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48th Meeting of the Committee of the Whole

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48th MEETING

Tuesday, 8 August 1978, at 11 a.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976

[Agenda item 11] (*continued*)

ARTICLE 33 (Succession of States in cases of separation of parts of a State)[1] (*continued*)

1. Sir Francis VALLAT (Expert Consultant), replying to a question put by the representative of the Soviet Union,[2] said that from the wording of article 33 and the commentary to it, it was clear that paragraph 3 was not intended to apply to the case where a predecessor State ceased to exist. Consequently it would not apply to the case of dissolution of a State. In paragraph 32 of its commentary to article 33, the International Law Commission had stated: "By contrast with cases under paragraph 1 where the predecessor State may or may not survive the succession of States, in cases to which paragraph 3 applies, the predecessor State would always continue to exist." (A/CONF.80/4, p. 105).

2. Mr. ROVINE (United States of America) said that his delegation had fully supported paragraphs 1 and 2 of article 33 but had expressed doubts about paragraph 3. Those doubts had been confirmed by the discussion on the article. Paragraph 3 presented difficulties from the theoretical viewpoint, from the political viewpoint and from the viewpoint of secession generally.

3. From the theoretical viewpoint, the "clean slate" principle, as conceived by the International Law Commission, seemed to be based essentially on the concept of consent. Since a colonial territory had not necessarily given its consent to be bound by the treaties applicable to it, other States could not, once that territory had acceded to independence, insist on their treaty rights. In that case, the application of the "clean slate" principle was only just. Logically, the circumstances in which the treaties had been concluded should have been taken into account but that would have constituted interference in the domestic affairs of States. For that reason, the International Law Commission had found itself obliged to shift the emphasis to another question, that of the circumstances in which a part of a State separated and became a State. That was an easier question, but it was perhaps not the right one. In his delegation's view, paragraph 3 did not really square with the "clean slate" concept as it appeared in articles 15 to 29. To take his own country as an example, during the period following the creation of the United States of America, it was the South which provided the leadership of the country and negotiated international agreements. Eighty-five years later, the South had separated from the Union in circumstances which, it could be argued, were essentially of the same character as those existing in the case of the formation of a newly independent State. Should the rest of the international community then have forgone its rights, although it was in fact the South which had concluded the treaties whose objections it now wished to evade?

4. From the political viewpoint, it might be considered that it was not realistic that a successor State should be bound by the treaty obligations of the predecessor State, as the Expert Consultant[3] had observed at the previous meeting. But neither was it just that a great number of States should lose their treaty rights. Thus a very serious choice had to be made. Perhaps it was better to be unjust to one State than to a very large number of States.

5. From the viewpoint of secession in general, it was obvious that paragraph 3 of article 33 was not intended to encourage the separation of parts of a State. Nevertheless, it had the effect of making secession a little easier for the seceding State in the event of a secession of that kind. Consequently, the question might be asked whether the Conference could adopt a provision which would facilitate secession in the case of separation of parts of a State.

6. For those three reasons, and unless some very convincing arguments were put forward in support of paragraph 3, his delegation would vote against it, if it was put to the vote.

7. Mr. DOGAN (Turkey) said he would like the Expert Consultant to explain the purpose of paragraph 3 of article 33 in the light of the following question: could the States which had emerged after the First or the Second World War invoke that provision? Would States which had become independent through separation of part of the territory of a State enjoy the benefit of the "clean slate" rule, irrespective of the date of their accession to independence and the way in which they had become independent?

8. If article 33 was put to the vote, each of its paragraphs should be voted on separately.

9. Sir Francis VALLAT (Expert Consultant) said that, under the non-retroactivity rule laid down in article 7, paragraph 3 of article 33 would not apply to States which had become independent after the First or the Second World War. On the other hand, it might be that part of the territory of a State which had thus acceded to independence might secede, in which case article 33 would apply.

10. The rule stated in paragraph 3 of article 33 was not based either on established practice or on precedent; it was a matter of the progressive development of international law rather than of codification. Paragraph 3 of article 33 was thus a saving clause for the application of the continuity principle. It was for the Conference to decide whether to retain the provision or not.

[1] For the list of amendments submitted, see 40th meeting, foot-note 9.

[2] See 47th meeting, para. 43.

[3] See 47th meeting, paras. 33-37.

11. Mr. RYBAKOV (Union of Soviet Socialist Republics) said that, with the exception of article 33, paragraph 3, the articles drafted by the International Law Commission had been generally well received by the Committee of the Whole and had not given rise to any lengthy discussions. When the International Law Commission had drafted paragraph 3 of article 33, substantial differences of opinion among its members had become apparent. Some had expressed doubts as to the usefulness of the provision. Those doubts, which he shared, had not been dispelled by the explanations given by the Expert Consultant. He was more than ever convinced that in some cases the paragraph could do harm. Moreover, it was completely at variance with the general trend of the draft with regard to the respective spheres of application of the "clean-slate" rule and the continuity principle. In the case of Singapore, it was to be noted that the "clean slate" rule had been applied to the treaties of the British Empire with the exception of the Malaysian treaties. All the problems which had arisen at Singapore had been settled as provided in article 15 of the draft. It might be considered that paragraph 3 of article 33 was unnecessary.

12. There was an internal contradiction in article 33 between paragraphs 1 and 2 on the one hand and paragraph 3 on the other. Paragraphs 1 and 2 provided one and the same régime for cases of separation of a part of the territory of a State or dissolution of a State, whereas paragraph 3 provided a totally different régime for cases of separation of a part of the territory of a State. But the distinction between dissolution and separation was very difficult to draw and was bound to give rise to disputes between States. It was to be feared that the case dealt with in paragraph 3 would cause a great many difficulties in practice. Furthermore, the paragraph did not cover the case where a part of the territory of a State separated from it in order to unite with a newly independent State. In preparing its draft on succession of States in matters other than treaties, the International Law Commission had reconsidered those questions of the various types of succession and discussed them at great length. They were too delicate for the Committee of the Whole to think of settling them at the present stage of its work. In the circumstances, his delegation could only endorse the view of those delegations which thought that paragraph 3 of article 33 raised more problems than it solved and should consequently be deleted.

13. Mr. VREEDZAAM (Suriname) said that before acceding to independence in 1975, in circumstances essentially of the same character as those existing in the case of a formation of a newly independent State, his country had been first a Dutch colony and then a part of the Kingdom of the Netherlands. Paragraph 3 of article 33 would have been applicable to the succession of States caused by the accession of Suriname to independence; furthermore the "clean slate" principle had been applied in that case. Consequently, he fully supported paragraph 3.

14. Mr. SHEIKH (Pakistan) said that the discussion showed that paragraph 3 deserved careful thought. Most delegations already appeared to be in favour of deleting it. In the circumstances, each paragraph of article 33 should be voted on separately. His delegation's amendment to paragraph 3 (A/CONF.80/C.1/L.54) dealt specifically with the case where an independent State separated into two States, like Pakistan and Bangladesh. His delegation would not press its amendment if paragraph 3 were deleted.

15. Mr. SAHOVIĆ (Yugoslavia) said that his delegation found article 33 acceptable, although it appreciated the difficulties paragraph 3 could cause for certain delegations. The reason why the International Law Commission had included article 33 was to take account of the variety of circumstances in which a part of the territory of a State might separate and become a State, for the future convention must deal with all the practical problems that might arise. Not only was paragraph 3 an exception to paragraph 1, it was a genuine saving clause. The International Law Commission had been right to provide, in paragraph 3, for the exceptional application of the "clean slate" rule. Perhaps the wording of the paragraph was not entirely satisfactory and the Drafting Committee could improve it.

16. Mr. DIENG (Senegal) said that his delegation had already expressed its support for paragraphs 1 and 2 of article 33 and its doubts regarding paragraph 3.[4] The conditions in which a part of the territory of a State separated from it to become a State on its own continued to cause problems. Nowhere in either the draft convention or the commentaries of the International Law Commission was any detailed information provided about the circumstances referred to in paragraph 3. In the absence of a clear description of those circumstances, paragraph 3 rather lent itself to varying and conflicting interpretations. Whereas in the third and fourth parts of the draft it was quite clear to what cases the "clean slate" and the *ipso jure* continuity principles applied, the situation appeared to be very confused in paragraph 3, which established a third, hybrid, category of States, quite distinct from that of States emerging as a result of decolonization and that of States born of the separation of a part of the territory of a State. In his opinion, it was impossible to produce a clearer text, because the situation was itself confused. The paragraph should therefore be deleted. He supported the proposal for a separate vote on paragraph 3.

17. Mr. AHIPEAUD (Ivory Coast) said he agreed that paragraph 3 could encourage separation and secession and injure the rights of creditors. He endorsed the arguments put forward against the retention of the paragraph and would vote for its deletion.

18. Mrs. BEMA KUMI (Ghana) said that if paragraph 3 were deleted, it would not harm the convention as a whole in any way. If they tried to cover all possible cases of succession of States, they would create more problems than they could solve. Paragraph 3 did not directly encourage secession, but there was no doubt that it would facilitate matters for separatists once they had achieved their aim.

[4] See 41st meeting, paras. 43-46.

They could easily reject obligations imposed on them by treaties, particularly economic treaties, on the pretext that the part of the territory which had seceded had become a newly independent State, and consequently was not bound by such treaties. It was clear that the problem was more of a political one, but as the case of newly independent States was dealt with in article 15, paragraph 3 could easily be deleted.

19. Mr. YANGO (Philippines) said the argument that paragraph 3 of article 33 could encourage secession was a very powerful one, and very damaging, because it was not the policy of members of the United Nations to encourage secessions. His delegation would therefore vote accordingly. His delegation asked that, when the separate vote was taken on paragraph 3, it should be by roll-call. Also paragraph 3 would have to be voted on before the amendment by Pakistan.

20. Mr. BRECKENRIDGE (Sri Lanka) said he regretted that the International Law Commission had used an analogous description in paragraph 3 of article 33. If, as the Expert Consultant had said, the situation dealt with in that provision had the characteristics of a colonial, trusteeship or protected territory and of a dependency which had had a prolonged struggle for independence, it might be wondered whether it was the analogy or the action itself that was under discussion. Was not the situation of such territories in fact identical with that of the newly independent States to which the "clean slate" principle applied?

21. The General Assembly in its resolution 1541 (XV) had indicated the forms in which the decolonization process could be completed: the emergence of a territory as a sovereign independent State, free association with an independent State, or integration with an independent State. The act of separation was never mentioned and was subsumed in the emergence of the State, no matter what the form or method of the emergence. Separation in that context was dealt with in Part III of the draft convention. It was a pity that the General Assembly had not given any precise guidance in the matter. If the International Law Commission had examined the question in the light of those considerations, it would not have established that unfortunate link between the provisions on the separation of States in section 5 of Part III of the draft articles (Newly independent States formed from two or more territories) and section 3, and the confusion would have been avoided.

22. The International Law Commission had endeavoured to balance the "clean slate" principle against that of continuity, and it had been no part of its task to determine when decolonization had taken place. That, however, was what their analogy in paragraph 3 of article 33 led to, and it did no service at all to the States in that situation, Singapore and Bangladesh, for example.

23. The Expert Consultant had drawn the Committee's attention to the fact that the International Law Commission had not only sought to codify existing practice, but to contribute to the progressive development of international law. But what was the progressive development that resulted? It was clear from the comments by Singapore and Bangladesh that those countries had applied the "clean slate" principle. The analogy drawn in paragraph 3 was not needed therefore and only served to emphasize the danger of secession, which was not the point, so that States hesitated to endorse the paragraph.

24. Resolution 742 (VIII) dealt with the circumstances in which Administering Powers were obliged under article 73 (*e*) of the Charter of the United Nations to provide information on the Territories they administered. In the annex to the same resolution, the General Assembly had also attempted to define the factors to be taken into account in deciding whether a territory was or was not a Territory whose people had not yet attained a full measure of self-government. On the subject of paragraph 3, of article 33, Bangladesh, among other States, had pointed out (A/CONF.80/5, p. 255) that a definition of newly independent State was needed in article 2, which would cover all cases. Resolution 742 (VIII) referred to the independent conduct of international relations as a characteristic of independence. That aspect of the question might have to be looked at at the appropriate time in relation to article 2.

25. Mr. SANYAOLU (Nigeria) said he would like to ask the Expert Consultant whether or not the formulation by the International Law Commission of the rule in paragraph 3 of article 33 took account of the definition of newly independent State given in draft article 2.

26. Mr. MARESCA (Italy) said he recognized that paragraph 3 of article 33 was open to controversy but he did not entirely share the fears expressed by many delegations during the discussion. A legal text could never provoke a revolution or start a civil war. The real weakness of paragraph 3, and the reason why the Italian delegation hesitated to support it, was that it was illogical, as there was an absolute contradiction between the paragraph as it stood and the definition of newly independent State given in paragraph 1 (*f*) of article 2. Take the case of an island which separated from the territory of a State; could that island, which until its independence had participated in the policy-making and diplomacy of the country to which it had belonged, be placed on the same level as a newly independent State? Those were the reasons why, from the very beginning of the discussion on article 33, he had not been able to support paragraph 3.

27. Sir Francis VALLAT (Expert Consultant), replying to the question by the representative of Nigeria, said that the International Law Commission had not endeavoured to put States emerging as a result of the separation of a part of the territory of another State and newly independent States on the same level, and had confined itself to drawing an analogy, clearly recognizing that the situation was not the same. He would draw attention to the last part of paragraph 32 of the International Law Commission's commentary to paragraph 3, where it was stated that "in cases to which paragraph 3 applies, the predecessor State would always continue to exist. That was implicit in the idea of "dependency" which provided the key to the meaning of "newly independent State" as defined in article 2, paragraph 1 (*f*)" (A/CONF.80/4, p. 16). The International Law

Commission had not intended that to cover the dependent nature of the part of the territory of a State which had seceded, but to indicate that, in some circumstances, the part which had seceded could be in a situation comparable to that of a newly independent State. The International Law Commission had therefore suggested including an escape clause in the continuity rule.

28. Mr. FARAHAT (Qatar) said that the discussion had revealed the concern felt by delegations at the exception to the "clean slate" principle in the case of separation of a part of the territory of a State, in paragraph 3 of draft article 33. That paragraph was liable to prejudice the stability of international commitments. Perhaps the Drafting Committee should review the wording and study the cases in which States formed by the separation of a part of the territory of a State were in a similar position to that of newly independent States.

29. Mr. ARIFF (Malaysia) said he thought paragraph 3 of article 33 was superfluous since it was self-evident. He was therefore in favour of deleting it.

30. Mr. MAHUNDA (UnitedRepublic of Tanzania) said he had no difficulty in accepting paragraph 3 of article 33. However, he had noticed that most delegations were against it and he wondered whether it was wise to seek to impose on some States a provision which they found unacceptable. Consequently, he was in favour of deleting paragraph 3.

31. Mr. AL-NASHERI (Yemen) said that he would vote against paragraph 3 of article 33 if it was put to the vote.

32. Mr. KOH (Singapore) said he thought that, if paragraph 3 of article 33 were deleted, some other way would have to be found of providing for the type of situation covered by that paragraph. He was grateful to the representative of the Soviet Union for saying that Singapore could regard itself as a newly independent State and benefit from the provisions of article 15. But he must point out that, according to the definition given in article 2, paragraph 1 (*f*), newly independent State meant "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". He would like to ask the Expert Consultant whether, in the light of that definition, the Soviet representative's interpretation held good.

33. Mr. FONT BLÁZQUEZ (Spain) said that the cases to which the International Law Commission referred in its commentary to articles 33 and 34 were very clear cases of separation from a union of States and not of separation of a part of the territory of a unitary State. In the cases quoted, therefore, practice justified the continuity rule set out in subparagraphs (*a*) and (*b*) of paragraph 1 of article 33. But the cases referred to in the title itself of article 33, and in the opening lines of paragraph 1 of the article, were not cases of separation from a union of States, but cases of separation of one or more parts of a State. Consequently, the rule which applied in those cases was the "clean slate" rule. Nevertheless, the International Law Commission had introduced the continuity rule for such cases in paragraph 3. Indeed, it was clear that if the Commission had retained the continuity rule solely for cases of separation from a union of States and the "clean slate" rule solely for cases of separation of parts of a State, paragraph 3 would have been superfluous.

34. Mr. GILCHRIST (Australia) said he understood the viewpoint of the representative of Singapore and saw some value in retaining paragraph 3 of article 33. In his opinion, the International Law Commission had introduced the paragraph into the draft in order to make provision for situations which had already arisen or which would arise in the future. In so doing, it had acted in accordance with its brief which was to codify existing customary law and to formulate rules to deal with all succession problems likely to arise. It had established a logical distinction between the "clean slate" rule, which applied in the Part III of the draft and the *ipso jure* continuity rule, which applied in Part IV. But exceptions to rules were inevitable and in his delegation's opinion, the exception provided for in paragraph 3 of article 33 was acceptable and necessary. Part III of the draft dealt with newly independent States formed as a result of decolonization, whereas Part IV basically dealt with the separation of States which had earlier decided to unite. But what was to be done if there was a secession in a non-colonial situation analogous, but not identical, to the situation provided for in Part III of the draft? His delegation thought that paragraph 3 of article 33 offered a pragmatic solution which seemed acceptable. Like the Expert Consultant, it thought the paragraph tended to strengthen the continuity principle in Part IV of the draft convention by introducing an indispensable saving clause which would in practice constitute the exception which proved the rule.

35. Sir Francis VALLAT (Expert Consultant) said he was unable to reply to the question raised by the representative of Singapore, since in his capacity as Expert Consultant he could not express an opinion of the application of a rule to a particular case.

36. Mr. MAIGA (Mali) said that the explanations given by the Expert Consultant[5] showed that article 33 was a hybrid article in which the International Law Commission had tried to combine two principles—that of continuity and that of the "clean slate". According to those explanations, paragraph 3 would apply to a situation similar to that of countries under trusteeship or mandate. However, in spite of those explanations and the International Law Commission's commentary, paragraph 3 still seemed to him ambiguous and obscure. He therefore asked the Expert Consultant whether, in the light of State practice, paragraph 3 referred only to trusteeship or mandated territories.

37. Sir Francis VALLAT (Expert Consultant) said that paragraph 3 did not apply only to mandated territories, since such territories came under the category of newly

[5] See 47th meeting, paras. 23-25.

independent States for which paragraph 3 would be superfluous. But there might be cases where a part of the territory of a State was kept under the control of the State in the same way as a colony. It was therefore necessary to introduce an exception clause to deal with that type of situation in the future.

38. The CHAIRMAN invited the Committee to vote on the first part of the amendment by France and Switzerland (A/CONF.80/C.1/L.41/Rev.1, para. 2), the proposal to delete paragraph 1, subparagraph (*a*) of article 33.

The amendment was rejected by 69 votes to 7, with 9 abstentions.

39. The CHAIRMAN invited the Committee to vote on the amendment by the Federal Republic of Germany to paragraph 1, subparagraph (*b*) of article 33 (A/CONF.80/C.1/L.52).

The amendment was rejected by 57 votes to 5, with 20 abstentions.

40. The CHAIRMAN put to the vote paragraph 1 of article 33.

Paragraph 1 of article 33 was approved by 77 votes to 3, with 5 abstentions.

41. The CHAIRMAN put to the vote paragraph 2 of article 33.

Paragraph 2 of article 33 was approved by 80 votes to none, with 3 abstentions.

42. The CHAIRMAN suggested that voting on article 33 be suspended and resumed at the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

49th MEETING

Tuesday, 8 August 1978, at 5 p.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976

[Agenda item 11] (*continued*)

ARTICLE 33 (Succession of States in cases of separation of parts of a State)[1] (*concluded*)

1. The CHAIRMAN invited the Committee to continue voting on the amendments to article 33 and to vote first of all on the second part of the amendment by France and Switzerland (A/CONF.80/C.1/L.41/Rev.1, para. 2), the proposal to delete paragraph 3 of the article. At the request of the Philippines delegation a vote would be taken by roll-call on the amendment by France and Switzerland to delete paragraph 3.

2. Mr. KOH (Singapore), said he wondered whether it was appropriate to vote on the amendment by France and Switzerland at the present juncture since, in his view, it was consequential on the amendment of the definition of "newly independent State".

3. Mr. VREEDZAAM (Suriname) said he also questioned the correctness of voting first on the joint amendment.

4. Mr. RITTER (Switzerland) said that in his delegation's view that part of the joint amendment to delete paragraph 3 was not consequential on any other amendment, except perhaps, insofar as the renumbering of article 34 and article 15 *bis* was concerned. His delegation had made it clear, when introducing its amendment, that the amended definition of paragraph 1, subparagraph (*f*) of article 2 could be taken separately.

5. Mr. ABOU-ALI (Egypt) proposed that the Committee vote first of all on paragraph 3 of the article under consideration.

6. Mr. MUSEUX (France) supported that proposal.

7. Mr. RYBAKOV (Union of Soviet Socialist Republics) said that although such a procedure would be logical, it would conflict with the rules of procedure. If paragraph 3 were deleted as a result of the vote on the joint amendment, there would be no question of voting on paragraph 3 at all. From a procedural point of view therefore, the Committee should vote first on the joint amendment.

8. Mr. MASUD (Pakistan) said he could not support the proposal to vote first on paragraph 3. Not only would it be against the rules of procedure as they concerned voting on amendments, but it would affect his own delegation's proposed amendment, which would not be pressed if the Franco-Swiss amendment were adopted.

9. Mr. TODOROV (Bulgaria) said he was in favour of voting on the joint amendment as the proper course of action. If that was rejected, paragraph 3 would stand, and the Committee would then have to vote on Pakistan's amendment (A/CONF.80/C.1/L.54).

10. The CHAIRMAN said that the Committee appeared to be generally in favour of voting first on the second part of the amendment by France and Switzerland (A/CONF.80/C.1/L.41/Rev.1, para. 2), the proposal to delete paragraph 3 of article 33. A vote would therefore be taken by roll-call and, according to the result a vote would then, if necessary, be taken on Pakistan's amendment.

Zaire, having been drawn by lot by the Chairman, was called upon to vote first.

[1] For the list of amendments submitted, see 40th meeting, foot-note 9.