. Furthermore, to adopt the principle in the draft would jeopardize the security of treaties. The draft should therefore specify the conditions in which it was applicable and provide appropriate safeguards.

4. Paragraphs 1 and 2 of the 1963 text had stated much the same idea, and the Special Rapporteur had had the choice of dropping either the one or the other. And yet there had been a shade of difference between those two paragraphs, as Mr. Briggs had noted. The original paragraph 1 had stressed, more categorically than paragraph 1 of the latest redraft, the exceptional character of the principle *rebus sic stantibus*. In the course of successive revisions, the principle had become diluted. The Commission should either stress in paragraph 2 of the latest redraft the exceptional character of the principle, or restore paragraph 1 of the 1963 text as the opening passage of article 44.

5. He noted that in the latest redraft the words "a fact or state of facts" had replaced the expression used in the 1963 text, "fact or situation". The Special Rapporteur had explained the connexion between that provision and article 34 concerning error, but in his (Mr. Ruda's) opinion, the expression used in the 1963 text, and in particular the word "situation", at any rate in the Spanish version, was preferable.

6. He approved of the addition of the word "continuing" in paragraph 1 (b), which made it clear that the principle did not apply to obligations already discharged by both parties.

7. He had been interested to hear Mr. de Luna say that paragraph 1 should state clearly that the conditions laid down in sub-paragraphs (a), (b) and (c) were cumulative.

8. With regard to paragraph 2, he agreed with Mr. Verdross that it could not apply to a treaty which had already been executed. That was logical and correct in theory, but since the paragraph dealt with frontier problems, a subject on which States were very sensitive, the reference to treaties fixing boundaries should be allowed to stand. States would certainly be favourably impressed by a provision which emphasized still further the exceptional nature of the principle and declared that it was not applicable to the politically very delicate subject of frontiers. He did not, however, understand the reference to provisions effecting a transfer of territory. Since any such transfer necessarily presupposed the fixing of a boundary, it should suffice if only the latter idea were mentioned.

9. With regard to the question of the safeguards for the application of the rule, he noted that the idea of a higher jurisdiction appeared to overhang the entire draft. Article 31, for example, contained the words "unless the violation of its internal law was manifest", while article 43, paragraph 2, in the Special Rapporteur's redraft, opened with the words "If it is clear". Those were patently subjective notions on which a ruling could only be given by a third party, not by the parties themselves. Again, the idea of a higher jurisdiction was inherent in article 44, where it spoke of a change that transformed in an essential respect the character of obligations. Who was to decide what was "an essential respect"? Consequently, he supported the comment by the United Kingdom Government that mere reference to the Charter under article 51 of the draft was quite inadequate for the purpose of safeguarding the security of treaties.

10. It was true that the rule laid down in article 44 might redress certain injustices. But at the same time it would tend to give rise to considerable instability and to manifest injustice in international relations, unless there was an appropriate safeguard to its application. In the ever-present dilemma between stability of the law and development of the law, he was on the side of stability.

11. Mr. ROSENNE said he was reminded of the words of Mr. Amado at the 695th meeting when he had said that: "Those who had been brought up to believe in the sanctity of the maxim *pacta sunt servanda* and in the inviolability of treaties were always inclined to adopt a defensive attitude to the insidious wiles of that serpent of the law, the *rebus sic stantibus* clause".² The real problem posed by article 44 was to achieve a balance between the *pacta sunt servanda* rule and the cautious recognition of the need to allow for the modification of treaties so that excessive rigidity should not prove harmful to the maintenance of peace.

12. Article 44, with articles 43 and 68, paragraph (c), formed a logical scheme in which the first contained an element of controlled subjectivity and the other two contained objective elements.

13. When describing the rule of *rebus sic stantibus* as controversial, he was uncertain whether governments were questioning its existence, or its scope and nature. Moreover, some of the comments perhaps reflected a transient attitude created by pending disputes.

14. The Commission should put aside doctrinal controversy and decide the question: should article 44, whether it was *lex lata* or whether it was *de lege ferenda*, be included in the draft? He favoured its being kept more or less in the form adopted at the fifteenth session, for the reason given in paragraph (6) of the commentary to that text, which stated that "The Commission, however, concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty might remain in force for a long time and its stipulations come to place an undue burden on one of the parties."³

15. With regard to the Special Rapporteur's new text, he feared that the amalgamation of paragraphs 1 and 2 might obscure the exceptional character of the rule. He was therefore inclined to think that paragraph 1 of the earlier text should be retained with the substitution of the words "concluded may not" for the words "entered into may only", the substitution of the word "unless" for the word "under", and the addition at the end of the paragraph of the words "are established".

16. Paragraphs 1 and 2 of the 1963 text rightly differentiated between mere changes of circumstances and fundamental changes of circumstances, and that distinction should be maintained.

17. The greater precision of the new paragraph 1, which referred to a fundamental change being invoked "by a party", was appropriate because it made it plain that the article only applied to States which had consented to be bound and for which the treaty had come into force. The article would not therefore apply to any State bound otherwise than by its own consent—if that were possible, which he doubted—and which was not a party within the terms of article 1 (*f*) (*bis*). The observations by the Governments of Cameroon and Jamaica on that point should be reflected in the text and in the commentary.

18. While there was force in a number of government comments concerning the impact of the principle of self-determination on the law of treaties, the Commission should adhere to its policy of refraining from interpreting the Charter. That was all the more necessary because the problem of self-determination had recently been referred to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Articles 37, 45 and 68, paragraph (c), probably had a bearing on the principle of self-determination, and the matter could be further clarified in the final version of paragraph (1) of the commentary.

19. The Special Rapporteur's new version of paragraph 2 was not very satisfactory; the 1963 text of paragraph 3 (*a*) was preferable. In conjunction with article 46, that provision would be sufficiently comprehensive.

20. The question had been raised whether or not to include in article 44 provisions analogous to those proposed by the Special Rapporteur for inclusion in article 43, paragraphs 3 and 4. But the very consideration which had prompted that proposal as regards article 43 should militate against introducing something of the same kind into article 44. Article 43 was entirely objective in character and the purpose of the new paragraph 3 was to avoid introducing subjective elements into it; article 44 attempted to provide an objective rule after the appearance of certain subjective factors which made the maintenance of the treaty burdensome for one of the parties, and the introduction of any provision similar to the new paragraph 3 proposed for article 43 would only be confusing. He had nothing to add to the comments he had already made during the discussion on article 43 concerning the proposed new paragraph 4 to that article.

21. He was unable to accept the thesis advanced by previous speakers about the relationship between procedural and substantive provisions and the contention that

² *Yearbook of the International Law Commission, 1963, Vol. I, p. 142.*

³ *Ibid., 1963, Vol. II, p. 209.*

procedure could be a condition for the formulation of a rule of law; it could only be a condition for its application. The concern expressed by those speakers was met in the present instance, and would be further emphasized by the Special Rapporteur's proposal to transfer certain general provisions to the beginning of section III. It would be impracticable for the Commission to go beyond article 33 of the Charter, which all would agree constituted *lex lata*. A diplomatic conference might wish to do more, but he was far from convinced that disputes about the interpretation or the application of treaties were inherently more justiciable than other international disputes, an idea which had been introduced at the 1907 Hague Peace Conference.

22. He doubted whether article 44 entailed greater risks for the stability of treaties than certain other articles in the draft. Indeed, the risks might even be less.

23. It seemed to him that the 1963 text achieved a balance between the requirements of stability and those of change, and could form a basis for discussion at a diplomatic conference.

24. Mr. YASSEEN said that the principle on which article 44 was based was not seriously challenged by governments. The principal criticism related to the procedure for applying the article. His own opinion was that the question of the application of such an article should be independent of the question of its formulation, a view often expressed by Mr. Ago.

25. He did not deny that, in some cases, a certain procedure for the application of a provision could be considered as a rule of substance. For example, Mr. Verdross had suggested, in his anxiety to safeguard the stability of treaties, that prior negotiations should be regarded as a substantive condition to be fulfilled before the article could operate. In that respect, Mr. Verdross had not gone so far as some governments, in whose opinion the article should not operate except after submission to arbitration or to the International Court of Justice.

26. His personal opinion was that an article of that nature would serve very little purpose. Normally, States did not sever relations until after they had tried to reconcile their points of view and had approached the other parties with a request for a review of the problem. Accordingly, conversations and negotiations did not have to be considered as a substantive condition for the operation of the rule *rebus sic stantibus*.

27. With regard to the drafting, the omission of paragraph 1 of the 1963 text was a definite improvement; having proposed that change in 1963,⁴ he was glad that his proposal had been heeded, since the substance of the former paragraph 1 was inherent in the former paragraph 2.

28. Under paragraph 1 (c) of the Special Rapporteur's redraft, it was a condition precedent for the operation of the doctrine *rebus sic stantibus* that the change in circumstances had not been foreseen. That proposition was correct, for if the parties had made provision for dealing with the consequences of the change, the article

would be inapplicable. He did not oppose the idea that the exception should be regarded as a condition for the application of the principle, but he thought that the paragraph should retain the form of the corresponding provision in the 1963 text, which in the revised wording had been strengthened without any compelling reason. He preferred the wording "for the consequences of which they have made provision in the treaty" to the vaguer expression "its consequences provided for. . .". The 1963 text made it clear that the treaty itself had to contain some provision for dealing with the consequences of a fundamental change of circumstances. A vague provision concerning some unspecified change should not prevent the principle *rebus sic stantibus* from operating.

29. So far as the proposed exceptions were concerned, Mr. Verdross had drawn attention to one of the very real aspects of the problem: the change must not have been provided for and must affect continuing obligations. In other words, the exception was based on the intrinsic nature of the principle *rebus sic stantibus*.

30. The exception concerning boundary treaties or treaties effecting a transfer of territory was merely an application of that general condition for the applicability of a rule. It would therefore be better to work out a formula which would cover not only those particular cases but all cases of the same nature. In that respect the Harvard draft might be helpful, for it stated that the treaty "may be declared. . . to have ceased to be binding, in the sense of calling for further performance".⁵ That language might form the basis of a formula of a general exception derived from the very nature of the principle *rebus sic stantibus*, and not covering only certain special cases.

31. Mr. TUNKIN said that, as he had explained at the fifteenth session, in his view a rule of international law concerning a fundamental change of circumstances did exist, but it was imprecise and for that reason presented a danger to the stability of treaties and international relations as a whole. The Commission's task was to define the rule clearly and make it applicable only in exceptional cases.

32. Generally speaking, the 1963 text was acceptable, though open to drafting improvements. In some respects the Special Rapporteur's new text was better, but of course in substance it did not depart from the earlier version.

33. The Special Rapporteur's new text for the beginning of paragraph 1 could be made more precise by dropping the phrase "or state of facts". Similarly, he was not in favour of using the expression "a situation" which, as United Nations practice had demonstrated, was not a precise notion.

34. In the new paragraph 1 (a), the word "essential" should be dropped as it would require interpretation.

⁵ Article 28: *Rebus sic stantibus*

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

⁴ *Yearbook of the International Law Commission, 1963, Vol. I, p. 250, para. 35.*

35. In the new paragraph 1 (b), the insertion of the word "continuing", as proposed by the Australian Government, was acceptable since it made plain that the obligations in question had not yet been executed. The words "in an essential respect", however, were not sufficiently definite and ought to be replaced by some such word as "radically".

36. He agreed with Mr. de Luna and Mr. Ruda that the three conditions set out in sub-paragraphs (a), (b) and (c) of the new text must all be met before the rule in paragraph 44 could be applicable, and that that should be brought out more clearly in the text.

37. He had already expressed his views on the general problem of combining substantive and procedural rules. The attempt to combine important substantive rules with the obligation to submit disputes to compulsory jurisdiction often resulted in killing the rule, because compulsory jurisdiction had only been accepted by some forty Member States of the United Nations.

38. Mr. PESSOU said he agreed with Mr. Ruda and Mr. Rosenne regarding the exceptional character of the rule *rebus sic stantibus*.

39. From among the comments made during the most recent session of the General Assembly, he wished to refer only to those by the delegation of Cameroon, which had said that it would be going too far to exclude boundary treaties altogether from the operation of the rule *rebus sic stantibus*, since to do so would be "contrary to the principle of self-determination laid down in the Charter, especially in cases where the States had had their territorial boundaries forced on them without the slightest heed for geographical or ethnic considerations". It would be realized that Cameroon's position was influenced by the problem of the two former territories of Cameroon under the trusteeship of the United Kingdom and France respectively and of the attachment of a part of one of them to Nigeria, a problem which had been brought before the International Court of Justice.⁶

40. Referring to the 1963 text of article 44, he said that in certain situations a change of circumstances did indeed occur, but the change itself was not decisive. The *clausula rebus sic stantibus* had been described as a rule operating in the case of a change of circumstances which rendered the achievement of the object of the treaty utterly impossible; however, it operated not as a term of the treaty but as a general principle of law.

41. Immediately after the proclamation of the independence of the thirteen French-speaking States in Africa south of the Sahara, what had happened was, at least in the case of Senegal and Dahomey, that the treaties fixing the frontiers had become the law for the new States, pursuant to the principle *uti possidetis, ita possideatis*. They also enjoyed the advantages of the agreements concluded by a small number of States for the benefit of the entire international community. The rule *rebus sic stantibus* did not raise any problem so far as the French-speaking States of Africa were concerned, for French law, from which their own law was derived, had the theory of *imprévision*. It was true that, as between

France and those States, practice had evolved. By their silence, the new States would be provisionally bound by the earlier general conventions to which the former territorial sovereign had been a party. It would be open to those States, by simple notice and without observance of the procedure laid down in those treaties, to declare that they did not accept those treaties. That approach was close to that reflected in the comment by the United Kingdom Government, that "in the present connexion a party alleging a fundamental change of circumstances is under an obligation, before it may invoke the change in any way, to propose negotiations to the other party and, if these are not successful, at least to offer arbitration of the issue" (A/CN.4/183/Add.3, p. 11).

42. As between the French-speaking States of Africa south of the Sahara and the former metropolitan Power, the question of arbitration had never arisen and no dispute had been brought before the International Court of Justice, for there was another procedure which worked very satisfactorily. If any difficulty arose, either by reason of earlier agreements signed by France or because an African State needed to strengthen its sovereignty, the head of the African State in question approached the President of the French Republic, who took the necessary action *vis-à-vis* the other parties to work out a settlement.

43. The legal relationship established between France and those States at the time of recognition of their independence by France was evolving rapidly and peacefully. But that transformation was not akin to "decolonization", a term which had overtones of aggression. The process was one of political emancipation in a climate of mutual trust. The practice which had been established was excellent; it safeguarded the freedom of action of the new States and had prevented, as was necessary, the formation of a legal vacuum in international relations at the time of the transfer of power.

44. With regard to the form of article 44, the fact that the parties had not foreseen the change, and the absence from the treaty of provisions concerning the change, should be stated not as a supplementary condition but as the principal condition for the operation of the rule laid down in the article.

45. Mr. AGO said that, after the debates in the Commission in 1963, the conclusion had been reached that the *clausula rebus sic stantibus*, however dangerous its operation might be, was a safety valve and definitely answered a need. The rule was not new; it had existed in earlier times when the means of peaceful settlement of disputes had been much more primitive, and when the idea of the compulsory jurisdiction of an international court of justice would have been inconceivable.

46. Some members of the Commission were concerned because there was no objective authority qualified to determine whether a fundamental change of circumstances had or had not occurred. Their concern might be justified, though the existence of a provision under which a State could invoke such a change as a ground for terminating a treaty did not in any way imply that the other party or parties were bound to concur; they might very well take the opposite view, that the treaty remained in force. That meant a legal dispute and every possible means should be employed to settle it—negotiation,

⁶ Case concerning the Northern Cameroon, I.C.J. Reports 1963, p. 15.

compulsory jurisdiction if agreed to by the parties, arbitration, or special modes of settlement like those mentioned by Mr. Pessou. It was to be hoped that, with the progressive development of international law, still further means would be devised.

47. On balance, the Special Rapporteur's latest redraft was an improvement on the 1963 text. If only for psychological reasons, it was important to stress the exceptional character of the proposed rule. From that point of view, the repetitious language of the 1963 text had not been particularly felicitous.

48. It would be a pity to drop the word "situation", which he preferred to "state of facts", alongside "fact" in paragraph 1, for often it was a situation in the general meaning of the term that was involved. But another possibility would be to use the word "circumstances", a term traditionally used in connexion with the *clausula rebus sic stantibus*; it still appeared in the title of the article and had appeared in paragraph 1 of the 1963 text. If that term were used, the ideas contained in paragraph 1 of the 1963 text and paragraph 1 of the new text might be expressed in a single clause which might read: "A change which has occurred in the circumstances existing at the time when the treaty was entered into may be invoked . . .".

49. One of the changes proposed by the Special Rapporteur was that the idea expressed in paragraph 3 (b) of the 1963 text should be transferred to paragraph 1 (c) of his redraft. On close inspection that change was not satisfactory either. According to the latest redraft, the change in circumstances could not be invoked if foreseen in the treaty; actually, however, the treaty might have mentioned precisely such a change as a ground for terminating the treaty.

50. Furthermore, paragraphs 1 (a) and (b) of the redraft laid down two equally essential conditions which had to be fulfilled before the exceptional rule laid down in the article could operate. If a third condition were added, it could hardly be stipulated that all three conditions had to be fulfilled simultaneously, particularly as the presence of the word "and" between the second and the third conditions seemed to introduce an element of ambiguity. If, on the other hand, only two conditions were mentioned, the place and meaning of the word "and" became perfectly clear.

51. For the purpose of expressing the condition laid down in paragraph 1 (c) of the redraft—the absence of provisions in the treaty—the Commission might mention the condition at the very beginning of the article in the following way: "A change which has occurred in the circumstances existing at the time when the treaty was entered into and which was not foreseen by the parties to the treaty may be invoked . . .". In that way, the drafting would be simplified to the maximum extent.

52. With regard to the two conditions laid down in paragraphs 1 (a) and (b), he saw no reason to amend the redraft proposed by the Special Rapporteur. The only effect of replacing the words "an essential basis" by the words "a basis" would be to state the rule in less categorical terms, and that was the very thing they wished to avoid.

53. The suggestion by Mr. Verdross at the previous meeting that paragraph 2 should contain a general reference to treaties which had been fully executed had at first sight seemed attractive, but on reflection he did not think it was acceptable. A treaty which had been fully executed was normally a treaty which had ceased to exist, and consequently a provision drafted on the lines suggested by Mr. Verdross would be devoid of all meaning. On the other hand, a treaty fixing a boundary was not terminated for the reason that it had been fully executed; a treaty which fixed a boundary along the thalweg of a river was a treaty which was not terminated and was not fully executed; it was in force and remained in force and continued to have effect. Consequently, it was better that paragraph 2 should retain the reference to a treaty fixing a boundary. The other case mentioned in paragraph 2, that of a treaty effecting a transfer of territory, seemed in fact to be covered by the reference to a boundary treaty.

54. Since the members of the Commission were agreed as to substance, and since the comments of governments on the whole seemed to endorse the article, he suggested that the Drafting Committee study the questions still undecided without, however, amending too drastically the text adopted in 1963.

55. Mr. de LUNA said that, after listening to the discussion, he saw no reason to change the views he had expressed at length in 1963. At the twentieth session of the General Assembly, he had noted with satisfaction in the Sixth Committee discussions that article 44 was generally acceptable to governments. That result was particularly fortunate because the provisions of the article were essential to the progress of international law.

56. With regard to the text, he preferred the term "circumstances" to "a fact or state of facts". "Circumstances" was the term traditionally used in the *rebus sic stantibus* rule. It had the additional advantage of being supported by etymological considerations, since it was derived from the same Latin root as *stantibus*. The provisions of article 44 came into play as a result not of a mere isolated fact, but of a change in the facts surrounding the treaty, in other words, of the circumstances.

57. He agreed with Mr. Rosenne, Mr. Yasseen and Mr. Tunkin that procedural rules should be a condition not of the formulation of substantive rules but of their application. Substantive rules were directly addressed to those called upon to comply with them, who did so spontaneously in most cases. It was only in exceptional cases that an authority independent of the parties had to decide on the application and interpretation of those rules. To make the very existence of substantive rules subject to procedural qualifications would betoken an extremely pessimistic view of the prospects of compliance by States in good faith with such rules. In fact, violations of substantive treaty provisions were extremely rare. There were some 30,000 international treaties in existence and they were being daily carried out in good faith by the parties thereto. It was therefore not possible to say that there could be no compliance with a rule of international law in the absence of a system of third party adjudication and of machinery for the enforcement of decisions.

58. The pessimistic view to which he had referred reminded him of the "double norm" doctrine put forward towards 1880, by the advocates of legal positivism, Binding in criminal law and Thon in civil law. According to that theory, every legal rule appeared as two norms: first, an imperative norm addressed to the actual subjects of the law and laying down the consequences of a given behaviour in society; secondly, a norm addressed to the authorities—from the law courts down to the police—instructing them as to what their reaction should be to a given behaviour on the part of the addressees of the first norm. According to those who held that doctrine, the first norm was of little or no importance; the whole emphasis should be placed on the second norm, which was addressed to the courts and to the enforcement authorities. That reactionary philosophy, which had emerged not inappropriately in the days of Bismarck, had failed to gain acceptance in the realm of municipal law. It was even more bound to fail in international law, which governed a community consisting of a small number of subjects and which laid down what were essentially rules of co-ordination. The fact that the subjects of international law were few in number enhanced the importance of each of them; moreover, they were all of them sovereign and equal.

59. He agreed with Mr. Tunkin on the need to avoid anything that might hamper the progress of international law. At a time when society was going forward at the speed of the jet engine, the law should not be allowed to advance at a walking pace. States should be trusted to carry out substantive rules in good faith. In the absence of good faith, no procedural safeguards could ensure the observance of international law, and force would dominate international relations.

60. Mr. JIMÉNEZ de ARÉCHAGA said that he would like to see in article 44 an express reference to judicial procedures, as advocated by Mr. Briggs, as well as by a number of governments. Like Mr. Verdross, he also favoured the inclusion of a reference to diplomatic negotiations.

61. However, he was prepared to abide by the compromise reached in 1963 and omit the reference to judicial procedures in article 44, while maintaining the general provisions in article 51. That being his position, he wished to place on record his interpretation of the relationship between articles 44 and 51.

62. Article 51 did not provide for any unilateral right of termination. Paragraph 1 of that article laid down the requirement of notification of any claim by a party to terminate a treaty. With regard to the consequences of that notification, there was a significant difference between the provisions of paragraph 2 and those of paragraph 3. It was only in the event of no reply being received from the other party that, under the provisions of paragraph 2, a unilateral right of termination existed. In the event of objection being raised by any other party, paragraph 3 specified that "the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations".

63. That reference was not devoid of legal significance, since Article 33 (1) of the Charter obliged all member

States to seek a solution of their disputes by "peaceful means of their own choice". Accordingly, a party was not entitled to refuse to recognize the existence of a dispute and thereby deny to the other all methods of peaceful settlement. A lot had been talked about unfounded claims for revision, but it was important to remember that all too often a satisfied State would adopt a negative attitude and refuse to recognize the existence of a dispute, thereby denying to its treaty partner any means of settlement. In the presence of such an attitude, it would be in conformity with Article 33 of the Charter for the claimant State to take unilateral action. The normal position, however, would be the recognition of the existence of a dispute; that recognition would result from the reply to the original notification. In such cases, it was of course possible that the parties might not agree on the choice of the appropriate method of settlement. And under the Charter, one party was not entitled to impose on the other party a particular mode of settlement. The theory of the Charter was that every dispute had an appropriate procedure for its settlement and Article 36 (1) instructed the competent organs of the Organization to recommend "appropriate procedures or methods of adjustment".

64. If a disagreement arose on the choice of procedures for peaceful settlement, it was for the appropriate organ of the United Nations, or of the competent regional organization, to recommend the appropriate mode of settlement of the dispute. Now, Article 36 (3) of the Charter, which was binding on all United Nations organs, stated that "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court". Normally, the kind of dispute that could arise concerning the validity or termination of a treaty would, in the majority of cases, be a legal dispute.

65. Those provisions did not amount to a system of compulsory adjudication, since Article 36 of the Charter did not lay down binding rules for States. However, the sequence of events clearly pointed to judicial adjudication of the question of the change of circumstances as a ground for the termination of a treaty. That approach was logical, for if a State initiated a legal dispute concerning the validity or termination of a treaty, the least that could be required, in order to release it from the treaty, was that it should be prepared to accept adjudication of the dispute by an impartial third party.

66. He supported the proposal by Mr. Verdross to replace the reference to a treaty provision fixing a boundary or affecting a transfer of territory by the more general reference to executed treaties and treaties that contained continuing obligations. He supported that proposal all the more readily because in 1963 he had himself unsuccessfully attempted to suggest the inclusion in article 44 of a provision of that type. It was true that, even after a treaty of that type had been executed, it continued to exist as a legal title to the territory transferred under its provisions. In that respect, it was clearly necessary to distinguish between the treaty itself and the situation created by its execution. All too often, a State attempting to revise a frontier settlement did so by attacking the treaty. It was therefore largely for psycho-

logical reasons that the provision excluding boundary treaties had been included, so as to reassure States that binding boundary settlements would not be upset by the rule in article 44. However, as he saw it, the exception did not require to be stated in article 44 because, from the legal point of view, the matter was already covered by the provisions of paragraph 1 (b) of article 53, which stated that the lawful termination of a treaty "Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty".

67. An illustration of the distinction between executed and executory provisions in a treaty effecting a transfer of territory was provided by the "Free Zones of Upper Savoy and the District of Gex" case.⁷ The treaty provisions in dispute related to a transfer of territory from France to Switzerland; those same provisions, however, established a continuing obligation on the part of France to abstain from levying customs duties in certain frontier zones. Treaty provisions of the latter type could involve the application of the *rebus sic stantibus* principle, and in the very thorough discussion which had taken place in 1963, that example had been particularly stressed.

68. On the wording of the new paragraph 1(a), he agreed with Mr. Ago regarding the retention of the adjective "essential", which underlined the exceptional character of the rule. He also supported Mr. Ago's suggestion to incorporate in the main clause of paragraph 1 the idea embodied in the new paragraph 1 (c).

69. The introductory paragraph, which it was now proposed to drop, he felt should be retained because it served a useful psychological purpose, although it was not essential from the legal or technical point of view.

70. He did not favour the inclusion in article 44 of two additional paragraphs, similar to paragraphs 3 and 4 of the Special Rapporteur's redraft of article 43. Those provisions would only introduce further complexities into an already difficult article. The first of those paragraphs was unnecessary, because its purpose was already served by the rule of estoppel. A similar provision had been proposed by the Special Rapporteur in 1963, but had not been adopted by the Commission. At that time, the present Chairman had given as an example "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".⁸

71. Mr. CASTRÉN said that, for the purpose of replying to two questions asked by the Special Rapporteur, he would elaborate on his remarks at the previous meeting.

72. First, he did not think that article 44 should contain a provision expressing an idea similar to that embodied in article 43, paragraph 3, as redrafted. If a party invoked a change of circumstances which it had brought on itself, such a change could hardly be said not to have been foreseen by the party in question—a point mentioned by Mr. Rosenne and Mr. Jiménez de Aréchaga.

Such action would, moreover, be unacceptable as conflicting with the overriding principle of good faith.

73. To the suggestion that article 44 should contain a provision analogous to that of article 43, paragraph 4, as redrafted, he would reply that if the Commission wished to deal with that point, it would have to do so either in a separate, general article, or in article 53, on the legal consequences of the termination of a treaty.

74. Mr. BRIGGS said that he had always endeavoured to avoid doctrinal disputes. However, he completely disagreed with the view that questions of theory prevented any reference to procedure in a substantive article. Article 36 offered a simple example. It stated the rule that "Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void". That rule could equally well be formulated in the following terms: "Any treaty which has been found by an international court to have been procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void". The only question which arose was that of deciding which of the two formulations was better. It had been suggested that a formulation of the second type would hamper the development of international law, but personally he felt that the orderly development of international law required a reference to judicial procedures.

75. On the wording of article 44, he supported the retention of the adjective "essential", which rendered the application of the rule more restrictive. The reference to "a fact or state of facts" was more precise than the single word "circumstances", but the matter could be left to the Drafting Committee.

76. Mr. VERDROSS, replying to Mr. Ago, said that a distinction should be drawn between the execution of a treaty and the validity of a treaty. If a State by treaty ceded a territory to another State, then, on the completion of the cession, the treaty could be said to have been executed, but it could not be said to have ceased to exist; disputes concerning the interpretation of the treaty might arise many years later, even a hundred years later. But the same thing could happen with other treaties. For example, under the State Treaty of 1955, Austria had committed itself to delivering to the USSR a certain quantity of petroleum within a specified period; on the completion of the delivery, the treaty was executed, but disputes concerning the quantity or the quality of the petroleum delivered or other matters might still arise. Thus the underlying principle did not apply only to treaties relating to the territory of a State. He was therefore still of the opinion that in such cases the *clausula rebus sic stantibus* could not be invoked.

77. The CHAIRMAN, speaking as a member of the Commission, said that he remained of the same opinion as in 1963. A rule concerning the operation of the *clausula rebus sic stantibus* was indispensable to international law, in consequence of the development of that law. The rule should, however, be formulated with the utmost care, lest it prejudice the stability of treaties. The fundamental rule was *pacta sunt servanda*, but it might happen that circumstances changed so radically that it would not be in the interest of the international

⁷ P.C.I.J., Series A/B, No. 46.

⁸ Yearbook of the International Law Commission, 1963, Vol. I, p. 149, para. 62.

order to maintain in being a treaty which had become anachronistic; in such a case, an exception to the rule *pacta sunt servanda* should be allowed.

78. Like Mr. Verdross, he considered that article 44 should not apply to a treaty which had been executed. And not only frontier treaties should be considered as having been executed but also the large number of treaties which established a certain régime as between States. Such treaties were executed in two ways: first, there was an immediate execution which established the conditions for the régime, and then an extended execution which maintained the régime in existence. The *clausula rebus sic stantibus* should be applied with extreme care to such treaties, lest it upset the régime in question.

79. To forestall possible abuse, the article should state that the proposed rule would apply to the exceptional case where a decisive element in the conclusion of the treaty had been modified. It would be the Drafting Committee's business to work out a formula offering ample safeguards.

80. The Commission's draft should contain a rule concerning the operation of the *clausula rebus sic stantibus* in order that those participating in the conference of plenipotentiaries which would carry the Commission's work to completion should realize the importance of the question and beware of the risk of the doctrine being abused.

81. Mr. AMADO said that never before, perhaps, had he followed a discussion with such keen interest, nor had he ever experienced such great satisfaction in seeing the correct rule crystallizing out. Every member of the Commission, each in his own way, had made a useful contribution. It remained for the Drafting Committee to work out the best formulation and to remove the minor differences between the versions of the article in the different languages.

The meeting rose at 1 p.m.

835th MEETING

Thursday, 20 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 44 (Fundamental change of circumstances)
(continued)¹

¹ See 833rd meeting, after para. 48, and para. 49.

1. The CHAIRMAN invited the Commission to continue its consideration of article 44.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that his own position remained very much what it had been in 1963 when he had submitted his second report. There were far too many indications, both in State practice and in legal literature, of the existence of a rule or doctrine that the continuance of a treaty could be affected by a fundamental change of circumstances for the issue to be ignored. The Commission was faced with the alternatives of either stating that no such rule existed, or trying to define it with sufficient strictness for it to be acceptable as part of the codification of the law of treaties. The first course was ruled out because it would certainly not receive the support of the majority of governments. Having taken the second course, the Commission had to a large extent discharged its task by adopting a close definition of the conditions for the operation of the rule. No doubt the drafting of article 44 could still be improved, but the position had been reached where the Commission had arrived at a text which, if applied in good faith, should not leave any room for abuse of the *rebus sic stantibus* principle.

3. It had been suggested by some members that article 44 would involve grave dangers to the stability of treaties, unless it contained procedural safeguards in the form of a requirement of the exhaustion of negotiations, and possibly even of a jurisdictional clause. He had some sympathy for those views but felt that there was no reason for making procedural requirements part of the substance of article 44 when the Commission had not done so in the case of article 37, on *jus cogens*, which represented a much greater danger to the stability of treaties. The provisions of article 44 were undoubtedly less susceptible to broad interpretation than some other articles in which the Commission had not included any procedural safeguards.

4. What the Commission should ensure was that the application of the provisions of article 44 was linked with the procedural provisions embodied in article 51, thereby providing the necessary guarantees against a purely arbitrary application of the doctrine of fundamental change of circumstances.

5. The *pacta sunt servanda* rule in itself prevented a State, acting in good faith, from abusing the provisions of article 44. The draft articles on the law of treaties were intended to become an international convention, and the application of that convention in good faith would provide a further guarantee against abuse.

6. It was almost impossible to prevent an arbitrary application of the law by one State on the basis of an interpretation of a legal rule which was considered inadmissible by others. In the present state of international law, protection could not be complete. In that respect, the situation of article 44 was no different from that of other articles, or indeed of other parts of international law.

7. The narrow formulation of the text of the article itself was calculated to diminish the dangers of the doctrine. It had been agreed by all members that the drafting should be as tight as possible so as to make it clear that