Document:-
A/CN.4/SR.1157

Summary record of the 1157th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1972, vol. I

existed, but had not been sufficiently independent to have the capacity to conclude international treaties themselves. That was the position of States under a protectorate. Secondly, it would be inappropriate to describe the accession to independence of a territory previously under the sovereignty of another State—no matter whether it was a case of decolonization or something different—simply in terms of replacement in the competence to conclude treaties. The basic phenomenon to be borne in mind was detachment from sovereignty, and it was therefore essential to keep both formulas, even if the necessary explanations had to be given in the commentary.

65. The Special Rapporteur had tried to give definitions which covered all possible cases of succession, except in sub-paragraph (*e*), where his intention had been to refer only to succession due to the birth of a new State. Apart from the question of improving the drafting of the English version, the definition given in that sub-paragraph needed to be supplemented. For as he had just said, the formula "territory which previously formed part" was not applicable in all cases; there, too, it would be better to use some such expression as "previously under the sovereignty". The words "an existing State" should also be reconsidered. In the first place, some States, like Poland, had been formed from parts detached from several different States. Secondly, the State from which the new State had been detached might have ceased to exist, like the Hapsburg Empire from which Czechoslovakia had emerged. It would be better to use a more neutral formula such as "one or more other States".

66. Then there remained the fundamental question whether to use the term "new State" and to retain the definition given in sub-paragraph (*e*), the scope of which was restricted and which was, as the Special Rapporteur had himself admitted, only of practical utility. The use of terms was always a matter of convention, but conventions had their own limits. Although there was a difference between the case of a State created in the territory of a former colony and that of a State which had freed itself from a protectorate, it could hardly be said that one was a new State and the other was not. It was doubtful whether the expression "newly-independent State" could be used. The most important point was that the definition given in sub-paragraph (*e*) excluded, although they were certainly new, States resulting from a fusion, such as the United States of America, Tanzania and many others. He would add that some States which had emerged from a separation, such as Sweden and Norway, did not regard themselves as new States, and many newly-formed States would not agree to be so designated either.

67. In fact, the expression "new State", as used in everyday language, was not a legal expression and it was not necessary for the Commission, whose work was exclusively legal, to use it. Besides, the idea it expressed was very relative, for what was new today would no longer be new in a little while. It would therefore be better to use the expression "successor State" to cover all the cases considered—he asked the Special Rapporteur to study that possibility—and to include a chapter containing the rules applicable to all cases of succession, followed by sets of rules dealing specifically with the different cases one after the other.

68. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself had not been enamoured of the term "new State", but that at the start of his work on the topic he has been pressed to give prominence to new States. He had since come to accept Mr. Ago's view that in a juridical exposition it would be preferable to use a less ambiguous phrase with fewer political overtones. Perhaps the answer could be found in the term "successor State", though some drafting technique might be called for in applying it to the "moving treaty frontiers" principle. He suggested, therefore, that the Commission should use the term "new State" for working purposes when drawing up the general rules and then go on to deal with particular cases.

69. A union was not a "new State"; the United Arab Republic, in fact, had been a fusion of two sovereignties, which had subsequently been dissolved and treated as two separate States.

70. The CHAIRMAN said that in view of those comments he assumed that the term "new State" would not appear as defined at present.

71. Sir Humphrey WALDOCK (Special Rapporteur) said that some speakers had been in favour of the term, but that from a legal point of view it now seemed better to replace it by something else.

The meeting rose at 1.5 p.m.

1157th MEETING

Friday, 12 May 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

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

(continued)

ARTICLE 1 (Use of terms) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of draft article 1 submitted by the Special Rapporteur.

2. Mr. Bartoš said he agreed with the Special Rapporteur's chosen method of work, but not entirely with the doctrine on which he relied. The classical doctrine was that succession, in other words, continuity, occurred

[1] For text see 1155th meeting, para. 50.

even in cases of the emancipation of colonies. But since the establishment of the United Nations and the appearance of the phenomenon of decolonization, a new doctrine had come into being, according to which States born of decolonization did not automatically assume the rights and obligations of the former colonial Power.

3. Excepting the case of the former British colonies and possessions, such as India, whose independence had been recognized by an act of internal law providing for devolution of sovereignty, the States which had issued from decolonization considered that they had obtained their independence by their own will and that the consent of the former "holder" of the territory, which they regarded as a usurper, had no part in the creation of the new State. In the eyes of those States there could be no continuity of sovereignty or, consequently, of rights and obligations, unless they agreed to it.

4. The Commission was thus faced with a choice: either it must fully support the Special Rapporteur's proposals and adhere to the old "classical" doctrine dear to certain States, or it must adopt the new revolutionary doctrine, which many States did not accept. The difference was more political than technical. He himself was inclined to favour the new doctrine, and thought it would be well to mention, either at the end of article 1 or at least in the commentary, that the phenomenon of decolonization, as the origin of the creation of new States, called for some other conception of continuity of sovereignty than the classical doctrine.

5. That comment should not be taken to imply any criticism of the Special Rapporteur's work, which was perfectly logical from the standpoint he had adopted.

6. Attention should, however, be drawn to the existence of a new doctrine, even though it was still ill-defined, for the new States themselves, while refusing to regard themselves as the successors of the colonial régime, sometimes invoked measures taken by the colonial Power if they were to their advantage. For example, when Pakistan had become a Member of the United Nations, it had cited a map made by the British authorities fixing the frontiers when the country had become independent and and thereby drawn a protest from Afghanistan, which had considered itself injured by that arbitrary act of the United Kingdom. In any case, it would be a mistake for the Commission to affirm that the classical doctrine was the only one that need be taken into account.

7. Mr. REUTER said he recognized that the definitions drafted by the Special Rapporteur were in no way final and were intended solely for the use of the Commission. It was also understood that the draft articles submitted related to a special case and that there would be other special cases to be considered. Obviously, the Commission would not know until it reached the end of its work to what extent it would need to recast the whole draft and work out simpler and more general rules to cover all the special cases. It was the Commission's method of work that was responsible for that situation, not the Special Rapporteur.

8. It was also understood that the Commission's work was only at a provisional stage. It was obliged to use a certain terminology in order to make progress without misunderstandings, though it was sometimes hard to dissociate substance from form. He hoped it would be possible to avoid unduly complicated formulations and terms that wounded legitimate susceptibilities.

9. Incidentally, a substantive problem was raised by sub-paragraph (*f*) of article 1, in regard to the possibility of States continuing their participation in multilateral treaties. He approved of the intention, but if the idea was to be retained it would be necessary to adopt a more radical solution and say that in order to preserve continuity, multilateral treaties continued to apply provisionally until the successor State took a decision.

10. Another point he wished to make was that the Commission must choose a reasonable solution and reach a compromise between the desire to adopt general solutions and the necessity of accepting particular solutions. If it was not to sink into chaos, the Commission could not do otherwise than take a general position on certain principles, but the facts were there and once it had taken a position on principle, the Commission would have to consider what would be the consequences in each specific case. It was not certain that the same principles could be adopted in every case. The most important question was how many special régimes were to be provided for.

11. It would therefore be best to follow the course proposed by the Special Rapporteur, who had started with a simple and clearly defined case, on the understanding that the solutions adopted for that case might not be applicable to others, such as cases of merger, like European unification.

12. He agreed with Mr. Bartoš on the subject of decolonization. It was no accident that the Special Rapporteur's approach in the draft articles coincided with the wish of the States issuing from decolonization to be born free from all prior commitments. But it was necessary to consider what other problems might arise from decolonization.

13. For example, several members of the Commission had alluded to the serious problem of colonial frontiers. The principle of the claim to former frontiers could be accepted so far as frontiers in general were concerned, but more caution was called for in the case of frontiers deriving from a colonial situation. There were many problems of decolonization which had not yet been settled, especially in Asia. Could the Commission lightly accept the idea of laying down special rules on decolonization applicable to the problems of Asia? He was not opposed to that idea, but he hoped such matters would not be considered until the end of the Commission's work; it would be better to start with the text submitted by the Special Rapporteur.

14. The Commission would have to deal, at least in the commentary, with the question of a succession involving an international organization, namely, the question of Namibia; it could not ignore problems of that kind.

15. If the Commission was going to refer to the Vienna Convention on the Law of Treaties, it should think twice before limiting the effects of its draft to treaties for which that Convention had laid down substantive rules. The Convention had done so only for treaties in written

form, but it contained other provisions from which it followed that the *pacta sunt servanda* rule also applied to oral agreements.

16. Mr. BILGE said that he too approved of the method proposed by the Special Rapporteur, who had prudently given warning against analogies with internal law. The difference was not only between internal law and international law, but also between national legal systems. It would be well, however, not to reject out of hand the idea that there could be analogies between internal law and international law, for example, in regard to the disposal of property or, even more, the transfer of contractual rights and obligations. The difference between the notion of the automatic transfer of rights and obligations in internal law and in international law should be brought out more clearly and explained in the commentary. Nevertheless, he accepted the definitions submitted by the Special Rapporteur, the sole purpose of which was to provide a working foundation for the Commission.

17. The reference to sovereignty in the definition in sub-paragraph (*a*) should be deleted, and it should be specified, either in a general reservation or in the commentary, that cases of military occupation were excluded.

18. With regard to the notion of a new State, the Special Rapporteur had naturally wished to take a typical case as his starting point. The Commission would not be able to decide whether the term was appropriate or not until it reached the end of its work. Similarly, it was only then that it would be able to decide on the structure for the draft. The Commission should therefore accept the proposals made by the Special Rapporteur in his third report (A/CN.4/224).[2]

19. He believed that the solution to the problems of succession in respect of treaties was not to be sought solely in the law of treaties, but in the whole of the international legal order.

20. Mr. TABIBI said he agreed with Mr. Reuter that the question of boundaries was a burning issue, particularly in Asia, where the lives and destinies of millions of people were involved. In his opinion, therefore, article 2 should not be dealt with after article 1, but should be considered in Part IV of the Special Rapporteur's draft, on dispositive, localized or territorial treaties.

21. With regard to article 1, while he accepted the Special Rapporteur's explanation that the article was not intended to be definitive, it was certainly highly important, since it was the key to the whole discussion. In particular, he thought that sub-paragraph (*g*), which defined "other State party", should be given greater prominence, since in practice the position of the other party to a treaty was often of equal importance to that of the predecessor State. It was unfortunately true that a number of treaties concluded during the nineteenth century era of colonialism had ignored the position of third parties. The treaties between his own country and the United Kingdom, for example, had been concluded on that basis.

22. The Anglo-Afghan Treaty of 1921 [3] had acknowledged the independence of Afghanistan, and article XI of that treaty had laid down certain provisions regarding the tribes in two frontier areas: the North-West Frontier area and the free tribal area. The latter was an area with 4 million inhabitants who were allowed to move freely, without passports, between Afghanistan and India, and the British Government had undertaken to consult the Afghan Government in all matters concerning the area; but by the Indian Independence Act of 1947,[4] the British Government had unilaterally transferred both areas to Pakistan, completely ignoring the millions of Afghans dwelling in the region, in violation of the principle of self-determination. That example was sufficient to show the need to give prominence to the position of the "other party" in bilateral treaties concluded by a predecessor State.

23. He agreed that sub-paragraph (*d*) should be retained, since there were many cases in which reference could be made to the chapter on invalidity in the Vienna Convention on the Law of Treaties.

24. As Mr. Ago had shown by historical examples, the term "new State", defined in sub-paragraph (*e*), was not a legal term. It was, nevertheless, a useful term, since it corresponded to earlier decisions by both the Sub-Committee on Succession of States and Governments [5] and the General Assembly. "New States" need not have acquired their status by decolonization; it was sufficient that they had all gone through the same process of attaining independence. Perhaps the term "newly independent States" could be adopted.

25. Mr. YASSEEN observed that article 1 was not confined to stating definitions, but in fact established the method of work to be followed in preparing the draft.

26. In wording sub-paragraph (*a*) as he had, the Special Rapporteur had wished to make it clear at the outset that the use of the term "succession" did not permit of analogies with internal law. It should be noted, moreover, that systems of internal law varied considerably in that respect; for instance the notion of transfer of obligations was unknown to the Moslem law of succession. The Special Rapporteur intended the term "succession" to designate a *de facto* situation, namely, the replacement of one sovereignty by another. The Commission's task was to try to find solutions to the problems raised by that situation. He supported the neutral method adopted by the Special Rapporteur, which was the only one that could lead to positive results.

27. Sub-paragraph (*a*) had, however, met with objections from members of the Commission, mainly in regard to the reference to sovereignty. Some members had expressed doubts about the birth or continuity of sovereignty over certain territories. He himself thought it inadvisable to say anything about the source of sovereignty, which might have been ursurped or exercised in a manner incompatible with the principles at present in

[2] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 25.

[3] *British and Foreign State Papers*, vol. CXIV, p. 174.

[4] Op. cit., vol. 147, p. 158.

[5] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 260.

force. The Special Rapporteur and the Drafting Committee should therefore ensure that sub-paragraph (*a*) was drafted in such a way as not to prejudge those questions.

28. Mr. ALCÍVAR said that when the Commission had discussed succession of States in 1970, he had stressed the unity of the subject, though he fully realized that there were sound technical reasons for dividing it into two topics.

29. He supported the Special Rapporteur's method of dealing with the topic of succession of States in respect of treaties within the framework of the 1969 Vienna Convention on the Law of Treaties. He also shared the Special Rapporteur's view that the municipal law concept of "succession" should not be injected into international law.

30. During the discussion in 1970, he had drawn attention to the problem of secession, of which a number of examples were to be found in Latin-American history.[6] One was the formation and subsequent break-up of the union of the five States of Central America; another was the splitting-up of the original "Greater" Colombia into the three separate States of Colombia, Ecuador and Venezuela. A fourth State, Panama, had subsequently been formed, in 1903, by secession from Colombia.

31. He regretted that sub-paragraph (*a*) contained a reference to "sovereignty", and would have preferred the formula originally proposed by the Special Rapporteur in his first report (A/CN.4/202),[7] which avoided that term and referred simply to the replacement of one State by another in "the possession of the competence to conclude treaties with respect to a given territory".

32. In 1963, in its interpretation of the effect of the provisions of Article 73 of the United Nations Charter,[8] the delegation of Ecuador had put forward the view that the adoption of the Charter had brought into being a new international legal order by virtue of which the colonial status was automatically abolished. Consequently, the former colonies had ceased to be subject to the sovereignty of the metropolitan Powers concerned. Those Powers were, in the language of Article 73, "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government". As such, and by virtue of the same Article, they undertook "to develop self-government" and to assist the peoples of those territories "in the progressive development of their free political institutions".

33. In such cases the metropolitan State ceased to be sovereign over the non-self-governing territory and became an administering authority answerable to the United Nations. As for the non-self-governing territory, it had two of the distinctive characteristics of a State, namely, a territory and a population; but it lacked a government of its own to represent it in international relations. The metropolitan State represented the non-self-governing territory in its international relations, not by virtue of its sovereignty, but in its capacity as an administering authority under the Charter. Moreover, it remained under a duty to assist the people concerned to attain self-government.

34. That interpretation of the Charter provisions on non-self-governing territories had been accepted by the Assembly and, for that reason, he would have preferred a formula for sub-paragraph (*a*) which avoided the use of the term "sovereignty". Nevertheless, he was prepared to accept the compromise formula put forward by the Special Rapporteur, which combined the concept of replacement in sovereignty with that of replacement in the competence to conclude treaties.

35. With regard to sub-paragraph (*e*), he had some doubts about the Special Rapporteur's idea of leaving the cases of mandates and trust territories outside the scope of the term "new State". He believed, however, that the Commission would be able to arrive at a formula that would cover those categories as well.

36. The CHAIRMAN speaking as a member of the Commission, said he agreed with the neutral wording put forward by the Special Rapporteur for sub-paragraph (*a*). He also agreed that the municipal law concept of succession should not be introduced. It was equally desirable, however, to avoid introducing into international law the municipal law concept of novation, to which he had noted a few references in the commentaries to the Special Rapporteur's draft articles. That concept did not carry over easily into international law and could cause constitutional difficulties in many States.

37. There was, perhaps, some conceptual confusion in the wording of sub-paragraph (*a*). The use of the conjunction "or" to link the two phrases "in the sovereignty of territory" and "in the competence to conclude treaties with respect to territory" appeared to suggest that the two phrases covered different ground, whereas in fact the concept of sovereignty necessarily included the power to conclude treaties with respect to the territory over which sovereignty was exercised.

38. He was not at all certain that it was necessary to include a reference to sovereignty in sub-paragraph (*a*) or to refer specifically to the competence to conclude treaties. He would therefore propose the following short definition: "'Succession' means the replacement of one State by another with respect to territory". If it was desired to retain the reference to the power to conclude treaties, the term "capacity" might be used, as in article 6 of the Vienna Convention on the Law of Treaties.[9] The reference would then be to the "replacement of one State by another in the capacity to conclude treaties with respect to a given territory". If it was also desired to retain the reference to sovereignty, it might be done by saying that: "'Succession' means the replacement of one State by another in the capacity to conclude, as sovereign, treaties with respect to a given territory".

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[6] Op. cit., *1970*, vol. I, p. 161, paras. 56 *et seq.*

[7] Op. cit., *1968*, vol. II, p. 90.

[8] See *Official Records of the General Assembly, Eighth Session*, vol. 2, Fourth Committee, p. 31, paras. 31 *et seq.*; p. 184, paras. 19 *et seq.*; p. 227, paras. 21 *et seq.*

[9] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 290.

39. Mr. ROSSIDES said he could accept the Special Rapporteur's formulation for sub-paragraph (*a*) as a convenient temporary solution to a problem of terminology to facilitate the Commission's discussions, but on the understanding that the Commission would later amend the wording if that proved necessary in the light of its discussions. The crucial fact was the passing of sovereignty over a territory from one State to another, regardless of whether it resulted from an agreement between two States or from the attainment of independence by a formerly dependent area.

40. With regard to the provisions of sub-paragraph (*e*), there was a great difference between the emergence of a new State as a result of the splitting up of an existing State, and the attainment of independence by a former colony. In the first case, of which the attainment of independence by Czechoslovakia in 1919 was an example, the inhabitants of the territory had been full citizens of the State from which they had separated. The inhabitants of a colony, on the other hand, had never been considered full citizens of the metropolitan Power. The Charter of the United Nations took note of that distinction when it placed upon metropolitan States the duty to emancipate their colonies, but those Charter provisions did not apply to such situations as the dismemberment of States and the formation of unions of States.

41. One method of overcoming those difficulties might be to retain the term "new State" with the meaning attached to it in sub-paragraph (*e*), and to introduce another term, such as "newly emancipated State", to cover the case of former colonies which had attained independence.

42. Of great importance for new States were the opening words, "Every treaty in force is binding...", of article 26 *(Pacta sunt servanda)* of the Vienna Convention on the Law of Treaties.[10] A treaty would be binding upon a new State only if it was "in force", which meant if it was validly in force. That point was vital for the newly emancipated States, because in some cases treaties had been imposed upon them, and since those treaties had not been freely entered into or were in conflict with a peremptory norm of general international law, they were not valid and so could not be held to be "in force".

Yearbook of the International Law Commission

(resumed from the 1151st meeting)

43. The CHAIRMAN said he would read out the letter concerning the printing of the Yearbooks of the International Law Commission drafted by the group to which that matter had been referred.[11] If the letter was approved by the Commission, he would send it to the United Nations Legal Counsel. The letter read:

I am writing in connexion with the memorandum from the Executive Secretary of the Publications Board relating to the printing of volume II of the 1971 Yearbook of the International Law Commission and volume I of the 1972 Yearbook (see document ILC (XXIV)/Misc.1 attached).

At its 1151st meeting, on 4 May 1972, the Commission referred that memorandum to the enlarged Bureau, composed of the officers of the Commission, the Special Rapporteurs and former Chairmen present in Geneva. The enlarged Bureau met on 9 May 1972 to consider the matter. In addition to the memorandum from the Executive Secretary of the Publications Board, it had before it a paper prepared by the Secretariat setting out the printing costs of the documents to be included in volume II of the 1971 Yearbook (see document ILC (XXIV)/Misc.2 attached).

The members of the enlarged Bureau stressed the importance of the documents published in the Commission's Yearbook. The Yearbook contains the *travaux préparatoires* which are indispensable for a proper understanding of the Commission's drafts. These documents are, in the first place, indispensable to States in their preparations for and participation in diplomatic conferences called to consider draft articles prepared by the Commission. They also have a continuing value of substantive importance as is established from the frequent references to them in State practice, in pleadings before and opinions of the International Court of Justice and Arbitral Tribunals, as well as the innumerable references in various scholarly works. It was pointed out in this connexion that paragraph (*g*) of article 16 of the Commission's Statute provides that:

> "When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in sub-paragraph (*c*) above;"

A similar provision appears in article 21.

However, taking into account the present exceptional financial difficulties of the United Nations, the enlarged Bureau considered the possibility of making the following recommendations to the Commission:

1. Volume II of the 1971 Yearbook would be divided into two parts.

2. Part I would contain the Commission's Report on the work of its twenty-third session, and the Reports of the Special Rapporteurs. These documents are listed under A and B.1 to B.5 in the Secretariat paper (ILC (XXIV)/Misc.2) and their printing costs are estimated at $37,640, a sum which exceeds by $9,640 the amount available for the printing of volume II of the 1971 Yearbook see para. 5 of the memorandum from the Executive Secretary of the Publications Board, ILC (XXIV)/Misc.1). Since Part I must be printed this year and circulated before the beginning of the next session of the Commission, the enlarged Bureau expressed the hope that, after reconsidering the matter, the Publications Board would find the additional funds required.

3. Part II of volume II of the 1971 Yearbook would contain all the other 1971 documents of the Commission with the exception of:

(i) The letters and memoranda listed under B.6 to B.9 of the Secretariat paper (ILC (XXIV)/Misc.2);

(ii) The historical survey listed under E.4;

(iii) The report by the Secretary General listed under F.1 to F.3.

Part II should be issued in 1973 at the same time as volume II of the 1972 Yearbook and the necessary funds should be included in the budget estimates which the Secretary-General will submit to the next session of the General Assembly. I may point out, in this connexion, that if the study of the practice of the Secretary-General as depositary of treaties is not published in volume II of the 1972 Yearbook, that volume will be shorter than usual (approximately 230 pages).

4. The Report of the Secretary-General listed under F.1 to F.3 in the Secretariat paper would be published in the Yearbook at a

[10] *Ibid.*, p. 292.

[11] See 1151st meeting, para. 56.

later date, when the Commission takes up the topic of the non-navigational uses of international watercourses.

The enlarged Bureau would greatly appreciate receiving your views on the above tentative recommendations before it takes a final decision thereon. The matter is somewhat urgent since the Editing Section of the Geneva Office cannot prepare the manuscript of volume II of the 1971 Yearbook before it receives the instructions of the Commission. You may therefore wish to give me your views by cable.

44. If there were no comments, he would take it that the Commission agreed that he should send that letter to the Legal Counsel.

It was so agreed.

The meeting rose at 12.50 p.m.

1158th MEETING

Monday, 15 May 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

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

(resumed from the previous meeting)

ARTICLE 1 (Use of terms) *(continued)* [1]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on draft article 1.

2. Sir Humphrey WALDOCK (Special Rapporteur) said it had been clearly understood by all the participants in the discussion that the provisions of sub-paragraphs (*a*), (*b*) and (*c*) were wholly provisional at the present stage and would have to be reviewed when the Commission arrived at some conclusion on the substantive rules.

3. Some of the points which had been raised during the discussion could be more conveniently dealt with in connexion with the substantive rules to which they related; for the present he would concentrate on the comments on sub-paragraph (*a*).

4. There had been general agreement that a formula on the lines of that which he had put forward should be retained for the time being for working purposes. It was true that the term "succession" was ambiguous, but it would create great difficulties if the concept of transmission of rights were to be adopted in sub-paragraph (*a*) at the present stage. The meaning of the term "succession" should be restricted for the time being to the mere fact of the replacement of one State by another. That being so, the French term "*substitution*" was not altogether appropriate in that it contained, to some extent, the notion of transmission; another term should perhaps be sought and it had been suggested to him that "*remplacement*" might be preferable.

5. Consideration would be given in the Drafting Committee to the drafting suggestions made by the Chairman, when speaking as a member of the Commission, at the end of the previous meeting, in particular to his suggestion that the expression "capacity to conclude treaties" should be used.

6. He had been very conscious of the dangers of the ambiguity of the term "succession" when drafting sub-paragraph (*f*), in which he had had to define the terms "notify succession" and "notification of succession". There, of course, "succession" meant succession in respect of a treaty and contained a certain element of transmission of rights. He had included that definition because the phrases defined were frequently used, especially in United Nations practice, where a new State had notified a succession in respect of a treaty.

7. With regard to the provisions of sub-paragraph (*e*), he realized that the term "new State" could be used in different senses, leading to different interpretations. He had used it because of the need for a framework in which to formulate the general rules on succession to multilateral and bilateral treaties. On further consideration, it might perhaps be decided to refer only to the "successor State" and to eliminate the concept of a "new State" altogether.

8. As to the method he had adopted of dealing with the present topic within the framework of the law of treaties, he wished to make it clear that he had no intention of separating the topic entirely from succession. What was needed was to determine the impact of cases of succession on the rules of the law of treaties.

9. On the question of drafting by reference, it would be for the Drafting Committee to decide whether that method was necessary in the present instance. Personally, he thought that cross-reference to the 1969 Vienna Convention on the Law of Treaties would be convenient as it would avoid having to frame a set of provisions on such difficult questions as reservations.

10. Considerable stress had been laid during the discussion on the principle of self-determination. It went without saying that the present topic should be considered in the light of all the principles of international law, of which the principle of self-determination was particularly relevant. Nevertheless, it should be remembered that it was an autonomous principle, just as the law of treaties and the law of succession were autonomous. It was also necessary to be cautious about the principle of self-determination, because if it were carried too far it would make it impossible to adopt what he understood to be the Commission's view on the question of localized or territorial treaties.

11. Mention had also been made of the distinction between general multilateral treaties and restricted multilateral treaties. He had introduced into draft article 7

[1] For the text see 1155th meeting, para. 50.