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Summary record of the 711th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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99. Mr. de LUNA warmly congratulated the Drafting Committee and endorsed the comments of Mr. Lachs, Mr. Tunkin and Mr. Gros. He had been particularly impressed by what Mr. Gros had said about paragraph 3 (*b*). By way of illustration, he referred to a treaty drafted in 1962 under the auspices of OECD on the protection of foreign property. Article 4 of that treaty established the *bona fide* obligation to guarantee the repatriation of property; it had given rise to lively discussion, as a result of which Greece had managed to secure the inclusion in the body of the treaty of a limitation originally in the commentary, under which the parties were required to honour that guarantee only so long as their balance of payments situation permitted them to do so within reason.

100. Mr. TUNKIN replying to Mr. Gros' comments, said that the deletion of paragraph 3 (*b*) would not mean that provisions concerning changes of circumstances included in the treaty itself would not apply, but that they would be subject to the conditions set out in paragraph 2. On the other hand, if paragraph 3 (*b*) were retained it would override the provisions of paragraph 2.

101. Mr. BRIGGS said he could not agree to the deletion of paragraph 1, because it was essential to state that a mere change in circumstances did not provide a legal basis for terminating a treaty.

102. In paragraph 2 (*b*), an objective criterion which had never formed part of the original doctrine of *rebus sic stantibus* had been combined with a subjective criterion.

103. He was opposed to deleting paragraph 3, which laid down exceptions to a rule that was being proposed by the Commission *de lege ferenda*. He agreed with Mr. Gros that there was no rule in existence whereby a fundamental change of circumstances could be invoked as a ground for termination, and he was inclined to think that even with the safeguards provided the article went too far, particularly since it made no provision for the reference of disputes to compulsory jurisdiction.

104. He endorsed Mr. Gros' comments on paragraph 3 (*b*).

105. The CHAIRMAN welcomed Mr. Stavropoulos, Legal Counsel of the United Nations.

106. Mr. STAVROPOULOS, Legal Counsel, said he was glad to have an opportunity of attending one of the Commission's meetings. It might perhaps be of interest to members, in the context of the illuminating discussion which was taking place on article 22, to know that during his long service with the United Nations he had been consulted on at least five occasions by representatives of governments which wished to invoke, in good faith, the doctrine of *rebus sic stantibus*. In each case the difficulty had been the lack of any precedent from which an objective criterion could be derived for determining whether the circumstances had in fact so changed that the government in question would be protected against a charge of taking arbitrary action.

The meeting rose at 1 p.m.

711th MEETING

Monday, 1 July 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

Articles submitted by the Drafting Committee (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the new text proposed by the Drafting Committee for article 22 (previous meeting, para. 27).

ARTICLE 22 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES) (*continued*)

2. Mr. PAL said that the proposed text was intended to meet the same requirements as the doctrine of *rebus sic stantibus*. That doctrine had originated as one of interpretation; it read into every treaty an implied clause providing that the treaty was concluded subject to the material conditions remaining the same: *omnis conventio intelligitur rebus sic stantibus*. The concept of the sanctity of treaties, as expressed in the maxim *pacta sunt servanda*, was primarily an instrument of rigid *status quo* policy, which, in its strict application, meant seeking to protect today, not the position of today, but the position of yesterday, despite the fact that material changes might have intervened. The doctrine of *rebus sic stantibus* had had to be introduced to serve the real purpose of law, which was to preserve today's way of life. It would be wrong to judge that doctrine only by the questionable assertions of the past.

3. Many recent treaties actually contained a clause providing that if, during the lifetime of the treaty, either party should consider that there had been a change in the basic assumptions underlying the agreement, it should be open to that party to set in motion the procedure for revision or termination of the treaty. Adjustment under such a provision would seem to be less difficult than under the proposed provisions of article 22, which appeared to have been unduly influenced by the fact that in the past there had been some abuse of the *rebus sic stantibus* doctrine. Personally, he thought that was a wrong approach and he accordingly supported those members who had proposed the deletion of paragraph 1 and the amendment of paragraph 2. The two paragraphs read together limited the doctrine to the point of abrogation.

4. He also supported the proposal to delete paragraph 3 (*a*), for the reasons given by Mr. Tabibi.

5. He was opposed to paragraph 3 (*b*), for the reasons given by Mr. Tunkin.

6. The provisions of article 22 should be confined to those contained in paragraph 2, with a number of drafting changes. First, the adjective " fundamental " before the word " change " in the first line should be dropped if sub-paragraph (*b*) were to be retained. That

sub-paragraph already purported fully to define the character of the change in terms of its effect on the obligations undertaken in the treaty. The additional qualification that the change must be a " fundamental " one would obviously add nothing, unless it was introduced with some sinister purpose.

7. It was difficult to understand what was meant by the expression " the character of the obligations " in paragraph 2 (*b*). Better wording should be found by drawing on the idea expressed in the concluding sentence of paragraph 14 of the commentary on article 22 in the Special Rapporteur's second report (A/CN.4/156/Add.1) that ". . . in determining the relation which the change of circumstances must have to the original treaty, the relevant consideration is rather the nature and extent of the effect upon the performance of the treaty obligations ".

8. Mr. BRIGGS said that the proposed redraft of article 22 was a carefully balanced compromise which had been reached only after a long discussion in the Drafting Committee and as a result of mutual concessions. Naturally, the text did not satisfy him completely, but he thought it well expressed the conflicting views that had been put forward in the Commission. He would certainly not be prepared to accept an article limited to the contents of paragraph 2.

9. The opinions of the International Law Commission had considerable influence both on States and on United Nations organs, even if they were not embodied in a treaty. The Commission would therefore be shouldering a heavy responsibility if it adopted an article that seemed to encourage States to make a flood of claims based on changed circumstances.

10. He was firmly convinced that, under international law, the mere fact that the circumstances existing at the time of concluding a treaty had subsequently changed did not provide grounds for terminating or withdrawing from the treaty. It was therefore essential to retain paragraph 1 as it stood.

11. It was also essential to retain the expression " a fundamental change " in the opening sentence of paragraph 2, because that expression made it clear that the rule stated in paragraph 2 constituted an exception to the principle stated in paragraph 1 — an exception which applied only where a fundamental change had occurred and the conditions set out in sub-paragraphs (*a*) and (*b*) were fulfilled. It was absolutely necessary to specify those limitations, because nothing could be more certain than the fact that, as soon as a treaty was signed, changes began to occur in the circumstances existing at the time of its signature.

12. Mr. VERDROSS said he wished to withdraw the comments he had made at the previous meeting on paragraph 3 (*b*) (para. 59). He had been looking at the French text only, and what he had said would cease to be applicable if the French were brought more closely into line with the English.

13. He supported Mr. Tunkin's proposal that paragraph 3 (*a*) should be amended so as to refer to treaties " establishing frontiers " rather than to treaties " establishing a territorial settlement "; the latter expression was too broad.

14. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said there appeared to be general support for the substance of the rule, which was expressed in paragraph 2.

15. Some members, though not a majority, thought that the adjective " fundamental " at the beginning of paragraph 2 was unnecessary and perhaps undesirable; on the other hand, it was the general opinion that the adverb " wholly " should be deleted from paragraph 2 (*b*). He agreed with Mr. El-Erian that the word " fundamental " was useful, because it helped to contrast the provisions of paragraph 2 with those of paragraph 1. With regard to Mr. Pal's view that there was an element of repetition in the provisions of paragraph 2 (*b*), he explained that the purpose of those provisions was to give further definition to the somewhat subjective notion of a fundamental change. He was prepared to accept the deletion of the word " wholly " in paragraph 2 (*b*), but not of the word " fundamental " at the beginning of paragraph 2.

16. He agreed that there was a drafting difficulty with regard to the initial proviso of paragraph 1. He had included a reference to both paragraph 2 and paragraph 3 because the second of those paragraphs slightly qualified the first. He had thought that the reference would be more complete in that form, but suggested that the point should be left to the Drafting Committee.

17. A more material point was whether paragraph 1 should be couched in its present negative form. Some members had gone so far as to suggest that the whole paragraph should be deleted; others had urged its retention because it served to emphasize the exceptional character of the rule in paragraph 2. His own view was that paragraphs 1 and 2 balanced each other and served to safeguard the position of all the members of the Commission. Although he would prefer to retain the present text of paragraph 1, an intermediate solution would be to reword the paragraph to read:

> " A change in the circumstances existing at the time when a treaty was entered into may only be invoked as a ground for terminating or withdrawing from the treaty in the conditions set forth in paragraphs 2 and 3 ".

That formulation would give a slightly less negative nuance to the text.

18. With regard to paragraph 3, he agreed that the criticisms of the drafting of sub-paragraph (*a*), in particular the use of the expression " a territorial settlement ", were justified. In his original draft of paragraph 5 (*a*), he had referred to " stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights ". The discussion had shown a clear wish on the part of the majority to avoid any reference to the grant of territorial rights and to limit the exception to treaties which either established a territorial boundary or actually transferred territory. Mr. Gros had pointed out the danger of

suggesting that territorial sovereignties could be upset and perhaps peace disturbed by invoking the doctrine of *rebus sic stantibus*. The Drafting Committee had therefore felt obliged to retain the exception in paragraph 3 (*a*).

19. If changes in territorial sovereignty were necessary, they would be brought about by other means and other procedures than the operation of the doctrine of *rebus sic stantibus*. He did not underestimate the political and legal importance of the principle of self-determination, even if its precise content was extremely difficult to define. He was not one of those who denied that it had any claim to be a legal concept; but it was not a concept which had any particular place in the law of treaties. On the contrary, those who advocated it regarded it as a general principle and one which concerned the rights of individuals and groups rather than of States. When a proper occasion arose for the application of the principle, it operated outside the law of treaties and it therefore seemed to him wrong to associate the principle in any particular way with the operation of article 22.

20. He supported the retention of paragraph 3 (*a*) on the understanding that it would be amended to state clearly that the reference was to treaties which effected boundary settlements or transfers of territory.

21. The difficulties which had arisen in connexion with paragraph 3 (*b*) were partly due to the unfortunate drafting of the French text, which did not make it clear that the case envisaged was one in which provision had actually been made for the consequences of the changes of circumstances. Perhaps the intended meaning would be made even clearer if the English text were reworded to read:

> " (*b*) to changes of circumstances for the consequences of which the parties have made express provision in the treaty ".

The reference would then clearly be to cases in which the parties had not only foreseen the change of circumstances, but had expressly provided for its consequences.

22. It seemed to go without saying that the parties were always at liberty to make their own arrangements for changes which they had themselves foreseen.

23. He suggested that the whole of article 22 should be referred back to the Drafting Committee with instructions to prepare a new text for submission to the Commission.

24. Mr. TABIBI said that the Special Rapporteur's scholarly summing up had not dispelled his doubts regarding paragraph 3 (*a*). In particular, he was not convinced by the argument that application of the *rebus sic stantibus* doctrine could involve a danger to peace; for any attempt to keep a treaty in force against the wishes of a people would involve an even greater danger to peace.

25. The parties to a treaty always acted on behalf of their peoples and the fate of peoples could only be decided in accordance with the principle of self-determination. That principle had a direct bearing on all territorial settlements. Consequently, he could not support paragraph 3 (*a*). The text suggested by Mr. Tunkin (previous meeting, para. 82) would be an improvement, but was still not satisfactory. Even a reference to frontier treaties would be too wide; a frontier treaty could cover anything from an agreement on the erection of boundary marks to a treaty on which the fate of millions of people depended. Even a treaty relating to military bases could come under the heading of frontier agreements. He accordingly urged that the provisions of paragraph 3 (*a*) should be re-examined in the light of the principle of self-determination.

26. The CHAIRMAN said that, if there were no objection, he would consider the Commission agreed to refer article 22 back to the Drafting Committee with instructions to prepare a new text in accordance with the Special Rapporteur's suggestions.

It was so agreed.

ARTICLE 22 *bis* (SUPERVENING ILLEGALITY OF PERFORMANCE)

27. Sir Humphrey WALDOCK, Special Rapporteur, said that article 22 *bis* replaced paragraph 4 of his original article 21 (A/CN.4/156/Add.1). The Drafting Committee had prepared a very brief formulation which read:

> " A treaty becomes void and terminates if a new peremptory norm of general international law of the kind referred to in article 13 is established and the treaty conflicts with that norm."

28. The Commission had on several occasions discussed the effect of a rule of *jus cogens* that came into existence after a treaty had been in force for some time. It had been agreed that the effect of such a rule would be to avoid or terminate the treaty. There had, however, been some difference of opinion on the placing of the provision. Some members had suggested that it should take the form of an additional paragraph in article 13; as Special Rapporteur, he did not favour that solution, because he wished to make it clear that in the case under discussion, the treaty had been initially valid and had only been invalidated subsequently by the supervening new rule of *jus cogens*. He preferred the solution adopted by the Drafting Committee, which was to deal with the matter in a separate article in the section on the termination of treaties.

29. The legal effects of termination under the provisions of article 22 *bis* would be considered by the Drafting Committee when it came to redraft articles 27 and 28.

30. Mr. PAREDES said that the expression " *norma perentoria* " (peremptory norm) in the Spanish text was not acceptable, because it meant the opposite to what the Drafting Committee had intended. The term " *perentorio* " was used in procedural law for the period allowed to the parties in which to exercise their rights, and on the expiry of which that faculty lapsed or was extinguished. But in the article under discussion the word

was used to qualify norms that were absolutely mandatory and remained in force indefinitely.

31. Mr. de LUNA fully endorsed Mr. Paredes' comment on the Spanish text.

32. The CHAIRMAN suggested that the difficulty could be overcome by using the expression "*norma imperativa*".

33. Mr. VERDROSS suggested that the words "becomes void and" should be deleted, so as to remove any idea of nullity *ex tunc*. Nullity *ex nunc*, on the other hand, was covered by the word "terminates".

34. Mr. CADIEUX thought it difficult to reach a decision of the substance of article 22 *bis* until the Commission had settled the terms of article 26, on the severance of treaties.

35. Mr. EL-ERIAN said he had been asked by Mr. Castrén, who had had to leave Geneva, to propose the deletion from article 22 *bis* of the words "becomes void and", as just suggested by Mr. Verdross. The article would then simply state that the treaty terminated if a new norm of *jus cogens* were established and the treaty conflicted with that norm; the effect would thus clearly be to terminate the treaty *ex nunc*. Any reference to the treaty being void would, in Mr. Castrén's opinion, suggest that the effect was *ex tunc*.

36. Mr. BARTOŠ said he approved of Mr. Verdross's suggestion in principle. A formula should be found which made it quite clear that the treaty lost its validity as soon as it conflicted with a new peremptory norm of general international law, but that it was not rendered void *ab initio* by the establishment of that norm.

37. The idea on which article 22 *bis* was based was not new; it had already been invoked several times in the United Nations. About fifteen years previously, when arguing that the treaty of alliance between Egypt and the United Kingdom [1] had ceased to be valid, the Egyptian representative to the Security Council had pleaded, *inter alia*, that the treaty had been concluded at a time when the conception of the independence and status of States had been different; even if, quite apart from the use of coercion, the treaty had been valid before the recognition of the right of peoples to self-determination and before the principle of the sovereign equality of States had been established by the Charter, it had lapsed when those principles had been proclaimed. In article 22 *bis* the Drafting Committee had accordingly endeavoured to express an idea which jurists had had in mind for fifteen years. If such a rule were accepted by governments it would be a great contribution to the development of international law.

38. Mr. YASSEEN said that the Commission's discussions had shown the evolutionary and dynamic character of *jus cogens*. Article 22 *bis* laid down how the establishment of a new rule of *jus cogens* would affect an earlier treaty which was incompatible with that rule. It was correct to say that the reason why such a treaty terminated was that it became void from the moment the new rule was established. The expression "becomes void" was therefore useful in that it specified the nature of the sanction whose consequence was that the treaty terminated.

39. Mr. LACHS said that the difficulty could be met by a simple drafting change. The opening words of the article should be re-drafted to read: "A treaty becomes void and terminates as soon as ..." or "A treaty becomes void and terminates from the moment that ..." It would then be clear that the effects were *ex nunc* and not *ex tunc*.

40. Mr. YASSEEN thought it would be sufficient to replace the word "if", after "terminates", by the word "when".

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the reason for using the expression "becomes void and terminates" was to make it clear that the treaty would cease to have effect from the date when the new rule of *jus cogens* was established.

42. He was doubtful about the suggestion that the word "if" should be replaced by some expression meaning "when". The use of the word "if" showed that the case contemplated in article 22 *bis* was somewhat exceptional.

43. The CHAIRMAN, speaking as a member of the Commission, said that in his view the case envisaged in article 22 *bis* was one of validity rather than of termination. The rights conferred under the treaty disappeared; in cases of termination, the rights conferred under the treaty would subsist. The provisions of article 22 *bis* should form a second paragraph in article 13. During the discussion of article 13 (683rd-685th meetings), several speakers had pointed out that the question of supervening illegality of performance was not one of termination, but of validity projected into the future.

44. He suggested that the provision should be inserted in article 13 and that the opening words should read: "A treaty becomes void and ceases to have effect if ..."

45. Mr. EL-ERIAN said that in the Drafting Committee he had suggested that the provision should open with the words: "A treaty shall be void and terminate ..." He was not at all certain that nullity would not operate *ab initio* in absolutely all cases, and that language would have avoided introducing the time element. However, the Drafting Committee had not adopted his suggestion.

46. He was grateful to Mr. Bartoš for explaining one of the reasons for the position taken by the Egyptian Government in 1947, when it had referred to the Security Council the question of the continued validity of the Anglo-Egyptian Treaty of 1936. The Egyptian case on that occasion had not been based on the doctrine of *rebus sic stantibus* alone; Egypt had also invoked the principle of the sovereign equality of States, laid

[1] League of Nations, *Treaty Series*, Vol. 173, pp. 402 ff.

down in Article 2, paragraph 1, of the Charter, when its representative to the Security Council had said:

> " What could be more contrary to the principle of sovereign equality than the occupation in time of peace of the territory of a Member of the United Nations, without its consent, by the armed forces of another Member? " [2]

47. Sir Humphrey WALDOCK, Special Rapporteur, said he still considered that article 22 *bis* was in its proper place, because it must not be given retrospective effect. In re-drafting the articles contained in section V, he had found it more convenient to deal with the legal effects of the supervening illegality of performance in the article relating to termination than in that relating to invalidity.

48. The points raised during the discussion could be referred to the Drafting Committee, which might consider substituting some such wording as " if and when " for the words " and terminates if ".

49. The CHAIRMAN suggested that the Commission might take a vote on the article on the understanding that the Drafting Committee would make the necessary changes in wording to meet the points raised during the discussion.

50. Mr. CADIEUX said he could not vote on article 22 *bis* until the Commission had seen the re-draft of article 26.

51. The CHAIRMAN said that a vote at the present stage of the discussion would in no way prejudice the position of any member regarding the interrelationship between certain articles in the draft; that was a matter on which members would be free to comment once the revised text of the whole draft was before the Commission.

Article 22 bis *was adopted, subject to drafting changes, by 19 votes to none.*

Special Missions (A/CN.4/155)

[Item 5 of agenda]

52. The CHAIRMAN invited the Commission to discuss the topic of special missions and drew attention to the working paper prepared by the Secretariat (A/CN.4/155).

53. Mr. BARTOŠ congratulated the Secretariat on the document it had submitted. After a thorough study of the question of special missions he had found, like the Secretariat, that there were no specific and precise rules on the subject. Special missions and itinerant envoys were being increasingly used in international relations, however, though current business was still transacted by permanent missions. There were very few rules of international law which specifically concerned special missions, and few sources of law on which it was possible to rely. The Regulation of Vienna of 1815,[3] article 3 of which referred to extraordinary missions, dealt only with their protocol aspect. Generally speaking, it had been concluded from its omission to deal with other aspects of the matter that special missions were governed by the rules of diplomatic law relating to permanent missions.

54. In his opinion, permanent missions and special missions differed both as to their functions and as to their nature, and it was impossible to apply the same rules to them. The League of Nations and later the United Nations had studied the question. When the Convention on the Privileges and Immunities of the United Nations had been drawn up, the question of how to deal with special missions had arisen, and it had been recognized that the basis of the approach would have to be the functional, not the representative, character of such missions.

55. International relations had developed to such an extent that it was necessary to make increasing use of special missions for settling political and technical questions and for consultations at the highest level. Permanent diplomacy was losing ground even at the political level and in bilateral negotiations. Another phenomenon had contributed to that change: formerly, a diplomat had only been expected to know protocol and be able to understand his country's interest. A career diplomat had not been required to have a profound knowledge of non-political problems concerning international relations. Today, on the other hand, many technical questions arose in international relations and special missions were indispensable for settling them.

56. The sources showed a total absence of historical continuity. Hitherto, certain special cases had been settled, but no general principles had been laid down. Generally speaking, the bodies which had studied the question of special missions had not done so thoroughly and had been content to say that there was an *ad hoc* diplomacy which was governed, in principle, by the rules applicable to permanent missions. The secretariat working paper noted that four broad principles appeared to be generally recognized, but that there was not sufficient material for codification of the rules applicable to special missions; it also showed that *ad hoc* diplomacy was becoming increasingly important and that governments were seeking rules to apply.

57. It was therefore important that the rules of a legal system applicable to special missions should be drawn up in detail. Such missions were no longer purely ceremonial; they worked parallel to the permanent missions and their activities sometimes merged with those of the permanent missions. Differences between permanent missions and special missions did exist, however, as could be seen from a number of examples. A study of international practice showed that certain general institutions had a different signification in the case of special missions. Among the institutions showing that difference were: the right to send *ad hoc* missions (prior agreement required); the task of the *ad hoc* mission

[2] *Security Council, Official Records*, second year, No. 70, 175th meeting, 5 August 1947, p. 1753.

[3] *Yearbook of the International Law Commission, 1958*, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), pp. 93-94, footnote 29.

(fixed in advance and specified); the agrément (non-formal); declaration as *persona non grata*; accreditation to more than one State (simultaneous or successive; circular note; influence of relations between other States and former dealings); composition of the special mission (head of mission, alternate head, chargé d'affaires *ad interim*, number of members); classes and ranks of *ad hoc* diplomats (difference as compared with resident diplomats, precedence between members of *ad hoc* missions); mode of reception of an *ad hoc* mission (no protocol, no formal reception or delivery of full powers, collective, alternate or subsidiary powers); notification of arrival and departure (period of notice and notification of departure); special rules concerning the beginning and end of *ad hoc* missions, etc. That analysis led to the conclusion that special rules were necessary and existed in practice.

58. There were many kinds of special mission, for they might be concerned with political, economic, technical, immigration and other questions, and it depended on the particular nature of each mission whether its privileges and immunities were broad or restricted. For example, some permanent missions were not entitled to enter certain areas known as military zones, whereas some special missions, such as those concerned with the demarcation of frontiers, necessarily had to enter such areas. All those matters required thorough study before the rules needed by States could be drawn up.

59. Mr. CADIEUX said he was glad the subject had been placed on the agenda, for although it was not of very wide scope, it was assuming increasing importance as relations between countries multiplied. Traditional diplomatic methods often proved inadequate, and special missions had become essential to international life. They were so numerous and so diverse that their status could no longer be left uncertain. The Commission would be doing useful work if it offered States precise rules on the subject.

60. The Commission should first consider its approach to the task entrusted to it by the General Assembly. The simplest course might perhaps be to appoint a special rapporteur who, on the basis of the Secretariat's excellent working paper, would submit suggestions to the Commission on both substance and procedure. So far as substance was concerned, it would not be necessary to go over all the ground again. On the basis provided by the Vienna Convention of 1961, the special rapporteur should be able to work out certain rules which the Commission could examine at a later session. The procedure followed should be such that States could endorse the rules worked out by the Commission. As it was doubtful whether the subject was important enough to justify a conference, the Commission might consider submitting the results of its work to the Sixth Committee of the General Assembly.

61. Next the Commission should decide whether to deal with the question of conferences and congresses convened by States. As that question was similar to the one to be considered by the Special Rapporteur on relations between States and intergovernmental organizations, the Commission might ask him to deal with both. Alternatively, it might ask the special rapporteur it appointed for special missions to deal also with conferences and congresses convened by States. He personally would prefer the first solution, as it would have the advantage of combining two subjects that were more genuinely interrelated.

62. Thirdly, the Commission should reaffirm the decision it had taken in 1960 to treat the case of itinerant envoys on the same footing as special missions.[4]

63. As to the form of the rules to be drawn up by the Commission, either a protocol supplementing the 1961 Convention or a separate convention might be suitable. The choice of the instrument would depend on the method adopted. If the whole subject was studied afresh, a convention would probably be required; but if, as he believed they would, the proposed rules contained only the specific provisions relating to special missions and for the rest referred to the rules in the Vienna Convention, then a protocol attached to that Convention would be more appropriate. The Commission could obviously not decide until it had received the special rapporteur's conclusions on the substance of the rules to be adopted and on questions of procedure.

64. Mr. TUNKIN said it was mainly owing to lack of time that the Vienna Conference on Diplomatic Intercourse and Immunities had not discussed the draft articles adopted by the Commission at its twelfth session [5] and it would be quite wrong to conclude that it had rejected the Commission's approach or the substance of the articles.

65. The Commission ought to follow the procedure adopted for the law of treaties, state responsibility and state succession, and appoint a special rapporteur on special missions who would be given fairly precise instructions as to how he should handle the subject.

66. With regard to the scope of the study, the decision taken at the twelfth session to leave aside the question of the privileges and immunities of delegations to international conferences [6] should be reaffirmed. There was, of course, a difference between conferences convened by international organizations and those convened by States, but the question belonged to what was now becoming a separate part of international law governing international conferences and called for special rules. The Commission could always reconsider its decision later.

67. The Commission should also maintain the decision taken at the twelfth session to cover itinerant envoys in its draft, because the same rules should apply to them as to special missions.

68. At the twelfth session, the Commission had considered that existing practice in some measure justified extending to special missions the privileges and immunities accorded to permanent missions, and the draft articles to be prepared might possibly take the form

[4] *Yearbook of the International Law Commission, 1960*, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), p. 179, para. 34.

[5] *Ibid.*, pp. 179-180.

[6] *Ibid.*, p. 179, para. 33.

of an additional protocol to the Vienna Convention on Diplomatic Relations; but no final decision need be taken on that matter at present.

69. As to the substance of the articles, the special rapporteur should be guided by practical considerations and should refrain from going into too much detail about the functions and composition of special missions, which could be of very different kinds. Extremely detailed legal rules, which jurists were sometimes tempted to draw up, did not always facilitate relations between States and could even have the opposite effect.

70. Sir Humphrey WALDOCK said that, not having been a member of the Commission at its twelfth session, he had found the Secretariat's working paper particularly helpful in explaining the position. In general, he subscribed to the views expressed by the members who had spoken before him, but he would hesitate to exclude from the scope of the study the privileges and immunities of delegations to international conferences of the ordinary kind called by States, as distinct from those convened by, or held under the auspices of, international organizations. The matter should be studied by the special rapporteur at least in his first report.

71. He entirely agreed that a special rapporteur should be appointed to examine in detail which rules in the Vienna Convention on Diplomatic Relations would be applicable to special missions, as that would be a far more effective and quicker way of dealing with the subject than for the Commission to undertake the study itself. Moreover, he considered it essential to study the subject with a view to determining what rules were suitable for special missions, rather than simply to regard the rules of the Vienna Convention as being suitable, subject to a few exceptions. In considering those parts of the law affecting consuls which came nearest to the same rules in the Vienna Convention, he had been impressed by how closely the matter had had to be examined in order to see how a principle applicable to diplomats was suitable for consuls.

72. It was too early to form any definitive opinion as to what kind of instrument would be most suitable for the draft articles, and perhaps the special rapporteur should start on his task with no preconceived idea on that point.

73. It certainly seemed clear that States wished the Commission to complete its work on special missions as an important subject in its own right. It would be easier to decide how much time should be devoted to the subject when the Commission had received the special rapporteur's first report. Perhaps it would be feasible to hold a short special session on a subject of the scope of special missions.

74. Mr. TABIBI said that the Secretariat's working paper provided a useful review of the work already done by the Commission and the action taken at the General Assembly. He had also found the observations by Mr. Bartoš and Mr. Tunkin most illuminating. Like other members of the Sixth Committee, he considered that the subject of special missions was most important and that it was very necessary to draw up rules to protect such missions, which were of widely different kinds. On the whole it would be better not to include delegations to international conferences in the study, but to deal with them separately under the important branch of law covering international conferences.

75. A special rapporteur should be appointed at once and given instructions on the content of his first report, which could be submitted in 1964. Once the Commission had the report before it, it would be in a better position to decide whether the draft articles should be embodied in a protocol to the Vienna Convention or in a separate instrument. The special rapporteur should be asked for suggestions on that point.

76. Mr. ROSENNE said he much appreciated the extremely helpful working paper prepared by the Secretariat, paragraphs 47-51 of which were of particular interest with regard to the procedure to be followed. Although the terms of General Assembly resolution 1687 (XVI) requesting the Commission to study the subject of special missions " as soon as it considers it advisable " might justify postponement on the ground that the programme was already a heavy one, there were several cogent reasons for proceeding at once with the topic, besides those already mentioned by other speakers and in the secretariat paper.

77. The first reason was international in character. Since the conclusion of the two Vienna Conventions and in the light of the progress made on the law of treaties, more particularly with the introduction of article 4 in Part I, it was easier to discern what was needed to complete the law on the machinery of international intercourse. The subject of special missions was no longer merely an adjunct of the law of diplomatic relations; it could stand on its own. Special missions fulfilled a variety of functions, some diplomatic or quasi-consular in character; for example, they dealt with migration problems, many of which were now covered by the Vienna Conventions. But it was their special nature that needed emphasis and it was particularly important to remember that they could, and often did, operate when there was no diplomatic recognition between the receiving and the sending State. The legal framework in which special missions had their being and their functions called for a set of rules to regulate them.

78. The second reason was of a domestic order. The conclusion of the two Vienna Conventions had made it necessary for many countries to re-examine their law on privileges and immunities. In some countries, international treaties automatically became law on ratification, but in others, like his own, special legislation had to be prepared. The passage of such legislation or the parliamentary ratification of such treaties was not easy, as experience of the various international agreements concerning privileges and immunities had shown. The completion of the Commission's work on the topic of special missions would greatly assist governments and those responsible for drafting national legislation and would help to fill gaps in the law where special missions were concerned.

79. As to the scope of the study, in principle it ought to cover all official intercourse between States that took place outside the framework of normal permanent diplomatic or consular missions and of international organizations. Consideration should be given first to political, technical and administrative special missions, which varied widely in character and were growing in number. Purely ceremonial missions could be relegated to second place.

80. The Commission should maintain its decision to assimilate itinerant envoys to special missions.

81. From the remarks of the Secretary to the Commission at the 565th meeting,[7] he inferred that the decision to exclude from the study questions concerning the privileges and immunities of delegates to congresses and conferences had been limited to meetings coming within the scope of conventions on privileges and immunities or host agreements. There were still a number of conferences that did not fall within that classification, and as Sir Humphrey Waldock had pointed out, it was important to distinguish between conferences that were convened by an international organization and those that were not, because immunity from judicial process in many countries derived from municipal law and would rest on a different international basis in the two cases. However, the question was not of great urgency and could be left aside until further progress had been made on other matters.

82. He agreed with Mr. Tunkin that it was essential to avoid going into great detail. The articles should be drafted as tersely as possible and be few in number. The draft could take other forms than those mentioned in paragraph 51 of the Secretariat's working paper, and all of them should be explored, bearing in mind the need for flexibility imposed by the nature of the subject itself.

83. Enough preparatory work had already been done with the report by Mr. Sandström, the Special Rapporteur for *ad hoc* diplomacy (A/CN.4/129), the Chairman's memorandum (A/CN.4/L.88), the secretariat working paper and the discussions in the Commission and the Sixth Committee. The discussions in the Sixth Committee and at the Vienna Conference on Diplomatic Intercourse and Immunities clearly showed that the Commission was expected to follow its usual procedure of appointing a special rapporteur to prepare draft articles with a commentary, which would be given two readings, the second taking place after the comments of governments had been received. He was therefore in favour of adopting that course and thought that the special rapporteur should be asked to submit the draft articles and commentary in time for the sixteenth session. It could be decided later when they would be discussed; in that connexion he had found Sir Humphrey Waldock's suggestion particularly interesting.

The meeting rose at 6 p.m.

[7] *Yearbook of the International Law Commission, 1960*, Vol. I (United Nations publication: Sales No.: 60.V.1, Vol. 1), p. 259, para. 13.

712th MEETING

Tuesday, 2 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Special Missions (A/CN.4/155)

[Item 5 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of item 5 of the agenda: special missions.

2. Mr. BRIGGS said that the secretariat working paper (A/CN.4/155) had been useful in focusing the Commission's attention on the decision it was called upon to take. But except for paragraphs 5 and 6, it made little reference to state practice and consisted largely of an account of the opinions of writers. It was therefore desirable that the Commission should appoint a rapporteur at the present session to make a thorough study of state practice in the matter and a more profound juridical analysis of the problem of special missions.

3. With regard to Mr. Tunkin's suggestion that the Commission should give instructions to the Special Rapporteur, he thought that such instructions should be of a general character.

4. As to the scope of the subject, he supported the view expressed by the Commission in its report on its tenth session, that the study of *ad hoc* diplomacy should cover itinerant envoys, diplomatic conferences and special missions,[1] a view that had later been qualified by the decision not to deal with the privileges and immunities of delegates to congresses and conferences. He thought that the limitation should be confined to the question of privileges and immunities. The general question of delegates to international conferences might well come within the scope of the subject of *ad hoc* diplomacy; on that point, he would like to hear the views of Mr. El-Erian, the Special Rapporteur for relations between States and inter-governmental organizations.

5. If the topic of special missions overlapped with other topics, the special rapporteurs concerned should co-operate. In the case of state responsibility, the Commission had already decided that the special rapporteur should co-ordinate his work with that of the special rapporteurs for succession of States and the law of treaties.

6. With regard to the form of the draft — a question dealt with in paragraph 51 of the secretariat working paper — it would be premature to try to decide at that stage whether it should take the form of an additional protocol to the 1961 Vienna Convention on Diplomatic Relations or of a separate convention. The Commission should await the findings of the special rapporteur on special missions.

7. The Commission should certainly appoint a special rapporteur at its present session.

[1] *Yearbook of the International Law Commission, 1958*, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 89, para. 51.