Document:-

A/CN.4/SR.1158

Summary record of the 1158th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

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.

(A/CN.4/224)[2] a sub-paragraph (*c*), which drew its inspiration from the relevant provisions of the Vienna Convention on the Law of Treaties and the effect of which would be to leave restricted multilateral treaties outside the scope of the main provisions of article 7. When the Commission came to discuss that article, it might appear desirable to formulate some further rules on the matter.

12. With regard to bilateral treaties, he fully agreed that the municipal law concept of novation should be avoided. In fact, he had not used the term "novation" at all in his draft articles. He had used it in one or two places in the commentaries for the sake of convenience, but the Commission could eliminate those references without difficulty for the purposes of its own commentaries when it came to adopt them.

13. There had been some misunderstanding of his general position when it had been suggested, during the discussion, that his draft articles were an expression of the traditional doctrine. In fact, the text of the draft articles was very much affected by the principles of the Charter, particularly the principle of self-determination. For that reason members from new States had approved the general philosophy of the draft articles. They contained an element of progressive development, but were largely based on modern State practice.

14. With regard to the question of boundary treaties, which he had reserved in his first draft, he wished to assure members that he intended to submit an article dealing with the matter.

15. The interesting problems of the European Economic Community and Namibia had been raised during the discussion. The Community, he thought, was as yet outside the scope of the draft articles; as to Namibia, the situation with regard to succession was still too undeveloped to be treated as a practical issue in the present discussion.

16. He suggested that article 1 be referred to the Drafting Committee for consideration in the light of the discussion.

17. Mr. USTOR said he understood that the Drafting Committee would be able to deal with any further suggestions from the Special Rapporteur on provisions dealing with the meaning of terms other than those included in the present draft. In particular, consideration could be given to the inclusion of provisions on the meaning of the terms defined in article 2, paragraph 1, of the Vienna Convention on the Law of Treaties.[3]

18. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 1 to the Drafting Committee as proposed by the Special Rapporteur and on the understanding expressed by Mr. Ustor.

It was so agreed.[4]

ARTICLE 2

19. *Article 2*

Area of territory passing from one State to another

When an area of territory, which is not itself organized as a State possessing treaty-making competence, passes under the sovereignty of an already existing State:

(*a*) Treaties of the successor State, concluded before the succession, become applicable in respect of that area from the date of the succession, unless it appears from a particular treaty or is otherwise established that such application would be incompatible with the object and purpose of that treaty.

(*b*) Treaties of the predecessor State cease to be applicable in respect of that area from the same date.[5]

20. Sir Humphrey WALDOCK (Special Rapporteur) introducing article 2, said that its provisions embodied the "moving treaty frontiers" rule, which was a generally recognized principle of international law. Briefly stated, that principle meant that, in the event of the replacement of one State by another in the sovereignty of territory, the territory moved out of the treaty régime of the first State and into the treaty régime of the second.

21. There was, however, a margin of political appreciation in particular cases. For example, on its formation after the First World War, Yugoslavia had been treated as an enlarged Serbia rather than as a new State, and the "moving treaty frontiers" rule had applied. If the case had been treated as the formation of a new State, different legal rules would have applied. It would be difficult to lay down precise criteria to differentiate between the enlargement of an existing State and the formation of a union of States. Other illustrations were given in his commentary, the extensive nature of which made further introduction of the article unnecessary.

22. Mr. TAMMES said that the case envisaged in article 2 differed from all other cases of succession, in that no change occurred in the status of the two States concerned. No new State came into existence and no existing State disappeared; the only change was in the respective treaty régimes. The "moving treaty frontiers" principle was well known and was to be found in all the textbooks.

23. The statement of the rule in article 2, with the clarification contained in the concluding proviso of sub-paragraph (*a*), was quite satisfactory; for the sake of completeness, however, a parallel rule should be included to cover the case of total succession where the predecessor State disappeared altogether. One example was that of the incorporation into the Kingdom of Sardinia, in 1860 and 1861, of a number of pre-existing Italian States. Quite apart from the question whether Italy was a "new" State in 1861, some countries had found it necessary to conclude new commercial treaties with Italy in order to extend to the newly-acquired territories the provisions of existing commercial treaties with Sardinia. Another

[2] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 37.

[3] See *Official Records of the United Nations on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[4] For resumption of the discussion see 1176th meeting, para. 20.

[5] For commentary see *Yearbook of the International Law Commission, 1969*, vol. II, pp. 52 *et seq.*

example was that of Newfoundland when it had become a part of Canada in 1949. The concept of unilateral annexation should be rejected, but there were other less objectionable ways in which one State could be merged with another. The problem was one of practical importance and should be dealt with in article 2.

24. He welcomed the restriction on the application of the main rule, contained in the concluding proviso of sub-paragraph (*a*), "unless it appears from a particular treaty or is otherwise established that such application would be incompatible with the object and purpose of that treaty". That wording was based on the language of two articles of the Vienna Convention on the Law of Treaties: article 18 on frustration and article 19 on the formulation of reservations. Personally, he thought that, in addition to the object and purpose of the treaty, explicit reference should be made to the question of fundamental change of circumstances, in the terms used in article 62, paragraph 2 (*b*) of the Vienna Convention. The extension of the treaty régime could bring about a fundamental change, detrimental not only to the successor State, but also to the other State concerned. The other State might, for example, have difficulty in extending the territorial scope of application of a commercial treaty.

25. Mr. SETTE CÂMARA said he supported the text of article 2, which combined the "moving treaty frontiers" principle with the "clean slate" principle. The rule it embodied was really a corollary to that contained in article 29 of the Vienna Convention on the Law of Treaties. Since that article stated that a treaty was binding upon each party "in respect of its entire territory", it followed that, if the territory of a party to a treaty was extended, the treaty would apply to the extended territory. The rule also had a negative aspect, in that the treaties of the predecessor State would cease to apply to the area of territory transferred, since that area was no longer part of the territory of the predecessor State.

26. The formulation proposed by the Special Rapporteur offered the necessary flexibility and was quite acceptable, but he had doubts about the position of the article in the draft.

27. Mr. NAGENDRA SINGH said that, before discussing article 2, he wished to refer once again to article 1. He considered that the draft on succession in respect of treaties should be kept distinct from the codification undertaken by Mr. Bedjaoui. If any action were taken to integrate the two aspects of succession, namely, treaties and matters other than treaties, such as credits, debits and contracts, it would cause complete confusion. Consequently, he did not favour the inclusion in article 1, sub-paragraph (*a*) of the reference to "sovereignty of territory"; questions of transfer of sovereignty belonged to the topic of succession in respect of matters other than treaties, and any attempt to bring those questions into the present topic would create serious difficulties. Since, in the present draft, the Commission was exclusively concerned with succession of States in respect of treaties, the reference to sovereignty should be dropped and sub-paragraph (*a*) should refer only to the replacement of one State by another in the competence to conclude treaties with respect to territory. A formulation of that kind would be enough to cover all the problems arising from such situations as decolonization, unions of States and dissolution of unions.

28. On the question of categories of treaties, it was necessary to bear in mind the important category of constituent instruments of international organizations. Succession in respect of such treaties was particularly important.

29. He was not in favour of codification by cross-reference; the draft articles should be self-contained.

30. With regard to article 2, he thought it could possibly be retained, although the International Law Association had not included a provision on the "moving treaty frontiers" rule in its draft.[6] The contents of article 2 would be useful, in particular, for purposes of the application of the provisions of constituent instruments of international organizations. For example, if a territory in which there were shipowners was added to that of a pre-existing State, the tonnage held by those shipowners would have to be added to that State's total for purposes of the application of certain important provisions of the constituent instrument of the organization concerned. However the territory must be acquired by legal means, not by war and conquest. As the United Nations Charter prohibited force in inter-State relations, that point should be covered by existing international law.

31. Mr. TABIBI said that the principle of self-determination was the paramount principle of the United Nations, as was clear from the language of Article 1 (2) and Article 55 of the Charter. That principle had to be borne in mind in any codification, but was particularly relevant to the present topic.

32. The principle of self-determination had affected all the rules of traditional international law. As a result of the adoption of the United Nations Charter, new principles of international law had emerged which had to be taken into account when framing any rule of international law.

33. On the question of frontiers, to which he had referred at a previous meeting,[7] he wished to make it clear that, as a citizen of a small country, he was in favour of stability. At the same time, it was essential not to do anything which could have the effect of legalizing situations created by unequal treaties. Throughout Asia, serious problems arose in connexion with frontiers and gave rise to many political difficulties.

34. He agreed with Mr. Sette Câmara that some other place would have to be found for article 2; its contents were not appropriate for an opening article. Consideration might be given to placing it in Part IV, on dispositive, localized or territorial treaties.

35. Mr. USHAKOV said that article 2 was not a general article but an article dealing with a particular case, namely, the transfer of an area of territory from

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[6] International Law Association, *Report of the Forty-third Conference (Buenos Aires) (1968)*, pp. xiii-xv.

[7] See 1155th meeting, paras. 10 *et seq*

one State to another. As the Special Rapporteur had indicated in his commentary, there were exceptions to the "moving treaty frontiers" principle stated in article 2 and the application of that principle might need to be qualified by other rules. A separate section should be devoted to all those rules so that they could be considered at the same time as article 2.

36. The text of article 2 called for some comments. First, with regard to the introductory phrase, it might be asked whether there were any States which did not possess treaty-making competence; if not, the phrase "possessing treaty-making competence" was superfluous. Secondly, it would be better to say "another State" instead of "an already existing State". Thirdly, the expression "passes under the sovereignty" was not clear. It meant, of course, the lawful transfer of an area of territory, but it would be better to be precise and to replace the phrase "passes under the sovereignty of an already existing State" by "is transferred by mutual agreement from one State to another State".

37. With regard to sub-paragraph (*a*), a definition of "the date of the succession" should first be given in article 1. The second part of the sentence stated the rule laid down in article 29 of the Vienna Convention on the Law of Treaties, but in a slightly different form; he wondered whether it was possible to transfer that rule, since article 29 of the Vienna Convention referred to the entire territory existing at the time of the conclusion of a treaty, whereas draft article 2 dealt with the entire territory after a treaty was concluded. Further, the draft articles made provision for the future, and the phrase "or is otherwise established..." referred to territory existing at the time of the conclusion of an earlier treaty; the Drafting Committee should pay careful attention to that question of time.

38. Finally, in sub-paragraphs (*a*) and (*b*) the expressions "that treaty" and "that area" should be made more precise.

39. Mr. YASSEEN said that article 2 raised no problem; it simply concerned the application of the "moving treaty frontiers" principle, which could be deduced from article 29 of the Vienna Convention on the Law of Treaties. A treaty applied in principle to the entire territory, but the intention of the parties could provide a basis for establishing that it applied to the territory not only as it was at the time when the treaty was concluded, but also as it would be at any other time.

40. The introductory phrase of article 2 certainly referred only to lawful transfers of territory. It would be inconceivable for the Commission to propose a provision sanctioning an unlawful situation. It was necessary to respect the principle of self-determination, within the limits recognized by international law.

41. In general, the provisions of article 2 were logical and were confirmed by practice. Subject to a few improvements in drafting, he thought the article acceptable.

42. Mr. CASTAÑEDA said he had no difficulty in accepting the Special Rapporteur's text for article 2; in particular, he could agree to his reasons for excluding other cases of transfer of sovereignty. Questions concerning the transfer of territory in connexion with the creation of a new State, or of a federation or union of States, could be dealt with in article 18 (A/CN.4/256).

43. However, there was one question which seemed deserving of consideration. While article 2 obviously dealt with the lawful transfer of sovereignty, he was inclined to wonder, like Mr. Ushakov, whether consideration should not be given, particularly when finalizing the draft, to the problem of reconciling the lawful transfer of sovereignty with the very obvious need not to recognize any transfer of territory achieved by unlawful conquest. In the time of the League of Nations, it had generally been acknowledged by legal authorities that any unlawful transfers of territory were contrary to the League Covenant; the Commission should consider to what extent even partial transfers of territory, in so far as they were possibly unlawful, could be reconciled with that principle and with the principles of the United Nations.

44. Mr. HAMBRO said he agreed with Mr. Yasseen that the Special Rapporteur had produced a satisfactory text for article 2, though he could also agree with Mr. Castañeda that it might be necessary to give further consideration to the article when considering article 18. In connexion with article 18, he did not think it necessary to invoke all the general principles of international law, since that would tend to prolong the discussion unnecessarily. It should be assumed as implicit in the draft that the Commission would not wish to adopt anything that would conflict with the purposes and principles of the United Nations.

45. Mr. USTOR said he was basically in agreement with article 2 and fully accepted the reasons given by the Special Rapporteur in support of the reservation contained in sub-paragraph (*a*).

46. With regard to sub-paragraph (*b*), he was not entirely clear as to what would happen to treaties, such as those concerning international servitudes, which might apply to the part of the territory transferred.

47. Sir Humphrey WALDOCK said that question had already been raised by Mr. Reuter and other speakers, and he had agreed that there was a need for some reservation with respect to localized treaties.

48. Mr. USTOR said he had only mentioned the point because, while the reservation had been made with respect to sub-paragraph (*a*), it had not been made with respect to sub-paragraph (*b*).

49. Mr. AGO said he agreed with Mr. Yasseen that the situation covered by article 2 was a simple one and should not be complicated unnecessarily. The article dealt with the transfer of territory from one existing State to another and its consequences for treaties. It was self-evident that the transfer must be valid; the Commission could not contemplate the legal consequences of an invalid transfer and, in any case, it did not need to concern itself with the validity of a cession or other agreement: it simply assumed, for its own purposes, the existence of a valid agreement.

50. The article showed once again that the Special Rapporteur was right in considering that the topic for which

he was responsible dealt with the fate of treaties in the event of a succession of States, rather than with, strictly speaking, the succession of States in respect of treaties. He fully agreed with the Special Rapporteur's views on that point, which were admirably set out in paragraph (2) of his commentary to article 2.

51. The text of article 2 only raised questions of drafting. It might be asked whether the phrase "an area of territory which is not itself organized as a State possessing treaty-making competence" was well chosen, since it had been affirmed in the Vienna Convention on the Law of Treaties that every State possessed capacity to conclude treaties. The wording used by the Special Rapporteur gave the impression that States were divided into two categories, according to whether they did or did not possess treaty-making competence. It might perhaps be true that that was sometimes so in reality, but as the Vienna Convention had sought expressly to exclude such a distinction, the Drafting Committee should try to find a way of removing that apparent contradiction.

52. Sub-paragraph (*a*) gave the impression that a main category and an exceptional category of treaties were contemplated, the former containing treaties which applied automatically to any territory newly acquired by a State, and the latter containing treaties which could not apply to a new territory—for instance, because they had been drawn up and concluded solely for a specific area. But there was another category of treaties which might perhaps have to be taken into account in drafting the article, namely, treaties which by their very nature were not susceptible of territorial application and consequently were not affected by any enlargement or diminution of territory. Examples were treaties providing for the supply of certain goods and treaties of defensive military assistance.

53. With regard to Mr. Ustor's comment and the Special Rapporteur's reply about sub-paragraph (*b*), he wondered whether localized treaties really came within the sphere of succession in respect of treaties or whether they did not rather come under succession in respect of other matters. One example was an international right of passage established by treaty. If the territory was transferred, would the servitude be imposed on the transferee State by succession to a treaty obligation or by succession to a real obligation? Rather than from succession to a treaty, would not the obligation derive from the principle *res transit cum onere suo*. That was also the standpoint from which the questions raised by treaties relating to frontiers should be considered, for it was open to question whether they really came within the sphere of succession in respect of treaties.

54. Article 2 was acceptable, on the understanding that the Commission would subsequently have to regulate certain special situations.

55. Mr. ROSSIDES said that, although article 2 appeared in general to be fairly clear, it should be made more explicit that any transfer of territory must be in accordance with the principles of the Charter and of the self-determination of nations. Some reference to the purposes and principles of the Charter should be included, possibly at the beginning of the draft, in order to make it clear to the international community as a whole that the Commission, in its work on the codification and progressive development of international law, was fully aware of their importance.

56. A reference to the principle of self-determination would seem to be particularly necessary: perhaps the words "passes under the sovereignty of an already existing State" could be amended to read: "passes with the consent of its people under the sovereignty of an already existing State".

57. Mr. QUENTIN-BAXTER said that in principle he could support the Special Rapporteur's text for article 2, though its exact place in the draft would have to be decided later. He did agree, however, that it was necessary to reconcile the phrase "not itself organized as a State possessing treaty-making competence" with the exception stated in sub-paragraph (*a*).

58. With regard to sub-paragraph (*b*), he noticed that at no other place in the draft was reference made to the position of the predecessor State, in particular with respect to its release from its rights and obligations under treaties. He would be grateful if the Special Rapporteur would consider that question in connexion with article 3 (A/CN.4/214/Add.1).[8]

59. The CHAIRMAN, speaking as a member of the Commission, said that he too could agree in general to the Special Rapporteur's text for article 2.

60. He did not consider it necessary to include a reference either to the principle of self-determination or to the unlawful seizure of territory, since such references would normally be made by the diplomatic conference in the preamble to the future convention, or wherever it judged best.

61. Sub-paragraph (*a*) was a restricted version of article 29 of the Vienna Convention on the Law of Treaties; the Commission would be able to determine later, when it had considered the final interrelationship of all the articles, whether the provision was sufficiently broad.

Appointment of a Drafting Committee

62. The CHAIRMAN suggested that the Commission appoint a drafting committee of twelve members, including both new and old members, on a basis of equitable geographical distribution. The members could be Mr. Ago, Mr. Alcívar, Mr. Castañeda, Mr. Elias, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen.

It was so agreed.

The meeting rose at 5.55 p.m.

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[8] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 54.