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Summary record of the 877th meeting

Topic:
Special missions

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of article 67, paragraph 1 (b) (i), as approved by the Commission. The two French texts were not completely identical but that was possibly unintentional.

122. The wording of sub-paragraph (b) differed slightly from that of article 67, paragraph 1 (b) (ii), but was intended to reflect the same idea.

123. Mr. TSURUOKA said that he had already drawn attention to the difficulty of translating the English verb "to affect" into French. The expression "*porter atteinte*" used in article 40 (bis) was a correct and neat rendering; but, for the sake of uniformity, the whole of the Commission's draft should be re-examined with reference to that point.

124. Further, article 40 (bis) referred to suspension "between", or "as between", the parties, whereas article 40 provided for suspension "in regard to" all the parties. In both provisions the meaning was no doubt the same, despite the different expression used; but uniform wording should be aimed at. His own preference was for "between" (or "as between").

125. Mr. CASTRÉN noted that in the French text of sub-paragraph (b) there was a reference to "*l'objet et le but du traité*" in the singular, whereas in article 67—from which the phrase had been taken—the plural form "*des objets et des buts*" had been used. For the sake of uniformity, one of the two texts should be amended.

126. Mr. BARTOŠ pointed out that the purpose of the agreement envisaged in article 40 (bis) was to suspend the treaty temporarily and as between the parties concerned—in other words, partially. The title of the article, on the other hand, referred only to suspension between certain of the parties and thus to partial suspension without any notion of time. Accordingly, either the word "Temporary" should be inserted at the beginning of the title, or the words "temporarily and" should be deleted from the text of the article.

127. Mr. TUNKIN, referring to the difference in the wording of the titles of articles 40 and 40 (bis), said that it might be necessary to adjust the latter, or to insert an explanation in the commentary in regard to the situation covered in article 42. Under the provisions of article 42, a party specially affected by the breach of a treaty could invoke the breach as a ground for suspension and the agreement of the other parties was not required. In such a situation, if two or three of the parties agreed to suspend the operation of a treaty in consequence of a breach, something tantamount to an *inter se* suspension would occur.

128. Mr. BRIGGS said that, in the commentary on article 40 (bis), mention should be made of the fact that there was at least one other case when unilateral suspension might take place in accordance with the provisions contained in the Commission's draft articles.

129. Mr. REUTER, referring to Mr. Castrén's comment, pointed out that, while the plural form "objects and purposes" was used in the English text of article 40 (bis), the singular form was used in the English text of other articles. The Commission should perhaps make the English text uniform. If it decided that the singular form should sometimes be used, the French text would follow suit.

130. With regard to Mr. Tsuruoka's remarks on the translation of the English verb "to affect", he had no strong views on the matter. The word "*affecter*" in French had two general meanings. In the first place, it meant "to assign to a specific use" or "to place at the disposal". Etymologically, it merely meant "to produce an effect on", as in English. In French usage, the verb had acquired a slightly pejorative connotation, and it was in that sense that someone could be described as speaking with "affectation". Accordingly, to translate the verb "to affect" by "*affecter*" was correct etymologically and from the standpoint of current usage, but the rendering "*porter atteinte*" was also satisfactory.

131. Mr. JIMÉNEZ de ARÉCHAGA said that the Drafting Committee's new text of article 40 (bis) contained some important additional guarantees; thus, the article would not apply if the treaty itself contained any provision concerning suspension. The second improvement introduced in the article was that the suspension had to be temporary; furthermore, the provision was a little more stringent than that contained in article 67, paragraph 1 (b) (ii). More stress was also being laid on the fact that the suspension must apply to certain provisions and not to the treaty as a whole. The safeguards were nevertheless still insufficient and he remained unable to vote in favour of such a rule, since he regarded it as a dangerous innovation and one likely to encourage States to have recourse to *inter se* suspension.

132. Sir Humphrey WALDOCK, Special Rapporteur, agreed that some reference should be made in the commentary on article 40 (bis) to the rather similar situation that could arise in connexion with termination or suspension as a consequence of breach, though the circumstances would be different.

133. The points made by Mr. Bartoš and Mr. Tunkin respectively might be met by revising the title of the article to read "Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only".

134. The CHAIRMAN put to the vote the Drafting Committee's text of article 40 (bis) with the amendments to the title proposed by the Special Rapporteur.

Article 40 (bis) and the title as thus amended were adopted by 15 votes to 1.¹⁹

The meeting rose at 12.50 p.m.

¹⁹ For a later amendment to the text of article 40 (bis), see 893rd meeting, para. 81; and para. 82 (French text only).

877th MEETING

Friday, 24 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Herbert W. BRIGGS

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Special Missions

(A/CN.4/188 and Add.1; A/CN.4/189 and Add.1)

(resumed from the 845th meeting)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Commission to consider the third report on special missions submitted by the Special Rapporteur (A/CN.4/189 and Add.1).
2. Mr. BARTOŠ, Special Rapporteur, reminded the Commission that at its previous session it had decided to submit to the General Assembly a report in which it would request States to give their opinion on certain questions about which it had doubts and to indicate the lines along which certain articles should be drafted.¹
3. At the twentieth session of the General Assembly, the Sixth Committee had considered the report and many delegations had taken part in the debate. He was not particularly satisfied with the results, however, for although all delegations had said that they welcomed codification of the question of special missions, they had confined themselves to very general comments, without going into detail.
4. Although a few governments had announced their intention of sending him their comments in writing, others had informed him that the statements made by their delegations in the General Assembly should be regarded as official comments and that their chancelleries, already overburdened by requests for information from the United Nations Secretariat, were too busy to reply.
5. The comments made in the Sixth Committee were reproduced in chapter II of document A/CN.4/188. He had received written comments from twelve governments, not counting the reply from Malawi, which merely congratulated the Special Rapporteur and expressed approval of the text. He had found himself in a quandary, having been unable to prepare his report on the basis of governments' comments before the beginning of the current session because those comments had arrived too late. Governments could hardly be blamed for that, since they had received the Commission's draft rather late and, moreover, the Commission, with the approval of the General Assembly, had reduced the time limit for the submission of comments from two years to one.
6. The officers of the Commission, in consultation with him, had selected the questions which could be considered pending circulation of all the addenda to his third report, namely, the general questions discussed in chapter II. Those questions were far from theoretical or doctrinal—their settlement would have the practical effect of enabling the Commission to lay down guidelines for its subsequent work and for his own revision of the text.
7. The first of those questions concerned the nature of the provisions relating to special missions—whether they had the character of *jus dispositivum* or of *jus cogens*. His views on that question differed from those of Mr. Ago, who had stressed *jus dispositivum*; he himself had explained that there were undoubtedly some rules which must be binding on the signatories of the instrument on special missions. On the other hand, the Swedish delegation in the Sixth Committee and the Belgian Government in its written comment (A/CN.4/188) had stressed the dispositive character of the whole draft.
8. If the Commission wished to give him more general instructions, it should decide how it proposed to settle the question. That could be done in two ways: the Commission might decide in advance that the whole draft would consist of rules of *jus dispositivum* or of rules of *jus cogens*, or that the draft would be *jus cogens* except for rules left to be agreed on between the States concerned, which would be *jus dispositivum*. Alternatively, the Commission might decide not to seek a general solution for the time being. When it had examined the draft article by article, it could decide whether certain rules should be *jus cogens* because a general custom was involved, and it might qualify the other rules by the phrase "except as otherwise agreed" thus allowing States to reach agreement in some other manner.
9. Mr. BRIGGS asked in what sense the Special Rapporteur was using the term *jus cogens*. The discussion on rules of *jus cogens* in the context of the law of treaties had been focussed on certain fundamental principles such as *pacta sunt servanda* and those which some lawyers perceived in Article 2, paragraph 4, of the United Nations Charter. His own view was that there were probably very few rules of *jus cogens* in international law and he feared that the Swedish Government might have been using the term in a different sense in its comments. If so, the Commission might run into the danger of trying to formulate rules of *jus cogens* of two different categories.
10. Mr. BARTOŠ, Special Rapporteur, explained that he had not wished to employ the expression "*jus cogens*" used by the Swedish delegation, either in his report or in the commentary. He had said that States would be free to derogate only from articles of the convention which expressly allowed such derogations. In other words, he did not consider that the draft partook of *jus cogens* in the sense in which the Commission had used the term in the law of treaties, where it had postulated the existence of general rules of international law which were binding on States, whether or not they were presented in contractual form, and which could even derogate from conventions.
11. On the contrary, he believed that the convention the Commission was drafting was such that the Commission could decide in advance whether its provisions were residuary rules from which the parties could agree to derogate if they deemed it possible and convenient to reach agreement in some other manner.
12. He was convinced that only a few of the rules of law on special missions were *jus cogens*, but some might possibly be regarded as mandatory customary rules. That was why he had not wished to employ the term "*jus cogens*" and had used the expression "except as otherwise agreed" as often as possible, so as to stress that the provisions in question had an expressly residuary character.
13. Mr. EL-ERIAN said it was important to distinguish between general rules of international law applicable

¹ Official Records of the General Assembly, Twentieth Session, Supplement No. 9, p. 12, para. 45.

unless the parties decided otherwise and particular rules of public or private international law. A State might extradite a criminal in the interests of justice; but it was under no compulsion to do so by virtue of any general customary rule of international law, although it might be bound by an express treaty obligation on the subject.

14. The reports on the law of treaties by Sir Humphrey Waldock had provoked lively discussion of the concept of rules of *jus cogens* in legal circles, but it might be dangerous to extend that concept in case it weakened the force of certain fundamental rules such as those deriving from the provisions of Chapter VII of the Charter concerning the determination of aggression and the machinery and procedure laid down in that Chapter.

15. In modern times the number and variety of special missions had increased so greatly that it was impracticable for the sending and receiving States to draw up agreements on privileges and immunities in each case. It was important, therefore, for the Commission to consider whether there were any general rules of customary international law that were applicable in the absence of express agreement between the parties. Perhaps there were a few rules in the nature of *jus cogens*, such as the traditional rule of immunity from criminal jurisdiction for heads of diplomatic missions, from which no State would consider derogating by agreement with another State. The Commission should carefully examine the implications of the Swedish Government's comment.

16. Mr. AGO said he was very grateful to the Special Rapporteur and to Mr. El-Erian for the points they had made in order to clarify a question which he regarded as crucial. In his opinion, if the concept of *jus cogens* were to be widened to that extent, it would be lost for ever and there would never be an article in the law of treaties on preemptory rules of international law.

17. Nothing would be more dangerous than to confuse *jus cogens* with all the general rules of customary law. Normally, those rules could be derogated from by agreement between the parties. The sanction inherent in the preemptory character of a rule of *jus cogens* must always be borne in mind: any convention derogating from such a rule was null and void between the parties. That sanction was so grave that the case was limited to certain principles vital to the international community. For his part, he would rather hesitate to say that there were rules of that kind in such a sphere as that of special missions. There might be such rules, but the Commission could not answer that question before it had examined the whole report.

18. In any case, it was the Commission's duty to react immediately against a presumption such as that of the Swedish Government, which revealed a certain confusion of ideas on the subject. There could be no question of making the provisions on privileges and immunities mandatory: if there was any matter in which there was no need for preemptory rules, it was surely that of privileges.

19. The Commission should also refrain from inserting the phrase "except as otherwise agreed" as a precaution at every step. The formula was a very useful one and Mr. Bartoš, with his usual caution, had used it as often as possible. But it should not be concluded

that, in the absence of that phrase—which did not appear, for instance, in the Convention on Diplomatic Relations—none of the rules could be derogated from by agreements concluded between the parties and that all agreements derogating from those rules would become null and void.

20. He therefore hoped that the Commission would leave the question pending for the time being, as the Special Rapporteur had suggested. It should prepare the draft as though that question did not exist; on re-reading the draft, it would be able to see if it really contained a few rules of *jus cogens* and whether it was necessary to state that no derogation from them by special agreement was permissible.

21. The Commission should proceed on the assumption that all the rules in the draft were dispositive—not even residuary, for that was yet another concept. If it subsequently found some rules which it deemed to be preemptory, it should say so expressly.

22. Mr. CASTRÉN congratulated the Special Rapporteur on his excellent report. He recognized that there was a great deal of truth in the comments made by the Swedish Government, which stressed the right of the States concerned, namely the sending State and the receiving State, to agree on the sending, task and status of special missions. Nevertheless, he agreed with the Special Rapporteur that the Swedish Government had gone too far in suggesting that the draft should contain only residuary rules to cover cases in which the States concerned had omitted to settle matters by agreement. As the Special Rapporteur had pointed out, there were probably already a few binding customary rules in the law of *ad hoc* diplomacy; even if that were not so, the Commission could, if it saw fit, include provisions in its draft from which no derogation was allowed.

23. Moreover, the Commission had already noted that there were few inflexible rules on special missions. He therefore considered that each provision of the draft should be carefully examined on second reading, in order to determine its character and define it in such a way that the possibility of individual arrangements between the States concerned was not needlessly excluded. To cover that point, the Special Rapporteur had already proposed a general reservation in part II of the draft; he would revert to that reservation later.

24. Mr. TUNKIN said that the question of rules of *jus cogens*, which the Commission was responsible for bringing to the fore, was one on which further research was needed. Several articles had already been written on the subject and a number of further studies were in preparation. A few well-known examples of such rules had been given during the discussion, but he believed that they were more numerous than had been suggested by some members.

25. The rules in question were fundamental rules of contemporary international law from which States could not derogate by agreement. For example, the rules bearing directly on the maintenance of international peace constituted rules of *jus cogens*, since they had been established in the interests of the international community as a whole.

26. A somewhat similar situation could arise under a multilateral treaty. Even a multilateral treaty concluded among a small number of States could contain clauses from which no derogation was permitted.

27. Most rules of general international law did not have the character of *jus cogens*. In the rules codified by the Commission, the fact that the proviso "unless otherwise agreed by the parties" did not appear in the formulation of a rule did not necessarily mean that it was a rule of *jus cogens*. That applied in particular to the draft articles on special missions. In that connexion, he agreed with Mr. Ago that those articles should be drafted on the assumption that derogation by special agreement was permitted. If the Commission intended any particular rule to have the character of *jus cogens*, it should say so expressly.

28. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on his excellent report.

29. He assumed that the draft on special missions would comprise three categories of rules. The first and largest category would consist of new rules of international law on the subject. Indeed, many of the rules which the Commission was trying to formulate were not yet rules of law in the strict sense of the term and had not yet acquired the force of rules of customary law. In formulating them, the Commission was engaged in the progressive development of international law; it was trying to create a practice, or to enunciate rules which would be mandatory under a convention. Existing rules which already belonged to general international customary law would form another category, while the third category would consist of general rules of law having the character of *jus cogens*.

30. Thus the vast majority of the rules to be included in the draft could be regarded as dispositive rules, whether they already had legal force or not. But he would be opposed to the Commission's deciding forthwith that there would be no rules of *jus cogens* in that limited field. In his opinion, there would certainly be some such rules, for instance, the rule of inviolability of the archives of a special mission, for it was hardly conceivable that two States would agree to derogate from that rule and to regard those archives as violable. However, the draft would certainly contain very few rules of *jus cogens*.

31. He agreed with Mr. Ago and Mr. Tunkin that the absence of the proviso "unless otherwise agreed by the parties" did not necessarily mean that an article stated a rule of *jus cogens*; but he urged the Commission to adopt a method which would not mislead States concerning the nature of the rules laid down in the draft. He supported the Special Rapporteur's suggestion that the Commission should first examine the draft article by article and then decide upon a general method of indicating unequivocally which rules were peremptory and which were dispositive.

32. Mr. TABIBI paid a tribute to the skill with which the Special Rapporteur had dealt with a difficult subject.

33. The question of special missions, which were becoming increasingly numerous, was one which was receiving very serious consideration from governments. So far, the subject had been regulated very flexibly, the

functions and privileges of each special mission having been settled on an *ad hoc* basis. In view of the diversity of special missions with respect to both functions and composition, governments hesitated to tie their hands by adopting general rules. Customary rules of international law relating to special missions were emerging from the daily practice in the matter, but he did not believe that the Commission would be able to find any which could be regarded as having the character of *jus cogens*.

34. The question of the privileges and immunities of members of special missions was causing considerable concern to the legal advisers of small countries. There was a genuine fear of granting extensive privileges and immunities to a class of persons which was becoming daily more numerous. It was therefore understandable that many governments should be reluctant to express a definite view on special missions until they knew the exact nature of the privileges and immunities to be extended to members of those missions.

35. In conclusion, he urged the Commission to codify those customary rules relating to special missions which had emerged and, by way of progressive development, to draft any further rules which might be of assistance in maintaining satisfactory international relations.

Mr. Briggs, First Vice-Chairman, took the Chair.

36. Mr. RUDA said he wished to associate himself with the tributes paid to the Special Rapporteur.

37. The question whether the rules embodied in the draft articles on special missions included any which had the character of *jus cogens* could be answered only by examining each article separately.

38. In article 37 of the draft on the law of treaties, rules of *jus cogens* were defined as rules from which no derogation was permitted. That criterion related to the effects of the rule; but the reason for giving the character of *jus cogens* to a rule of international law was that stated by Mr. Tunkin, namely, that the rule in question safeguarded values of vital importance to all mankind. The prohibition of the use of force in international relations was a case in point.

39. An examination of the rules on special missions with a view to determining whether any of them had the character of *jus cogens* would give the Commission an excellent opportunity of testing the provisions of article 37 of the draft on the law of treaties.

40. Mr. de LUNA congratulated the Special Rapporteur on his third report. The Commission should react strongly against the confusion which had appeared in the Swedish Government's comments.

41. The rules of *jus cogens* represented a minimum requirement for safeguarding the existence of the international community. Any agreement which violated one of those rules was null and void.

42. The Swedish Government's comments showed some confusion between peremptory norms of international law (rules of *jus cogens*) and mandatory rules. All rules of general international law were mandatory to some extent. The fact that a rule required the subjects of the law to act in a certain way did not necessarily give it the character of *jus cogens*. No derogation was possible from the most-favoured-nation clause, but it would be

absurd to suggest that there was a rule of *jus cogens* in the matter.

43. Peremptory norms of international law could not be created by treaty, although treaties could play a part in the emergence of such rules. A famous example was the Pact of Paris of 1928² and the subsequent emergence of a rule of *jus cogens* banning aggressive war as an international crime, a development that had constituted a radical departure from the traditional concept of the sovereign right of States to wage war.

44. The diplomatic conference which examined the Commission's draft articles on special missions would not create any new rules of *jus cogens*. Any such rules that might exist on the subject would not derive their character from their incorporation in the articles or from their adoption by the conference.

45. Lastly, he did not believe it necessary to include the proviso "except as otherwise agreed" in every draft article embodying a rule from which it was possible to derogate by agreement.

46. Mr. ROSENNE congratulated the Special Rapporteur on his scholarly report.

47. The question of possible rules of *jus cogens* on special missions had been discussed by the Commission at its sixteenth session, when the Special Rapporteur had said that the draft on special missions "should not contain *jus cogens* rules, except perhaps a few broad substantive rules concerning, for instance, the need for a State's consent to receive a mission and the freedom of a mission to perform its functions".³

48. The Special Rapporteur had thus stated the position very clearly, and had mentioned the only cases in which the application of a rule of *jus cogens* to the matter of special missions might require special treatment. The requirement of a State's consent to receive a mission, for example, was based on the fundamental and cogent rule of the equality of States, a rule which had its origin in customary international law.

49. The Commission should be extremely careful not to introduce into its draft articles or its commentary the idea that a rule of *jus cogens* could easily be created by the provisions of a treaty, since that could lead to difficulties in the sense that any subsequent treaty amending those provisions might be void under article 37 of the draft articles on the law of treaties.⁴

50. In the draft articles on special missions, special prominence should be given to article 1, paragraph 1, because it embodied the rule that the consent of the receiving State was necessary. He therefore suggested that that provision should be separated from the other provisions of the draft articles.

51. Partly for the reasons which he had stated and partly for more general reasons, he regretted that the Swedish delegation should have raised the question of *jus cogens* in the form in which it had done. In general, he supported Mr. Ago's approach and also the suggestion made by the Swedish representative in the Sixth Com-

mittee that it was advisable to accept as a basic presumption that States were free to derogate from the rules in the draft articles on special missions by express agreement between themselves, unless the contrary appeared.

52. The question now under discussion had some bearing on that of the relationship of the draft articles to other international agreements, a question dealt with in chapter II, section 5 of the Special Rapporteur's third report (A/CN.4/189). In that connexion, he wished to state that, contrary to the view he had expressed at the 819th meeting on a possible distinction between part I and part II of the draft,⁵ he now believed that, in general, all the articles embodied principles which were applicable in the absence of a particular agreement between the States concerned.

53. Mr. TSURUOKA congratulated the Special Rapporteur on the quality of his work. With regard to the point under discussion, he shared the view of most of the preceding speakers that it was only by studying the articles successively that the Commission could decide which of them contained rules of *jus cogens*, which contained mandatory treaty rules and which contained treaty rules from which derogation was permissible. There seemed to be general agreement that rules of *jus cogens* were very few in number, particularly if only those specifically relating to special missions were considered, to the exclusion of those which belonged to international custom and were general rules of international law. For instance, acts such as the assassination of the head of a special mission or the infiltration of spies or agitators under cover of a special mission had to be condemned as acts contrary to a general rule of international law, not as acts contrary to a specific rule relating to special missions.

54. He hoped that the Commission would specify what were the implications and legal scope of the rules it was formulating, even in the case of rules having a mandatory character as provisions of an international convention, without mentioning *jus cogens*. If it was specified in the future convention that a particular treaty rule could not be derogated from by agreement between the parties, and if two States found it necessary to conclude an agreement contrary to that rule, they could always evade the issue by stating that their agreement related to something other than a special mission, and the rule which the Commission wished to be mandatory would not have the desired effect. That was a problem the Commission should consider.

55. As Mr. Rosenne had already pointed out, the Commission was trying to codify the law on special missions, not with a view to imposing mandatory rules, but in order to facilitate and develop international economic, cultural and other relations. Its main purpose was to provide an instrument which would help States to deal with what was still a fluid situation. Members of the Commission would probably agree on that point.

56. Mr. JIMÉNEZ de ARÉCHAGA said he also wished to congratulate the Special Rapporteur on his work.

² League of Nations, *Treaty Series*, vol. XCIV, p. 59.

³ *Yearbook of the International Law Commission, 1964*, vol. I, p. 15, para. 2 *in fine*.

⁴ A/CN.4/L.115.

⁵ *Yearbook of the International Law Commission, 1965*, vol. I, p. 305, para. 126.

57. In his view, rules of international law could be divided into three categories: *jus cogens* rules, imperative rules and residuary rules.

58. He believed there was no place for *jus cogens* rules in the draft on special missions and urged that no reference to *jus cogens* should be made, either in the text of the articles or in the commentary. The example of the inviolability of the archives of a mission was not a case of *jus cogens*; there was no reason why two States should not validly agree among themselves that the archives of each other's special missions were open to judicial inspection, for instance.

59. He stressed that the essence of *jus cogens* was that it comprised those rules of general international law which affected the vital interests and moral values of the international community as a whole to such a point that not merely the actual violation of the rules was condemned, but even a preparatory act in the form of an inter-state agreement contemplating their violation was also inadmissible.

60. Mr. AGO thought it was essential to draw a clear distinction between rules of *jus cogens* and rules embodied in a treaty which itself specified that no derogation from them was allowed. In the latter case, the parties to the treaty could not derogate from the rule while the treaty was in force; but it was self-evident that the treaty itself could be amended or terminate. As Mr. Rosenne had rightly pointed out, if certain rules of a treaty were rules of *jus cogens*, the treaty in which they were embodied would be eternal, since any other treaty which derogated from those rules would be null and void. The sanction for concluding a convention derogating from those rules was the responsibility of the parties for violating the treaty, not the nullity of the convention in question. To become a rule of *jus cogens*, a treaty rule had to change its character and become a customary rule of *jus cogens*.

61. Mr. Ruda had said that there should be some criterion to distinguish between what was *jus cogens* and what was not; he had suggested that the criterion should be whether a rule safeguarded individual interests or the general interest. However, it was not enough for a rule to safeguard the general interest for it to become a rule of *jus cogens*. In his opinion, it was even more important to determine whether derogation from the rule by agreement between certain States would be prejudicial to the general interest of the international community.

62. The examples that had been given were not really examples of *jus cogens*, as Mr. Jiménez de Aréchaga had pointed out. It was difficult to regard even inviolability of archives and immunities in general as rules of *jus cogens*. The topic of special missions was too ill-defined and too diversified to be governed by such rigid principles. If two States decided to exchange special missions on fisheries, for example, but agreed that those missions would need no immunities, they could hardly be accused of having violated a rule of general international law. Even with regard to the rule of consent, to which Mr. Rosenne had referred, it was doubtful whether two States would infringe international law by agreeing, for instance, that their special missions could move freely between the two States

without special authorization, although in such a case the agreement to that effect might be regarded as prior general consent. Thus, the more one looked for rules of *jus cogens* in the particular field of special missions, the fewer one found.

63. The Special Rapporteur had been very wise to raise that question. The Commission should not exclude *a priori* the possibility that there might be rules of *jus cogens* relating to special missions, but it should proceed on the assumption that there were none; if it ultimately concluded that such rules did exist, it should substantiate that conclusion very clearly.

64. Mr. AMADO paid a tribute to the Special Rapporteur's mastery of the topic and said he had been most gratified by the sensible remarks of Mr. Ruda and Mr. Jiménez de Aréchaga on the important question of *jus cogens*. Mr. de Luna and Mr. Ago had also said things which needed to be said in order to counteract a tendency to generalize that concept, which owed its importance to its exceptional character. He wished Mr. Tunkin success in his attempts to find examples of *jus cogens* in the practice, but hoped that he would not find many.

65. The Commission's task in drafting articles on special missions was to formulate rules to help States solve the problems that might arise in connexion with those missions, which were being used with increasing frequency; it was important to facilitate their work, so that it might yield results which would be useful not only to the States concerned, but also to the international community as a whole. How could *jus cogens* be mentioned lightly in dealing with a topic dominated by the principle of reciprocity?

66. Mr. de LUNA said it was very difficult to conceive of the existence of *jus cogens* rules relating to special missions. But if any such rules existed, their source would not be a multilateral treaty but a customary rule of international law.

67. Mr. TUNKIN, referring to the distinction made by Mr. Jiménez de Aréchaga, said that rules of international law could be divided into two categories: rules of *jus cogens* and other rules. The latter, in turn, could be subdivided into the two further categories: imperative and purely residuary rules.

68. A multilateral treaty could well lay down rules from which no derogation was permitted; as far as the parties to the treaty were concerned, the position was not very different from that which resulted from *jus cogens* rules. However, he did not press for the use of the same term in both cases; it was perhaps preferable to reserve the term "rule of *jus cogens*" for peremptory norms of general international law.

69. The Commission could safely proceed with the formulation of the rules on special missions without inquiring whether any particular rule would be singled out as one from which no derogation was permitted.

70. Mr. BARTOŠ, Special Rapporteur, summing up the debate, pointed out that the comment made by the Swedish delegation in the Sixth Committee of the General Assembly might be regarded as an echo of a wider attack on the concept of *jus cogens* embodied in the Commission's draft on the law of treaties.

71. He himself did not believe either that there were any rules of *jus cogens* relating directly to special missions. There were only reflections of certain rules of *jus cogens*, such as the sovereign equality of States, which lay outside the scope of the draft.

72. He was grateful to Mr. Tunkin for drawing a distinction between rules of *jus cogens* and other rules of international law which did not have the character of *jus cogens* and among which there was a certain hierarchy. For example, no one would maintain that the Vienna Convention on Consular Relations was a compendium of rules of *jus cogens*; that Convention contained some treaty rules and some rules which the parties could modify between themselves.

73. The draft on special missions would be even less stringent than the Vienna Convention on Consular Relations; it might contain only one or two articles stating rules which could not be modified by the parties. He therefore thought it would be well to insert at the end of the draft a special article providing that the parties could, by mutual agreement, substitute their own rules for those stated in the convention, with the exception of certain articles in which the actual institution of special missions would be defined.

74. He recommended the Commission not to mention the concept of *jus cogens* either in the articles or in the commentary; he felt sure that all the members would agree with him on that point. Even the requirement of consent need not be said to be a rule of *jus cogens*; his own view was that that rule derived from the principle of State sovereignty. The rule was a general contractual one which the parties were obliged to apply unless the convention was modified, and from which no derogation could be made except by another treaty having equal status.

The meeting rose at 1.5 p.m.

878th MEETING

Monday, 27 June 1966, at 3.10 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Special Missions

(A/CN.4/188 and Add.1 and 2, A/CN.4/189 and Add.1)

(continued)

[Item 2 of the agenda]

1. The CHAIRMAN welcomed Mr. Stavropoulos, the Legal Counsel of the United Nations, and Mr. Koel-

meyer, the Observer for the Asian-African Legal Consultative Committee.

2. He invited the Commission to continue its discussion of the first of the preliminary questions raised by the Special Rapporteur, in Chapter II of his report (A/CN.4/189), namely, the nature of the provisions relating to special missions.

3. Mr. BRIGGS said that, no matter whether there were any *jus cogens* rules among the rules relating to special missions or whether such rules were to be found in the underlying principle of equality of States, he agreed with the view that the Commission should make no attempt to identify any rules of *jus cogens* in connexion with special missions until it had completed its draft.

4. It should be borne in mind that the Commission's purpose was to clarify any customary rules of international law on special missions that might be found to exist and to incorporate those rules which it considered appropriate and desirable in a draft convention on special missions. All those rules would be legally binding on the parties to the convention as rules of international law, though some of them might take the form of residuary rules, in other words, rules that were legally binding on the parties provided that they did not otherwise agree among themselves.

5. Sir Humphrey WALDOCK said that his view was much the same as Mr. Ago's. The Commission would have to exercise great care over the question of *jus cogens* or it would find itself in serious drafting difficulties. It was essential to keep clear the distinction between rules of general international law, which could be departed from by the will of the parties, and general rules of international law which, because of their substantive content, were rules of *jus cogens* from which no derogation was permissible. The topic which the Commission was studying was closely related to the Vienna Convention on Diplomatic Relations: if too much emphasis was placed on *jus cogens* in connexion with that Convention, much confusion would arise over such matters as the power of a State to waive or derogate from any particular rule which it contained. The Commission should put aside the question of *jus cogens* for the time being and feel free to specify which rules were residuary rules, without any implication that a rule which was not a residuary rule was necessarily a rule of *jus cogens*.

6. Mr. BARTOŠ, Special Rapporteur, restated the conclusions he had formulated at the end of the previous meeting.

7. In the Sixth Committee, several delegations, including that of Sweden, had expressed dissatisfaction at the use of the term *jus cogens* in the draft on the law of treaties (A/CN.4/188). Mr. Briggs had found that the Commission tended to seek out matters into which it could introduce the concept of *jus cogens*; that suggested that there was some confusion about the term. As understood by the Commission, rules of *jus cogens* were general peremptory rules of public international law which were binding in themselves, irrespective of the form in which they were introduced into international law, and even if they were not embodied in a treaty.