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Report by Mr. Manfred Lachs, Chairman of the Sub-committee on Succession of States and Governments (approved by the Sub-Committee)

Topic:

Succession of States and Governments

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ANNEX II

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[7 *June 1963*]
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CONTENTS

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(Approved by the Sub-Committee)

1. The International Law Commission, at its 637th meeting on 7 May 1962, set up the Sub-Committee on the Succession of States and Governments, composed of the following ten members: Mr. Lachs (Chairman), Mr. Bartos, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Commission, at its 668th meeting on 26 June 1962, took the following decisions with regard to the work of the Sub-Committee: [1]

" (1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963;

" (2) The Commission took note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat:

" (*a*) A memorandum on the problem of succession in relation to membership of the United Nations,

" (*b*) A paper on the succession of States under general multilateral treaties of which the Secretary-General is the depositary,

" (*c*) A digest of the decisions of international tribunals in the matter of State succession;

" (3) The members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the Sub-Committee;

" (4) Its chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a working paper containing a summary of the views expressed in the individual reports;

" (5) The Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission."

2. In accordance with these decisions, the Sub-Committee met at the European Office of the United Nations on 17 January 1963. As the Chairman of the Sub-Committee, Mr. Lachs, was prevented by illness from being present, the Sub-Committee unanimously elected Mr. Erik Castrén as Acting Chairman. The Sub-Committee held nine meetings, and ended its session on 25 January 1963. It was decided that the Sub-Committee would meet again, with the participation of the Chairman, Mr. Lachs, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report. The Sub-Committee approved its final

[1] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr 1), para. 72.

report at its 10th meeting held on 6 June 1963, during the fifteenth session of the International Law Commission, with the participation of the Chairman, Mr. Lachs, and all its members.

3. The Sub-Committee had before it memoranda submitted by the following members:

Mr. Elias (ILC(XIV)/SC.2/WP.1 and A/CN.4/SC.2/WP.6);
Mr. Tabibi (A/CN.4/SC.2/WP.2);
Mr. Rosenne (A/CN.4/SC.2/WP.3);
Mr. Castrén (A/CN.4/SC.2/WP.4);
Mr. Bartos (A/CN.4/SC.2/WP.5).

The Chairman, Mr. Lachs, also submitted a working paper (A/CN.4/SC.2/WP.7) which summarized the views expressed in the foregoing memoranda. The Sub-Committee decided to take Mr. Lachs' working paper as the main basis of its discussion.

4. The Sub-Committee also had before it the three following studies prepared by the Secretariat:

The succession of States in relation to membership in the United Nations (A/CN.4/149 and Add. 1);

The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150 and Corr. 1).

Digest of decisions of international tribunals relating to State succession (A/CN.4/151).

5. The Sub-Committee discussed the scope of the topic of succession of States and Governments, the approach to be taken to it and the directives which might he given by the Commission to the Special Rapporteur on that subject. Its conclusions and recommendations were as follows:

I. The scope of the subject and the approach to it

A. Special attention to problems in respect of new States

6. There is a need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special attention and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter.

7. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the fact that these principles are already contained in the United Nations Charter and the resolutions of the General Assembly.

B. Objectives

8. The objectives are a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles on the topic having regard also to new developments in international law in this field. The presentation should be precise, and must cover the essential elements which are necessary to resolve present difficulties.

C. Questions of priority

9. The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties.

D. Relationship to other subjects on the agenda of the International Law Commission

(a) *Law of treaties*

10. The Sub-Committee is of the opinion that succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties.

(b) *Responsibility of States, and relations between States and inter-governmental organizations*

11. The fact that these subjects are also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

(c) *Co-ordination of the work of the four Special Rapporteurs*

12. It is recommended that the four Special Rapporteurs (on succession of States and Governments, on the law of treaties, on State responsibility and on relations between States and inter-governmental organizations) should keep in close touch and co-ordinate their work.

E. Broad outline

13. In a broad outline the following headings are suggested:

(i) Succession in respect of treaties

(ii) Succession in respect or rights and duties resulting from other sources than treaties

(iii) Succession in respect of membership of international organizations.

14. The Sub-Committee was divided on the question whether the foregoing outline should include a point on adjudicative procedures for the settlement of disputes. On the one hand, it was argued that the settlement of disputes was in itself a branch of international law, which was extraneous to the branch relating to the succession of States and Governments to which the Commission had been asked to give priority. On the other hand, other members, stressing that the outline was only a list of points to be examined by the Special Rapporteur, expressed the view that the Special Rapporteur should be asked to consider whether some particular system for the settlement of disputes should be an integral part of the regime of succession.

F. Detailed division of the subject

15. The Sub-Committee was of the opinion that in a detailed study of the subject the following aspects, among others, will have to be considered:

(a) *The origin of succession:*

Disappearance of a State;
Birth of a new State;
Territorial changes of States.

(b) *Ratione materiae:*

Treaties;
Territorial rights;
Nationality;
Public property;
Concessionary rights;
Public debts;
Certain other questions of public law;
Property, rights, interests and other relations under private law;
Torts.

(c) *Ratione personae:*

Rights and obligations:
(i) Between the new State and the predecessor State;
(ii) Between the new State and third States;
(iii) Of the new State with respect to individuals (including legal persons).

(d) *Territorial effects:*

Within the territory of the new State;
Extra-territorial.

II. Studies by the Secretariat

16. The Sub-Committee decided to request the Secretariat to prepare, if possible by the sixteenth session of the Commission in 1964:

(*a*) An analytical restatement of the material furnished by Governments in accordance with requests already made by the Secretariat;

(*b*) A working paper covering the practice of specialized agencies and other international organizations in the field of succession;

(*c*) A revised version of the digest of the decisions of international tribunals relating to State succession (A/CN.4/151), incorporating summaries of the relevant decisions of certain tribunals other than those already included.

17. The Sub-Committee noted the statement by the Director of the Codification Division that the Secretariat would submit at the earliest opportunity the publication described under paragraph 16 (*a*) above, that it would publish the information requested under 16 (*b*) as soon as it could be gathered, and that the request under 16 (*c*) would be given earnest consideration, in the light of the availability of the decisions in question.

III. Annexes to the report

18. The Sub-Committee decided that the summary records giving an account of the discussion on substance, and the memoranda and working papers by its members mentioned in paragraph 3 above, should be attached to its report.[2]

Appendix I

INTERNATIONAL LAW COMMISSION

Sub-Committee on Succession of States and Governments

SUMMARY RECORDS OF THE 3RD, 4TH, 5TH, 6TH AND 7TH MEETINGS

SUMMARY RECORD OF THE THIRD MEETING

(Thursday, 17 January 1963, at 10.30 a.m.)

Organization of work

Mr. LIANG, representative of the Secretary-General, welcomed the members of the Sub-Committee on behalf of the Secretary-General and informed them that he had received two telegrams from Mr. Lachs, Chairman of the Sub-Committee, expressing regret at his inability to attend the meeting owing to a sudden serious illness.

He therefore called for nominations for the office of Acting Chairman.

Mr. BRIGGS nominated Mr. Castrén.

Mr. TUNKIN seconded the nomination.

Mr. Castrén was elected Acting Chairman and took the chair.

The ACTING CHAIRMAN thanked the members for his election and suggested that he should send, on behalf of the Sub-Committee, a telegram to Mr. Lachs wishing him a speedy recovery.

It was so agreed.

The ACTING CHAIRMAN drew attention to the working papers submitted by members of the Sub-Committee.[3]

He invited comments on the subject of the organization of the Sub-Committee's work.

The first point to be decided was the number and schedule of meetings.

The second question was that of observers. The missions of two countries had informally inquired whether they could send observers to the meetings of the Sub-Committee. Similar inquiries had been received in respect of the meetings of the Sub-Committee on State Responsibility but that Sub-Committee had decided, in view of the informal and preliminary nature of its proceedings, that observers would not be admitted.

The third question was that of the distribution of summary records. It was possible that the Secretariat would receive requests for the provisional or final summary records of the Sub-Committee from members of the International Law Commission who were not members of the Sub-Committee, and also from delegations. Accordingly, it was desirable to decide to what extent those requests could be met. The Sub-Committee on State Responsibility had decided that the provisional summary records of its meetings should be restricted to members only, but that the final versions of the records giving an account of the discussions on substance should be attached to its report.

Mr. TUNKIN proposed that, on all three points, the Sub-Committee should follow the same course as the Sub-Committee on State Responsibility. The situation was absolutely the same for both Sub-Committees.

Mr. ELIAS supported that proposal.

Mr. BRIGGS also supported Mr. Tunkin's proposal, with the qualification that members of the International Law Commission who were not members of the Sub-Committee should be welcomed to attend the meetings as observers.

Mr. EL-ERIAN supported Mr. Tunkin's proposal with the qualification suggested by Mr. Briggs.

The ACTING CHAIRMAN said that if there were no objection, he would consider that the proposal by Mr. Tunkin, as amended by Mr. Briggs, was unanimously approved by the Sub-Committee.

It was so agreed.

Succession of States and Governments

The ACTING CHAIRMAN invited debate on the procedure to be followed by the Sub-Committee.

Mr. TUNKIN said that the Sub-Committee on State Responsibility had been able to adopt a report which included an outline of the future study of the topic because it had had before it a paper from its Chairman containing a draft outline; in fact, that draft outline had been adopted by the Sub-Committee with only a few amendments and incorporated into its report.

In view of the absence of the Chairman, he suggested that the present Sub-Committee should confine its work to a discussion of the documents submitted by its members and any problems of succession of States that members might wish to raise.

He further suggested that the Sub-Committee should re-convene early during the next session of the International Law Commission. The Chairman would be asked to prepare a draft report, including an outline of the subject, which report would be considered by the Sub-Committee when it re-convened. The Sub-Committee would then be able to approve the Chairman's report (as had been done by the Sub-Committee on State Responsibility) and submit it to the full Commission early in the latter's next session.

Mr. ELIAS said that the Sub-Committee should not confine its work during the present series of meetings to a mere general discussion. It should consider the outline of the topic of the succession of States and Governments, bearing in mind that it was called upon to define the scope of that topic and report thereon to the Internaional Law Commission.

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[2] These summary records, memoranda and working papers are reproduced in appendix I and appendix II below.

[3] Reproduced in Appendix II *infra*.

Perhaps the Sub-Committee could meet a few days before the opening of the Commission's next session.

Mr. ROSENNE said that he sympathized with the views expressed by both Mr. Tunkin and Mr. Elias. He understood, with regret, that the Chairman would be unable to participate at all in the present series of meetings. The Sub-Committee would nevertheless have to carry its deliberations to the stage of a draft report, the final adoption of which could be left until the Sub-Committee re-convened early in the session of the International Law Commission. He hoped that by then the Chairman would be able to attend.

He recalled the difficulties which had arisen regarding the holding of Sub-Committee meetings during the last session of the Commission, because some members had to combine their duties in the Commission with membership in other United Nations bodies meeting concurrently at Geneva. That situation might well arise again.

He added that, whereas the Sub-Committee on State Responsibility would be able to report to the Commission well in advance of the next session, the present Sub-Committee would only be able to report early in that session. Nevertheless, the Commission would still be able to consider the reports during its session and fulfil its mandate to report to the General Assembly on both subjects in time for the Assembly's next session.

Mr. TABIBI said that the course suggested by Mr. Tunkin would probably not delay the work of the Sub-Committee. Members could exchange views on the subject of the succession of States and Governments, and a preliminary report could be prepared which would be transmitted to the Chairman, together with the summary records of the Sub-Committee's meetings. The Chairman would then be able to report to the full Commission, in accordance with the latter's decision.

Mr. EL-ERIAN said that Mr. Tunkin's suggestion was most practical. He agreed with Mr. Elias that the Sub-Committee should not confine its work to a general discussion; it would advance the work as far as possible but it could not finalize it, in view of its terms of reference, which required that the Chairman should report to the full Commission.

Mr. LIU said it might perhaps be premature to discuss at that stage the form which the report would take. The immediate task of the Sub-Committee was to explore the topic of the succession of States and define the scope of the subject. The Sub-Committee had before it a number of valuable working papers and Secretariat documents. On the basis of the discussion on those documents, either the Acting Chairman or the Chairman, if he had by then sufficiently recovered, could prepare a report to the International Law Commission.

Mr. TUNKIN said that the Chairman's absence presented no practical difficulties. The Sub-Committee could proceed to discuss the problem of State succession as a whole and attempt to reach agreement on certain points; on that basis the Chairman could then prepare a draft report which the Sub-Committee could adopt at a meeting to be held early during the next session of the Commission.

The ACTING CHAIRMAN said that the Sub-Committee would be in a better position to take a final decision on the matter at a later stage in the discussion. In his opinion, the Sub-Committee should prepare a provisional draft report, which, as Mr. Tunkin had suggested, would serve as a basis for the final draft report to be prepared by the Chairman.

Mr. BRIGGS agreed that the Sub-Committee should wait until later in its session before taking any decision as to the type of report which it would submit. He hoped that it would try to reach at least tentative conclusions on certain questions, such as, for example, whether the study of State succession should be kept separate from that of the succession of Governments. The Chairman could then use those conclusions in preparing its own draft report, which, as Mr. Tunkin had said, should then be formally approved by the Sub-Committee.

Mr. BARTOS said the understood that the Sub-Committee would shortly have before it the working paper which the Chairman had prepared on the subject and which would be very important for its work. Under the Sub-Committee's terms of reference (A/5209, chapter IV, para. 72) its Chairman would also serve as its rapporteur. Any interim draft prepared by the Sub-Committee, therefore, would be subject to amendment by the Chairman, who would then prepare his own report. That report, after approval by the Sub-Committee, would also constitute the latter's report to the Commission.

Mr. LIANG, representative of the Secretary-General, drew attention to three studies prepared by the Secretariat: (1) The succession of States in relation to membership in the United Nations (A/CN.4/149); (2) Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150); and (3) Digest of decisions of international tribunals relating to State succession (A/CN.4/151). He explained that those studies did not call for any substantive discussion by the Sub-Committee but were intended merely for reference purposes.

Mr. ROSENNE said that he realized that the Secretariat papers in question did not relate directly to the Sub-Committee's main tasks, although they impinged upon it. He suggested that the Sub-Committee might devote some time to an exchange of views concerning the type of material which the Secretariat should in future be asked to produce.

The meeting rose at 11.30 a.m.

SUMMARY RECORD OF THE FOURTH MEETING

(Friday, 18 January 1963, at 3.15 p.m)

SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN invited the Sub-Committee to continue its discussion.

Mr. BRIGGS said that the complexity of the task confronting the Sub-Committee was well indicated in the working paper prepared by the Chairman, Mr. Lachs. He expressed the fear that if the Sub-Committee were to embark upon a general debate, no two members would be talking about the same thing. He agreed, therefore, with Mr. Rosenne and Mr. Tabibi that in the interests of a more orderly discussion it would be better to start which specific questions, for example whether the succession of States should be dealt with separately from the succession of Governments.

Mr. TUNKIN agreed that the Sub-Committee should concentrate on practical problems in its discussion with a view to producing a useful draft report.

Mr. ELIAS shared the view that the Sub-Committee should confine itself to specific questions and should first discuss whether State succession should be taken up separately from the succession of Governments. It could then discuss the form in which its final conclusions should be expressed — whether as general rules or in an international convention.

Mr. BARTOS said that the systematic working paper prepared by the Chairman would provide a good basis for the discussion. As had been suggested by the previous speakers, the Sub-Committee should avoid any general debate and concentrate on such specific problems as the distinction between the succession of States and the succession of Governments.

The ACTING CHAIRMAN agreed that the approach suggested by the speakers offered a sound plan for the organization of the Sub-Committee's work and that the Chairman's working paper would undoubtedly provide a useful basis for the discussion.

Mr. TUNKIN said that, as the Chairman had indicated in his working paper, the problem of State succession could be

approached in various ways. Whereas the Sub-Committee on State Responsibility had considered only general principles, the present Sub-Committee might have to go further and consider specific matters. In that connexion, he agreed that the Sub-Committee should deal first with the question of the succession of States; actually, it was States and not Governments which possessed rights under international law. The Sub-Committee should not, however, close the door altogether to the possibility of discussing in that connexion also the problem of the succession of Governments, if the need should arise, for it was not entirely clear as yet how the two subjects could be separated.

With regard to the scope of the study to be undertaken, he thought that it would have to include the question of the succession of States in respect of general multilateral treaties, that being one of the most important parts of the subject. It would also be difficult to avoid the question of succession in respect of membership in international organizations. But the Commission should put specific emphasis on the problems of succession arising out of the attainment of independence by former colonies; those problems were of particular interest to the new States, and the Commission should show its awareness of their importance.

It had been indicated in the various working papers that the Sub-Committee should, in its study, be guided primarily by the existing practices of States. As Mr. Bartos had pointed out in his paper, however, those practices had to be interpreted with caution, since some of them had been imposed by metropolitan States on new and weak States and might lead the Sub-Committee astray if taken as typical examples.

He stressed the importance of being guided by those general principles which constituted the very core of contemporary international law, with due regard for the logical sequence in which they had evolved. It was necessary, however, to distinguish clearly between substantive rules of international law and the specific rules relating to State succession. The Sub-Committee would be acting correctly if it followed the example of the Sub-Committee on State Responsibility and drafted an outline programme of work which could serve as the basis for instructions to be given to the future special rapporteur on the subject.

With regard to the form which the Commission's draft should ultimately take, he said it was premature to reach a decision, but the experience of the Commission had shown that the draft articles drawn up by a special rapporteur should be as short as possible and formulated with a view to the drafting of a convention rather than a code.

Mr. BARTOS said that the general rules of international law should not be regarded as a sort of static dogma; they had developed with the evolution of the international community. They had, in particular, been modified by the Charter of the United Nations.

In his memorandum he had drawn attention to that point, which was illustrated, in regard to the topic of the succession of States, by the emergence of a large number of new States as a result of the process of decolonization. Admittedly, cases of State succession could arise otherwise than in consequence of the formation of newly independent States, but that phenomenon provided a clear example of the need to bring old principles into line with new developments.

He noted that all the working papers devoted special attention to the problems relating to the newly independent States. The same was true of the excellent Secretariat documents which were before the Sub-Committee.

Turning to the Chairman's memorandum and to the first question raised in the outline therein contained, he said that the questions of State succession and governmental succession were in fact inseparable. The issue of the continuity of the State, i.e. governmental succession, could also arise in regard to new States and remained of interest in contemporary international law.

The question of the continuity of the State — in other words whether a State continued to be bound by the acts of a former government notwithstanding the changes which had taken place — could arise not only in regard to treaties but also in regard to actual situations (*situations de fait*), in particular as to frontiers. For example, was an event having legal implications (*un fait juridique*) (such as the drawing of the McMahon line in the Himalayas by former rulers) actually binding upon the States concerned?

Another interesting example was provided by the frontier between China and the USRR near Lake Baikal. In that case the USSR relied on a Protocol signed by the Russian and Chinese Empires in the last decade of the nineteenth century; the case was not one of succession to sovereignty but of succession to possession, itself implying the exercise of sovereignty.

He agreed that the Sub-Committee should work on the basis of the plan contained in the Chairman's paper.

Mr. EL-ERIAN agreed with Mr. Bartos that State succession and governmental succession were inseparable. The future special rapporteur on the topic would have to deal with the succession of Governments, at least in connexion with the succession of States.

The purpose of such an approach would be twofold. First, to enable the special rapporteur to delimit more precisely the scope of State succession. Second, to enable him to draw upon material which would be denied to him if he confined his attention to State succession.

However, the Sub-Committee should clearly realise that the connexion between State succession and governmental succession existed only at the preliminary stage. Sooner or later the two questions would have to be divided and studied separately. There were precedents for the division of a subject in the course of its study by the International Law Commission; for example, the study of consular relations had been severed from that of diplomatic relations, and the law of the sea had been divided into several component parts.

Turning to the question of other topics related to State succession, he agreed with Mr. Tunkin that succession to treaties should be included in the study of the topic of succession of States rather than in that of the law of treaties.

With regard to the topic of the relations between States and inter-governmental organizations (for which he had been appointed Special Rapporteur) and its connexion with that of the succession of States for the purpose of membership in such organizations, he would draw a distinction between two questions. The first was that of the succession between inter-governmental organizations — such as the succession of the United Nations to the League of Nations — which came within the scope of the topic of the relations between States and inter-governmental organizations. The second question was that of succession of States in the membership to such organizations, a question which belonged to the topic of State succession.

He thus drew attention to the fact that questions like that of succession between international organizations, which related to the legal position of such organizations, i.e. their external relations, raised problems which bore on relations between States and international organizations rather than problems of State succession.

Turning to the question of the approach to the subject of State succession, he agreed on the need to deal with the general principles, which he construed in the same manner as Mr. Bartos and, in particular, as including the principles of the United Nations Charter.

He also supported the view, put forward in the scholarly paper by Mr. Bartos and also emphasized in the Chairman's paper, that special treatment should be given to problems arising out of the emancipation of the newly independent States.

A further question arose: Should the objective be the codification or the progressive development of international law? In that connexion, he said that the General Assembly had

clearly indicated in its debates on the question of future work in the field of international law during the fifteenth and sixteenth sessions that more emphasis should be given to progressive development. That desire of the General Assembly had special force in regard to State succession, since it was admitted that the customary law on the subject was, as had been pointed out in a number of the working papers, uncertain in some of its aspects and incomplete as a whole.

He reserved the right to comment on the Chairman's paper at a later stage.

Mr. BRIGGS agreed with the view, expressed in Mr. Tabibi's working paper, that any recommendations upon which the Sub-Committee might agree should be firmly based on State practice.

He supported Mr. Tunkin's suggestion that the draft on State succession should take the form of terse and brief articles of the type usually included in a convention.

He inclined to the view that the results of the Commission's labours should be embodied in a convention, to be approved at an international conference such as that held at Vienna in 1961. More than half of the States at present Members of the United Nations had not been in existence when the rules on State succession had come into being: those States were entitled to an opportunity to consider those rules at an international conference, where they could be adapted and even supplemented by new rules as necessary.

As to whether the objective should be codification or progressive development, he thought it would be premature at that stage to take a decision.

Turning to the question whether State succession and governmental succession should be treated as one topic or as two, he pointed out that the two were already divided: they concerned two distinct legal situations. It was true that the problem sometimes arose whether a new entity was a new State or a new government. For example, when Italy had replaced Sardinia, the question had been debated whether a new State had come into being and whether the problems which arose were those of State succession and not of governmental succession. In the modern international community, he was sure that no Government of a new State of Asia or Africa would agree to be regarded as merely a new Government which had replaced the former colonial authority.

The problems of State continuity, in other words those of governmental succession, arose frequently in connexion with the international responsibility of the State, for they related to the responsibility of a State for the acts of past Governments.

For those reasons, he thought that a distinction should be drawn between State succession and governmental succession. He noted the suggestion, mentioned in the Chairman's paper, that the latter question should be studied " in connexion with " State succession. He was not at all certain of the meaning of that suggestion; he agreed with Mr. Tunkin that governmental succession should be studied as much as was needed for an understanding of State succession; care should be taken, however, not to pursue two objects at the same time. He had been interested by Mr. El-Erian's remark that State succession and governmental succession would have to be divided sooner or later, and thought that the division should be made at an early rather than a late stage.

Referring to part II, section 1 D of the Chairman's outline, he said that the principle of self-determination had been at the origin of the appearance of all the States which had emerged in the last two centuries, such as the United States of America. He agreed, naturally, that the study of State succession should take particular account of the interests and needs of the newly independent States.

On the question of succession of States in relation to treaties, he found very valuable the Secretariat document on the subject (A/CN.4/150). He had also been much impressed by the paper submitted by Mr. Bartos.

His own views in that respect had changed somewhat. Some fifteen or twenty years previously, he had considered that the matter of succession to treaties belonged to the law of treaties, but he now concurred with the view, so ably put forward by Mr. Bartos, that the matter should be studied in conjunction with State succession.

Mr. ELIAS said that, since the Sub-Committee had had an opportunity of hearing the views of those members who had not submitted papers, it should close the general discussion. At its next meeting, it should confine itself to deciding how to approach the problem of succession of States and succession of Governments; in his view, the Sub-Committee should suggest that the future special rapporteur should concentrate on the topic of the succession of States and consider the succession of Governments only to the extent to which it would help him to elucidate the subject. Once a firm decision had been reached on that point, the Sub-Committee should consider the extent to which the implications of State succession for treaties should be dealt with under the heading of State succession rather than under that of the law of treaties.

Mr. TABIBI agreed that, owing to shortage of time, the Sub-Committee should try to reach a decision on the basis of the Chairman's paper and of those points on which general agreement was likely. Nevertheless, he thought that the general discussion should not yet be closed: he for one would wish to comment further on the memoranda submitted by members and by the Secretariat.

Mr. ROSENNE thought it was premature to reach a decision. A consensus might well emerge if the discussion was continued. It was already apparent that the members of the Sub-Committee were virtually unanimous in thinking that the treaty aspects of succession should be dealt with in the context of the law of succession rather than in that of the law of treaties. Nevertheless, it would be desirable to devote some attention to considering what precisely had to be included in the law of treaties in the context of the topic of the succession of States. For example, could there be succession to the signature of a treaty as opposed to succession to a treaty that had actually come into force, in view of the decision reached by the Commission at its 14th session with regard to the legal effects of signature? And to what extent was it possible for a new State to make reservations to existing treaties in the context of the general law on reservations?

With regard to the problem whether the Sub-Committee was called upon to deal with one topic or with two, or with a combination of both, he said that a decision should be postponed for several days until some of the other problems had been considered. He noted, for example, that in document A/CN.4/150 the Secretariat had not made a distinction between instances of succession which on closer analysis might be found to be cases of succession of Governments; examples were Lebanon, Jordan and Morocco. The Secretariat had been quite right; but that demonstrated the danger of too rapid a decision on the main issue. Moreover it was significant that, in its resolution 1686 (XVI) the General Assembly had referred to " the topic " (in the singular) of succession of States and Governments.

Mr. LIU said that he was inclined to regard the succession of States and the succession of Governments as one topic; the emphasis, however, should be on the study of the former, since what rules could be formulated on the succession of Governments were vague and were certainly related to the succession of States.

Mr. ELIAS, supplementing his earlier remarks, said that it had not been his intention to suggest that the discussion should be closed at once but that, in view of the limited time at its disposal, the Sub-Committee should confine itself as from that meeting to considering whether the succession of States and the succession of Governments should be treated together or separately.

The ACTING CHAIRMAN said that a decision with regard to the closure of the general discussion would be taken at the next meeting.

The meeting rose at 5.10 p.m.

SUMMARY RECORD OF THE FIFTH MEETING

(Monday, 21 January 1963, at 3 p.m.)

SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN, speaking as a member of the Sub-Committee, said that he shared some of the views expressed in the valuable working paper submitted by Mr. Bartos. That working paper dealt exclusively and very thoroughly with the question whether, and to what extent, new States were bound by pre-existing treaties relating to their territory; it would be of great value both to the future Special Rapporteur and to the Commission itself. The two documents submitted by Mr. Elias also contained very valuable suggestions for the Special Rapporteur and for the Commission when the real work of codification began. Those documents drew attention to a number of important new problems which deserved thorough consideration.

The working paper submitted by Mr. Tabibi very appropriately stressed that the problem of State succession should be dealt with on the basis of the general practice of States. However, the difficulty of the matter lay in the fact that the practice of States was not always uniform. In that respect, he agreed with Mr. Tabibi that the Commission should not devote much attention to theoretical issues but should focus its attention on territorial re-organization accompanied by a change of sovereignty.

Like Mr. Tabibi, he believed that the main task of the Commission should be to examine the succession of States and not the succession of Governments.

Mr. Tabibi, like Mr. Bartos, thought that the Commission should first consider whether new States were bound by treaties entered into by their predecessors; he appeared to give, in principle, a negative answer to that question.

The working paper submitted by Mr. Rosenne dealt with a broad range of subjects. In the first place, Mr. Rosenne appeared to think that the succession of States and the succession of Governments shoulds be treated as a single topic, for the reason (among others) that the attainment of independence had sometimes taken technically the form of a change of Government. Yet, even in that case a new State in fact came into being, and consequently the problem was essentially one of State succession. Actually, there was no reason why the two aspects of the question should not be studied jointly, but the problems of State succession were much more important and urgent than those of governmental succession.

With regard to the form which the codification of the subject would take, Mr. Rosenne (in paras. 5 and 6 of his paper) rejected that of a convention and favoured the formulation of a set of general principles or, alternatively, of a set of model rules. In support of that view, Mr. Rosenne had stated that many of the problems of State succession were of a bilateral character, that the number of non-successor States directly affected was small and that other States would not be sufficiently interested in concluding a general international convention on the question. There was some force in those arguments but he (Mr. Castrén) believed that third States would be interested in the formulation of general rules on so important a subject as State succession, because they might be affected in future by the problem. Naturally, any general international convention on the question should be sufficiently flexible to cover at least the majority of the various possible cases.

Mr. Rosenne further suggested (para. 8) that consideration should be given to possible differences between a successor Government and foreign individuals affected by State succession, and recommended judicial settlement in such cases. Admittedly the question was an important one, but the problem involved was vast and difficult and was, moreover, connected with State responsibility.

Mr. Rosenne had made a number of suggestions (para. 10) regarding the exclusion of certain questions which belonged to the realm of municipal law. There would no doubt be an advantage in limiting the scope of the very broad subject of State succession, and he (Mr. Castrén) had perhaps gone too far in his own working paper in suggesting the study of all questions relating to the legal status of the local population coming under the territorial and personal jurisdiction of the new State. However, it was not possible to exclude such questions as nationality; in addition, the new sovereign had a duty to respect human rights in its relations with the local population.

So far as the law of treaties was concerned and its connexion with State succession, Mr. Rosenne had drawn attention to a number of important problems which needed to be solved (paras. 12 *et seq.*). The first was whether the succession to treaties should be dealt with by the Commission in the context of its work on the law of treaties or as part of the subject of State succession. In his own paper he (Mr. Castrén) had indicated that both courses were possible, while showing a preference for the second one. Of course, it would be very difficult to draw a clear line of demarcation between the two subjects and, for that reason, the two Special Rapporteurs concerned should work in close contact.

As indicated by Mr. Rosenne, the Commission should arrive at a clear formulation on the question how new States could become parties to multilateral treaties and members of international organizations. There already existed some practice in the matter, but it was not uniform. Another question which arose was that of the legal effects of a general agreement between the new State and the former metropolitan State on the question of maintaining in force various treaties formerly rendered applicable to the territory of the new State; Mr. Bartos had dealt with that question in his working paper, and he (Mr. Castrén) believed that it was possible to find an acceptable solution to that problem.

With regard to economic rights, he agreed with Mr. Rosenne (paras. 19 - 22 of his paper) that it would be desirable to classify the agreements which constituted the legal basis for the exercise of economic activities by aliens before the new State's attainment of independence. There existed a very real difference between the case of an alien whose rights were based on an international convention and an alien whose rights were based on administrative action taken under municipal law. It was also necessary, when examining questions relating to concessions and to the respect due to the rights of private individuals, to bear in mind that they were connected with the topic of State responsibility.

The question of the public debt of a territory which had become independent was also a problem of State succession (Mr. Rosenne's paper, para. 23).

In his conclusions Mr. Rosenne suggested that the Sub-Committee might make recommendations to the Commission relating to the appointment of a Special Rapporteur, to his precise terms of reference and to the time schedule for the progress of the work. He agreed in principle with Mr. Rosenne but thought that those questions should be postponed and dealt with only in the final report of the Sub-Committee.

The Chairman's working paper constituted an excellent analysis of those of the other members. The suggestions it contained were generally acceptable, and he suggested that the Chairman's paper should be taken as a basis of the Sub-Committee's detailed discussion, as soon as the general discussion was concluded.

He thanked the Secretariat for the three excellent studies concerning matters connected with the topic of State succession. In particular, the Secretariat had provided information on recent practice in the matter of succession to treaties, which was very important because the study of State succession would probably begin with that question. As the work on the topic of State succession advanced, however, further documents would be needed relating to the attitude of the new States to the obligations of the predecessor States other than those arising from treaties, in such matters as public debts, concessions and nationality. Information was needed on all the problems connected with the process of the attainment of independence. Of course, the future Special Rapporteur could obtain such information directly from governments and official documents, but he suggested that the already difficult task of the Special Rapporteur would be made easier if the Secretariat could undertake that research work.

Mr. TABIBI said that, after reading the valuable working papers submitted by members, he had been confirmed in the view that the topic of State succession was a difficult and complicated one, because of the many political, economic and human factors involved. It constituted, however, a new and challenging field of study and one which was of great contemporary importance in view of the changes taking place in the world.

He had emphasized in his own working paper that the study of State succession should be based on State practice. He agreed that undue emphasis on State practice might involve some dangers because the former colonial Powers had, in past practice, imposed some of the solutions. However, the general rules of international law were inadequate to provide the answer to all the problems involved; in any event, many of those rules had also been formulated in the past by former colonial Powers. His conclusion on that point was similar to that of Mr. Bartos, namely that due attention should be paid to the principles of the United Nations Charter and to the practice and principles of the United Nations — in particular, the principle of self-determination — and the extent to which the general rules of international law had been modified by the Charter, principles and practice of the United Nations.

In the consideration of the general principles of the topic of State succession, two types of problems called for attention. The first were the problems of the newly independent nations; the second were those of third States. It was essential to bear in mind both types of problems, for the former colonial Powers had signed treaties which affected third States.

Turning to the various theories mentioned by Mr. Bartos in his paper, he said that he favoured the *tabula rasa* theory, which took into account the will of the people concerned. The other theories were not suited to present circumstances. Mr. Bartos had given, in connexion with the theory of option, the example of the Peace Treaties of 1946; however, those treaties had been imposed on the defeated Powers by the victorious Powers, which had thus been able to impose upon the vanquished the system of option in question. As to the system embodied in the theory of a period of reflection (Mr. Bartos's paper, section IV), he could not agree to any suggestion that the Secretary-General should merely fulfil the duties of a post office; the Secretary-General should be able to examine whether a declaration relating to the validity of treaties affected other Members of the United Nations.

As to the possible forms of the codification of the international law relating to State succession, he favoured a draft convention rather than a code; a convention would be more acceptable to States and would prove a more effective means of codifying the international law on the subject.

With regard to the question of the separation of the subject of governmental succession from that of State Succession, he referred to his own memorandum. On that point, he had understood Mr. Tunkin as having suggested as a compromise that the future Special Rapporteur on the topic of State succession should make passing references to governmental succession, as necessary. But surely the question of governmental succession was an important one, and the Special Rapporteur would find it necessary to devote attention to it.

With a view to avoiding overlapping, he agreed with the suggestion contained in the Chairman's working paper that there should be close co-operation between the Special Rapporteurs on the topics of State succession, State responsibility and the law of treaties.

Mr. Rosenne had referred in his working paper (para. 14) to " dispositive treaties " or treaties creating local obligations, regarding which it was sometimes asserted that they subsisted despite changes of sovereignty; the reference was to international treaties and treaty settlements which defined and delimited international frontiers, and Mr. Rosenne had indicated that " this theory has obvious practical advantages ". He could not agree with M. Rosenne on that point; the theory in question had no practical advantages, was unnecessary and was moreover contrary to the will of the people affected by such treaties. The majority of the territorial treaties which would be covered by such a theory had been imposed upon the people concerned against their will; the frontiers drawn by those treaties had been drawn under the influence of colonial Powers. The issue was an important one because the territories affected were sometimes larger in area than that of some Member States of the United Nations.

Referring to the memorandum prepared by the Secretariat (A/CN.4/149) on the subject of the succession of States in relation to membership of the United Nations, he said the memorandum reproduced the text of the legal opinion of 8 August 1947 given by the Assistant Secretary-General for Legal Affairs on the subject of the admission of Pakistan to membership of the United Nations. That legal opinion envisaged the situation of both India and Pakistan in the light of the succession to all treaty rights; the new Dominion of India was regarded as continuing to possess all the treaty rights and obligations of the pre-existing State of India; the territory which had broken off from India, i.e. Pakistan, was regarded as a new State and was considered as not taking over the treaty rights and obligations of the old State. The issue, as thus presented, was not limited to the question of membership of the United Nations. The question of membership was viewed as consequential to the broader issue of succession to treaty rights and obligations.

That was true not only of the legal opinion to which he had referred, but also of the action taken by the General Assembly and the Security Council in the matter of the admission of Pakistan.

In that connexion, he had been surprised to see that the Secretariat document to which he had referred reproduced (in para. 5) the text of an agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan. That agreement was one of the strangest in the history of international law. He failed to see how the new Dominion of India could confer upon Pakistan, i.e. a part of its territory seceding from it, rights under treaties relating to the territory of the State of India, rights which affected third parties. It was equally strange for Pakistan, i.e. the seceding portion of India, to confer upon the new Dominion of India rights which affected third parties.

Mr. ROSENNE said, with reference to the proposed separation of the subject of the succession of States and that of the succession of Governments, that there was a danger that the Commission might create inequalities and artificial distinctions if it decided to treat the practical problems arising out of the independence of new States as if they were exclusively problems of State succession. There was a distinction in law between former colonial territories which had been formally annexed by the colonial State and those which had not been so annexed. The latter included the old-fashioned kind of protectorate, as well as the two modern phenomena of the Mandated and Trust Territory. The special

legal position of such territories had been considered by the Permanent Court of International Justice and by the present International Court of Justice in a number of cases, and that jurisprudence could not be lightly discarded.[4] The problem had been very well expressed by Mr. Bartos in his working paper when he had stated that the Sub-Committee should devote its attention mainly to the question of succession of States and Governments raised by the birth and creation of new States through the application of the principles of self-determination of peoples embodied in the United Nations Charter. In such a context, any attempt to set aside the question of the succession of Governments as not relevant would create more difficulties than it would solve. What should be excluded from a study of the succession of Governments, however, was the consideration of questions not not directly relevant to the creation of new States, such as the status of Governments which had come into power by revolutionary or unconstitutional means and also some Governments, such as that of the present Republic of South Africa, which had come into power by constitutional means but which had undergone an elaborate series of changes during the past forty years, where the change of government had not led to the creation of a new State. Secondly, all questions of governmental succession relating to insurgents should be excluded, and so should, thirdly, all questions relatong to matters of State responsibility arising out of a change of government. Nor should the Sub-Committee be concerned with any problems of recognition. What it should concern itself with was the problem of changes of government, whether constitutional or not, which led directly to independence accompanied by membership in the United Nations. That point could be covered by adding another heading under part II, section 3 B, sub-paragraph (*a*) of the Chairman's working paper, which would refer to succession originating in the termination of a protectorate, mandate or trusteeship agreement.

He was not clear about the interpretation of the heading of section 1 C of part II of the Chairman's paper, which read: " In favour of giving priority to the topic of succession of States and studying succession of Governments in connexion with it." He preferred the wording used by Mr. Tunkin, who had said that the succession of Governments should be studied " when the need arose ". He noted also that Mr. Tunkin had said that it would be premature for the Sub-Committee to reach any decision at the present time concerning the final form in which its conclusions would be expressed. However, he agreed with Mr. Tunkin that the draft articles should be terse, and in a form suitable for ultimate incorporation in a convention.

So far as the form of the final text was concerned, he maintained an open view at the moment, with the understanding that, if in the final text the progressive development of the law of the succession of States and Governments predominated over its codification, the Commission, under its Statute, would have no choice but to recommend the conclusion of a convention. Lastly, he hoped that the Sub-Committee would find time to discuss the types of working paper which the Secretariat should be asked to produce.

Mr. LIANG, representative of the Secretary-General, said that the Secretariat had informed the Commission at its last session that it would furnish it and its Sub-Committees with certain working papers. Three of those documents (A/CN.4/149, 150 and 151) were already before the Sub-Committee, and a fourth study containing an analysis of national court decisions concerning State succession was in the course of preparation. He regretted that in view of the Secretariat's heavy schedule of work, including the preparation of the forthcoming Vienna conference, it would be unable to assume any additional tasks before the Commission's next session.

Mr. ROSENNE explained that he had not expected the Secretariat to prepare any more documents before the Commissions's next session but had referred only to the work to be done by it during the next twelve months.

Mr. ELIAS proposed, in the interests of a more orderly discussion, that the Sub-Committee should proceed to consider the Chairman's working paper point by point.

Mr. EL-ERIAN supported that proposal.

It was so agreed.

Mr. BRIGGS said, with reference to part I (preliminary remarks) of the Chairman's paper, that the problems concerning new States should be given " special attention " rather than " special treatment ".

With reference to part II section 1 (Succession of States and Governments: one or two topics?), he proposed that paragraph C should be revised along the lines suggested by Mr. Tunkin to include the following phrase: ". . . that the Sub-Committee recommends that the Special Rapporteur should initially give priority to the topic of State succession, while considering the succession of Governments in so far as needed to throw light on State succession ".

Mr. ELIAS said that he would prefer the phrase " should concentrate on " to the phrase " give priority to ".

Mr. BRIGGS accepted that amendment.

Mr. ROSENNE said that he might accept the phrase " that the Special Rapporteur should initially concentrate on ", but since two different topics were involved, he was afraid that the second part of Mr. Briggs's amendment, namely the phrase " to throw light on ", would lead to confusion.

Mr. BRIGGS said that in formulating his amendment he had acted under the impression that Mr. Rosenne was satisfied with the wording suggested by Mr. Tunkin for paragraph C. He also noted that Mr. Rosenne, when referring to those cases of the succession of Governments which he would exclude from consideration, had excluded almost everything and had said that the Sub-Commission should concern itself with the problem of changes of Government, whether constitutional or not, which led directly to independence accompanied by membership in the United Nations. To him that seemed to be an example of State succession. In dealing with the subject, the special rapporteur would have to consider the practical implications of both kinds of succession.

Mr. ELIAS thought that Mr. Briggs's suggestion was an adequate solution, since it merely indicated to the special rapporteur the lines on which the Sub-Committee was thinking; it would be open to the rapporteur at any time to depart from the Sub-Committee's suggestions if he thought it necessary. He also criticized Mr. Rosenne's reference to the case of the Republic of South Africa as illustrating a kind of Government succession that ought to be excluded from consideration; surely, the *Robert E. Brown Case*[5] was a significant landmark in international law.

Mr. LIU said that the wording proposed by Mr. Briggs, as amended by Mr. Elias, was acceptable to him.

Mr. ROSENNE proposed that Mr. Briggs's amendment should be revised to read ". . . recommends that the Special Rapporteur should initially concentrate on the topic of State succession and also the problem of succession of Governments ".

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[4] As instances cf. the cases of the Mavrommatis Palestine Concession, Tunis and Morocco Nationality Decrees, United States Nationals in Morocco and the various South West Africa cases.

[5] Robert E. Brown claim, American and British Claims Arbitration Tribunal, in *British Year Book of International Law*, 1924, pp. 210-221; also in *American Journal of International Law*, XIX (1925), pp. 193-206.

Mr. TUNKIN said be preferred Mr. Briggs's original text, as amended by Mr. Elias.

Mr. BARTOS supported the amendment of Mr. Briggs, but reserved the right to comment further on the matter after the presentation of subsequent arguments.

Mr. ROSENNE said that he would agree provisionally to the proposed amendment, although he was not entirely satisfied with it.

Mr. ELIAS proposed, as a compromise, that part II, section 1, of the Chairman's working paper should be left unchanged and that Mr. Briggs's amendment, together with the other suggestions made during the debate, should be included at the end of it. That would enable those who were not members of the Sub-Committee to know what other views had been expressed, while all the members themselves could feel that their points of view would be available to the future special rapporteur.

The ACTING CHAIRMAN said that, so far as the records were concerned, the Sub-Committee would follow the same procedure as the Sub-Committee on State Responsibility.

Mr. TABIBI said that to mention all the alternatives in the report might cause confusion; it would be best if the different points of view were explained in the records, although some indications should be given in the report.

Mr. TUNKIN thought that it would be preferable if the preliminary remarks were included in the section entitled " The scope of the subject "; an injunction to the Special Rapporteur to pay particular attention to the problems arising out of the accession of new States to independence would then be included in his instructions.

Mr. BARTOS, supported by Mr. BRIGGS and Mr. EL-ERIAN, suggested that the words " and of the principles of the United Nations Charter " should be added after the words " in the light of contemporary needs " in the passage entitled " preliminary remarks ".

The ACTING CHAIRMAN said that, in the absence of objection, the suggestions made by Mr. Tunkin and Mr. Bartos would be adopted. Section 1 D could then be deleted.

He then invited the Sub-Committee to consider part II, section 2 (Delimitation of the topic) and noted that the subject matter of paragraph A (*a*), " Law of treaties " had already been discussed at some length by the Sub-Committee.

Mr. TUNKIN thought that the Commission should go further than the Chairman had done in that paragraph and should state positively that it was of the opinion that the subject of succession in respect of treaties should be dealt with in the context of State succession.

Mr. ROSENNE said that, in that case, the best course would be to delete the last two sentences of paragraph A(*a*).

It was so agreed.

The ACTING CHAIRMAN suggested that sub-paragraphs (*b*) and (*c*) of section 2 A should be considered together.

Mr. EL-ERIAN said that the recommendation to the three Special Rapporteurs in sub-paragraph (*c*) was equally applicable to the Special Rapporteur on the topic of relations between States and inter-governmental organizations, who should therefore be mentioned.

It was so agreed.

Mr. TUNKIN said that, with regard to responsibility (sub-paragraph (*b*)), the only problem was to avoid overlapping. That could be achieved by co-ordination between the Special Rapporteurs: but since what was being drafted was a programme of work for the future Special Rapporteur on succession of States, the wording would have to be reformulated in the draft report in clear-cut terms, on the same lines as in the report of the Sub-Committee on State responsibility.

The ACTING CHAIRMAN agreed that the same formulation as that used by the Sub-Committee on State responsibility should be employed.

He then asked the Sub-Committee to consider section 2B (Exclusion of certain issues) in the Chairman's report.

Mr. BARTOS said that, while in principle he could accept sub-paragraph (*a*), he had certain reservations with regard to (*b*) and (*c*). He fully agreed that all matters falling within Article 2(7) of the Charter were outside the scope of international law in the ordinary sense; but there were certain questions in connexion with the succession to sovereign rights which could not be regarded *ipso facto* as being purely domestic during the period of transition. There were some matters that had an international law aspect. Moreover, it might not merely be a question of relations between former subjects of the metropolitan Power and the Government; it might be a question of aliens in general.

Mr. BRIGGS agreed. He was not convinced that all the items in (*b*) and (*c*) should be excluded from the study. Reference had been made to matters which appeared to fall essentially within the domestic jurisdiction of States under Article 2(7) of the Charter and thus to be outside the scope of a state of international law; but some of those matters were not so clearly excluded. As Feilchenfeld had suggested in his *Public Debts and State Succession* (1931), the jural relations sought to be continued by theories of State succession were predominantly jural relations under municipal, not international, law, and the problem was therefore to determine whether international law required a succeeding State to assume or revivify the municipal law obligations of its predecessor. Before approving the suggestions made in sub-paragraphs (*a*), (*b*) and (*c*) the Sub-Committee should certainly devote more time to considering whether there were any rules of international law which required a succeeding State to assume the municipal law obligations of its predeccessor.

With regard to (*a*), it had frequently been held, notably by the Permanent Court of International Justice in the *German Settlers case* [6] and by courts in the United States that, in the case of a territorial transfer, the old law survived a change of sovereignty until it was formally changed. Though that statement might reflect practice, it concealed an ambiguity, since the laws which continued in operation derived their character as positive law from the fact that they were regarded by the new State as rules of its own law.

The ACTING CHAIRMAN suggested that the examples quoted in (*a*), (*b*) and (*c*) might be omitted.

Mr. ELIAS said that the examples in question were based on an assumption that had been disputed earlier in the Sub-Committee when it had endeavoured to delimit the scope of succession of States and of Governments. If it was accepted that all subjects such as changes of government, whether by revolution or by constitutional or unconstitutional means, were outside the scope of the topic, then the examples would be pertinent. But once the validity of that assumption was challenged, a reference to the examples would merely hamper the Special Rapporteur in his work. Moreover, unless he was allowed to examine those topics, he would not know to what extent they ought to be excluded from the study. Care had to be exercised in making reference to Article 2(7) of the Charter since, when it had been invoked, it had often led to difficulties: for instance, it had been cited by the Government of the Republic of South Africa in support of its policy in South West Africa and even in South Africa itself.

Mr. TUNKIN said that, regardless of any argument in favour of retaining or deleting section 2B (*a*), (*b*) and (*c*), the

[6] Advisory opinion of the PCIJ in the case of the *Settlers of German Origin in Territory ceded by Germany to Poland*, Series B, No. 6.

Sub-Committee could not very well begin by saying what should be excluded from the study. What the Chairman had written was merely a recapitulation of suggestions made by members in their papers. In his view the whole of paragraph B should be omitted.

Mr. ROSENNE agreed that that would be the best course.

Mr. LIU observed that the reference to Article 2(7) of the Charter was irrelevant, since the intention of Article 2(7) was to preclude the United Nations from taking action in matters lying within domestic jurisdiction; it made no attempt to define what was in the sphere of international law and what was in the sphere of domestic jurisdiction.

Section 2B was deleted.

The ACTING CHAIRMAN invited the Sub-Committee to consider section 3 (Division of the topic). He recalled that it had already been decided to include (*a*) " succession in respect of treaties " and to exclude (*d*) " succession between international organizations ".

Mr. EL-ERIAN suggested that the order of sub-paragraphs (*b*) and (*c*) should be reversed.

It was so agreed.

Mr. BARTOS proposed the deletion of the words " concerning individuals " which appeared within brackets in sub-paragraph (*e*). The sub-paragraph dealt with succession in respect of rights and duties resulting from sources other than treaties and applied to relations between States in general. The words in brackets would limit the scope of the Special Rapporteur's work.

It was so agreed.

Mr. ELIAS inquired what was intended by sub-paragraph (*e*).

Mr. ROSENNE said that it was desirable that consideration should be given to the question how far specific proposals for the settlement of disputes were an integral part of the system to be evolved by the Commission for the topic of succession. The question should be studied by the Special Rapporteur even if he were to reach a negative conclusion.

Mr. TUNKIN said that the different means of settling disputes constituted a separate subject: the introduction of such a topic would merely complicate matters.

Mr. ROSENNE said that, if the majority wished to delete sub-paragraph (*e*), he wished it to be placed on record that he was opposed to such a decision.

The ACTING CHAIRMAN noted that, if a sub-heading was deleted by the Sub-Committee, that did not mean that the Special Rapporteur would be precluded from studying the point covered by the sub-heading in question.

Mr. ELIAS said that it was surely not intended that a set of articles was neccessarily to be regarded as incomplete if no machinery was established for the settlement of disputes. The sub-paragraph should be deleted.

Mr. BRIGGS said that, while he agreed that the subject should not be made more complicated, he thought that sub-paragraph (*e*) should be retained. He could visualize situations in which a recommendation with regard to special adjudicative procedures might be very appropriate. The Special Rapporteur should be left free to deal with the point.

Mr. BARTOS also thought that the sub-paragraph should be retained. There had certainly been cases in the past where special judicial machinery had been established to settle disputes arising out of territorial changes and State succession: the Charter did not exclude such methods of settling disputes, which were in conformity with United Nations practice. Under the League of Nations system too, disputes had been settled by arbitral and other special tribunals; it was not always possible for the parties to go to the expense of taking a case before the International Court of Justice.

Mr. TUNKIN said that a question of principle was involved. The Sub-Committee should be clear in its own mind about what it was trying to do. It was engaged in drafting an outline for the codification of the particular branch of international law dealing with the succession of States, and there was no point in confusing the issue by introducing a topic which formed a separate and distinct branch of international law.

The meeting rose at 6 p.m.

SUMMARY RECORD OF THE SIXTH MEETING

(Tuesday, 22 January 1963, at 10 a.m.)

Message from the Chairman

The ACTING CHAIRMAN read a telegram just received from the Chairman, thanking the Sub-Committee for its wishes for a speedy recovery and stating that he would appreciate receiving the Sub-Committee's draft and recommendations.

Succession of States and Governments (*continued*)

The ACTING CHAIRMAN invited the Sub-Committee to continue its debate on part II, section 3A (*e*) of the Chairman's working paper.

Mr. ROSENNE said that the document which the Sub-Committee was preparing would, if the International Law Commission accepted it, constitute guidance for the future Special Rapporteur on the topic of State succession, without committing him, or the other members of the Commission as to substance.

If, therefore, it was agreed that the outline for the study of the topic should contain a reference to the question of adjudicative procedures for the settlement of disputes, the effect would be merely to invite the Special Rapporteur to bear mind the question of such procedures and to consider whether, in particular, procedures other than those of existing organs such as the International Court of Justice were in any way relevant to the topic of State succession.

He recalled that the International Law Commission had on many occasions drawn attention in its past drafts to the question of adjudicative procedures for the settlement of particular types of disputes. It had, for example, included a provision on the settlement of certain types of disputes in its draft on nationality including statelessness.[7] In the draft articles on the conservation of the living resources of the sea, the Commission had embodied provisions for a special type of machinery for the settlement of disputes; [8] a more general type of provision had also been included in the draft articles on the continental shelf [8] and both provisions had been incorporated into the results of the work of the first Conference on the Law of the Sea (1958).[9]

He thought that the Commission would have to envisage the problem of State succession in its totality, and hence it was appropriate for it to consider the question of the settle-

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[7] Draft convention on the elimination of future statelessness, and draft convention on the reduction of future statelessness: provision for judicial settlement in article 10 of both conventions, see report of the International Law Commission on its 5th session, chapter IV (A/2456, in *Yearbook of the International Law Commission, 1953*, vol. II, United Nations publication Sales No. 59.V.4, vol. II).

[8] See report of the International Law Commission on its 8th session, chapter II (A/3159, in *Yearbook of the International Law Commission, 1956*, vol. II, United Nations publication, Sales No. 1956.V.3, vol. II)

[9] *United Nations Conference on the Law of the Sea, Official Records*, vol. II, annexes (A/CONF.13/38), United Nations publications Sales No. 58.V.4, vol. II.

ment of disputes. The decision whether provisions on the subject should be included in the final text to be adopted on the basis of the Commission's own proposals was perhaps a political one; indeed, it might well be that, on the basis of the material submitted by the future Special Rapporteur, the Commission itself would reach the conclusion that the question of the settlement of disputes was not an integral part of the topic of State succession.

He agreed with Mr. Bartos that the reference to the procedures for the settlement of disputes was not intended to refer to any particular existing procedure. There were in effect a variety of organs for the settlement of particular types of disputes arising out of State succession; those disputes might in some cases involve two States and in others a State and a private individual.

Mr. EL-ERIAN expressed doubts regarding the advisability of including, particularly at the preliminary stage, any reference to the question of procedures for the peaceful settlement of disputes.

The Sub-Committee's task was to delimit the topic of the succession of States and Governments. Accordingly, it should confine its deliberations to the content of that topic, i.e., the substantive law of State succession, and should not enter into the question of machinery for the implementation of those substantive rules of law.

It was as yet uncertain whether the final draft on the topic of State succession would take the form of a draft convention or that of a restatement of the law on the subject. He therefore urged the Sub-Committee not to engage at that stage in work on a question which would be normally covered in the final clauses of a draft convention.

His view was borne out by the experience of the International Law Commission itself. He seemed to recollect that, during the Commission's discussion of one of the concluding articles of the late Mr. Scelle's draft on arbitral procedure,[10] Mr. François had pointed out that, if the provision then under discussion (concerning the settlement of disputes as to the meaning of the arbitral award) were to be included in the draft, it might well become a habitual clause (*clause de style*) to which governments would automatically make a reservation; the effect would be to hinder rather than to advance the cause of pacific settlement of disputes.

It was true that in the Geneva Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf (1958) certain provisions on the settlement of disputes had been included. The reason for their inclusion had been that those particular Conventions, as distinct from the other two 1958 Geneva Conventions, contained an element of progressive development which had been accepted by a number of countries only on condition that a particular machinery for the settlement of disputes was embodied in the appropriate Convention.

He recalled that, at its most recent (seventeenth) session the General Assembly had adopted its resolution 1815 (XVII) in which it had included among the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations the " principle that States shall settle their international disputes by peacful means ". In its operative procedural paragraph, the resolution included the principle of pacific settlement of disputes among the three topics which were to be given priority study by the Assembly at its next session. As pointed out by Mr. Tunkin, it was thus clear that the question of the pacific settlement of disputes was another important branch of international law, which should be kept distinct from the topic of State succession.

[10] A/CN.4/113, in *Yearbook of the International Law Commission, 1958*, vol. II, United Nations publication Sales No. 58.V.1, vol. II.

The ACTING CHAIRMAN noted that there was a fairly even division of opinion among the members of the Sub-Committee on the question whether the outline for the study of State succession should or should not include a reference to procedures for the settlement of disputes. It would be preferable not to put the question to the vote, but instead to record that division of opinion in the Sub-Committee's draft report. For his part, he saw no harm in suggesting that the future Special Rapporteur might take into consideration the question of the settlement of disputes; the Special Rapporteur would not be under any obligation to propose a rule on the subject, but if he saw fit to do so, it would be for the full Commission to decide whether a clause on the settlement of disputes should be included in the draft on State succession.

Mr. TUNKIN found the Acting Chairman's suggestion acceptable as far as the draft report was concerned; when the Sub-Committee reconvened in May, it would decide the question in connexion with its final report.

The problem under discussion was an important one; if the Sub-Committee were to decide to recommend that the Special Rapporteur should study the question of the pacific settlement of disputes, the Special Rapporteur would be under an obligation to deal with a matter which, in his (Mr. Tunkin's) view, was extraneous to the subject.

Mr. ELIAS said he would prefer the matter to be decided by a vote.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to adopt the course suggested by Mr. Tunkin.

It was so agreed.

The ACTING CHAIRMAN invited the Sub-Committee to consider part II, section 3B of the Chairman's outline, dealing with the " detailed division of the subject ".

Mr. BRIGGS suggested that section 3B should be left substantially unchanged: it provided a satisfactory table of contents for the study of the topic of State succession. In that regard, he pointed out that the criteria mentioned under sub-paragraphs (*a*), (*b*) and (*c*) were not mutually exclusive.

He had no objection to the suggestion made by Mr. Rosenne at the previous meeting that a reference should be introduced to the termination of a protectorate, mandate or trusteeship, but thought that those cases were covered by the expression " birth of a new State ".

Mr. ELIAS said he had no objection to the retention of sub-paragraphs (*a*), (*b*) and (*c*), but thought that the material contained in sub-paragraph (*d*) was already substantially covered by sub-paragraph (*b*) of paragraph A entitled " Broad outline ".

Mr. BARTOS agreed that the criteria specified in sub-paragraphs (*a*), (*b*) and (*c*) were not mutually exclusive; it was impossible to carry out an analysis on that basis without inter-relating the various sets of criteria.

He stressed that the Chairman, in the outline contained in his working paper, had merely intended to catalogue the various criteria which had been put forward; it had not been the Chairman's intention to express a definite view on the choice between those criteria.

He urged that all the material contained in the Chairman's outline should be retained; he suggested that the Sub-Committee should, rather than delete anything, make it clear that the enumerations in the various sub-headings were not exhaustive and that further points could be added in future. That result could be achieved by introducing into the opening sentence an expression such as " in particular ".

He found very interesting Mr. Rosenne's suggestion that sub-paragraph (*a*) should contain a reference to the question of the termination of a protectorate, mandate or trusteeship agreement. Such a reference would not, however, exhaust all the important cases which might arise; he was thinking, in particular, of the re-emergence of a State. For example, the

disappearance of Ethiopia as a result of successful military action had been more or less acknowledged by the League of Nations; when Ethiopia had later regained its independence, the question had arisen what had been its status in international law during its temporary disappearance from the international scene.

As far as protectorates were concerned, he drew attention to the well established doctrine in international law, acknowledged by the practice of international courts, that a protected State was a semi-sovereign State, and as such possessed in some measure a legal personality in international law. With reference to sub-paragraph (*d*), he drew attention to the existence of guarantor States, which were neither " States directly concerned " nor " third States ".

The ACTING CHAIRMAN said that the valuable points made by Mr. Bartos and other speakers would come to the attention of the Special Rapporteur through the summary records of the meetings.

Mr. LIANG, representative of the Secretary-General, said he was somewhat puzzled by the use of the term " criteria " in the opening sentence of paragraph B, a paragraph which in fact spelled out the details of the subject matter of the future report on the topic of the succession of States and Governments.

Furthermore, it was not quite clear what exactly was the purport of the preposition " by " (in the English text) which was used in (*a*), (*b*) and (*c*), apparently to connect the opening words " several criteria are offered " to " the origin of succession », " the source of rights and obligations " and " territorial effects " respectively.

The points to which he had drawn attention could be dealt with by redrafting. In addition it would perhaps be desirable to rearrange the order of the various sub-paragraphs. Sub-paragraph (*a*), dealing with the origin of succession, would be appropriate as the opening paragraph, and should be followed by two sub-paragraphs dealing respectively with *ratione personae* questions (sub-paragraph (*d*) and *ratione materiae* questions (sub-paragraph (*b*)).

A final sub-paragraph along the lines of (*c*) would deal with " effects ".

Mr. EL-ERIAN expressed misgivings about the wisdom of including in the outline any detailed references to the various ways in which new States came into being, and to the question whether certain particular States were " new " or not. He noted the suggestion by Mr. Briggs that a formerly protected State might, on the termination of the protectorate, be considered as a new State; in fact, the International Court of Justice, in its decision in the case concerning rights of nationals of the United States in Morocco, had held that Morocco was a State in protectorate relationship with France: the external aspects of its independence had been suppressed during the protectorate but Morocco had retained its personality as a State in international law.[11]

He also reserved his position regarding the examples given in the Secretariat documents. He realized that those documents were not before the Sub-Committee at that stage; he would, therefore, have ample opportunity of discussing them in the International Law Commission before which they would be formally placed at its next session.

Mr. TUNKIN agreed with the doubts expressed by the representative of the Secretary-General. There was some overlapping between the headings in paragraphs A and B; the explanation was that the Chairman had had no intention of setting forth a programme of work but merely of recapitulating the various points raised by members in their working papers. It was for the Sub-Committee to draft a programme of work; in doing so it would inevitably have to choose from the Chairman's working paper those points which it considered appropriate for inclusion and arrange them in proper order.

In particular, he agreed with Mr. Elias that sub-paragraph (*d*) of paragraph B was largely covered by the sub-headings in paragraph A.

Mr. TABIBI agreed with Mr. Tunkin's remarks and with those of the representative of the Secretary-General. The defects to which attention had been drawn could be removed by redrafting.

In the redrafting of the section, he urged that the suggestion by Mr. Bartos should be taken into account and that it should be clearly stated that the enumerations were not exhaustive. In that manner, it would be possible to add further points that might later come to the attention of the Commission in its work.

Mr. TUNKIN suggested that the Sub-Committee should at that stage confine its work to an examination of the various items in paragraph B, to see whether any should be deleted and whether any further points should be added. It should be left to the Chairman to rearrange the material for submission to the Sub-Committee when it reconvened in May.

Mr. BRIGGS, while agreeing that such terms as " criteria " and " source " had not perhaps been well chosen, said that the outline set forth in paragraph B provided a satisfactory sketch of the questions which any Special Rapporteur would have to consider. He therefore agreed with Mr. Bartos that none of the items which the Chairman had considered relevant should be deleted but that the Sub-Committee should, if it thought appropriate, add further items to the list.

He agreed that the various sub-headings of paragraph B were necessarily inter-related. It would be precisely the task of the Special Rapporteur to work out all the inter-relationships in question.

Mr. ROSENNE drew attention to the use in sub-paragraph (*b*) of the term " servitudes ", a term which had been the subject of much criticism and which he did not find suitable at that stage of the development of international law.

With regard to sub-paragraph (*d*), he pointed out that it dealt with two entirely different sets of rights: firstly, rights as between two States, and secondly, rights as between a State and an individual.

The ACTING CHAIRMAN said that the term " servitude " had probably been used by the Chairman in order to refer to territorial treaties.

Mr. BARTOS said that the Chairman, in using that term, had probably been thinking of such cases as the régime established for the navigation on the Danube.

In some cases the particular status described as a "servitude " had been established by treaty; in others, it was the result of geographical circumstances. He referred in that connexion, to the efforts made at the Geneva Conference on the Law of the Sea, 1958, by the representatives of landlocked countries to establish the principle that their countries were entitled to the benefit of a servitude which would give them access to the sea through the territory of other States. That idea had a definite tendency to become part of positive international law.

Other examples could be cited, such as the respective rights of Egypt and the Sudan in the Nile waters and the respective rights of India and Pakistan with regard to the Indus.

The fact that questions of " servitudes " often created acute problems on the emergence of new States was an argument in favour of the inclusion of a reference to that point. In spite of the objections which had been made to the term, he found its use appropriate in international law, as a convenient one to describe the type of situation to which he had referred.

Mr. LIU proposed that the first sentence in paragraph B should be redrafted to read: " The following subjects are suggested ..." and that the word " by " at the begnining of each of the sub-paragraphs should be deleted.

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[11] *Rights of United States Nationals in Morocco; I.C.J. Reports*, 1952.

Mr. BARTOS suggested that the word " criteria " might be replaced by " aspects ".

Mr. ROSENNE said that he would not insist on including the termination of a protectorate, mandate or trusteeship agreement as one of the origins of succession.

The ACTING CHAIRMAN said that it had been suggested that the formation of unions of States and the dissolution of such unions might be included under sub-paragraph (*a*).

Mr. BRIGGS and Mr. ELIAS thought that that addition was not necessary.

The ACTING CHAIRMAN said that no further changes in sub-paragraph (*a*) appeared necessary.

Mr. ELIAS and Mr. TUNKIN thought that sub-paragraph (*b*) could be left unchanged.

Mr. ROSENNE said that sub-paragraph (*b*) might be included under the general heading of " *ratione materiae* " suggested by Mr. Liang.

The ACTING CHAIRMAN said that the term " property " was too general; reference should be made to both private and public property.

Mr. TUNKIN thought that a general reference to property was sufficient.

Mr. BARTOS suggested that the expression " property and interests " might be used, although he did not insist on it.

The ACTING CHAIRMANN said that the consensus appeared to be that the word " property " by itself be retained.

Mr. BRIGGS pointed out that sub-paragraph (*b*) contained no reference to public debts and private rights. Those matters might come under the heading " contracts in general " or even partly under the heading of " property ".

The ACTING CHAIRMANN said that he would agree to the inclusion of a reference to public debts but not to a reference to private rights. He suggested that the reference to public debts might be inserted after the heading of " property ".

Mr. ELIAS said that in that case the words " in general " after " contracts " should be omitted.

Mr. ROSENNE proposed that under the heading " public law ", administrative and nationality problems should be treated separately, since the distinction between them was clear-cut and since nationality problems, in particular, deserved special study.

Mr. ELIAS suggested that the phrase " especially in relation to nationality problems " might meet his point.

Mr. LIU proposed the deletion of the words " administrative and " in the parenthesis after " public law ".

The ACTING CHAIRMAN agreed to that proposal, since he also believed that the two topics should be treated separately. With respect to the next heading, " torts ", he noted that there was no objection. With respect to sub-paragraph (*c*), he thought that the special rapporteur should study both effects within the territory of the State concerned and extra-territorial effects.

Mr. ROSENNE agreed that sub-paragraph (*c*) might be retained, but pointed out that there be three kinds of territorial effects: (1) effects in the newly independent State, (2) effects in the former metropolitan State, (3) effects in third States.

The ACTING CHAIRMAN, referring to sub-paragraph (*d*), said that Mr. Bartos had earlier mentioned a category of States which were neither " States directly concerned " nor " third States ".

Mr. BARTOS said that it might suffice if the record referred to the existence of an intermediate category of States.

The ACTING CHAIRMAN, in reply to a question by Mr. ELIAS, explained that the nationality problems referred to after " public law " in sub-paragraph (*b*) included all those concerning the status of the population of the territory, whereas the treatment of that population would be the subject of the third heading of sub-section (*d*).

Mr. LIANG, representative of the Secretary-General, said that one problem arising in connexion with the third and fourth headings of sub-paragraph (*d*) was the possession of nationality, whereas in sub-paragraph (*b*) it might be a question of whether nationality had or had not been retained.

Mr. ELIAS said that, without wishing to press the point, in his opinion the two sub-sections were imprecise and overlapped in that respect.

The ACTING CHAIRMAN said that the future special rapporteur would obviously have to avoid overlap with the topic of State responsibility; for that purpose all the rapporteurs should maintain contact with each other. Meanwhile, the Sub-Committee could adopt sub-paragraph (*d*) provisionally.

He invited debate on part III (The approach to the subject).

Mr. BRIGGS said, with reference to section 1 of part III of the Chairman's paper, that he did not understand the statement: " there are no general agreements on State succession and even the international customary law on it is defective." Did that mean that the existing law was incomplete or merely that the writer did not like it? He suggested that the statement should be replaced by the phrase in the section heading: " evaluation of the present state of the law on succession ". As it stood, the statement was misleading; it was for the future rapporteur to determine the extent to which agreement had been reached.

The ACTING CHAIRMAN supported that view.

Mr. LIU suggested that section 1 might be omitted altogether.

Mr. TABIBI said that sections 1 and 2 might be combined, or, alternatively, that they might be amalgamated with the " Preliminary remarks " at the beginning of the paper.

Mr. BARTOS said that he was unwilling, as a matter of general principle, to delete any part of section 1, since the sub-Committee had a duty to indicate the various points which, in its opinion, should be covered by the study. After all, the work would involve a combination of codification and progressive development of international law. The rules of international law were subject to change according to circumstances, but the Sub-Committee should determine the existing state of affairs to the best of its ability. If it found that those rules were not universally applied, it could state that there was " uncertainty " regarding them, but it should not say that there was no general agreement on the subject.

Mr. ELIAS proposed that the words " point of departure " should be deleted in the heading of section 1, which should be revised to read " survey and evaluation of the law of State succession from the point of view of (*a*) customary international law (*b*) treaty rights and obligations (*c*) State practice."

It might then be added that the study of those three aspects could be divided into two parts, one relating to the period before and the other to the period after the beginning of the Second World War.

Such a solution would avoid the necessity of beginning the section with a value judgement that might be controversial.

Mr. ROSENNE agreed with Mr. TABIBI that the matters in question should be mentioned at the very beginning of the document. He would suggest that the expression " point of departure " should be retained and that the wording should be " taking as the point of departure a survey and evaluation of the present state of the law and practice on succession, the objective is the elaboration of detailed replies to the question: 'to what extent is the successor State bound by the obligations of its predecessors, and to what extent is it to benefit from its rights?' This is necessary because of the many uncertainties which have recently come to light."

Mr. ELIAS said that if his suggestion was taken into account, he would propose that the quotations in section 2 should be omitted and their content rephrased as a guide to the Special Rapporteur, who should be told that the study should be limited and precise and should cover the essential elements which were necessary for the establishment of acceptable principles on State succession.

Mr. BRIGGS said that he was prepared to accept Mr. Rosenne's proposal with the exception of the latter part. He thought that it would be better to say the the objective was a survey and evaluation of the existing state of the law and practice on succession and the preparation of draft articles on the law of State succession.

Mr. TABIBI said that in fact there was little difference between the various suggestions. The objective should be placed first, for emphasis; it should be followed by a text based on the proposals made by Mr. Rosenne and Mr. Elias. With a view to guiding the Special Rapporteur, it would be advisable to add to the end of Mr. Rosenne's text a statement that the Special Rapporteur's work should be limited and precise and should cover the essential elements necessary for the creation of rules in the field of State succession.

Mr. TUNKIN said that there were three questions to be settled in connexion with the approach to the subject. The first was, what aspect should be dealt with first. After the different problems to be studied had been listed, an indication might be given that the Special Rapporteur should first deal with a specific problem and stress certain aspects of it. The second question was that of the ultimate aim: whether a treaty, a draft convention or a code should be prepared. The Sub-Committee might suggest that the Special Rapporteur should prepare his draft article in conventional language, as was generally agreed. Thirdly, there was the question of the criteria or principles which should guide the Special Rapporteur. In that connexion the Sub-Committee should indicate that the Special Rapporteur should be guided by the fundamental principles of modern international law, especially by the principles of the Charter, and that existing practice should be taken into account.

He had an open mind on the question whether section 1 should be placed at the beginning of the document; if it was, then all matters connected with the approach to the problem should also be placed at the beginning.

Mr. ROSENNE said that the difficulty confronting the Sub-Committee arose from the fact part III dealt with two separate things: the approach to the general question of succession and the approach to specific subjects arising out of the law of succession. The term " objective " should be interpreted to mean the purpose of the study of the entire topic; the question of the approach to particular aspects of the topic should be dealt with separately elsewhere in the paper.

Mr. TUNKIN said that the approach to particular problems could not be decided at that stage. For instance, section 3(*b*) contained the words " the principle of respect for . . . vested rights ". He would be quite unable to agree that the " principle " of vested rights should appear under " guiding criteria ". It was admittedly one of the problems which the Special Rapporteur ought to study, but not as a " principle ". It was in fact impossible to say in advance that the Special Rapporteur should accept a particular principle; it was necessary to study the problem first and then to formulate principles.

He thought that the formulation suggested by Mr. Rosenne might be accepted because it was phrased in more general terms, although he considered the reference to " the many uncertainties which have recently come to light " to be unnecessary.

Mr. LIU said that a general statement of the reasons why such a study had to be made should be placed at the beginning of the draft. He did not disagree with the substance of sections 1 and 2 of part III either as they stood or as it was proposed to amend them; but they definitely belonged to the introductory part.

Mr. Tunkin's point about " vested rights " could be met if the " principles " enumerated in section 3 (*a*) and (*b*) were merely enumerated as subjects for study and not worded in such a way as to be directives to the Special Raporteur.

Mr. ROSENNE said that he accepted the amendment proposed by Mr. Briggs. He also agreed to the omission of the passage in his proposed text concerning " the many uncertainties which have recently come to light ". He accepted Mr. Elias's proposal that section 2 should be included in an amended form. The only question remaining was the actual formulation of the single text of sections 1 and 2, where his text differed from that proposed by Mr. Elias.

Mr. ELIAS said he would no insist on his text. With regard to Mr. Briggs's suggestion (that one of the objectives should be the preparation of draft articles on the law of State succession), he thought that the reference to draft articles should come under a separate numbered heading.

Mr. BARTOS said that section 4 of part III was not in the appropriate place since its contents had nothing to do with the approach to the subject. In the instructions to the Special Rapporteur, it should be stated that he should start from the principles of positive law on the matter, as modified by existing practice and by the evolution of the international community. The heading of the section should not read " codification or progressive development " as the Chairman's paper put it, but " codification and progressive development ". In Article 13 of the Charter and in the Statute of the Commission codification and progressive development were mentioned in juxtaposition and were not regarded as being separate. It was essential that the Sub-Committee should specify that the draft articles should be based on the existing state of international law and take international practice into account: they should conform to the realities of the modern age.

Mr. BRIGGS said that it had been his impression that the Sub-Committee had not yet considered whether the draft articles to be prepared by the Special Rapporteur were to be in the form of codification or were to constitute progressive development of international law. Once the Special Rapporteur had submitted the draft articles, the Commission could decide whether codification of existing law was sufficient and, if not, how far it was insufficient.

Mr. TUNKIN said that codification and progressive development could not be separated. Under its Statute the Commission was expected not only to codify but also to develop international law. There was no need to give any directives in the matter: each Special Rapporteur was necessarily guided by the Statute of the Commission.

The ACTING CHAIRMAN suggested that the authors of the various proposals in connexion with sections 1 and 2 of part III should confer with a view to working out an agreed draft in time for the next meeting of the Sub-Committee.

The meeting rose at 1 p.m.

SUMMARY RECORD OF THE SEVENTH MEETING

(Wednesday, 23 January 1963, at 10 a.m.)

Succession of States and Governments (*continued*)

The ACTING CHAIRMAN recalled that the Sub-Committee had agreed on the following formulation for the paragraph of its draft report which dealt with the scope of the subject:

" There is a need to pay special attention to problems of succession arising as a result of the emancipation of

many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special treatment, and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter."

Mr. BRIGGS suggested that, in the second sentence, the words " special treatment " should be replaced by " special attention ".

It was so agreed.

The ACTING CHAIRMAN invited the Sub-Committee to consider the paragraph of the draft report concerning objectives, as proposed by Mr. Elias and Mr. Rosenne. That paragraph would replace sections 1 and 2 of part III of the Chairman's working paper and would read:

" The objective is a survey and evaluation of the present state of the law and practice on succession as the point of departure for the preparation of draft articles on the topic. The presentation should be limited and precise, and must cover the essential elements which are necessary to resolve present difficulties."

Mr. ELIAS, on behalf of the sponsors of the paragraph, amended the first sentence so as to replace the words " as the point of departure is " by " with a view to ".

Mr. LIANG, representative of the Secretary-General, pointed out that it was not altogether apropriate to say that the presentation of draft aricles should be " limited "; it would be more appropriate to say that the presentation should be precise and, perhaps, that the scope of the study should be limited.

Mr. BRIGGS agreed with the representative of the Secretary-General. He, too, found the second sentence imprecise. As he recalled, the Sub-Committee had agreed, on the suggestion of Mr. Tunkin, that the draft articles should be drafted in precise terms, along the lines of the articles of a convention.

Mr. BARTOS also agreed with the representative of the Secretary-General and said that it had been agreed by the Sub-Committee that the draft articles should be formulated in precise terms.

Mr. ELIAS suggested, in the light of these remarks, the deletion of the words " limited and " in the second sentence.

It was so agreed.

Mr. BRIGGS said that the second sentence could be further improved by specifying that it was the " presentation of the draft articles " which should be precise.

Mr. ROSENNE objected that it was not only the draft articles, but also the commentary, which should be precise and should cover the essential elements to overcome present difficulties:

Mr. BRIGGS did not press the point.

Mr. LIU said that, as it stood, the first sentence appeared to limit the objective to " a survey and evaluation of the present state of the law and practice on succession ". He was not at all certain of the necessity to lay down any objective for the Special Rapporteur, but if any such objective were to be laid down, it should certainly not be limited to a survey and evalutaion of the present state of the law.

The ACTING CHAIRMAN suggested that, in order to meet that point, the first sentence should be revised to read:

" The objectives are a survey and evaluation of the present state of the law and practice on succession and the preparation of draft articles on the topic."

Mr. ELIAS supported that suggestion, on the understanding that that redraft would serve to indicate that the Special Rapporteur would not only deal with the codification of the existing law but also make suggestions for its improvement.

The Acting Chairman's suggestion was adopted.

The ACTING CHAIRMAN invited the Sub-Committee to resume its consideration of section 3 of part III (The approach to the subject) of the Chairman's working paper. At the previous meeting doubts had been expressed about the advisability of retaining any part of sub-sections (*a*) and (*b*). He suggested that the heading " Guiding criteria ", which was perhaps somewhat inappropriate, and the opening sentence, should be omitted in any case.

Mr. TUNKIN pointed out that the questions mentioned in sub-paragraphs (*a*) and (*b*) were already covered by passages of the draft report already approved by the Sub-Committee.

Sub-paragraph (*a*) was covered by the reference to " the principles of the United Nations Charter " in the seconde sentence of the opening paragraph of the draft report which dealt with the scope of the subject. And so far as sub-paragraph (*b*) was concerned, he said it would be altogether inappropriate to lay down as one of the " guiding criteria " for the Special Rapporteur the " principle of respect for economic rights, private or vested rights ". If the Sub-Committee made such a recommendation it would in effect be touching on substance.

He urged that all points which related to substance should be left out. The Chairman had mentioned them in his paper because of his duty to make an analysis of the various points raised in the member's working papers. The Chairman had not intended to suggest that all those points should be included in the outline to be adopted by the Sub-Committee as part of its report.

Mr. BRIGGS said that he was largely in agreement with Mr. Tunkin. He suggested that the bulk of part III should not be included in the draft report. The only points which he suggested should be retained were the following:

First, a reference to " private rights " at the end of the list under the heading *ratione materiae* in part II on the " scope of the subject ". No value judgment would be expressed; the inclusion of those words would merely have the effect of indicating that private rights other than property should also be considered.

Second, a reference to the question of the time factor (sub-paragraph (*c*)), which he felt would be useful.

Mr. ROSENNE found himself largely in agreement with Mr. Tunkin regarding the deletion of the bulk of part III. However, the whole of section 3 could well be omitted. The question of the time factor, mentioned in sub-paragraph (*c*), would inevitably come to the notice of the Special Rapporteur.

Some reference should be included, possibly immediately after the opening paragraphs of the material part of the draft report, to the Sub-Committee's discussion on the subject of codification or progressive development (part III, section 4 of the Chairman's working paper) and on the related question of the form which the Commission's final draft would take (section 6). It was, of course, for the full Commission to decide on those questions, but its conclusion would depend on the survey and evaluation of the present state of the law and practice in the matter of State succession. He was by no means certain that, once the survey and evaluation had been made, the existing law should be found as unsatisfactory as had on occasion been suggested.

He suggested that, at an appropriate place in the Sub-Committee's report, a passage should be introduced stating that, in the study of State succession, priority should be given to the question of succession to treaties. It was generally agreed that succession to bilateral and multilateral treaties was by far the most urgent aspect of succession at present.

Mr. ELIAS agreed that the bulk of part III should be omitted. In particular, he agreed with Mr. Rosenne that the question of the time factor mentioned in section 3(*c*) would as a matter of course be dealt with by the Special Rapporteur along with other matters of substance; it was therefore unecessary to mention it in the Sub-Committee's draft report. That question had arisen mainly because of the special case of Tanganyika.

He hesitated to support the proposal of Mr. Briggs for including " private rights " under the heading of *ratione materiae*. He considered that " property ", " contracts ", " concessionary rights ", " torts " and " public debts " covered all private rights.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed not to include in the draft report any part of either (*a*) or (*b*) of section 3 of the Chairman's paper.

It was so agreed.

Mr. ROSENNE said that he had not had in mind the specific case of Tanganyika when he had originally raised the question of the time factor. The point which he had wished to stress was that, if the rules on State succession were to be regarded as transitional, the question would arise how long the transitional period should last.

Mr. BRIGGS said that, although he had not been altogether satisfied with the reply given by Mr. Elias, he would not press for the inclusion of a reference to " private rights ".

With regard to section 3 (*c*), he said that the question of the time factor was, in fact, material, and he was not at all thinking of the specific case of Tanganyika.

In that connexion, he noted the passages from the advisory opinion of the Permanent Court of International Justice in the case of the Settlers of German Origin in territories ceded to Germany by Poland (1923), quoted in paragraphs 41 and 42 of the Digest of decisions of international tribunals relating to State succession prepared by the Secretariat (A/CN.4/151). To those quotations he wished to add the following passage from that same advisory opinion:

> " The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here ".

In that particular case, the Permanent Court of International Justice had not needed to go into that general question, because of the existence of the Minorities Treaty of 1919 [12] binding the State concerned. However, the question had arisen whether, immediately after succession, a State could cancel private rights by sovereign legislation. The question of the time factor was therefore a very real one, an deserved consideration.

Mr. TABIBI said that if the contents of sub-paragraph (*c*) were to be retained in any form, it was necessary to include a reference to third States; succession did not affect only the new State but also third States.

The ACTING CHAIRMAN said that it appeared to be generally agreed that sub-paragraph (*c*) should be dropped altogether. If there was no objection, he would consider that the Sub-Committee agreed to that course.

It was so agreed.

Mr. TABIBI said that a reference to the principle of self-determination in both its economic and political aspects, was essential. It was a fundamental principle of the United Nations and had been recognized, in particular, through the adoption of article 1 of the draft Covenants on Human Rights. Its importance was all the greater because many peoples had still to achieve self-determination.

It was essential that any Special Rapporteur on the topic of State succession should place particular emphasis not only on political self-determination but also on economic self-determination. In that connexion, he cited the example of the Congo, which had achieved political self-determination but had not attained full economic independence. In regard to economic independence, General Assembly resolution 1314 (XIII) on the subject of permanent sovereignty over natural resources was particularly relevant.

For those reasons, he suggested that a specific reference to economic and political self-determination should be introduced into the opening paragraph of the material part of the draft report.

Mr. TUNKIN supported Mr. Tabibi's proposal and suggested that in the second sentence of the relevant paragraph of the draft report, after the words " the principles of the United Nations Charter ", a phrase along the following lines should be added:

> " and especially the principles of self-determination and sovereignty over natural resources ".

Mr. BRIGGS said that he could not support that proposal. He would, however, be prepared to accept the inclusion of a reference to self-determination in the section concerning " Origin of succession ". All States had come into being through the exercise of the right of self-determination, with or without struggle, with or without the consent of the mother country.

Mr. El-ERIAN said that he undestood and shared Mr. Tabibi's concern for the inclusion of a reference to the principle of self-determination both in its economic and in its political aspects. He thought, however, that the principle would be covered by the existing reference to the principles of the United Nations Charter in general. Those principles included self-determination of peoples, sovereign equality of States and equal rights of nations.

Mr. BRIGGS and Mr. ELIAS agreed with Mr. El-Erian and said that the second sentence of the relevant paragraph of the draft report might be left as it stood.

The ACTING CHAIRMAN said that a reference to " the principles and resolutions of the United Nations " might perhaps cover the point which had been raised. However, he noted that there appeared to be general agreement not to change the text of the second sentence of the paragraph in question in the draft report. The different views expressed by members would be recorded in the summary records and, if there was no objection, he would consider that the Sub-Committee agreed not to make any change in that paragraph.

It was so agreed.

The ACTING CHAIRMAN invited comments on part III, section 4 of the Chairman's paper, entitled " Codification or progressive development ". In his view, codification was not enough: there should be some new rules based on contemporary practice. The Sub-Committee might perhaps indicate that the Special Rapporteur could propose new rules if he saw fit.

Mr. TUNKIN thought that there was no need to include any reference to the matter in the draft report. Every Special Rapporteur should make concrete proposals which might be codification or progressive development, in accordance with the Commission's Statute.

Mr. LIANG, representative of the Secretary-General, said that in no task undertaken by the International Law Commission had it been decided in advance that the work to be done should constitute codification or development or even both. It was only after the work had been completed that the Commission had said that certain parts of it dealt with progressive development or codification; and even then the Commission had not always followed that course. In the case of the draft on the continental shelf,[13] the Commission had indicated that much of it was progressive development. In the case of the draft on the conservation of the living resources of the sea,[14] there were many elements of legislation in the machi-

[12] Hudson: *International Legislation*, vol. I, pp. 285 *et seq.*

[13] Report of the International Law Commission on its 5th session (A/2456), in *Yearbook of the International Law Commission, 1953*, vol. II, United Nations publication, Sales No. 59V.4, vol. II.

[14] Report of the International Law Commission on its 7th session (A/2934), in *Yearbook of the International Law Commission, 1955*, vol. II, United Nations publication, Sales No. 60V.3, vol. II.

nery devised for the conservation of the living resources of the sea.

Mr. EL-ERIAN, while agreeing with Mr. Liang that it had not been the practice of the Commission to give any indication at the preliminary stage, thought that the topic of State succession was a special case. It was generally agreed that it was one of the least developed branches of international law. Moreover, General Assembly resolution 1686 (XVI) concerning the future work of the Commission placed special emphasis on the progressive development of international law. It was true, however, that the subject was covered by the statement in the draft report that " the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter ".

Mr. BARTOS said that, for the reasons he had given at the previous meeting, he considered that section 4 of part III of the Chairman's paper should be deleted.

Mr. ROSENNE said that, although he had been in favour of retaining sections 4 and 6, he was now convinced that it would be premature to include any reference to codification or progressive development.

Section 4 was deleted.

The ACTING CHAIRMAN asked the Sub-Committee to comment on section 5 (Treaties).

Mr. TUNKIN thought that the Sub-Committee should adopt Mr. Rosenne's suggestion that a definite indication should be given in the draft report that the problem of succession in relation to treaties should be given priority.

Mr. ELIAS suggested that a passage to that effect should be included under " miscellanea ".

The ACTING CHAIRMAN suggested that the whole of section 5 should be omitted and a reference to the need to give priority to succession in relation to treaties should be made in the concluding paragraph.

It was so agreed.

The ACTING CHAIRMAN noted that no decision had been reached on Mr. Briggs's proposal that private rights should be included under the heading *ratione materiae* in the passage of the draft report dealing with the division of the subject. He suggested that the word " property " should be qualified by the words " public or State ". Contracts, concessionary rights and other private rights could then appear together on one line.

Mr. BRIGGS said that he was far from certain that all private rights were property rights: indeed, he was convinced that they were not. His view was that private rights were one of the items that the Special Rapporteur should bear in mind.

Mr. ROSENNE said that the list under *ratione materiae* confused questions concerning relations between States and questions of relations between States and individuals. It could be left to the Acting Chairman to rearrange it; his own view was that the proper order should be, first, pure questions of States and inter-State relationships; second, nationality as such; third, the remainder.

After further discussion, Mr. BARTOS, agreeing with Mr. Rosenne, suggested that the order should be: treaties; territorial servitudes; nationality; State or public property; concessionary rights; public debts; property, rights, interests and relationships governed by private law; torts.

Mr. Rosenne said that, while agreeing with Mr. Bartos, he was not clear whether the last item referred to international or to domestic torts. If it was intended to refer to domestic torts, the word should be dropped because it was covered by Mr. Bartos's phrase regarding relations governed by private law.

The ACTING CHAIRMAN thought that it would be advisable to retain the reference to torts.

Mr. Bartos's suggestion was adopted.

The ACTING CHAIRMAN invited the Sub-Committee to consider part III, section 6 of the Chairman's paper — " The form of the final work of the Commission on the subject ". It would perhaps be best, as Mr. Tunkin had suggested, not to take a final decision with regard to the form of the final work but to recommend that the Special Rapporteur should draft his rules in the form of short articles.

Mr. BRIGGS agreed. There was already a reference to the preparation of the articles in the draft report. The matter was one for the Commission to decide.

Mr. BARTOS thought that it would be inadvisable to make no reference at all to the matter. He would suggest that the existing section 6 should be replaced by a statement that the matter was one for the Commission to decide.

Mr. Bartos's suggestion was adopted.

The ACTING CHAIRMAN inquired whether the Sub-Committee had any comments to make on part IV (Miscellanea) of the Chairman's paper.

Part IV, section A was deleted.

Mr. LIANG, representative of the Secretary-General, referring to section B (*a*) and (*b*), said that a Secretariat paper analysing and collating the replies from governments would be ready in time for the next session of the Commission. A paper covering the practice of specialized agencies and international organizations in the field of succession was being prepared and would perhaps be ready in time for the Commission's next session.

Mr. ROSENNE said that, now that the Sub-Committee had concluded its consideration of the Chaiman's paper, he wished to make some observations on document A/CN.4/151. It was a useful document so far as it went, but he thought that it should be revised and expanded. The sources referred to in paragraph 1 omitted a good many which might be taken into consideration in a revised version. Useful material could be culled from the *Recueil des décisions des tribunaux arbitraux mixtes*; from the reports of the several conciliation commissions established under the Peace Treaty with Italy of 1947;[15] the decisions of the United Nations Tribunal for Libya established under General Assembly resolution 388 (V); the decisions of the tribunal sitting at Coblence under the Bonn-Paris agreements relating to the Federal Republic of Germany; those of the tribunal under the London agreement with regard to German foreign debts; and possibly from the reports of the administrative tribunals of the United Nations and the International Labour Organisation.

Perhaps it would be possible for the Secretariat to prepare a revised document in time for the Commission's 1964 session.

Mr. LIANG, representative of the Secretary-General, said that careful consideration would be given to the suggestion, depending on the availability of the sources.

The Sub-Committee decided that the words " who should be appointed at the fifteenth session of the Commission " should be inserted after the words " The Sub-Committee recommends that the Special Rapporteur ..." in the relevant paragraph of its draft report.

The meeting rose at 12.45 p.m.

SUMMARY RECORD OF THE EIGHTH MEETING

(Thursday, 24 January 1963, at 10.20 a.m.)

Consideration of Draft Report

The ACTING CHAIRMAN drew attention to the draft provisional report and invited members to consider it paragraph by paragraph.

[15] United Nations Treaty Series, vol. 49.

Paragraphs 1 to 4

Mr. ELIAS asked whether the draft report, when completed, would be submitted to the Commission or to the Chairman. In the latter case, would the Chairman then submit it to the Commission or would final action by the Su-Committee be necessary?

Mr. BRIGGS said that the draft report, when submitted to the Commission by the Chairman, would be the report of the Sub-Committee.

Mr. ROSENNE said that at the Sub-Committee's third meeting on 17 January 1963 Mr. Tunkin had suggested that the Chairman should be asked to prepare a draft report which would be considered by the Sub-Committee when it reconvened. The Sub-Committee would then be able to approve the Chairman's report and submit it to the full Commission early in the latter's next session. At the same meeting Mr. Bartos had said that any interim draft prepared by the Sub-Committee would be subject to amendment by the Chairman, who would then prepare his own report. That report, after approval by the Sub-Committee, would also constitute the latter's report to the Commission. In those circumstances, could not the heading be simply " draft report " instead of " draft provisional report " and could not that report be then issued as a mimeographed Secretariat document?

Mr. LIANG, representative of the Secretary-General, said that the present report, as had been the case with the report of the Sub-Committee on State Responsibility, would in its final form be the report of the Sub-Committee to the Commission. The only doubt that could arise would be concerning the exact manner of its presentation. It was normal United Nations practice to issue a document such as that now before the Sub-Committee as a " draft report "; upon submission to the parent body the word " draft " would be deleted. Accordingly, he suggested that the word " provisional " was unnecessary.

It was so agreed.

Paragraph 1 was approved.

Mr. ROSENNE drew attention to the last sentence in paragraph 2: " It was decided that the Sub-Committee would meet again during the fifteenth session of the International Law Commission in order to approve its final report with the participation of Mr. Lachs, the Chairman ". He suggested that it be revised to read " early in the fifteenth session ".

Mr. LIANG, representative of the Secretary-General, suggested that the sentence be revised to read: " It was decided that the Sub-Committee would meet again, with the participation of Mr. Lachs, its Chairman, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report ".

Mr. Liang's suggestion was adopted.

Paragraph 2, as amended, was approved.

Paragraph 3 was approved without comment.

Mr. ROSENNE drew attention to the first part of the first sentence in paragraph 4: " The Sub-Committee held a general discussion of the scope of the subject of succession of States and Governments. . .". He recalled that both the General Assembly, in its resolutions, and the Commission had always referred to the " topic " of succession of States and he proposed that the text be revised accordingly.

It was so agreed.

Mr. BRIGGS, supported by Mr. ELIAS, proposed that the first part of that sentence should be revised to read: " The Sub-Committee discussed the scope of the topic of succession of States ...".

It was so agreed.

Paragraph 4, as amended, was approved.

PART I: THE SCOPE OF THE SUBJECT AND THE APPROACH TO IT

Section A: Special attention to problems in respect of new States

Mr. LIANG, representative of the Secretary-General, drew attention to the second and third sentences of paragraph 5, reading: " The problem concerning new States should therefore be given special attention, and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the reference to the principles of the Charter ". Since the matters referred to in the last sentence were the subject of General Assembly resolutions as well, he suggested that the sentence should be made a separate paragraph and that the final phrase should be revised to read: " ... in view of the principles of the Charter and the resolutions of the General Assembly ".

Mr. TABIBI said that the passage as drafted did not sufficiently reflect the great importance of certain other principles, besides those contained in the Charter, such as the principle expressed in General Assembly resolution 1803 (XVII) concerning permanent sovereignty over natural resources. He proposed, therefore, that the words " Some members wished to indicate that ..." at the beginning of the sentence should be deleted, so that the sentence would begin with the words " Special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources. . . ". The rest of the sentence could then be revised accordingly.

The ACTING CHAIRMAN said that not all members could agree to such a formula.

Mr. BRIGGS did not think that the future special rapporteur on State succession should be given instructions to give special emphasis to the principles of self-determination and permanent sovereignty over natural resources.

Mr. LIANG, representative of the Secretary-General, suggested that the third sentence should be included as a separate paragraph, as he had indicated before, but that the final phrase should be revised to read: "... in view of the fact that these principles are already contained in the Charter of the United Nations and in resolutions of the General Assembly ".

Mr. Liang's suggestion was adopted.

Paragraph 5, as amended, was approved.

Section B: Objectives

Paragraph 6 was approved without comment.

Section C: Questions of priority

Mr. ROSENNE wished to comment on paragraph 7, which read: " The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of governments in so far as necessary to throw light on State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties, both multilateral and bilateral ". He objected to the expression " in so far as necessary to throw light on " and proposed that it be replaced by the phrase " in so far as necessary to meet the objectives set forth above ".

Mr. EL-ERIAN said it was his understanding that any study of succession of governments should be only supplementary to the study of State succession.

Mr. ELIAS proposed that the phrase should be revised to read: " in so far as necessary to complement the study of State succession ".

It was so agreed.

Mr. ELIAS questioned, with respect to the final phrase of the paragraph, whether it was desirable to define the types of treaties to which priority should be given in the study of State succession; he therefore proposed the deletion of the words " both multilateral and bilateral ".

It was so agreed.

Paragraph 7, as amended, was approved.

Section D: Relationship to other subjects on the agenda of the International Law Commission

Paragraphs 8 and 9 were approved without comment.

Paragraph 10 was approved with a drafting change.

Section E: Division of the topic

Paragraph 11 was approved with drafting changes.

Section F: Detailed division of the subject

The ACTING CHAIRMAN invited the Sub-Committee to consider paragraph 12, taking sub-paragraphs (*a*) to (*d*) successively.

Sub-paragraph (a) was approved without comment.

Mr. BARTOS suggested the introduction of the words " certain other questions of public law ", immediately below " public debts ".

Sub-paragraph (b) was approved with that amendment.

Mr. LIANG, representative of the Secretary-General, found the terminology used in sub-paragraph (*c*) somewhat ambiguous. In particular, the expression " States directly concerned ", used in the first heading, was probably intended to refer to the new State and to the former metropolitan State.

In the second heading, the expression " other States " was used in the sense of " third States ", the more apt expression used in the last heading.

Mr. BARTOS agreed with the representative of the Secretary-General. The expression " States directly concerned " could cover, for example, guarantor States. He cited the examples of the former territory of Tangier and the former Free State of Trieste to show that the expression " States directly concerned " could refer to States other than those actually affected by the transfer of territory or sovereignty.

Moreover, he found the expression " former metropolitan State " unsatisfactory. It would not cover, for example, a case such as that of the United Arab Republic and Syria. He suggested that the expression " predecessor State " should be used.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to replace, in the first heading, the expression " States directly concerned " by " the new State and the predecessor State ".

It was so agreed.

Mr. ROSENNE proposed that the second heading, reading " rights and obligations towards other States " should be replaced by " rights and obligations between the new State and third States ".

It was so agreed.

Mr. BRIGGS criticised the drafting of the third heading (" rights and obligations of nationals of the former metropolitan States "). The apparent intention was to refer to persons who retained the nationality of the former metropolitan State after the emergence of the new State. The drafting did not make that clear.

Mr. ROSENNE suggested that the heading in question should be redrafted along the following lines: " rights and obligations of new States towards persons who have retained the nationality of the predecessor State ".

Mr. LIU drew attention to the problem existing in many new States of certain categories of residents who had been treated as part of the local population by the former metropolitan State but who, on the new State's achieving independence, had not acquired the nationality of either the new State or the former metropolitan State. They sometimes became nationals of a third State.

Mr. BRIGGS proposed that both the third heading and the fourth (" rights and obligations of nationals of third States ") should be replaced by a single heading along the following lines:

" rights and obligations of the new State with respect to individuals ".

That language would cover all individuals, regardless of nationality.

Mr. ROSENNE proposed the insertion at the end of the text proposed by Mr. Briggs of the words " including juridical persons ", in brackets.

The proposal by Mr. Briggs, as amended by Mr. Rosenne, was approved.

Sub-paragraph (c) was approved subject to drafting changes.

Sub-paragraph (d) was approved with a drafting change.

Paragraph 12 as a whole, as amended, was approved, subject to drafting changes.

PART II: STUDIES BY THE SECRETARIAT

Paragraph 13

Mr. ELIAS proposed that paragraph 13 should be amended to read " The Sub-Committee decided to request the Secretariat to prepare ... "

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

The ACTING CHAIRMAN said that the word " suggestion " in the fourth line of paragraph 14 should be replaced by the word " request " in view of the amendment of paragraph 13.

Mr. LIANG, representative of the Secretary General, suggested that the second line should be altered to read " that the Secretariat would submit at the earliest opportunity the publication described under (*a*) above ".

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraph 15

Mr. ELIAS proposed that the opening words of paragraph 15 should be redrafted to read " The Sub-Committee decided that the summary records ..... would be attached to this report ".

Paragraph 15, as amended, was approved.

Mr. ROSENNE proposed that a further paragraph should be inserted, preferably after paragraph 3, stating that the three papers (A/CN.4/149, 150 and 151) prepared by the Secretariat had been made available to the Sub-Committee.

It was so agreed.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE NINTH MEETING

(Friday, 25 January 1963, at 10 a.m.)

ADOPTION OF THE SUB-COMMITTEE'S DRAFT REPORT

(A/CN.4/SC.2/R.1)

The ACTING CHAIRMAN invited the Sub-Committee to consider the draft report (A/CN.4/SC.2/R.1). He drew

attention to a mistake in paragraph 15 (*b*): the world " certain ", which was erroneously placed at the beginning of the eighth line, should be moved to the previous line and inserted before " other questions of public law ".

Mr. ELIAS drew attention to two further mistakes: in the English text of paragraph 15(*c*) the words " with respect of individuals " should be corrected to read " with respect to individuals " and in paragraph 15(*d*), the word " concerned " should be deleted after " new States ".

The ACTING CHAIRMAN said the appropriate corrections would be made.

Mr. ELIAS proposed that the title of paragraph 13 " E. Division of the topic (*a*) Broad outline " should be amended to read: " E. Broad outline ".

It was so agreed.

The ACTING CHAIRMAN suggested that, in paragraph 15(*a*), the word " existing " should be deleted from the heading " territorial changes of existing States ".

It was so agreed.

Mr. ELIAS proposed that the adjective " private " should be inserted before " property " in the penultimate line of paragraph 15(*b*).

Mr. BRIGGS proposed that the whole line should be amended to read:

" Private property, rights, interests and other relations under private law ".

Mr. Briggs's proposal was adopted.

Mr. ROSENNE asked whether it was appropriate for the Sub-Committee to request the Secretariat to prepare certain documents as indicated in paragraph 16. Perhaps the Sub-Committee should recommend that the Commission should make that request.

Mr. LIANG, representative of the Secretary-General, said that, from the point of view of the Secretariat, paragraph 16 could remain as drafted; he was inclined to believe that the Sub-Committee was entitled to address requests to the Secretariat.

Mr. LIU noted the expression " discussion on substance " which was used in paragraph 18; perhaps a better expression could be found since the Sub-Committee had not dealt with the substance of the topic of State succession.

Mr. ROSENNE thought the reference in paragraph 18 was to the substance of the matter referred to in the Sub-Committee and not to the substance of State succession.

Mr. LIU did not press the point.

The draft report as a whole, as amended, was adopted.

The ACTING CHAIRMAN said that a copy of the draft report, as adopted, would be forwarded to the Chairman, whose absence had been regretted by all.

He thanked the members for their co-operation, which had made it possible for the Sub-Committee to do useful preparatory work. He hoped that, when the Sub-Committee reconvened at the beginning of the next session of the International Law Commission, it would be possible to complete the report in one or two meetings.

Mr. BRIGGS expressed regret at the absence of the Chairman, Mr. Lachs, and paid a tribute to the successful and impartial manner in which the Acting Chairman had conducted the work of the Sub-Committee. He also expressed appreciation for the work of the Secretariat, and in particular the representative of the Secretary-General.

Mr. TABIBI associated himself with the tributes to the Acting Chairman and to the Secretariat. In view of a certain anxiety which had in the past been expressed regarding the technical services provided by the European Office, he wished to place on record his appreciation of the high quality of the services provided for the Sub-Committee, with special reference to the summary records.

Mr. ROSENNE, Mr. LIU, Mr. BARTOS and Mr. ELIAS associated themselves with the remarks of the previous speakers.

Mr. EL-ERIAN, also associating himself with those remarks, noted that the fruitful work of the Sub-Committee represented an encouraging new experience in the methods of work of the International Law Commission.

The ACTING CHAIRMAN thanked all the members for their kind words and said that he looked forward to meeting them when the Sub-Committee reconvened in May 1963.

The meeting rose at 11.5 a.m.

SUMMARY RECORD OF THE TENTH MEETING

(Thursday, 6 June 1963, at 3.45 p.m.)

Approval of the Sub-Committee's final report to the International Law Commission

The CHAIRMAN, after thanking Mr. Castrén for the able way in which he had functioned as Acting Chairman during his abseuce, said that the Sub-Committee's present task was to approve its final report to the Commission and at the same time to discuss the studies which it had requested the Secretariat to prepare.

Mr. BRIGGS, Mr. CASTREN and Mr. ELIAS pointed out that the Sub-Committee's draft report, adopted at its ninth meeting on 25 January 1963, had been based on the working paper submitted by the Chairman. The Sub-Committee should, therefore, hear the comments of the Chairman on its draft report before proceeding to approve its final report.

Mr. TABIBI, after associating himself with the remarks ofthe previous speakers, pointed out that the Sub-Committee had not yet decided whether the outline for the study of State succession should or should not include a reference to adjudicative procedures for the settlement of disputes; that was a question on which the Commission itself might take a decision. With respect to the Sub-Committee's final report, he said that for technical reasons it would be rather difficult to revise the draft report, but that the summary records containing any new views might be appended to it.

Mr. ROSENNE, supported by Mr. TUNKIN, proposed that the Sub-Committee should consider its draft report paragraph by paragraph, with a view to approving it as its final report to the Commission. In that way, the studies requested of the Secretariat could be discussed in connexion with the relevant paragraphs of the draft report.

It was so agreed.

Paragraphs 1-6

Paragraphs 1-6 were approved without comment.

Paragraph 7

Mr. TUNKIN said that there appeared to be a certain discrepancy between the French and the English texts of the first clause: the former read " *Certains membres ont voulu que le rapport souligne la nécessité de mettre l'accent sur les principes de l'autodétermination . . .*", whereas the latter read " Some members wished to indicate that special emphasis should be given to the principles of self-determination . . .". Exactly by whom was that emphasis to be given?

The CHAIRMAN suggested that since the emphasis was presumably to be given by the Special Rapporteur, the French text should be revised to read " *qu'on souligne . . .*".

It was so agreed.

Paragraph 7, as amended in the French text, was approved.

Paragraph 8

The CHAIRMAN said that he had certain doubts concerning the formulation of that paragraph, since some members thought that the objectives should include not only a survey and evaluation of the present state of the law and practice on succession but also a reference to the progressive development of the law.

Mr. ROSENNE said that it had been the general understanding that the Special Rapporteur would have the necessary discretion in that respect.

Mr. TUNKIN, supported by Mr. CASTREN, said that the paragraph should include some mention of the progressive development of international law on the subject, since otherwise it might be interpreted to mean that members of the Sub-Committee were not entirely in agreement on that point.

Mr. BRIGGS said that such an addition would be quite appropriate, although he personally was satisfied with the paragraph as it stood.

The CHAIRMAN suggested that the phrase " having regard to new developments in international law in this field " should be added to the first sentence.

It was so agreed.

Paragraph 8, as amended, was approved.

Paragraphs 9-13

Paragraphs 9-13 were approved without comment.

Paragraph 14

Mr. ROSENNE said that at the sixth meeting he had initiated the discussion of the question whether the outline should include a point on adjudicative procedures for the settlement of disputes; although opinion in the Sub-Committee had been divided, the views of members were clear from the summary records and the Special Rapporteur would undoubtedly bear them in mind.

The CHAIRMAN said he inclined to the view that the question of the settlement of disputes constituted a separate chapter in itself, but he would not wish to influence the Sub-Committee.

Mr. TUNKIN agreed that that question constituted a separate subject of international law; in his opinion, those who thought that it should be included in the outline were too much influenced by Anglo-American legal practice based on judge-made law. In order to expedite the Sub-Committee's work, however, he proposed that the paragraph should be allowed to stand as it was.

Mr. CASTREN supported that proposal.

Mr. BRIGGS also supported the proposal but wished to make it clear that those who had expressed the view that the Special Rapporteur should be asked to consider the inclusion of the question of the settlement of disputes had not been thinking of the compulsory jurisdiction of the International Court.

The CHAIRMAN suggested that paragraph 14 should be retained with the exception of the last sentence.

It was so agreed.

Paragraph 14, subject to the drafting change suggested by the Chairman, was approved.

Paragraph 15

Mr. EL-ERIAN, Mr. TUNKIN, Mr. BRIGGS and Mr. ROSENNE suggested that the reference to territorial servitudes should be deleted, since the idea of servitudes was foreign to international law.

Mr. ELIAS suggested that the phrase might be changed to read " territorial servitudes or rights "; in any case the Special Rapporteur would be free to delete the reference if he saw fit.

Mr. BARTOS thought a reference to the subject should be retained, for an important question was involved which arose in international law and which would have to be dealt with, though perhaps the terminology might be changed.

Mr. TABIBI, supported by Mr. CASTREN, proposed that the phrase should be changed to " territorial rights ".

It was so decided.

Paragraph 15 as amended was approved.

Paragraph 16

The CHAIRMAN said that in addition to the three studies mentioned in paragraph 4, the Secretariat had completed a fourth study, consisting of a digest of decisions of national courts relating to succession of States and Governments (A/CN. 4/157), since the Sub-Committee's last meeting.

Mr. TABIBI suggested that in view of the importance of the analytical restatement of the material furnished by Governments, the deadline for replies should be extended.

Mr. BRIGGS considered that the actual texts of the replies were even more important than the analysis and hoped that they would be included in the document.

Mr. ELIAS and Mr. ROSENNE suggested that the Secretariat should be asked to send Governments a reminder.

It was so agreed.

Paragraph 16 was approved.

Paragraph 17

Paragraph 17 was approved subject to drafting changes.

Paragraph 18

Mr. ROSENNE regretted the inclusion of paragraph 18, as it was completely at variance with what had been decided in the plenary session. Unfortunately, the decision by the Sub-Committee on State Responsibility to publish the summary records and working papers had left the Sub-Committee on Succession little choice. However, the latter Sub-Committee's work was somewhat different in that questions of substance had been discussed to the very end of its session, as in the discussion of territorial rights in the current meeting. Accordingly, annex I should include the summary records of the 8th, 9th and 10th meetings, which the Chairman and the Secretariat could be asked to make as short as possible.

Mr. BARTOS said that when the Sub-Committe had discussed the question in January it had decided to follow the same procedure as the Sub-Committee on State Responsibility. That decision could, of course, be reconsidered, but he thought it had been a wise one. He agreed with Mr. Rosenne that the summary record of the current meeting should also be annexed to the report. With regard to the memoranda and working papers, there was nothing secret about them; they had been circulated to universities and institutions and they might be of use to students. Accordingly he considered that the Sub-Committee should abide by paragraph 18, and he proposed that it should be approved.

Paragraph 18 was approved.

Mr. BRIGGS, supported by Mr. EL-ERIAN proposed that the Sub-Committee should approve the final report, as amended, as a whole and submit it with its annexes to the Commission and request the Chairman to inform the Commission accordingly.

It was so decided.

The meeting rose at 4.50 p.m.

APPENDIX II

Memoranda submitted by members of the Sub-Committee

DELIMITATION OF THE SCOPE OF " SUCCESSION OF STATES AND GOVERNMENTS "

Submitted by Mr. T. O. ELIAS [1]

Synopsis of Chapters

1. (i) Analysis of the concept of " Succession of States and of Governments ". Consider *Luther* v. *Sagor* (1921) 1KB 456; 3KB 532; *Haile Selassie* v. *Cable & Wireless Ltd.* (1936). No. 2, Ch. 132; The Tinoco Concessions 1923 (See AJIL, Vol. 18, 1924, p. 147) — an arbitral award by Taft, C. J., between Great Britain and Costa Rica.

   (ii) *Universal* v. *partial* succession (e.g. dismemberment, cession, incorporation in a federal State, attainment of independence).

   (iii) Inference from (i) and (ii): International rights and obligations attach to *States,* not to Governments. A State's identity is not affected by a mere change of government, whether as to form or as to personnel.

   (iv) Where there is a union of two States, sometimes difficult to say which is the annexor or whether there has been a simple merger of their separate identities in a new State; e.g. Italy (see *Gastaldi* v. *Lepage Hemery,* Annual Digest, 1929-30, Case No. 43). Turkey (see *Ottoman Debt Arbitration,* Annual Digest, 1925-26, Case No. 57).

   (v) Succession in the field of international organizations.

2. Main headings for detailed consideration of the subject:

   The *legal effects* of succession on —

   (*a*) Treaties,
   (*b*) Contracts (e.g. debts, concessions),
   (*c*) Torts (i.e. civil wrongs or delicts), and
   (*d*) State property.

3. (*a*) *Treaties:*

   (i) Distinction sometimes drawn in international practice between *political* treaties (e.g. treaties of alliance) and *dispositive* treaties (e.g. treaties of neutralisation)? Both do not pass on succession.

   (ii) *Quaere:* whether treaties of commerce, extradition, etc. continue to be binding after the extinction of the predecessor State. The majority view is that there is no succession in such cases (Oppenheim, *International Law,* vol. I, 8th edn., p. 159).

   (iii) The principle of *Res transit cum suo onere* applies to render valid treaties relating to boundary lines, river navigation, etc.

   (*b*) *Contracts:*

   (i) Whether succession occurs as a result of cession, annexation or dismemberment, there is *prima facie* a duty on States to respect the acquired *proprietary, contractual* or *concessionary* rights of private individuals? (See, e.g. Oppenheim, *op. cit.,* pp. 161-2).
   Per contra: West Rand Central Gold Mining Co. v. *The King* (1905) 2KB 391, ". . . The conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them." This is a highly controversial proposition.

   (ii) *The Permanent Court of International Justice* on the matter: *The German Settlers in Poland,* Advisory Opinions, No. 6, Series B; Hudson World Court Rep. 207: *Mavrommatis Palestine Concessions,* Judgment No. 5, Series A, Hudson *op. cit.,* p. 297.

   (iii) *The Peter Pazmany University* (1933), Series A/B, No. 6; Hudson *op. cit.,* p. 311.
   Effect of annexation upon the public debt of the State annexed: e.g. *Italy,* in respect of the annexation of Lombardy from Austria in 1860;
   Prussia, in respect of the annexation of Schleswig-Holstein from Denmark in 1866.

   (iv) *Quaere:* Is an annexing State bound to assume the public debt of the annexed State incurred by the latter in the course of waging war against its conqueror?

   (v) In regard to concessionary contracts, no general rule of succession can be laid down. Each case must be considered on its merits (Oppenheim, *op. cit.,* p. 162).

   (*c*) *Torts:*

   (i) Apart from issues as to denial of justice, exhaustion of local remedies, etc., there is no general liability for the delicts or civil wrongs of an annexed or extinguished State but there may be for *liquidated* damages.

   (ii) The Anglo-American Pecuniary Claims Tribunal's decision in *The Robert E. Brown Claim Case* (See BYIL, 1924, pp. 210-221), on the annexation by Great Britain of the South African Republic, which resulted in certain gold-mining losses to an American citizen.

   (iii) This case was followed by the same tribunal in *No. 84 of The Hawaiian Claims* (see AJIL, 1926, Vol. 20, pp. 381-2).

   (*d*) *State property:*

   (i) Annexation entails the passing of the property in such things as the former government's bank balance, public buildings and undertakings (e.g. transport, public utilities) to the annexing or successor State.

   (ii) e.g., Britain handed over the Confederate cruiser *Shenandoah* to the U.S. Government after the Civil War. Also *U.S. of America* v. *Prioleau* (1865) 35LJ Ch. 7.

   (iii) But the Mixed Commission appointed by The Treaty of Washington, 1871, held that the United States of America was " not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces ". (Moore, *Digest,* i, §, 22, p. 60).

4. *Succession in the field of international organizations:*

   (i) When an international organ is dissolved and another is established to perform similar or even identical functions — e.g. the United Nations replacement of the League, ICJ of PCIJ, WHO of International Sanitary Bureau.

   Mandates Commission replaced by the Trusteeship Council:

   Status of South West Africa (1950) (Advisory Opinion of ICJ) Reports; p. 136?
   But see *Anglo-Iranian Oil Company* (1951) for the ruling of the Vice-President of the Court that certain functions of the PCIJ did not devolve upon the ICJ.

   (ii) Consider (a) Yearbook of the International Court of Justice 1952-3, p. 45; (b) Fitzmaurice in BYIL, Vol. 29, 1952, p. 8.

5. *Succession on the attainment of political independence by former dependencies*

   (i) Regarding certain members of the British Commonwealth, see O'Connell in BYIL, Vol. 26, 1949, pp. 454-463.

   (ii) A. B. Keith: The Theory of State Succession with Special Reference to English and Colonial Law, 1907.

[1] Originally circulated as mimeographed document ILC/(XIV)/SC.2/WP.1.

(iii) E. H. Feilchenfeld: Public Debts and State Succession, 1931.

(iv) Sir Cecil Hurst: State Succession in Matters of Tort: 5 BYIL, 1924.

(v) F. B. Sayre: Change of Sovereignty and Concessions: 12 AJIL, 1918, p. 182.

(vi) A. S. Hershey: The Succession of States: 5 AJIL, 1911.

(vii) J. W. Garner: De Facto Government and State Succession: 9 BYIL, 1928.

(viii) Wilkinson: The American Doctrine of State Succession (1934).

A SUPPLEMENT TO ITEM 5 OF THE NOTE ON SUCCESSION OF STATES AND GOVERNMENTS

Submitted by Mr. T. O. ELIAS [2]

1. Is the traditional law governing State succession in general adequate to cover State succession in consequence of colonial independence?

Existing rules and past State practice are not necessarily inapplicable, but a different if deeper kind of legal analysis and adaptation is called for. A *juristic,* rather than a *political,* solution to the contemporary problem of State succession must be provided without avoidable delay.

2. (*a*) The older Dominions of the British Commonwealth (particularly Canada, Australia and New Zealand) share with the newer the one characteristic that they all became, at independence, parties to a large number of United Kingdom treaties by devolution; but, whereas inter-governmental treaties were gradually extended to them, over the years, by the tacit consent of the other contracting parties, there can be no presumption of any tacit consent in the case of the newly independent Dominions in Africa and Asia, precisely because there has been little or no time for this to be tested.

(*b*) In this respect, Latin American experience may be likened to that of the older British Dominions, and there has been time for practice to crystallise.

3. (i) The theory of *universal succession* cannot fit the case of the newly independent States because

(a) some at least of the treaties supposedly taken over are of the " personal ", rather than the " territorial " type, and therefore pertain solely to the metropolitan Powers concerned;

(*b*) there have been criticisms, in the ex-colonial countries, of the attempted devolution of treaty rights and obligations through the more or less informal exchange of notes or letters between a plenipotentiary of the metropolitan Power and the head of government of the colony at independence. Thus the treaties have frequently not been studied and publicly discussed by the colonial legislatures before their automatic " inheritance ". Indeed, it has been said that " these agreements are models of evasive draftsmanship ".

N. B.: The earlier practice of attempting to devolve treaty rights and obligations upon States members of the British Commonwealth by means of United Kingdom statutes has also been criticized.

(*c*) sometimes, as in the ex-Belgian Republic of the Congo, there may have been no formal settlement of the issues of State succession, which is thus left to be implied from the mere fact of independence.

Consider Katanga and the Union Minière. Has Katanga an international personality? Has it acquired rights and obligations of State succession separate and distinct from any which the Republic of the Congo might be deemed to have " inherited " direct from Belgium?

(*d*) in the case of French ex-colonies in Africa and Asia, the situation at independence was rendered extremely fluid by the concept of the new French Community which at first had control of the external relations of these territories.

Of course, a series of subsequent agreements have placed the legal situation on probably the same footing as with the British ex-colonies.

Note: The Treaty of Rome contained provisions for the continued associate membership of the European Economic Community of the former colonies of France and Belgium. There is attached to it a list of such territories. The whole exercise is not strictly one of State succession as such.

(*a*) some of the treaties may devolve upon the new States at independence, while others clearly do not. An empirical approach to each treaty is the surest guide. Ordinary canons of statutory interpretation cannot be applied without reference to the surrounding circumstances both at the time of the making of the treaty by or with the metropolitan Power and at the moment when it is sought to enforce it against a newly independent State e.g.:

(i) the House of Lords has held that the expression " High Contracting Parties " in the Warsaw Convention refers only to the actual signatories to it. How, then, can a newly independent State of Great Britain be said to have inherited such a convention under a theory of universal succession?

(ii) when the United Kingdom Government ratified the Counterfeiting Convention, which was expressly limited to the States that participated in the preceding Conference, some of her colonies had become independent, while others became so only afterwards. The first category might accede or succeed to this Convention, but the second category of new States could not.

3. (ii) A study of the *Status of Multilateral Conventions* of the United Nations shows that many newly independent Members States accept the principle of " automatic " succession to such conventions, especially if they are of a humanitarian character.

4. Former Trust (or Mandated) Territories furnish yet another illustration of the inadequacy of the existing rules governing State succession.

Problems arising generally similar to those of the ex-colonies, but dissimilar because of the legal implications of the withdrawal of " the protective umbrella " not only of the mandatories but also of the United Nations on their attainment of independence.

Consider Palestine (so far as relevant, now Israel), Togo, Cameroons, and Tanganyika; also the peculiar position of South West Africa and the South African Government's claim that it is already an integral part of its territory. Any possibility of State succession in respect of South West Africa? If finally integrated with South African Republic, the old rules should cover the case. If not, then the new rules, about to be formulated ought to apply to it, as to the other trust territories.

5. The practice (or lack of it) of certain ex-Protectorates like Morocco, Tunis and Syria must be examined to see what lessons it may hold for the modern principles of State succession now under study. e.g.

(*a*) Morocco, but not Tunis, accepted the Road Traffic Convention in virtue of France's signature as the protector State.

(*b*) Morocco and Tunis were held by the P.C.I.J., in the *Nationality Decrees in Tunis and Morocco Case,* to be

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[2] Originally circulated as mimeographed document A/CN. 4/SC.2/WP.6.

bound by treaties contracted by them before they came under French protection. In strict legal theory ought to be bound by treaties specifically entered into on their behalf by France as the protector State.

(*c*) Compare the practice of Malaya, a protectorate under the British until attainment of independence in 1957.

6. State succession issues may also arise when former colonial territories have, prior to independence, been subjected by the metropolitan Powers to leases and international servitudes in favour of other sovereign States.

(i) The leased military bases in the British West Indies, of which the Chaguaramas in Trinidad is the best known, present peculiar problems of their own. In the absence of any express treaty provisions, a tripartite negotiation between the British, the American and the Trinidad Governments has been going on for some two years now.

N. B: It is significant that the United States Government has declared its stand to be that, on the attainment of independence by the respective West Indian Colonies concerned, all military base leasehold agreements must be negotiated anew.

(ii) Despite the current revolution in Cuba, the Guantanamo Naval Base Agreement with the United States of America has not been expressly repudiated.

7. (i) The scope and variety of the problems posed by the new States and by contemporary international practice emphasize the urgent need for an objective and analytical re-appraisal of the law of State succession today. The alternative to the rule of law in this sphere is chaos. There could be an all too easy recourse to the plea of the doctrine of the *clausula rebus sic stantibus.*

(ii) Already, a theory is being advocated to the effect that independence puts an end to all the treaty obligations previously assumed by the metropolitan Powers on behalf of the newly independent States. This is as difficult to accept as is the equally controversial theory of universal succession.

(*iii*) There can be no valid substitute for a close and painstaking study and analysis of the policies and practices of the newly independent States and of the attitude of the Secretary-General of the United Nations, as the depositary, to these matters.

Examples:

(*a*) India has not made an official list of treaties to which she regards herself as having " succeeded " at independence.

(*b*) Nigeria has also not made any list of those of the 234 treaties to which she is supposed to have " succeeded " at independence. This has been because the texts of only some 169 treaties are so far available to her.

(*c*) Ghana has submitted to the United Nations the selected list of the treaties to which she regards herself as having " succeeded ": see Summary of the practice of the Secretary-General as depositary of multilateral conventions (ST/LEG/7), p. 60, foot note 57. It is to be noted that she has not limited the devolution clause to multilateral treaties, but it is not clear whether bilateral treaties are also covered by this clause.

(*d*) Wherever there is a devolution clause, the Secretary-General of the United Nations has due regard to the policies and attitudes of the successor States concerned in following the provisions of such a clause.

The practice of the Secretariat is first to ascertain whether the treaty contains a territorial application clause and whether it was in fact applied to the particular colony before independence, next to send to every new Member State of the United Nations an up-to-date list of all multilateral treaties deposited with it in accordance with the Charter and to which the relevant metropolitan Power was a party prior to the Member State's independence. The latter is thereby invited to declare its attitude to such treaties. It is noteworthy that no new State has so far accepted the invitation.

N. B.: If the treaty does not contain a territorial application clause or where it can be shown that despite the inclusion of such a clause the treaty was never in fact applied to the colony prior to independence, the United Nations Secretariat does not normally refer it to the new Member State for a declaration, as it assumes that the latter is not a successor State under the treaty.

But, in regard to the *Convention on the Privileges and Immunities of the United Nations,* the Secretary-General's assumption (and decision) that it is of application in all colonies was called in question by Morocco which denied that it had " succeeded " to this Convention in virtue of France's participation as protector State. Tunis and Malaya have, however, accepted the Secretary-General's ruling.

(iv) Special attention should be paid to the legal effects of devolution clauses upon third parties to the treaties in question.

(*a*) The great question here is surely to determine when lack of protest on the part of other States parties to a treaty can be taken to imply their *tacit consent:*

The I.C.J. held in the *Reservations to the Genocide Convention Case* that the reservations became part of the Convention by the tacit consent of the other parties to it.

(*b*) But this doctrine of tacit consent should not be carried too far.

(*c*) Civil law systems are more apt than Anglo-Saxon ones to accept novation of a contract by implication or stipulation for the benefit of third parties.

(v) Does a presumption in favour of State succession in the case of newly independent States make for legal continuity and international order, rather than the opposite theory of non-succession?

With proper qualifications and exceptions, the former offers a more rational basis for the continued integrity of international law and the facts of international life.

Memorandum on the topic of Succession of States and Governments — an outline of method and approach to the subject

Submitted by Mr. Abdul H. TABIBI [3]

State succession in general is a thorny subject and that is why the literature of international law offers divided and sometimes confusing principles, but, nevertheless, lawyers tend to regard the State as eternal, and, in their view, the death of a State is regarded as an exception.[4]

We must admit that in our day the law and function of treaties has greatly changed and this change is obvious during the last century. The treaty law surpassed the customary international law because the customary international law did not save the world from the horror of two world wars and both the League and the United Nations were established on the basis of treaties; the Charter of the United Nations is the new instrument of positive international law. In the law of treaties a new field has emerged, the law of State succession. World War II brought a number of frontier changes and many nations in Asia and Africa and other parts of the world achieved independence to assume new obliga-

[3] Originally circulated as mimeographed document A/CN. 4/SC.2/WP.2.

[4] R. W. G. DeMuralt, *The Problem of State Succession with Regard to Treaties.*

tions in the expanding community of nations. A number of frontier and territorial changes took place by force or by agreement, new circumstances were created to find the effects of treaty concluded by nations before and after the territorial changes or the effects of treaties after secession. Annexation, fusion with other States, entry into federal union, dismemberment of partition and finally separation or secession, make it indeed necessary to study the question of codification of the law of State succession, and Governments, particularly on the basis of the practices of State, and priority must be given to its consideration in the work of International Law Commission.

In a world in which all the desirable habitable territory belongs to one nation or another and the expansion of one State means the waning of another, it is of prime importance that some device should and must be found, accepted and applied to equitably solve the serious problems of personal and public rights and obligations that arise, and to bring nations in close co-operation who are in feud and disagreement.[5]

The solution of such problems cannot be left to the mercy of the strong nations or the bargaining of military Powers. As in private law this problem has found solution, it is much more important to find means and devices for the solution of this important question.

Many writers in the past, despite the importance and the challenging character of the problems raised as a result of change in the shape of the State, referred to this important area only to pass quickly to other subjects — but from the work of the publicist of international law three main theories of State succession can be found, namely the theory of universal succession, a doctrine taken from Roman law and based on the analogy of the State to a private individual, and influence of this doctrine can be found in the thinking of many authorities from the time of Grotius to the present day. When this theory was considered in international law it led to another doctrine that a State had a " personality " composed by, unity of territory, population, and political organization. The second doctrine which was developed by Huber differs from the Roman concept and is based on the theory of " continuity or universal succession ". But there is no doubt that the third theory which is supported very strongly by Keith, and which he describes with the term " singular succession " because of its analogy to that doctrine in early Teutonic private law, is supported by many others.

There is no doubt, however, that these three theories give different results on application, for, as Wilkinson believes, a State could apply any one or all three theories in different cases or at different times. But the best solution and validity to the acceptance of any of these theories should be based on the general practice of States.

Approach to the question

The International Law Commission should try not to be confused with doctrine, but should search devices on the basis of the practice of States. The term " State succession " should not be used too vaguely or loosely, but it should concentrate on territorial re-organization accompanied by a change of sovereignty. In my view it is more wise to separate the subject of succession of States from the succession of Governments. The International Law Commission should draw a distinction between the State and its Government, as Willoughby states in his " Fundamental Concept of Public Law " that by the term State is understood the political person or entity which possesses the law-making right. By the term Government is understood the agency through which the will of the State is formulated, expressed and executed.[6]

In governmental changes there are no shifts of boundaries, no transfer of sovereignty, and therefore, the effects of governmental transformations are usually different.[7] That is why in the first meeting of the Sub-Committee on Succession of States and Governments on 10 May 1962 I had the honour to propose that the study of State succession should be made separately from the subject of succession of Governments, the latter being an important question in itself, for which study is necessary and priority should be given.

The scope of the study of State succession should be limited and precise, and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties arising out of the result of colonialism and imposition of territorial and boundary changes which are contrary to the will of the inhabitants and contradictory to the principle of self-determination.

The most important question on which the Commission should concentrate is whether new States are bound by the treaties of their predecessors and whether a party to the treaty is obliged to be under the same obligation towards the successor States who have come with new obligations and a clean slate to the world. Although the answer to this question in the view of almost all general publicists of international law is negative, it is necessary to establish basic principles on this subject to be applied universally. It is important that these devices should be studied on the basis of those treaties of a " personal " nature because the treaty falls to the ground at the same time as the States. This question in particularly important because of the faith of many treaties concluded by colonial Powers and now the aftermath of independence creates many problems which should be solved.

In conclusion, we might say that now there is sufficient material available regarding the practice of States to make it possible to find positive devices of law on the subject of succession to treaty rights and obligations. It is also necessary for any special rapporteur who deals with the subject to avoid general theories on the subject of State succession — instead, to search on the main road, as Hall believes,[8] which is the " personality of the State ", changed conditions and the will of the contracting parties about the right of succession. There are other factors which should be examined for the purpose of the formulation of legal rules.

WORKING PAPER

Submitted by Mr. Shabtai ROSENNE[9]

I. *Introduction*

1. Pursuant to the decisions of the Sub-Committee and of the Commission at its 14th Session, this paper indicates some tentative views regarding the approach to and scope of the subject, thus amplifying my remarks during the Commission's 634th meeting.[10]

2. The Commission has so far refrained from taking any decision on whether what General Assembly resolution 1686 (XVI) terms " Succession of States and Governments " consists of one or of two questions. Some elucidation of this aspect now seems necessary. In so far as earlier official work on the codification of international law has attempted any differentiation, it appears that what has been denominated the " so-called succession of Governments " has been described as concerning itself with " the rights and obligations of a Government which

[5] Herbert A. Wilkinson, *The American Doctrine of State Succession.*

[6] W. W. Willoughby, *Fundamental Concepts of Public Law,* chapter V, p. 49.

[7] H. A. Wilkinson, *The American Doctrine of State Succession,* p. 17.

[8] *Internationa Law,* eighth edition, 1926, p. 114.

[9] Originally circulated as mimeographed document A/CN. 4/SC.2/WP. 3.

[10] See *Yearbook of the International Law Commission, 1962,* vol. I.

has been successful in a civil war with respect to rights and obligations of the defeated *de facto* Government " and " with the affirmation of the principle which is well recognized, that the obligations of a State continue notwithstanding any changes of government or of the form of government of the State in question ".[11] (*Survey of international law in relation to the work of codification of the International Law Commission*, memorandum submitted by the Secretary-General (A/CN.4/1 Rev.1), para. 47). That memorandum stresses that any attempt to codify the rules governing this latter principle would not be feasible without a parallel attempt to qualify some such rules as that the obligations in question must have been validly contracted, or that their continuation cannot be inconsistent with any fundamental changes in the structure of the State accompanying the revolutionary change of government. Recognizing that any attempt to formulate such principles and their qualifications would raise " problems of great legal and political complexity ", the memorandum, nevertheless, did not see in that any decisive argument against including the topic within the scheme of codification.

3. On the other hand, both the Commission in its report on the work of its first session (A/925, paras. 15 and 16) and the General Assembly in resolution 1686 (XVI) paragraph 3 (*a*), referred to the " *topic* of Succession of States and Governments " [my emphasis]. The debates preceding resolution 1686 (XVI) may support a view that the General Assembly regarded this item as constituting a single topic, or at least that it wished the International Law Commission to initiate work on a single topic which would combine relevant elements of the two traditional headings of succession. This may be regarded as having been confirmed at the seventeenth session of the General Assembly.[12]

4. This approach, which avoids technical, and probably artificial, differentiations, is seen as appropriate to contemporary requirements. The necessity for some measure of general legal regulation arises above all from the problems generated by the emancipation and independence of territories and peoples, in nearly all parts of the world, which have achieved their independence after the Second World War. The technical manner and the formal process by which this independence has been achieved vary. In some instances the acquisition of independence may have taken the form, technically, of a change of government, such change being the product of due constitutional process or not, as the case may be. In others, the process of emancipation and independence of colonial territories has clearly created a new international personality. In some cases the transition was peaceful, in others it was accompanied by the use of force and acts of warfare, sometimes with and sometimes without the co-operation of the metropolitan State. There are even to be found instances in which the transfer of power took place in more than one step, leading perhaps to the phenemenon of double succession (Mali). Common to the process in all types of emancipation and independence is the fact that as one of the consequences of the achievement of independence, the political, social, economic and cultural aims of the State change: and in the light of that, the prospect of a successful outcome for a project of codification based upon technical distinctions between succession of States and succession of Governments may be taken to be problematical. For the urgency demonstrated by the General Assembly is to be found precisely in the far-reaching practical consequences of independence, and not in the purely legal difficulties occasioned by the distinction between succession of States, and succession of Governments, as rubrics in the formal exposition of the rules of international law. The conclusion therefore is that for present purposes — though only for present purposes — the traditional distinction is not relevant, and that the Sub-Committee should propose to treat the topic of succession primarily in the context of those contemporary needs which have arisen as a consequence of the magnificent progress of emancipation.[13]

5. It is also necessary to consider at this early stage, even if only in a preliminary and a tentative manner, the form in which the work of codification is to be consummated. Despite the very strong tendency which has been manifested in recent years to consummate all the work of codification by general multilateral conventions concluded in conferences of plenipotentiaries convened under the auspices of the General Assembly, the question arises whether this would be the most appropriate form for regulating the codification of this topic. In this regard, several factors appear to be relevant. It is likely that close study of the material to be made available to the Commission in response to the circular note recently sent to Governments[14] will disclose that many of the acute problems are essentially bilateral and not altogether suitable for regulation by means of a general multilateral convention. Secondly, with perhaps relatively few and isolated exceptions, and dependent upon what will be accepted as the proper scope of the topic (see para. 10 below), in all probability it will be found that while the number of " successor States " (i.e. the States which have achieved their independence since the Second World War) may reach the figure of nearly fifty, the number of non-Successor States having direct concrete interest in the matter is relatively small, being limited (except, perhaps, as regards general multilateral treaties) to the former metropolitan States on the one hand, and the few non-metropolitan States whose nationals were widely engaged in economic enterprises in the former dependent territories, on the other. In these circumstances it may be questioned whether other States will be sufficiently concerned to warrant an assumption of their willingness to participate actively in any universal international conference convened with the object of concluding a general international convention on the topic.[15] Thirdly, in many cases it will, it is believed, be found that the practical problems have been regulated by bilateral arrangements, and in these circumstances the project of codification would be reduced to the formulation of a series of residual rules operative only in the absence of specific stipulation.

6. The following alternatives could be considered:

(*a*) The Commission could draw up a set of general principles representing its consensus on the matter, for submission to the General Assembly. Precedents of such a character can be found in some of the earlier work of the Commission.

(*b*) The Commission could submit to the General Assembly a set of model rules, not intended to be combined into a general international convention, which could guide States in their dealing with concrete problems. Such model rules, which would be fuller than principles, could deal in some detail with the different types of problems which call for regulation.

7. Whatever method is followed, it seems essential that the Commission should take the initiative for the praparation of

[11] This quotation is used for purposes of exemplification only: it is doubtful if " Succession of Governments " need be concerned only with the Government which has been successful in a civil war. Probably an expression such as " change of regime " would be more apt.

[12] Note that at the seventeenth session of the General Assembly (1962) an attempt was made, in the three-Power draft resolution (A/C.6/L.501) to redefine the topic as " State Succession ", but this was not adopted by the Sixth Committee in its resolution on the report of the International Law Commission covering the work of its fourteenth session (A/C.6/L. 503). See General Assembly resolution 1765 (XVII) of 20 November 1962.

[13] For these — and other — reasons the question arises whether the term " succession " itself is appropriate.

[14] Report of the Commission covering the work of its fourtheenth session (A/5209), para. 73.

[15] The small participation in the Conference on the Elimination or Reduction of Statelessness comes to mind as an instance of a project of codification and progressive development which, important though it is, did not attract universal interest.

an adequate and reliable survey of contemporary State practice. Material for this will undoubtedly be forthcoming from the replies of Governments to the circular note. However, mere republication of this material, as it is received, in the *United Nations Legislative Series* would not be sufficient. A comprehensive analytical restatement of that material, together with the material which has been promised by the Secretariat, could constitute a reliable and objective guide to current practice of considerable practical value. A precedent for such a compilation exists in the Secretariat's *Commentary on the Draft Convention on Arbitral Procedure* (A/CN.4/92).[16]

8. In view of the fact that questions of succession frequently give rise to differences not only on the inter-governmental level but also in the relations of the successor Government with foreign individuals, and that the settlement of such differences may itself occasion political difficulties and international tension, the question arises to what extent should adjudicative procedures be regarded as essential for this aspect of the law and international relations, and what type of procedures would be suitable.

II. *Scope of the topic*

9. Two factors at least cause difficulties in defining the scope of the topic. The first is that in one sense it can be said that the topic of succession impinges on a great number of the institutes of contemporary international law. The second (which is related) is that very little attempt has been made in the past by Governments and others, urging priority treatment for the topic, to indicate what in their view should be included within its scope.

10. It might be useful, before considering the scope of the work to be undertaken, to investigate what may legitimately be *excluded* from its scope. Guidance on this appears in Article 2, paragraph 7, of the Charter itself, namely matters which are essentially within the domestic jurisdiction of a State. The effect of identifying and applying the concept of domestic jurisdiction would be, broadly speaking, to exclude all questions appertaining to the legal relationships between the new State and its nationals when those relationships are a continuation of identical relations previously subsisting between the former Government of the dependent territory and the same individuals who were then subjects of that Government. (On the other hand, their exclusion would not necessarily apply in the case of aliens.) Questions analogous to succession may arise in those relationships. However, these are not questions of succession under international law. An exclusion of this nature would cover a vast area of relationships to which considerable attention is devoted in the literature, but the relevance of which to general international law is not always self-evident. These questions include, for instance, such matters as: (*a*) the effect of the emancipation on the domestic legal system itself; (*b*) questions of purely private law rights and obligations between the individual, formerly a subject of the metropolitan Power, and the independent Government, as well as those anchored in domestic constitutional law; (*c*) the rights of officials of the former government who became nationals of the new State; (*d*) the status of various transactions concluded prior to independence, which were and remain governed exclusively by domestic law, such as contracts, internal debts, tax liabilities, franchises granted to persons who have become nationals of the new States; (*e*) torts, etc. It is difficult to see why such matters come within the scope of any international regulation of the question of succession. In this connexion, attention may be drawn to leading decisions of the Supreme Court of Israel in *Shimshon Palestine Portland Cement Factory Ltd. v. the Attorney-General,* International Law Reports, 1950, p. 72 and *Sifri v. Attorney-General, ibid.*, p. 92.

11. A broad exclusion of that nature would leave for examination matters which under general international law do not come within the scope of the principle of domestic jurisdiction. For practical purposes, it is believed that this examination can for the present be limited to questions connected with: (*a*) the law of treaties; (*b*) the economic rights of nationals of foreign States; and (*c*) certain miscellaneous questions, especially some aspects of the public debt.

III. *The Law of Treaties*

12. The first, and from the point of view of method, perhaps the principal, question that arises in connexion with succession and the law of treaties, is whether the Commission is to deal with it in the context of its work on the law of treaties, or not. One of the pervious Special Rapporteurs on the law of treaties included some provisions relating to succession in the scope of the law of treaties [17] but it appears that our present Special Rapporteur on the law of treaties has not yet expressed any firm opinion on the matter beyond his general remarks at the Commission's 630th meeting.[18]

13. In considering this question, regard must be had to the draft articles on the law of treaties prepared by the Commission at its 14th session,[19] and to certain guiding lines which the Commission then adopted. Of particular significance is that the Commission has apparently eschewed attempts to classify treaties by reference to their subject-matter, with, however, two major exceptions, namely the general multilateral treaty (as defined in article 1 of the 1962 draft) and the constitution of international organizations (referred to in article 3 of the same draft). But when the literature, and the practice, of succession are examined, it will be found that the classification of treaties from the point of view of their subject-matter and their operation may come to occupy a more prominent role: at least there will be found a well-marked tendency to make the automatic transmission of treaty obligations by operation of law from the former sovereign to the new sovereign depend upon a purported classification of treaties.

14. For instance, it is sometimes asserted that what are frequently called " dispositive treaties " or treaties creating local obligations subsist despite change of sovereignty. The reference here is to international treaties and treaty settlements which define and delimit international frontiers. This theory has obvious practical advantages despite its theoretical awkwardness, in so far as it is intended to give effect to the certainty, stability and finality of agreed frontiers. However, closer inspection of the various types of treaties cited as illustrations for the theory shows that often they go further than to determine and delimit frontiers, and lay down detailed regulations for the regime applicable to frontier traffic and relations of the population of the frontier area, rights to or over different natural features constituting the frontier and even rights exercisable over the territory of another State remote from the frontier area, etc. The Sub-Committee, it seems, should consider the problem which this theory attempts to answer. If the Commission persists in its unwillingness to base its codification of the general law of treaties on a system of treaty classification founded upon the subject-matter and operation of treaties, the question will arise whether, in dealing with succession, some other legal basis does not exist which would in practice achieve the same results as regards the stability of the frontiers

[16] United Nations publication. Sales No. 1955.V.1.

[17] Sir Gerald Fitzmaurice, first report on the law of treaties (A/CN.4/101), article 6; second report on the law of treaties (A/CN.4/107), article 17, section I A (i), and see paragraph 95 of his commentary on that provision; on the relations between succession and the termination of the treaty by operation of law through application of the principle of *rebus sic stantibus,* see *ibid.*, article 21(3); fourth report on the law of treaties (A/CN.4/120), articles 2(1) (c), 6, 21, 28; fifth report on the law of treaties (A/CN.4/130), articles 15, 27, dealing with the transmission of treaty rights and duties by operation of law.

[18] See *Yearbook of the International Law Commission, 1962,* vol. I.

[19] See *ibid.*, vol. II, pp. 161 *et seq.*

as is sought to be achieved by the theory of the perpetuation of the dispositive treaties, but which at the same time would not come into conflict with the Commission's attitude towards the general law of treaties.

15. The approach adopted by the Commission in 1962 for the general law of treaties could facilitate separate treatment of the problem of succession and treaties. For instance, the Commission's proposals on the matter of participation in treaties, contained in articles 8 and 9 of its 1962 draft, may be found to have practical consequences as regards succession. Thus the question whether new States are to be regarded as automatically parties to general multilateral treaties and to multilateral treaties not of a general character in the sense of paragraph (6) of the commentary to articles 8 and 9 of the draft articles which had been applicable to their territory prior to independence is likely to become a problem which can be solved by administrative means such as are envisaged in paragraph (10) of that same commentary.[20] It is believed that the Commission would perform a valuable service were it able to clarify the law and the procedures to govern this aspect. Similar considerations may be found to be prescnt as regards the issue of membership in international organizations. Since 1955, all newly created States have on their request been almost automatically admitted into the United Nations, and hence become eligible for membership in the specialised agencies; and if this policy is continued, the type of problem which arose for example in connexion with the membership of India and Pakistan in the United Nations will be plainly exceptional and for that reason probably not suitable for general regulation.[21]

16. The Secretariat has undertaken to prepare a working paper on the succession of States under general multilateral treaties of which the Secretary-General is the depositary. The question arises whether this would be sufficient, and it is suggested to request the Secretariat to expand the scope of its paper by including material relating to the practice followed by the specialized agencies, and if possible of other international organizations and of Governments which are depositaries of international treaties.[22] Furthermore, there is believed to exist a certain amount of bilateral practice on this question which may also be relevant. An example is seen in the recent Note dated 9 December 1961, from the Prime Minister of Tanganyika to the Secretary-General, and that dated 2 July 1962 from the Government of the United Kingdom, both of which were circulated to Member States through the Secretariat of the United Nations.[23]

17. But the real problem regarding the law of treaties seems to lie in a different direction. It is usual, though not invariable, as part of the process of emancipation, for the metropolitan State and the authorities of the new State to agree that the new State shall be bound by the international agreements to which the former dependent territory was party prior to its emancipation, in accordance with the terms of each individual treaty. Such a blanket formula has several immediate consequences. First, it attempts to place the whole of the problem of the succession of the new State to previously existing treaty rights and duties on a basis of treaty law, and thereby to make reliance on general international law unnecessary. Against this, on the other hand, it gives rise to many difficulties in practice, as the Government of Israel had occasion to point out in a reply which it submitted to the Commission in 1950.[24] Further instances of difficulties were given by our colleague, Mr. Elias, at the Commission's 629th meeting.[25] The problems — raising in a peculiar way the question of *pacta in favorem tertii* and *in detrimentum tertii* — requiring further elucidation seem to include the following:

(*a*) How far is the usual blanket type of stipulation merely a bilateral matter between its contracting parties, and how far is it capable of constituting *prima facie* assumption of treaty obligations by the new State in its relations with other States, not parties to that bilateral transaction? Does it embrace treaties which the metropolitan State concluded on its own account, by virtue of its own sovereignty, and those which the metropolitan State simply extended to the dependent territory, by virtue of a territorial application clause, as distinct from treaties which the metropolitan State concluded in the name of the dependent territory? Both from the theoretical point of view and from the practical point of view these distinctions seem to be of considerable significance.

(*b*) How far does that type of stipulation confer on the new States the right to insist upon the observance of the treaties to which the stipulation refers by the other party or parties to those treaties, such parties themselves remaining strangers to the transaction in which the blanket stipulation was included?

(*c*) To what extent are the other parties to a given treaty entitled to rely upon such a blanket stipulation (to which they themselves are strangers) in their legal relations with either the former metropolitan State or with the newly emancipated State? This is probably the most crucial aspect which the Commission will have to elucidate.

(*d*) Does the blanket stipulation operate in the same manner for multilateral and for bilateral treaties?

(*e*) What is the position where no such blanket stipulation exists?

The solution to the above problems may be closely connected with the conclusions which the Commission will reach on the relevant general aspects of the law of treaties.

18. Such indications — they are not exhaustive — of the special character of the problems posed by the succession for the law of treaties suggest that, should the Commission decide to consider the question of succession and treaties otherwise than as part of its general work on the law of treaties, a sufficient number of problems exist for which a coherent programme of work could be produced. However, should the Commission proceed in that way, obviously full co-ordination will have to be maintained between the Special Rapporteur on this aspect of the law of succession and the Special Rapporteur on the law of treaties, and the point of departure to be adopted in connexion with succession to treaties must be consistent with the Commission's general conceptions on the law of treaties.

IV. *Economic rights of nationals of foreign States*

19. *Ratione personae*, a distinction exists between aliens (in the newly independent States) who are nationals of the former metropolitan State, and aliens who are nationals of

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[20] In this connexion, attention is drawn to the discussion in the 748th to 752nd meetings of the Sixth Committee, and General Assembly resolution 1766 (XVII) of 20 November 1962.

[21] The particularity of that solution seems to be implicit in the report of the Sixth Committee on the question. *Official Records of the General Assembly, Second Session* (1947), First Committee, p. 582 (A/C.1/212).

[22] Particular importance is believed to attach to a full description of the practice of the International Labour Organisation and the World Health Organization in this regard. On the existence of special considerations " which give international Labour Conventions a more durable character than treaty engagements of a purely contractual character ", see *The International Labour Code, 1951*, vol. I (1952) p. xcviii.

[23] Since some members of the Sub-Committee may not be familiar with this correspondence, the text of it is included in the annex to this Working Paper.

[24] Document A/CN.4/19, *Yearbook of the International Law Commission, 1950*, vol. II, pp. 206-18, especially paragraphs 19 to 28. For a fuller account of the considerations which found expression in that reply, see Rosenne, " Israel et les Traités internationaux de la Palestine ", *Journal du Droit International*, 77 (1950), p. 1140.

[25] See *Yearbook of the International Law Commission, 1962*, vol. I.

third States. From the aspect of the root of title, a distinction exists between economic rights of aliens resulting from activities conducted on the basis of an international treaty concluded between the metropolitan State and a third State, for example a treaty of establishment, the terms of which were applicable to the dependent territory, and economic rights of aliens resulting from activities conducted on the basis of direct agreement, such as a concession, between the Government of a former dependent territory and the foreign economic interests. The Commission will have to examine all these aspects.

20. As far as concerns economic activities of aliens conducted on the basis of international agreements, the future legal status of those activities and the extent of the rights of the aliens claiming them would appear to stand or fall according as the newly independent State is legally bound by the stipulations of the international treaty in question. That being so, this aspect would not appear to call for special treatment. On the other hand, if the caducity of the international treaty, followed by the lapse of particular rights previously enjoyed by aliens, leads to the abandonment of tangible assets in the territory of the new State, the question which arises for examination is whether and to what extent and under what conditions the successor State ought to make compensation for those assets.

21. As far as concerns concessions, it may be recalled that, as in the case of international treaties, so also in the case of concessions it is frequent for the authorities of the successor State to agree formally with the previous metropolitan Government in a blanket provision to recognise the validity of all subsisting concessions in accordance with their terms for their unexpired duration. Such a blanket provision may well give rise to legal problems not dissimilar from those which arise in connexion with the law of treaties. Much may depend on the circumstances of the negotiation of such a blanket provision. Furthermore, a question may exist of the initial validity of the concession in the light of the international agreements (if any) which determined the status of the dependent territory and the rights and duties of the metropolitan State over it. Practice shows that this aspect may be of particular significance when the concessions or other privileges were granted while the territory was under some form of international protection such as that inherent in the Mandates and Trusteeships systems, or, possibly, in the provisions of Chapter XI of the Charter relating to non-self-governing territories. *Cf.* para. 29 of the Report of the Committee on Information from Non-Self-Governing Territories (A/5215), Official Records of the General Assembly, Seventeenth Session, Suppl. No. 15 (1962).

22. In this connexion, the real problem which the Commission will have to examine thoroughly concerns the extent of the widely held theory that there exists in international law a general principle of respect for private rights, and the implications of that theory for the problem of succession. As Kaeckenbeeck has pointed out,[26] apart from international obligations accepted by the State as such under a treaty or otherwise, the question when the legislature should overrule vested rights or capitulate before them is always and exclusively a question of policy, of public interest, which the State alone is competent to decide. " And we must not forget that almost every social change . . . plays havoc with some vested rights ". The Commission would be performing as valuable service, the implications of which may well extend beyond the law of succession as such, were it to succeed, after careful analysis of the conflicting interests involved, in effecting a just balance between the necessity for maintaining a measure of stability such as the principle of respect for private right embodies, and the necessity for a regulated change such as is implicit in that very political process which leads first to the political independence of the new State and then to its economic independence. This problems is in evidence in the documents of the Commission on Permanent Sovereignty over Natural Resources (documents in the A/AC.97/. . . series) and the activities of the Economic and Social Council related thereto.

V. *Miscellaneous*

23. Among the miscellaneous questions, that of the disposal of the external public debt of a new State is of importance in so far as it is not covered by bilateral agreement between the new State and the former metropolitan State. The external public debt, by which is meant loans floated in foreign markets, has to be kept distinct from the internal public debt which, under the principles suggested in paragraph 10 above, is not a matter regulated by general international law.

24. It seems clear that in the same way that the question of succession and treaties stands in close relation to the Commission's work on the law of treaties, so does the codification of the other aspects of succession stand in some relationship with other items being considered by the Commission and by other competent organs of the United Nations. For instance, some of the problems discussed in section IV of this working paper have a connexion with some aspects of the problem of responsibility of States,[27] while others are undoubtedly similar to questions which have been debated in the General Assembly and in the Economic and Social Council and its competent subsidiary organ in connexion with the agenda item of sovereignty over natural resources. It seems that the Sub-Committee is called upon to determine concretely the relationship between the topic of succession and these other related topics, and the priorities to be accorded. It also has to be considered for how long after independence the transitional rules of the topic of succession can legitimately endure. Keeping in mind provisions such as Article 2, paragraph 1, and Article 78, of the Charter, it would appear that, once the transition to independence has been effected and the purely economic consequences of the regime of dependency fairly liquidated, new States stand on exactly the same basis as " old " States under general international law with regard to any measures they may be entitled to adopt in order to ensure that political independance shall be accompanied by economic independence and that each State may freely use its own natural ressources for the betterment of the condition of its own citizens.

VI. *Conclusions*

25. The conclusions of this working paper are that in order to decide on the scope of an approach to the topic, the Sub-Committee has to examine the following questions:

(*a*) For present purposes, does the Commission have to codify two distinct topics — succession of States and succession of Governments — or can it combine the relevant elements into a single topic of succession of States and Governments (paragraphs 2 - 4)?

(*b*) In what form will the work of codification be consummated (paragraphs 5 - 7)?

(*c*) The settlement of disputes (paragraph 8).

(*d*) The exclusion of matters governed by domestic law, from the scope of the topic, and the consequent limitations of its scope (paragraphs 9 - 11).

(*e*) On the law of treaties:

[26] " The Protection of Vested Rights in International Law ", *British Year Book of International Law*, 17 (1936), 1, at p. 15. For other references, see my article " The Effect of Change of Sovereignty on Municipal Law " in *British Year Book or International Law*, 27 (1950), at p. 281, footnote 3. See also Mr. Garciá Amador's fourth report on international responsibility (A/CN.4/119).

[27] There are other areas in which the topic of succession impinges on aspects of the topic of State responsibility, for instance the impact of State succession as regards nationality on the so-called nationality of claims rule, from the point of view of the claimant State.

(i) Is this aspect to be treated as part of the law of treaties or separately (paragraphs 12-14 and 18)?

(ii) Particular questions relating to succession to various types of multilateral treaties (paragraphs 15 and 16).

(iii) The legal consequences of the blanket stipulation between the new State and the former metropolitan State regarding the continuation in force of treaties — multilateral and bilateral — formerly applicable to the territory of the new State (paragraph 17).

(*f*) On the question of economic rights:

(i) The classification of the legal basis under which the economic activities of aliens were conducted prior to the achievement of independence and the conclusions to be drawn therefrom (paragraphs 19 and 20).

(ii) Questions of concessions and the nature and extent of the principle of respect for private rights (paragraphs 21 and 22).

(*g*) The question of the public debt of the former dependent territory (paragraph 23).

(*h*) The relationship of the Commission's work on succession with:

(1) its work on the topic of responsibility of States, and

(2) other relevant work being undertaken by other organs of the United Nations (paragraph 24).

(*i*) Recommendations to the Commission regarding:

(1) the appointment of a Special Rapporteur; (2) his precise terms of reference, and (3) the time schedule for the progress of the work.

Annex

1. From the Prime Minister of Tanganyika to the Secretary-General of the United Nations (9 December 1961)

Your Excellency,

The Government of Tanganyika is mindful of the desirability of maintaining, to the fullest extent compatible with the emergence into full independence of the State of Tanganyika, legal continuity between Tanganyika and the several States with which, through the action of the United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration:

As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika, or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period or two years from the date of independence (i.e. until December 8, 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

It is the earnest hope of the Government of Tanganyika that during the aforementioned period of two years, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument — whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.

It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

I have the honour, etc.

2. From the permanent Representative of the United Kingdom to the Secretary-General of the United Nations (2 July 1962)

Your Excellency,

I have the honour by direction of Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, to refer to the Note dated the 9th of December, 1961, addressed to Your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence.

Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign State on the 9th of December, 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.

I am to request that this statement should be circulated to all Members of the United Nations.

I have the honour, etc.

The Succession of States and Governments the limits and methods of research

Submitted by Mr. Erik CASTREN [28]

When the International Law Commission of the United Nations considered whether to include in its programme problems concerning the succession of States and Governments — which may here be referred to under the common name of " international (legal) succession " — and the further problem which aspects should then be investigated, in what way and in which order, practically all members of the Commission participating in the discussion agreed that these questions are important and that their solving is rather urgent. As to the limitation of the topic and the manner of its examination differing opinions were, however, expressed both in the Commission and in the Sub-Committee set up to prepare an investigation of these questions. Doubts were even expressed in the Commission as to the very existence of international succession. If these doubts were justified, then the task of the Commission would be solved simply by a presentation of this negative opinion. It is, however, hard to believe that the General Assembly would have recommended a study of this problem and that the Commission would have included it in the original programme if so meagre a result had been intended.

Several studies, some of an extensive and others of a more restricted nature, have been written on international succession, and in these the concept and nature of this legal institute have been studied, and different theories and ideas presented either to support or to contest its existence. Where international succession is understood to signify some kind of a general transfer of rights and duties between international persons regardless of their will, a firm stand must be taken against it. On the other hand, it has to be admitted that State practice, which at least in some respects has to be regarded as of equi-

[28] Originally circulated as mimeographed document A/CN.4/SC.2/WP.4.

valent standing to customary law, admits the principle that the successor State may make use of certain rights which previously belonged to its predecessor in relationship with other States and human beings, and further that the successor is also partly bound by the duties of the predecessor State. It is of negligible importance whether these rights and duties are interpreted as being transferred to the successor State or whether independent rights and duties similar to those belonging to the predecessor State are in question. The main thing is that there is a right or a duty based either on international customary law or on some treaty. The boundaries for international succession dealing with States — which may be called State succession — are however uncertain, there are no general agreements on State succession and even the international customary law on it is defective.

As far as *Governments* are concerned, the new Government may in general, in accordance with international law, derive rights from the international acts of the predecessor Government, while it is also bound to respect the treaties made on behalf of that State and its international agreements in general. Difficulties do arise, however, when a Government has gained power by unconstitutional means and especially during an insurrection or a civil war, when there may be several governments, and also at the end of such an exceptional period.

It is always possible to speak of an international succession when rights and duties are transferred from one international person to another. But State succession in a more restricted sense, which is now the question nearest at hand, signifies legal problems arising in connexion with *territorial changes*. Territorial changes are still possible, although it must be said that even general international law nowadays prohibits the acquiring of territory from other States by means of a war or by other forcible acts. It is possible to exchange territories, for example in connexion with the defining of boundaries or by means of voluntary cessions against monetary or other compensation. States may also form among themselves different types of unions of States, while, on the other hand, unions of States may dissolve. Trust territories, colonies and even some parts of the mother country may gain independence. Changes of territory are manifold, and the legal problems of succession vary accordingly. The most noticeable difference lies between two main cases, when a State (*a*) disappears completely from the international scene and (*b*) loses only a part of its territory. But if the loss of territory is considerable, it may mean the dissolution or end of the State, and a great loss of territory may also have a practical bearing on the ability of the State to discharge its international obligations (*clausula rebus sic standibus*). State succession may also have extraterritorial effects, as has been pointed out by some members of the Commission. In so far as the attitude of third States in regard to the legal effects of territorial changes is not considered, the following two cases are nearest to the question at issue: (*a*) the fate of State-owned property situated outside the territory of the State (in a third country) a the time of the fall of the State and (*b*) the effect of the change of territory on the nationality of its citizens resident in a third country. When State succession is investigated, attention should also be directed to the difference between such cases on the one hand, dealing only with mutual relations of States, and, on the other hand, such cases in which there is on the one side an individual, for whom the nationality (or the absence of it) may also have an importance. In general, States do not have duties in international law in relation to individuals excepting foreigners, but the position of a foreign State and its national, who, for instance, is the creditor of another State, is also different, which results from the fact (among others) that the State even in private law relationships is, on account of its power, in a more advantageous position than the private individual. And if the private person is, in addition to this, under the territorial supremacy of the successor State, this may also have a weakening effect on that individual's legal position.

In one meeting of the Sub-Committee it was suggested that, by reason of the extent of the problem of international succession, some questions belonging to it should at least temporarily be left aside, which solution seems sensible and expedient. Following this principle of elimination, it would seem that questions of the succession of governments could be postponed for the time being for the following reasons. Some of these questions are rather clear, as for instance that a change of government does not affect the identity of the State nor its international personality. Other questions, such as the position of an insurgent government, may be too complicated, for the doctrine differs even in regard to some of the main questions, and State practice varies greatly. In all these questions problems dealing with the responsibility of States — for instance, how the new government must treat international obligations which the predecessor government has incurred by exceeding its powers — must be faced; these problems are intended to be separately studied within the Commission. In addition, it must be taken into account that in the Commission's future programme of work the question of the recognition of Governments (and States) already appears separately. Lastly, questions concerning the succession of Governments are not as important as many problems relating to State succession. It has, on the other hand, also been pointed out in the Sub-Committee that problems of the succession of Governments and States have such a close connexion that a real difference between them cannot be drawn. It is, however, not clear if this is so, but if it is, the former should be studied in connexion with the latter.

At the Commission's session the possibility was even mentioned of the succession to a state of war. Such special cases, which are based on a situation contrary to international law, ought to be left outside a legal investigation.

Instead it is possible to think of the study of international succession being extended so as to cover the problem whether membership in an international organization may be based on the membership of another State (the predecessor or mother country) — this is, in fact, connected with the problem whether the rights and duties based on a treaty are transferable — and the problem whether there exists a succession, and, if so, in what way, between international organizations (the dissolved and the newly created). In this respect the Secretariat of the United Nations has already promised to provide the Commission with material. A certain amount of practice has already occurred, although no customary law can here be spoken of. The question may have a considerable practical importance. The latter part of it, i.e., the succession between international organizations, is quite distinct and it may thus be studied either simultaneously with the problem of State succession or subsequently to it.

The limitation of the problem concerning international succession and the method of dealing with it depend greatly on whether it is the intention to draft a mere collection of legal rules (a code) or an international treaty. Both approaches can be defended but perhaps weightier reasons speak for the latter solution. These reasons are to a great extent the same as those which made the Commission, in regard to the problem of treaties, change from a code to a treaty-basis. A treaty has naturally considerably greater practical importance, and by means of a treaty it is easier to bring new States more extensively within the confines of international law, as they themselves can participate in the drafting of the new principles and rules. The codification of the problems of State succession in the form of a treaty may, nevertheless, cause special difficulties, because the questions have a strong political character, and because established practice, as has been mentioned, is to a great extent lacking. Because of this it is perhaps necessary to be satisfied with a treaty or several treaties, which allow many exceptions and far-reaching reservations and which present several alternatives, sometimes mere recommendations; this method has been used before. Because of the differences between the problems and in order to promote the establishment of treaty relationships it is probably more suitable to draft several treaties. In these treaties one has to try to create, as far as possible, some uniformity instead of the present varied

practice and to establish the most important principles protecting certain rights. Thus it is not enough to rest content with a mere codificaion, but the creation of new, expedient rules must be pursued. If the form of a treaty is chosen, this means, among other things, that the Commission must not complicate the treaty drafts with theoretical views and declaratory statements, the correct place for which is the report of the rapporteur and the comments on the draft treaty. The Commission must also limit itself to the study of primarily new cases, although in the light of the teachings of history, cases such as gaining independence since the end of the Second World War, transfers of territory and the formation and dissolution of unions of States. The Commission must be in closer contact than usual with the Governments and respective international organizations in order to obtain from them the necessary material and in order to know how they approach the proposals planned, because of the wide implications and difficulties of the question it may perhaps be necessary for the Sub-Committe which has been estabished to continue its activity even during the intervals of the Commission's sessions, but in such a way that the independent position and responsibility of the rapporteur is preserved.

It has already been pointed out that the problem of international succession is connected with many other important fields of international law, such as State responsibility. Therefore a problem to be solved is where the limits should be drawn so as to avoid encroaching on other and wider questions. As to the order of investigation there are several different possibilities, because the division can be made in many different ways. It would seem most appropriate to follow the example of those theorists who would make the main division on a material basis, that is, according to what kind of rights and duties are in question. But within the confines of each group of topics the next division must be made dependent on whether there is a case of complete destruction of the State or only a partial loss of its territory. In addition, the extra-territorial effects of succession have to be dealt with when the need arises. In accordance with what has been said above one could begin with the effects of territorial changes on treaties, which would make a suitable continuation, or perhaps completion, of the present main study of the Commission. It is naturally possible to deal with questions of the succession of treaties in connexion with the law of treaties, but it seems as if they rather belonged to the confines of the institute of succession, and this seems to be also the opinion of the present and some previous rapporteurs of the Commission who dealt with the legal problem of treaties. When investigating succession to treaties, special attention should be paid to the nature of the treaties, i.e., whether they are personal or territorial. In this connexion the extensive and controversial problem of international servitudes should be dealt with, even if it should not perhaps be treated too extensively. When investigating treaties the question should also be dealt with from the point of view of the State which has acquired new territories in the first place on the basis of the principle of movable treaty boundaries, which principle, however, is not unconditional. Difficult problems can appear in regard to the treaties establishing and dissolving unions of States.

The fate of State-owned property in connexion with territorial changes makes up the next group of questions. Even here, different situations must be investigated taking into account the nature and extent of the territorial changes. The location of the property and its nature (public and financial property) must also be taken into attention, although in actual practice this distinction is not made when deciding the fate of the property.

Particularly far-reaching and difficult problems are connected with the question what stand to take with regard to the economic obligations of State towards other States and individuals. There are different opinions on this among the theorists, and State practice has varied greatly in different times and countries. Theorists often try to derive some legal rules from general principles of law, in which quite commonly the duty to respect the so-called acquired rights is spoken of, but in actual practice the political and expedient aspects of the questions are usually decisive. When a State disappears it is especially important that the successor State undertakes certain responsibilities for the clearance of the debts and other economic obligations of its predecessor. The territory is transferred with its servitudes: *res transit cum suo onere*; but if there are several successor States, great difficulties may arise in agreeing on the basis of the division of debts and encumbrances. If there has been some State-owned property as security for the debts, this security should be respected, and if the newly-independent State has had financial autonomy, it ougt to be responsible for its debts continuously. Some debts, such as war debts and those which have been regarded as damaging the State acquiring the territory, are not in general carried over. This is also the case with claims for damages based on those actions of the predecessor State which have been deemed to be contrary to international law. On the other hand, administrative debts, such as the wages and pensions of officials, should always be respected. Concessions may be abolished or their conditions changed only in exceptional cases, and then the losses involved must be compensated for.

As has been already pointed out, the citizens of the successor State — either old or new — are, in regard to these as well as to many other questions, in a worse position than foreigners and foreign States, in so far as the home State can in general treat them at will, unhindered by international law, presuming always that general human rights are not violated. When State succession is investigated one meets very often, both when treating the debts of the State and also in the cases mentioned below, the same problems which appear in the treatment of aliens, which in its turn is closely connected with the problem of State responsibility. The duties of the successor State as to the aliens resident in the new territory and to their economic interests there are nearest regulated by the general rules concerning the treatment of aliens. If it is once agreed that the (limited) protection of the property and other so-called acquired rights belong to the principles governing the treatment of aliens, then, so long as the rights arose legally, it is immaterial how and in the jurisdiction of which State they arose. The cancellation of rights can also take place under certain circumstances even if these rights have been granted by the State concerned. On the other hand, it is possible to consider that in a case of this kind there must be particularly strong grounds to justify the modification of the contracts and the cancellation of the rights.

Accordingly a territorial change has in general the most noticeable effect on the legal position of the indigenous population which comes under the territorial and personal supremacy of the new territorial Power. But in regard to this problem of nationality several problems may already appear, for example concerning those people who at the time of the territorial change are abroad and who do not return to their home State, while the right of option, as far as it is admitted, is by itself quite a difficult problem. In general it is held that the successor State has a free hand to arrange conditions within the new territory even to the extent of incorporating it into its existing domains, which leads to a complete change in the legal and in the administrative and judicial institutions. The handling of pending legal and administrative cases creates difficult problems. Their handling may be interrupted and begun anew, but in general retroactive actions should be avoided, and it is not always even possible to undo what has already been done. State practice varies greatly in regard to all these questions, and it would be good if at least some leading principles could be adopted in this matter.

When the Commission begins, in due course, to investigate the above-mentioned extensive and complicated questions, perhaps in the order mentioned above, attention must — as has already been said — be paid once again to the necessity of trying to avoid going too far into such common problems as for instance those concerning the recognition of Governments and the responsibility of the State especially in regard

to the treatment of aliens. How this limitation is to be made, is, for the time being, difficult to say. The Commission should, as has also been mentioned before, investigate new cases, because the treaty drafts to be proposed can gain acceptance only if they are based on present State practice. But in planning treaty rules their compliance with present international law and its most important principles, a part of which have been expressed in the Charter of the United Nations, must be observed. Because practice is not uniform and because differences of opinion are possible even in regard to the principles governing State succesStion, the Commission will apparently have to suggest many new principles, which is likely to make its task more difficult and to make the creation of a treaty binding the different States equally difficult. To begin with one should perhaps be satisfied with partial solutions between a limited number of States, but even such a result ought to be regarded as satisfactory.

Working Paper

Submitted by Mr. Milan BARTOS

The writer considers that the Sub-Committee, while not neglecting the general rules governing the subject under study, should devote its attention mainly to the question of succession of States and Governments raised by the birth and creation of new States through the application of the principles of self-determination of peoples embodied in the United Nations Charter. As a contribution to the study of this question, he submits the following considerations and suggestions to the Sub-Committee.

General considerations

One of the questions arising out of the succession of States is that of the fate, and prolongation of the validity, of international treaties concluded by States whose sovereign rights or territories are transferred to a new State. The doctrine of successor States, built up over the centuries, played a particularly important part in connexion with the unification of Germany and Italy in the nineteenth century, and the Versailles Treaty system, especially the treaties relating to the succession of Austria-Hungary and the Ottoman Empire. Many writers see in these cases the confirmation of the rules derived from the emancipation of the Latin American States and consider that, on the basis of these treaties and of practice, it is possible to establish the definitive rules of public international law on the succession of States, or rather on the prolongation of treaty relations when there is a change in sovereignty over a territory.

Whether what takes place is the creation of new States, or secession, or emancipation, it is important in practice to determine the position of third States as regards their rights and duties *vis-à-vis* the new sovereign Power in the territory to which the treaty with the former sovereign State applies; but it is even more important to determine the material and legal status of the independent or emancipated State. For the question whether all ties with the partners of the former sovereign Power are broken or whether certain particular treaty relations subsist is not a matter of indifference to that State either. The absolute repudiation of such treaty relations by the new State would appear at first sight to ensure that there will be no acceptance of passive succession, i.e. acceptance of unfavourable treaties which may have been concluded by a foreign master without regard to the needs or interests of the liberated territory and its population. Such a situation, however, would put the newly created State in difficulties, at least for a time, for it would have no treaty relations with other States, perhaps not even its neighbours, with the consequence that even its frontiers, transit requirements, water supply, use of waterways, etc. could be called in question. On the other hand, if the old rule is maintained that treaties termed *traités internationaux réels* — i.e. treaties relating to the status of the territory, to territorial servitudes and to privileges granted with regard to investments — continue in force, then the right of self-determination and the unrestricted sovereignty of the emancipated people is challenged once more, as, consequently, is also the inalienable right of that people to the sources of its national wealth. All these treaties may have settled certain questions in a manner at variance with the views of the people whose right to self-determination has found expression in its emancipation; consequently, if such treaties are recognized as remaining in force, the question arises whether the people concerned have really gained their freedom, or whether these treaties do not represent the vestiges of colonialism and the basis for what is now called "neo-colonialism" — one of the phenomena contrary to the principle of decolonization which, deriving as it does from the right of self-determination, has become one of the guiding principles of the international practice established by the will of States within the framework of the United Nations. Here, as in many other branches of public international law, traditional rules must necessarily be intermingled with modern concepts; or rather it is necessary to bring these traditional rules into accord with the principles of the United Nations Charter and with the gradual evolution resulting from its development and application.

This paper is confined to the problem of the continuance of the treaty relations of newly created States and emancipated territories under treaties entered into by the Power which formerly exercised sovereignty over the territory; attention must accordingly be drawn to two groups of treaties. The first comprises treaties concluded in its own name by the former sovereign Power and applied in accordance with general principles to all the territories under its control, or expressly rendered applicable to the territory in question by virtue of the colonial clause incorporated in such treaties. The second group comprises treaties concluded by the former sovereign Power acting in the name of the territory now emancipated, either as the administering authority of a trust territory or as the protecting Power or other high authority for a dependent territory. Some jurists seek the key to a practical solution in this division into two groups. They recognize that the newly-created State is entitled to consider treaties in the first group as applying solely and exclusively to the former sovereign Power; with the termination of its authority over the territory, the contractual bond was also dissolved, and hence these treaties do not concern the new sovereign Power; in other words, the validity of the treaties with respect to the territory in question ceased with the extinction of the former master's sovereign rights over that territory. In certain cases, the supporters of this view refuse to recognize any transfer of the treaty relationship to the new sovereign Power, i.e. to the newly-created State, with the transfer of sovereignty over the territory. This theory makes it possible for the new State to decline to accept the succession except with *beneficium inventorii*, but it may also place it in a difficult position *vis-à-vis* third States, with which its relations will not be regulated by treaty, since third States will no longer have the same obligations in regard to its subjects as when they were considered to be subjects of the former sovereign Power. This situation has very unfortunate consequences for workers from an emancipated State employed in a third State: it deprives them of all the rights they enjoyed as subjects of the colonial Power with which the third State had treaty relations. As to the second group of treaties, it is claimed that they are directly binding on the territory, that is to say on the State newly established in the territory, since these treaties were concluded in the name of the territory by an administering authority empowered to act in its name. However, the population of the territory, i.e. the people who exercised the right of self-

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[29] Originally circulated as mimeographed document A/CN. 4/SC.2/WP.5.

determination and set up the new State, were not consulted. And even consultation would be no guarantee that such treaties were drawn up in conformity with their wishes and interests and with the principles on which their right of self-determination is based. The writer considers it justifiable to maintain, as do most of the States set up by the peoples of emancipated colonies, that the difference between these two groups of treaties is only apparent, and that in both cases the treaties were concluded in the exercise of its own will and authority by the former sovereign Power, which was alien to the liberated people, even if it had a mandate from the international community to administer and represent the territory.

To these two groups of treaties, the writers who defend the interests of the former sovereign Power add a third group, comprising treaties concluded with third States by the local government of the territory which has now been liberated and become an independent sovereign State, but under the aegis of the former sovereign Power, i.e. of the colonial master or administering authority. It is held that the local government represented the territory and its population, and that the Power exercising sovereignty over the territory merely added its authority to the will of the representatives of the territory to conclude a treaty, thus enabling it to have international effect. The writer considers it justifiable to reject this group of treaties as necessarily surviving the rule of the former sovereign Power, for it is certain, or at least probable, that the dependent government was not in a position to make any valid assessment of the interests of the population of the territory and to dissociate them from the interests of the colonial master or administering authority, or at least from its influence, on which the granting of authority depended. Consequently, this group of treaties will not be discussed separately here.

In the writer's opinion, the treaties in force at the time when a territory is emancipated form an indivisible whole and must be brought into harmony with the law of the newly-created State and with the right of its people to self-determination. They must not stand in the way of the liberation and sovereign will of the emancipated people and cannot bind it for the future. But in practice, the States created after the Second World War in the course of the struggle for national liberation and the action taken by the United Nations to implement the right of self-determination and decolonization, have not all adopted the same solution to the problem of their position in regard to international treaties and other obligations left behind by the former master of the territory, whether conqueror or administrator. They all agree that the old rules of public international law on succession to treaty relations cannot be applied, or cannot be applied in their entirety, to the new situation, in which the territorial problem is not to be settled by the principle of legitimate possession of the territory, but by the principle of the right of peoples to self-determination. Broadly, it may be said that there are four theories covering the situation that has arisen.

I. *Theory of the* tabula rasa

The first and most radical theory is based on the principle that the emancipation of a territory and the creation of a new sovereign State produces a *tabula rasa* situation as regards treaty relations, so that the new State is not generally bound by former ties and does not inherit any contractual obligations. The former sovereign Power did not act in the name of the population, but by virtue of its colonial or administrative authority; hence, all the effects of the treaty ceased with the termination of that authority. This theory seems to be closest to the concept of the right of self-determination; the act of emancipation would eliminate all traces of colonialism. The advocates of this theory claim that it presents no danger for third States, since they can establish treaty relations with the new sovereign Power if they reach agreement with it to conclude new treaties or extend former ones. However, this theory meets with objections from various quarters — even from those who defend the interests of the emancipated territory. Third States maintain that under former treaties they acquired certain rights in good faith and even that legal situations were created to their advantage and that of their inhabitants, whereas they now suddenly find themselves in an unregulated, if not an illegal, situation. The more moderate objectors observe that the *tabula rasa* can have no effect, at least on established legal situations, which must be respected in accordance with the treaties with the former sovereign Power that were in force when the new State was created. This view is certainly not without foundation and practical importance; but there is also no denying that these allegedly legally established situation, mainly concessions and the right to settle and work (which are acts of colonization) granted by the former sovereign Power to foreign States, to corporate bodies set up under their private law (generally large companies) and to their nationals, often represent a burdensome colonial heritage detrimental to the economic freedom of the emancipated State. Consequently, this provisional respect allegedly due to rights acquired by virtue of former treaties is also a dangerous influence for self-determination and one that cannot be uniformly regulated. It is for this reason that the advocates of the *tabula rasa* theory propose examining whether the legal situations established are, or are not, compatible with the right of the liberated people to self-determination. It is difficult to establish objective criteria for settling this question. Every people knows what it wants. It is precisely because the objective criteria are uncertain, that it is for the newly-created State to decide for itself whether, and to what extent, it will respect rights deriving from treaties in force at the time of its emancipation. This subjective act of itself deprives these rights of their contractual nature and provides a new basis for them — an ephemeral and precarious concession by the new sovereign Power, which may reverse its decision to tolerate such situations in its territory. The *tabula rasa* theory also deprives the newly created State of protection for its rights and interests and those of its citizens in the territory of third States where they previously enjoyed a certain guaranteed legal status based on treaties concluded between third States and the former sovereign Power. This is only logical, since a treaty cannot create rights for the benefit of one party only. Even less tenable is the view of certain defenders of the emancipated States' interests, that the *tabula rasa* principle must not be interpreted in an absolute sense. According to that view, a new State can release itself from treaty provisions which are not consistent with its emancipation or with the right of its people to self-determination, but can leave in force those treaty provisions which it does not regard as a continuation of colonialism. A treaty, however, forms a single whole, and either it remains in force under changed conditions or it ceases to be in force; otherwise, the emancipated State would be in a more favourable position than a third State which was a party to the treaty.

II. *Right of option concerning the validity of treaties*

Another theory is that the new State has the right to choose among the treaties in inherits, i.e. it has the right to declare which contractual relations, or rather which treaties, it proposes to keep in force. Treaties not remaining in force would not be mentioned in the declaration. It is assumed that the new State is entitled to make a positive choice, a treaty ceasing to be in force *ipso facto* by the mere fact of not being maintained in force. This system is not unknown in the practice of international law. The peace treaties drafted at the Paris Conference of 1946 contain a provision along these lines for the benefit of the victorious Powers, which had the option of maintaining certain treaties with the vanquished Powers in force, while the others ceased to be in force automatically on the expiry of the time-limit for the option. In theory, this practice is considered to be based on the will of the parties (recognition by the vanquished Power expressed in the peace treaty and option exercised by the Power enjoying the advantage). It is, however, very difficult to draw any analogy with

this system. The question arises why certain contracting parties should be placed in a less favourable position than the new State, and why they should passively accept the choice of the new State as a legal fact on which their treaty relations depend. The position is quite different where a peace treaty is concerned; in that case the vanquished State accepts, by signing the treaty, the obligation to respect the choice. The supporters of this theory rightly argue that the former sovereign Power was not able to bind the new sovereign Power and that the new State, in accordance with its people's right to self-determination, is alone competent to judge whether treaties previously concluded conform with its interests, in other words, whether it wishes to assume the obligations imposed by those treaties. But this is not the foundation of the right of option. The supporters of this theory also rely on United Nations practice with respect to multilateral treaties, which is that the Secretariat receives from the new State a declaration of the obligations it accepts under treaties formerly applied to its territory, thus maintaining the continuity of the treaty relations. It must be particularly stressed that this United Nations practice applies to multilateral treaties to which all States, or at least al States Members of the United Nations, can accede. New States submit such declarations to the Secretary-General, or some other depositary, usually on admission to the United Nations. Bilateral and plurilateral treaties, which are not open to accession, cannot be compared to these treaties, so that this Secretariat practice cannot contribute to creating an obligation for the other contracting parties to accept the right of new States to exercise an option. Attention must nevertheless be drawn to certain features of this practice of new States within the framework of the United Nations. They consider, first and foremost, that they are continuing the treaty relations established by the former sovereign Power, i.e. maintaining the continuity of the validity of the treaty. The United Nations Secretariat, in its capacity of depositary, transmits their declarations to the States parties to the treaty. The present writer does not know whether any State party to a treaty has observed that this is not continuation of the treaty relationship, but accession by the new State. The question whether continuity must be legally recognized and the treaty considered valid for the new State by virtue of the treaty relationship with the Power formerly exercising sovereignty over the territory, may be important in fact. If it is a matter of confirming treaty obligations with retroactive effect from the date on which the new State was created, hence *ex tunc*, is this confirmation generally necessary? And what becomes of treaties not so confirmed? Does this mean that, from the time when the new State is created until the time when the confirmatory declaration is deposited, the old treaty remains in force for the new State, or that the treaty is *in suspenso* for that State, but is given retroactive effect by the act of confirmation? The latter interpretation would mean that the right of option really exists for new States, at least in the case of open multilateral treaties. However, although no comments to that effect have been made to the Secretariat — or at least none have come to the writer's knowledge — in practice it is held by some that there is no continuity of the validity of the old treaty; the new declaration represents accession to the open treaty, the act of accession being based not on the former treaty relationship, but on the new capacity of the emancipated State, as a State or even as a Member of the United Nations, and on the nature of the treaty itself, to which all States, or all States Members of the United Nations can accede. It seems that the Universal Postal Union has accepted this view and has, in all such cases, applied the procedure for the admission of a new State and its accession to the Universal Postal Convention. The writer has been unable to establish whether, in the interval between the creation of the new State and the admission of the territory in question, the latter is considered as a territory to which the contractual régime of the Universal Postal Union applies. According to the information available it is a *de facto* rather than a *de jure* relationship, i.e. the universal régime is applied in postal relations, but the new State cannot be considered as having a contractual relationship under the International Postal Conventions as a whole. It appears from the foregoing that there is no real justification for the doctrine that the new State has a right of option regarding the treaty relations to be applied to its territory by virtue of treaties concluded by the former sovereign Power, for that doctrine would give the new State a privileged position compared with the other contracting party and thus upset the principle of equality of the contracting parties. Conversely, if equality of the contracting parties is to be guaranteed, the right of option must be granted not only to the new State, but also to the other contracting party. There would, in reality, no longer be a right of option, but the possibility of express or tacit prolongation of treaty relations. This is, in fact the third theory, which will be discussed later.

Attention must also be drawn to a further variant of the doctrine of option. Its advocates raise the question of the divisibility of treaties: the treaties concluded by the former sovereign Power often contain provisions which are useful to the new State and its population, though they contain other provisions which are not in conformity with its interests, with the object of self-determination or with the situation of the newly independent State. It is held that the new State can maintain those parts of a treaty which provide for normal relations between States and reject those parts which bear the mark of colonialism or are at variance with normal contractual relations between equals. This trend is undoubtedly consistent with the principles deriving from the Charter and the policy of the United Nations; but it would be impossible, in law, to recognize this special kind of option, which would give the new State twofold discretionary powers. The first would be the right of option itself, of which no more need be said, since the matter was examined in the previous paragraph. The second would be the right of the new State to maintain only certain parts of the former treaty. This would only upset the balance between the contracting parties even further, since not all the unfavourable provisions necessarily bear the stamp of the colonial heritage; in treaty relations there are often clauses which represent a sort of compensation for the privileges granted under other provisions. It is obvious that such clauses could only be revised by agreement between the contracting parties and, in case of agreement, with the tacit consent of the other contracting party. It is no longer a matter of exercising the right of option, but of confirming and modifying the former treaty relationship, i.e. the conclusion of a new treaty modifying the old one, and the question whether the former treaty continues in force or a new treaty relationship is created is of no importance in this case.

Another important question which arises in practice in connexion with the exercise of the new State's option, even where open multilateral treaties are concerned, is whether, when making a declaration by which the former treaty is kept in force with legal continuity, the new State can qualify its declaration by withdrawing or adding reservations to the treaty whose continuation in force is confirmed. The writer sees no difficulty as regards the withdrawal or reservations made by the former sovereign Power concerning the application of the treaty to the territory now represented by the new State. Reservations to treaties can be withdrawn or revoked by the contracting party concerned. As regards continuity, however, the question still arises. The treaty relationship subsists, but the present writer considers that in such cases the reservation ceases to be effective when the declaration of withdrawal is submitted to the depositary, not when the new State is created. The withdrawal of the reservation takes effect in accordance with the rules governing the legal effect of such declarations, and does so at the time of notification. This means that third States would not be obliged to accord to the new State, and to its subjects, the rights kept in abeyance by the reservation during the interval. The situation is much more difficult, however, if the new State formulates a reservation which was not made by the former sovereign Power. There is no doubt that such a reservation affects the

substance of the obligations under the treaty, and that in this case what happens is not that the former treaty relationship is confirmed but that a new one is established. In any event, from the date when the reservation is formulated, in other words from the date on which it takes effect, the new State must be considered to have acceded to the treaty subject to that reservation. The reservation will, in any case, take effect *ex nunc*. But what happens if objection is made to the reservation? Must the new State be considered to have confirmed the former treaty relationship, which will then take effect with respect to that State regardless of the fate of the reservation? Or, conversely, must its declaration be considered to constitute an acceptance of, or accession to, the treaty, as the case may be, with the proviso that the condition contained in the reservation forms an integral part of the declaration of accession, so that the new State is entitled to make its accession to the treaty conditional on the fate of the reservation, in so far as it does not itself withdraw the reservation if it is not accepted? In the absence of a consistent practice in the matter, it is difficult to express a definite opinion without examining specific cases. In practice, however, the right of new States to formulate necessary reservations is recognized in principle, provided that the pre-existing treaty relationship is confirmed. The majority of States do not consider this confirmation to be an act prolonging the treaty relationship, but treat it as equivalent to accession and permit the new State to avail itself of the right to make reservations, although the time-limit for their formulation (as specified in the treaty) has expired. This is justified by the fact that the new State was unable to exercise its right to formulate reservations within the specified time-limit, for the simple reason that it did not exist at the time. The fact that the right was not exercised by the former sovereign Power is not considered decisive, since its interests and acceptance of the full scope of the treaty obligations were not necessarily in accordance with the interests and views, or even with the needs and circumstances, of the new State. This tolerance is consistent with respect for the right of self-determination of the people of the new State and with the desire to see the greatest possible number of States participate in multilateral agreements aiming at universality, even if such participation is limited by the conditions of the reservation; of course, the reservation must be admissible, or compatible with the object and purpose of the treaty.

III. *Theory of continuity with right of denunciation*

The third theory is much simpler. It is based on the idea that there is general succession of the new State and its government organs to the former sovereign Power and its government. The object of this approach is to prevent the new State from being left without any treaty relations with third States, which might, in certain circumstances, place it in an illegal position. It is considered, however, that the new State is not thereby left without any remedy, since that State and the other contracting party can denounce treaties they do not wish to maintain in force, acting under the provisions of the inherited treaties and within the normal time-limits for denunciation. Two periods can be distinguished in regard to a treaty which is denounced: the first runs from the creation of the new State to the expiry of the period of notice for denunciation, when denunciation begins to take effect; the second starts when denunciation takes effect. During the first period, the treaty is presumed to be in force and nothing can change that presumption. Denunciation does not prove that the treaty is not in force; it rather confirms that it is in force, but will cease to be so when denunciation takes effect. In the second period, the treaty ceases to have effect, but this cessation is *ex nunc*, i.e. from the time when the denunciation became effective, and not *ex tunc*, from the time when the new State was created. The opposite view, namely that denunciation takes effect *ex tunc*, is a return to the doctrine of option, but of option in a negative sense, by which some new States have tried to explain the effect of their denunciation of inherited treaties. This would mean only one thing: that the new State has an option to set aside some of the existing treaties. The writer does not believe that this is the case, but considers that according to this theory all existing treaties remain in force. This view has met with a very serious well-founded objection, namely that it is not consistent with the creation of the new State resulting from the exercise of the right of self-determination. Even assuming that the new State wishes to maintain treaty relations with the former partners of the Power which formerly exercised sovereignty over its territory, there is no doubt that there are provisions in the old treaties, and even whole treaties, which are not consistent with the political position and status of a new independent State. This is also true of certain so-called statutory provisions governing the territory and of certain so-called " real " or local provisions. Can the former partner demand, after the creation of the new independent State, that that State observe provisions which are at variance with its status as an independent State? The writer considers justified and legally well-founded the attitude of certain new States which, while recognizing the existing treaty relationship in principle, refuse in exceptional cases to consider themselves bound by treaties which are at variance with general contractual obligations, and he believes that they are entitled to refuse to recognize the validity of such treaty provisions. These provisions have lapsed, that is to say they are no longer in accord with international relations and they cease to be valid without it being necessary to invoke the *rebus sic stantibus* clause. From this point of view, there are still certain situations that are not clear, and although they are being gradually clarified, it is not without difficulty or resistance from third States which benefit by treaty provisions of this kind. However, this process of settlement and clarification is tending in practice towards adaptation of the treaty relationship to the principles of the United Nations and respect for the independence of the new State, i.e. in the direction of the newly created situation, provided, of course, that the Government of the new State is resolute and capable of defending the interests of its people.

IV. *Right to a period of reflection*

The fourth theory is only a modification of the third. It is the theory put forward by the Government of the Republic of Tanganyika in a general declaration communicated to the Secretary-General of the United Nations. In that declaration, Tanganyika recognizes the validity of all the treaty obligations accepted for its territory by the former sovereign Power, but limits the duration of its own resultant obligations to the next two years. In practice, this is an invitation to the other contracting parties to settle their treaty relations bilaterally with the Government of Tanganyika within two years, unless they wish the declaration to have, with respect to them, the effect of a general denunciation of all the treaties in question. This declaration also constitutes a communication from the Government of Tanganyika signifying that, after two years, it will exercise an option regarding the multilateral treaties it wishes to maintain in force. This theory of the " period of reflection " (as the writer called it during a discussion in the International Law Commission) is open to criticism on several points. Is Tanganyika not reserving the right to consider all the treaties as being extended for two years from the date of its declaration, without authorizing its treaty partners to make necessary and desired denunciations before the expiry of that period? The writer does not believe that Tanganyika can impose such an alternative or force the other contracting parties to maintain treaty relations with it against their will. The question then arises whether Tanganyika, by this declaration, has taken over obligations deriving from treaties which must be regarded as incompatible with its new status. In the writer's opinion, this declaration does not validate so-called " absolving treaties ", since they are invalid not by reason of the will of the contracting parties, but by reason of objective circumstances. Lastly, it has been openly asked whether, in the case of multilateral treaties, there can be provisional accession or provisional maintenance in force, and even if that is possible, what will

become of treaties in respect of which Tanganyika, within two years of its declaration, neither confirms that it will remain a contracting party, nor notifies its denunciation in order to render them ineffective with regard to itself. It has also been asked whether Tanganyika is entitled to denounce these treaties within the prescribed time-limit for denunciation, with effect before two years have elapsed since the date of the declaration, thus reducing the period during which it has undertaken to observe the contractual obligations taken over.

V. *Other possibilities*

There can be no doubt that other theories could be developed regarding the fate of the treaties in force when a new State is created. The International Law Commission has heard statements explaining the difficulties of new States in regard to the fate of existing treaties and their doubts about applying the legal rules on the succession of States where new States have been created within the framework of the legal system instituted by the United Nations Charter and the general lines of United Nations policy on the liquidation of colonial regimes. Their views have not been explained in detail, but it has been made clear that many rules of so-called traditional law are incompatible with present conditions and that it is necessary, by codifying the rules of international law on the succession of States and Governments without delay, to settle cases of conflict between the aspiration of new States and the claims of the treaty partners of the former sovereign Powers that the new States must at all costs respect the treaty obligations existing when they gained their independence, regardless of how the treaty provisions affect the newly created state of affairs and the exercise of the right of self-determination.

General conclusions

It is agreed that this is one of the most immediate problems of public international law. The writer is deeply convinced that it must be solved by combining the rules of traditional international law with rules based on modern concepts. Rules must therefore be formulated in a spirit of progressive development of international law, which will certainly make it necessary to revise some old ideas and work towards other institutions of contemporary international law and international practice, which require that purely legal arguments be brought into line not only with the present tendency to create new States, but also with the tendency to eliminate all relics of colonialism. In other words, the whole approach must be in the spirit of the policy of decolonization, but a policy of decolonization which spares the new States the difficulties of a dearly-bought emancipation.

In this connexion, one of the difficulties of the new States arises from the fact that at the time of their emancipation, most of them concluded a series of treaties with the former sovereign Power, on whose attitude the date on which emancipation would take effect often depended. These treaties are partly the price of freedom paid to the former master, but they also contain provisions benefiting third parties, i.e. provisions relating to the obligations of the new State towards the treaty partners of the former sovereign Power. Both kinds of provision are designed to safeguard established rights, or their continued existence under the future regime of independence of the emancipated territory. These provisions are not only legal or economic in character; in some cases, they are political or even military (compulsory accession to certain treaties or political groups, federation of States, military alliances, bases for armed forces). The question seriously arises whether these treaties have any binding force for the newly created States. Admittedly, they were concluded as a result of political negotiations, though some of them were stipulated before the proclamation of independence and signed after it (but generally before the withdrawal of the former master's troops); yet it is difficult to consider them as representing freely accepted international treaty obligations, or their signatories as the genuine representatives of the new sovereign State and its people. (In several cases experience has confirmed that these so-called transitional governments were organs of the former masters, or represented a group of genuinely national forces chosen by the former masters to return the power to them, thus uniting their interests with those of the new ruling group.) Disputes concerning the binding force of this kind of treaty arise after independence has been established for some time, when the new regime has grown stronger and the administration of the State has passed into the hands of genuine representatives of the people. In practice, these disputes often arise when the exhilaration of independence is over and people begin to consider the price paid for it and the demands by which the beneficiaries of the treaties seek to continue a disguised form of colonial exploitation and influence. The emancipated State then invokes the incompatibility of the treaty provisions with the principles of the United Nations Charter governing relations between States and with the position of a sovereign State enjoying equality of rights. The beneficiaries of the provisions, on the other hand, claim that each of these treaties was freely negotiated without any physical pressure, and is not a treaty inherited from the former sovereign Power, but a new treaty concluded with the representatives of the independent State. Consequently, they demand full application of the treaty in accordance with the principle *pacta sunt servanda*. The writer does not consider that the fate of these treaties must be decided in an absolutely uniform manner and that they must be declared invalid *a priori*. He believes that they belong to a special class, and must be regarded as voidable treaties — that the whole of such treaties, or some of their provisions, can be attacked if it is shown that they are incompatible with the status of the new independent State and that they represent the continuation of a special, inequitable influence for the benefit of the former sovereign Power or of third States which have abused their power and influence. In the writer's opinion, these treaties should be regarded as being suspended by reason of an objection by the State threatened, and the question of their validity should be decided by the International Court of Justice or a political organ of the United Nations. Such treaties form a special class which should not be overlooked.

This paper has only one purpose: to show that the creation of new States by virtue of the right of self-determination has raised a new problem of international law, which consists in examining, in the light of United Nations principles, the fate of international treaties applying to a liberated territory up to the time of its emancipation, and effectively placing the new State in a position of complete political, economic and social independence *vis-à-vis* the former colonial Power or trusteeship authority.

WORKING PAPER

Submitted by Mr. Manfred LACHS [30]

1. By a decision taken at its fourteenth session (A/5209, para. 72) the International Law Commission requested the members of the Sub-Committee to prepare individual memoranda which were meant to facilitate the discussion at its meeting to be held between 17 and 25 January 1963.

2. These memoranda were intended to deal " essentially with the scope of and approach to the subject " of succession of States and Governments.

3. The present writer was entrusted with the task of preparing " a working paper containing a summary of the views expressed in the individual reports ".

He received memoranda from the following members of the

[30] Originally circulated as mimeographed document A/CN. 4/SC.2/WP.7.

Sub-Committee: Mr. Milan Bartos, Mr. Erik Castrén, Mr. T. C. Elias, Mr. Shabtai Rosenne and Mr. Abdul H. Tabibi.

The present working paper constitutes therefore an attempt to summarize the views presented in these five papers.

I. *Preliminary remarks*

There seems to be common agreement among the authors of the memoranda as to the need of paying special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. It is therefore suggested that the problems concerning new States be given special treatment and that the whole topic be viewed in the light of contemporary needs. Where differences do arise they concern issues of proportion and emphasis. There seems to be little doubt that this chapter has a special bearing on the approach to the whole problem as reflected in the memoranda.

II. *The scope of the subject*

1. *Succession of States and Governments: one or two topics? Question of priority*

The problem was touched upon during the preliminary discussion in the Commission and is further developed in the papers submitted.

The following views should be recorded:

A. *In favour of dividing the two topics and of postponing the treatment of that concerning the succession of governments*

Reasons:

(*a*) Some of the problems involved in the latter are clear (for example, identity and personality of the State), while some others are too complicated (for instance, insurgent Governments);

(*b*) The latter topic is linked with the issues of responsibility and recognition which will be dealt with separately;

(*c*) The problem is not one of primary importance.

B. *In favour of treating both issues as a single topic*

Reasons:

(*a*) The General Assembly regarded both as constituting one topic, or " at least wished the International Law Commission to initiate work on a single topic which would combine relevant elements of the two traditional headings of succession ";

(*b*) In recent developments, particularly the creation of so many independent States, the technical distinction between succession of States and succession of Governments " may be taken to be problematical ".

C. *In favour of giving priority to the topic of succession of States and studying succession of Governments in connexion with it*

This procedure is suggested by way of a compromise and concession to those who claim that the two topics have a close connexion with each other.

D. *In favour of concentrating on issues of succession of States as the result of the application of the principle of self-determination*

This proposal is supported by the claim that a great number of new and hitherto unknown problems have been posed by the creation of new States by virtue of the principle of self-determination contained in the Charter of the United Nations, and that they require urgent solution.

2. *Delimitation of the topic*

A. *Relationship to other subjects on the agenda of the International Law Commission*

(*a*) *Law of treaties*

It is pointed out that succession in respect of treaties could be dealt with as part of the report on the law of treaties (the Special Rapporteur on the law of treaties has not expressed any definite views on the subject). It seems, however, that the common view is in favour of including it in the topic of succession. At the same time it is indicated that the approach of the International Law Commission to the law of treaties would facilitate the treatment of the subject (mention is made *inter alia* of articles 8 and 9 of the 1962 draft). But it is also suggested that the classification of treaties, which the International Law Commission so far has been unwilling to accept, becomes of importance.

(*b*) *Responsibility*

The fact that this subject is also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

(*c*) *Co-ordination of the work of the three Special Rapporteurs*

In view of the above it is recommended that the three Special Rapporteurs (on the law of treaties, on responsibility and on succession) keep in close touch and co-ordinate their work.

B. *Exclusion of certain issues*

Attention is drawn to the need to eliminate a series of subjects, thus leaving them outside the scope of the study to be undertaken. Particular reference is made to those which are covered by Article 2, paragraph 7, of the Charter of the United Nations. The following subjects are mentioned, among others:

(*a*) the effect of the creation of a new State on the domestic legal system itself;

(*b*) question concerning rights and duties based on private or public law, in the relationship between individuals, formerly subjects of the metropolitan Power, and the new Government;

(*c*) contracts, torts, internal debts, tax liabilities and franchise concerning persons who have become nationals of the new State.

3. *Division of the topic*

A. *Broad outline*

In a broad outline the following headings are suggested:

(*a*) Succession in respect of treaties;

(*b*) Succession in respect of membership of international organizations;

(*c*) Succession in respect of rights and duties resulting from other sources than treaties (concerning individuals);

(*d*) Succession between international organizations;

(*e*) Adjudicative procedures for the settlement of disputes.

B. *Detailed division of the subject*

Several criteria are offered, on the whole those traditionally used:

(*a*) by the origin of succession:
disappearance of the State;
birth of a new State;
territorial changes of existing States;

(*b*) by the source of rights and obligations:
treaties;
property;
contracts in general;
concessionary rights;
servitudes;

public law (administrative and nationality problems);
torts;

(*c*) by territorial effects:

within the territory of the State concerned;

extra-territorial;

(*d*) *ratione personae:*

rights and obligations between the States directly concerned;

rights and obligations towards other States;

rights and obligations of nationals of the former metropolitan States;

rights and obligations of nationals of third States.

III. *The approach to the subject*

1. *The point of departure — evaluation of the present state of the law on succession*

This is clearly stated in one of the memoranda:

" there are no general agreements on State succession, and even the international customary law on it is defective ".

2. *The objective*

Elaboration of detailed replies to the question: to what extent is the successor State bound by the obligations of its predecessor, and to what extent is it to benefit from its rights?

A very general indication of how this is to be achieved can be found in the formula: " that it should be limited and precise and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties ".

3. *Guiding criteria*

These are of the essence, as it is upon them that the direction of the future work depends. The following are mentioned:

(*a*) Primary consideration should be given to the principle of self-determination and the interests of the newly-born States.

(*b*) The principle of respect for economic rights, private or vested rights, and its effect on succession. Within a more general consideration: the relationship between change and stability.

(*c*) The place to be given to the time-factor: how long do the effects of succession operate after the acquisition of independence? How long do they limit the freedom of action of the new State?

4. *Codification or progressive development*

There seems to be common agreement that some of the old principles should be revised in the light of recent developments. In this connexion several suggestions are made: among them an empirical and flexible approach is advocated " as a rational basis for the continued integrity of international law and the facts of international life ".

5. *Treaties*

Special attention is paid to succession problems resulting from treaties.

A. *Universal and singular succession*

Many objections are raised against universal succession for both theoretical and practical reasons. It is pointed out, with reference to recent practice, that many of the treaties in question are even unknown to the new countries, some of them are labelled as " models of evasive draftsmanship ", while in other cases extremely complicated and confused situations have been created (the case of the Congo and Katanga is offered as illustration).

The negation of treaty succession on the one hand releases the new State from burdensome obligations, but at the same time deprives it of many rights from which it might have wished to benefit. On the other hand, it is argued that the maintenance of many of the territorial treaties may amount to depriving the new States of their rights of self-determination, including the right to dispose freely of their natural resources.

Some of the memoranda raise important issues of principle and detail, and offer definite suggestions of solutions.

B. *Type of treaties*

(*a*) treaties concluded by the old sovereign on behalf of all the territories under his jurisdiction or applied to the territory in question by virtue of the colonial clause,

(*b*) treaties concluded by the old sovereign acting on behalf of the territory in question as its trustee, proctector etc.

(*c*) treaties concluded by the local administration of the territory which has achieved independence, but acting under the auspices of the metropolitan power.

The memorandum in question rejects any differentiation between these types of treaties, suggesting that all of them have one thing in common: the fact that they were concluded by the former sovereign who was an outsider.

(*d*) It assimilates to them also a fourth type of treaty — treaties between the old sovereign and the new State concluded on the eve of the latter's acceding to independence or immediately after it (they deal mainly with economic, political and military questions).

In this connexion four approaches are mentioned:

(*a*) the theory of the *tabula rasa* — the new State is not bound by any treaty and inherits no contractual obligation,

(*b*) the theory of the right of option concerning the validity of the treaties in question (an analogy is drawn with the provisions of the Peace Treaties of 1946, and the United Nations practice with regard to multilateral treaties),

(*c*) the theory of continuation with the right of denunciation,

(*d*) the theory of the right for a time limit for reflection (the recent case of Tanganyika is quoted in this connexion).

Positive and negative elements of each of them are recorded.

C. *The effect of the* prima facie *assumption of the treaty by the new States*

The question is raised of the extent to which the usual blanket formula accepted by the new State binds it with regard to agreements of the former Sovereign.

These are some of the more important problems submitted in the memoranda.

6. *The form of the final work of the Commission on the subject*

The memoranda contain in this respect some tentative proposals which are worth recording.

A. *Multilateral treaty*

The advantage of adopting this solution is stressed in view of its greater practical importance and the facilities it offers in bringing the new States into the confines of international law.

B. *Several treaties* providing for alternative texts or containing recommendations only. Suggested as an alternative in view of the difficulties *one multilateral treaty* may present, namely the political character of the issues involved, and the lack of established practice.

C. *Set of principles or model Rules as a guide for States, to be approved by the General Assembly.*

This solution is backed by the following considerations:

(*a*) most of the problems are of a bilateral character and " not altogether suitable for regulation by means of a general multilateral convention ";

(*b*) the number of interested States is limited: about 50 successor States on the one hand, and a few former metropolitan States on the other;

(*c*) practical problems are being settled by bilateral agreements, thus reducing codification to a series of residual rules.

IV. *Miscellanea*

The memoranda contain some other suggestions and recommendations. Those which require mention concern the future work of the International Law Commission in this field:

A. The Sub-Committee should continue even after the Special Rapporteur is selected;

B. Apart from the documents already submitted the Secretariat should be requested to prepare:

(*a*) an analytical restatement of the material which will be forthcoming from replies of Governments;

(*b*) a working paper covering the practice of specialized agencies and other international organizations in the field of succession.