Document:-

A/CN.4/SR.1067

Summary record of the 1067th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1970, vol. I

45. His first suggestion was that the Commission should, at some stage, consider the adoption of internal rules of procedure. Experience had shown that it was absolutely essential to have, for instance, a rule on the closure of discussions. He was sure that rules of procedure would greatly contribute to the efficiency of the Commission's work.

46. Secondly, with regard to the future programme of work, he suggested the inclusion of a new topic which had attracted much attention from writers and was a matter of concern to governments, namely, the forcible diversion of aircraft. There was an international instrument already in existence on the subject—the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft[5]—but it had proved ineffective. The problem of the forcible diversion of aircraft had been a matter of concern in America for some time, and it was now arising in Europe. The Commission should consider that problem, since it was causing serious disturbance both in the domestic life of countries and in international affairs. The situation could only be remedied by the adoption of a universal convention and the Commission should therefore include the topic in its long-term programme of work.

47. Mr. CASTAÑEDA said that the Commission should devote a whole meeting to a thorough discussion of the interesting questions which had been raised during the present debate.

48. Mr. TABIBI said he supported that suggestion. He also supported Mr. Ruda's suggestion that the booklet "The Work of the International Law Commission" should be brought up to date and reissued. It should include not only the Vienna Convention on the Law of Treaties, but also the important resolutions and declarations adopted by the Conference on the Law of Treaties.

49. The idea of showing what parts of international law had been codified by the Commission and what gaps remained should be examined by a small committee of members of the Commission.

50. In connexion with the celebration of the twenty-fifth anniversary of the United Nations, he believed that the Commission should take into account the views of the whole membership of the United Nations and also those of regional bodies, which had taken a special interest in certain topics, such as that of international rivers.

51. The CHAIRMAN said he noted that there had been general acceptance of the suggestion for bringing up to date and reissuing the booklet "The Work of the International Law Commission". There had also been general acceptance of the suggestion put forward by the Legal Counsel and it had been agreed that the Secretariat should prepare a paper on topics for inclusion in the Commission's long-term programme of work.

52. The Commission would continue its discussion on the organization of future work at its 1069th meeting.

53. Mr. STAVROPOULOS (Legal Counsel) said that the question of reissuing the Secretariat "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" and republishing the booklet "The Work of the International Law Commission" had financial implications. Now that it had taken a decision on the matter, the Commission should therefore include an appropriate passage in its report.

54. With regard to the paper to be prepared by the Secretariat on the future programme of work, members would be receiving individual communications from the Secretariat inviting them to state their views.

The meeting rose at 1.15 p.m.

1067th MEETING

Wednesday, 10 June 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and governments in respect of treaties

(A/CN.4/149 and Add.1; A/CN.4/150, 151, 157, 200 and Add.1 and 2, 210, 214 and Add.1 and 2, 224 and Add.1, 225 and 232; ST/LEG/7; ST/LEG/SER.B/14)

[Item 3 (*a*) of the agenda]

1. The CHAIRMAN invited the Commission to examine the topic of succession of States and governments in respect of treaties (item 3 (*a*) of the agenda).

2. He explained that the discussion which would follow the Special Rapporteur's introduction of his second (A/CN.4/214 and Add.1 and 2) and third (A/CN.4/224 and Add.1) reports would not lead to the usual referral of draft articles to the Drafting Committee. Its purpose would simply be to show the Special Rapporteur the reaction of members to the articles in his two reports and to the problems raised by those articles. He expected the Special Rapporteur, in his opening statement, to focus attention on the essential principles and methods of approach on which he would like to have members' views. At the present stage the discussion need not go into points of detail or drafting.

3. Sir Humphrey WALDOCK (Special Rapporteur) said that the Commission had only a short time in which to discuss a large subject.

[5] See *The American Journal of International Law, 1964*, vol. 58, p. 566.

4. He had so far produced three reports on succession in respect of treaties. The first (A/CN.4/202) had been of a preliminary character and had been discussed by the Commission in a preliminary way. In drafting his later reports, he had taken into account the points raised during that discussion.[1]

5. His second (A/CN.4/214 and Add.1 and 2) and third (A/CN.4/224 and Add.1) reports, which he was now introducing, must be treated as a single report which took the Commission only a certain distance into the topic. They covered certain matters of fundamental significance and dealt fairly exhaustively with multilateral treaties. In his fourth report, which he would submit at the Commission's next session, he proposed to deal with bilateral treaties, with certain particular categories of treaty and with certain particular forms of succession.

6. The Commission had also before it a number of valuable Secretariat papers. Apart from those mentioned in his second report (A/CN.4/214, para. 12), he would draw attention to the more recent studies, such as that on the ITU practice (A/CN.4/225).

7. He had also found very useful the Secretariat "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7). In using that document, however, he had noticed that entries needed further explanation if their implications in regard to succession were to be fully understood, and he had obtained helpful additional information direct from the Secretariat.

8. Not much information had so far been secured on bilateral treaties, but he hoped that more would become available before he submitted proposals on those treaties. A good deal of information on succession to bilateral treaties was contained in the well-known book by O'Connell[2] and in the volume published by the International Law Association.[3] There was also some practice on succession in regard to bilateral treaties in the Secretariat publication "Materials on succession of States" (ST/LEG/SER.B/14). The Secretariat was at present engaged in studies on the practice relating to bilateral treaties; a study on extradition treaties had been completed and other studies, on such matters as transport services agreements, were in course of preparation.

9. It would be noted that there was no wealth of reference to legal literature in his reports. He had, of course, drawn inspiration from the great writers of the past but had felt that, with regard to the topic of succession in respect of treaties, it was his duty to look mainly to State practice, and particularly the modern State practice. The more one studied the subject the more one realized that legal writers started from a certain doctrinal hypothesis which was not always supported by the practice; for that reason, he had based his work essentially on the practice of States and on the very pertinent practice of depositaries in their dealings with States.

10. He had taken as the basis of his draft the thesis that in the context of the present topic succession was a particular problem in the framework of the general law of treaties. That approach was founded on a close examination of State practice, which provided no convincing evidence of a general doctrine of succession on the basis of which the various problems of succession relating to treaties should find their solution. What happened was that there were cases of succession in the form of changes of sovereignty, and the problem which arose was that of determining the impact of the occurrence of that succession of States in regard to existing treaties affecting the territory. The hypothesis in every case was that, at the date of succession, there existed a treaty—governed by the general law of treaties—which was then binding on the predecessor State with respect to its territory or in regard to which the predecessor State had in some degree expressed its consent on behalf of the territory.

11. The general law of treaties thus appeared as an integral part of the foundations of the law relating to succession in respect of treaties. In the past, there had been the difficulty that there was no well-accredited statement of the general law of treaties. For example, the rules on reservations had been far from settled, and since the question would also arise in the context of succession in respect of reservations to treaties, reliance on the rules accepted in the Vienna Convention on the Law of Treaties was really essential.

12. Since its adoption in 1969, however, the Vienna Convention did provide a general frame of reference in the matter, and his present draft therefore assumed that the general law of treaties was that expressed in the Vienna Convention. He recognized that some members might, on general grounds, prefer not to formulate the provisions of the present draft by cross-reference to those of another Convention. But in certain cases, for drafting purposes, he had found it convenient to refer to articles of the Vienna Convention when it was necessary to refer to the existing law of treaties. He suggested that that use of cross-reference as a drafting technique could be reviewed by the Commission at a later stage.

13. He had assumed that the scope of the work would, for the time being, be limited to inter-State treaties. The problem of succession could, of course, arise for treaties concluded between States and international organizations. For example, it had been a common occurrence for a country, on the eve of independence, to receive assistance from the International Bank for Reconstruction and Development, so that the problem of succession arose with regard to the relevant agreements with the Bank. For the purposes of the present work, however, it was convenient to concentrate on succession to inter-State agreements and leave succession to other types of agreement until a later stage of codification, after the general law of succession in respect of treaties had been determined.

14. It would also have to be assumed that whatever rules were drafted in the present context would be subject to any relevant rules in force in international organizations. That assumption would cover such special cases as the practice of succession with respect to international labour

[1] See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 130-146.

[2] D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 1967.

[3] *The Effect of Independence on Treaties*, London, 1965.

conventions which had emerged from the ILO practice regarding admission to membership of that Organization. In due course the necessary drafts would be prepared on both those points.

15. With regard to the general scheme of his draft, it would begin with a Part I containing general provisions. Those provisions would include the safeguard relating to the rules of international organizations and the rule on the scope of the draft. Later discussion might well reveal the need for some additional general provisions. For example, he had not yet any definite view on the question whether a general provision should be included on the criteria of the transmissibility of treaties. He had the impression that once the rules were laid down satisfactorily regarding the circumstances and the conditions under which a treaty could be continued by a successor State, the rules governing transmissibility would naturally emerge without any need for a separate provision on the subject.

16. Part II of the draft was entitled "New States". He had chosen that somewhat artificial term in order to show that the articles in that part did not deal with special cases of succession, such as federal States, unions of States and protected States. He thought it would be better for the Commission to agree first on a substantive rule applicable to the separation of a territory, including a colony, from a State in its purest form. Once that basic rule was settled, consideration could be given to any extra factors that might be introduced by particular forms of succession. It might be found that there was no substantial difference between some of those special cases and the case of new States.

17. The articles in Part II, in his third report, all dealt with multilateral treaties. In his fourth report, to be submitted at the Commission's next session, he would include a section on bilateral treaties which would cover the problem of real or dispositive treaties and the question of boundaries.

18. He would also include a Part III dealing with special forms of succession. One section would cover federal States and federal unions; others would deal with protected States, trusteeships and mandates. At the same time, he would consider the question whether colonies should be given separate treatment; and he noted in that connexion the recent declaration by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States that the territory of a colony had a status separate and distinct from the territory of the State administering it.[4]

19. In the same report he also proposed to examine some special problems. One would be that of treaties concluded very shortly before independence, and another would be that of treaties of a long-term nature which established special territorial rights or a special régime. In the light of that examination he would decide whether to propose special provisions on those problems or not.

20. Succession to bilateral treaties was a very important part of the present subject, and for purposes of codification it suffered from one disadvantage in comparison with multilateral treaties. The absence of a depositary meant that the practice was less formal and looser, so that much depended on interpreting the attitudes of the States concerned. The machinery of the depositary, on the other hand, imposed a certain discipline and depositary practice provided valuable guidance for the identification of rules relating to succession to multilateral treaties. The position was different in the case of bilateral treaties, where it was more difficult to reduce the law relating to them to clear-cut rules.

21. Unless a fuller examination of the practice—based on the further evidence to be made available by the Secretariat—were to alter his present views, he expected to base the rules relating to bilateral treaties on mutual consent; that was to say, to treat the matter as one of novation and of express or tacit agreement to the continuance of the treaty.

22. The concept of succession which emerged from his work so far was characterized in the first place by the fact of the replacement of one State by another in the sovereignty over a territory or in the competence to conclude treaties; and secondly, by a distinction between the fact of a succession and the transmission of treaty rights and obligations on its occurrence. The transmission of rights and obligations was a question distinct from the fact of succession of States, and had to be decided in the light of the practice.

23. A further element in the concept was that a consent to be bound, or a signature, given by the predecessor State in relation to a territory established a certain legal nexus between that territory and the treaty. To that legal nexus, upon the occurrence of a succession, certain legal incidents attached. One such incident was that, subject to certain exceptions, in the case of multilateral treaties the legal nexus established a customary right for the successor State to notify its acceptance of the treaty and to consider itself a party to it. Practice, however, did not support the view that there existed any obligation in the matter, with certain exceptions such as dispositive treaties.

24. Many writers held the belief that customary law recognized certain categories of automatic transmission of obligations to successor States. He was satisfied, however, that the general rule was that there was no obligation. That conclusion could clearly be drawn from the practice relating to multilateral treaties.

25. As to bilateral treaties, the legal nexus implied, both for the successor State and for the third State concerned, a faculty to establish the continued application of the treaty bilaterally between those two States by mutual consent. The legal nexus created a legally recognized process for bringing about the novation of the treaty as between the successor State and the third State. The general rule in the matter was that of mutual consent.

26. It might indeed be argued that the position was the same in the case of multilateral treaties; in other words that the new State could bring about the continuance of the application of a multilateral treaty by notification to the depositary, who in turn notified the other parties, and only if no objection were then made would the notifi-

[4] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, p. 69.

cation establish succession. That approach would be based on the idea that there was no succession to a multilateral treaty without the consent of the other parties. He believed such an approach to be unrealistic, unduly conservative and unprogressive. There was no evidence from the practice of States and of depositaries to show that the consent of the other parties to the multilateral treaty was required. The right of a successor State to notify its succession and to have itself considered a party to the treaty as of right had never been questioned by the other parties.

27. His conclusion differed from that reached by the International Law Association in the course of its extensive study of the "Succession of New States to the Treaties and certain other Obligations of their Predecessors", to which he had referred in his second report (A/CN.4/214, paras. 13 to 18). In his draft, he had taken the position that there was no legal presumption of continuity. Continuity as a policy in treaty relations was desirable and, as a progressive policy, it should be encouraged; but there was no evidence in practice of the existence in law of any obligation of continuity or of any legal presumption in favour of continuity, and the principle of self-determination militated against such a presumption.

28. It was true that in one article of his draft—article 4 (A/CN.4/214/Add.2) entitled "Unilateral declaration by a successor State"—there was to be found an element of continuity. Such a unilateral declaration was designed to obtain a *provisional* application of the treaty in order to give time for reflexion. His proposed article 4, to that extent and in that context, took account of the desirability of continuity.

29. It was his impression that to speak of "continuity" begged the question. Writers who spoke of continuity as of an obligation did not make a sufficient distinction between the rights and the obligations of the successor State. There was a world of difference between being under an *obligation* to succeed to a treaty and having a certain *right* to notify succession to it, or to proceed to novate it by mutual consent.

30. If the Commission were to endorse his approach to succession in respect of treaties, that would not necessarily mean that the same approach ought to be adopted for the topic of succession in respect of matters other than treaties. Of course, if one were to start from a general doctrinal theory of succession, there would be a tendency to treat the two situations in the same manner. But if one approached the problem from the point of view of practice, it was clear that there was a material difference between succession in respect of treaties and succession in respect of other matters, such as public property.

31. In the case of succession in respect of treaties, there existed an instrument which affected a third State and which was the subject-matter of the succession. With regard to questions such as public debts and acquired rights, on the other hand, there might be a third State which was interested in so far as its nationals might be affected, but then the involvement of the third party was indirect. He himself had an open mind regarding succession in matters other than treaties, but he believed it would be wrong to approach the whole subject of State succession on the assumption that there existed a fundamental notion which was the key to the whole problem.

32. In the discussion which was to follow his introduction, it would be most useful if he could be given some idea whether the general substance of his report was considered by members as a sound basis on which to proceed with the study of the topic. As the Chairman had pointed out, it would not be helpful at the present stage to go into drafting problems.

33. He would like to know, in particular, whether the following basic draft provisions seemed to members to be on the right lines: first, the definition of the notion of succession in paragraph 1 (*a*) of article 1 (Use of terms) (A/CN.4/214); second, the treatment of devolution agreements in article 3 (Agreements for the devolution of treaty obligations or rights upon a succession) (A/CN.4/214/Add.1); third, the handling of unilateral declarations in article 4 (Unilateral declaration by a successor State) (A/CN.4/214/Add.2); fourth, the general rule, which was made subject to possible exceptions, that there was no obligation of succession on the part of the successor State, in article 6 (General rule regarding a new State's obligations in respect of its predecessor's treaties) (A/CN.4/224); fifth, the right expressed in article 7 (Right of a new State to notify its succession in respect of multilateral treaties), which, he emphasized, related to multilateral treaties only; and sixth, the rule in article 8 (Multilateral treaties not yet in force), which also related only to multilateral treaties.

34. Mr. YASSEEN asked whether, in order to enable the discussion to proceed in the way the Special Rapporteur desired, the Secretariat could draw up a list of the points to be given special consideration.

35. Mr. CASTRÉN asked whether the Special Rapporteur had intentionally refrained from mentioning article 5 as one of the articles which he regarded as important and on which he wished discussion to take place.

36. He would also like to know whether each speaker should deal with general points and individual articles in the same intervention or whether the Commission would have a short general debate before examining the articles. He was not in favour of the first procedure, which might lead to confusion.

37. Sir Humphrey WALDOCK (Special Rapporteur) replied that he did not regard article 5 (Treaties providing for the participation of new States) as being of a fundamental character; its operation depended on the intention of the parties. He therefore suggested that article 5 be left aside for the time being.

38. With regard to the method to be followed in the present discussion, he thought it would be practically impossible to discuss the draft article by article. At the same time, members knew his aversion to general debates, which tended to be unproductive for a Special Rapporteur. He therefore suggested that the discussion should cover specific points on which members agreed

or disagreed with respect to the basic articles he had mentioned.

39. The CHAIRMAN suggested that the Secretariat prepare, in consultation with the Special Rapporteur, an informal paper setting out the basic issues. The Commission could then take up those issues one by one.

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

40. The CHAIRMAN said that the five main points on which the Commission's comments were requested were, first, the use of the term "succession" (article 1); second, devolution agreements (article 3); third, unilateral declarations (article 4); fourth, the general rule that there was no obligation on the successor State to assume its predecessor's treaties (article 6); and fifth, the right to notify succession to multilateral treaties in general (articles 7 and 8).

41. Mr. EUSTATHIADES said that the Special Rapporteur had chosen the best possible method of presenting the topic. The Commission should bear in mind the indications he had given, in his brilliant statement, of the future course of his work, in particular on bilateral treaties and treaties relating to independence, so as to avoid premature discussion. For that reason, while he could say that he approved of the principle of article 2, he would not dwell on the exceptions it would be necessary to make in the case of treaties relating to the transferred territory.

42. The Special Rapporteur's preparatory work had been excellent and the systematic method he had proposed was the only one that would enable the Commission to see whether, and if so when, it could lay down guiding principles. The best proof of the excellence of the proposed method was the position given to article 6, which laid down the indisputable principle of non-continuity. There might have been a temptation to place that principle at the beginning of the draft articles, but it was in fact more appropriate to place it where it was for the time being. And conversely, the Special Rapporteur had rightly refrained from stating a contrary principle—that of continuity—which, however desirable it might be as a progressive solution, could not be taken as establishing a presumption that the successor State was bound by the treaties of its predecessor.

43. The method proposed by the Special Rapporteur had the advantage of being based strictly on the facts of international practice, including the most recent practice, so that the Commission could have the full range of possible solutions before it, and of dealing with different hypothetical cases as a basis for drafting concrete provisions.

44. In dealing with new States, faced with a practice that lacked uniformity, the Special Rapporteur had succeeded in bringing out those solutions which threw open wide for them the doors of international treaty law. He (Mr. Eustathiades) approved of the bases of articles 7 and 8, though some redrafting might be necessary later.

45. The definition of "succession" given in article 1 might give rise to some doubts at first sight, because it extended to competence to conclude treaties with respect to territory, but it was quite clear that the purpose of the provision was to cover cases which were not cases of substitution of sovereignty. It was also clear that it was impossible not to make substitution of sovereignty the main criterion of the definition, because that was the starting point, whereas substitution in the competence to conclude treaties, independently of substitution of sovereignty, was the exception. Consequently, if all cases of succession were to be provided for, and if the purposes of the draft were to be met, that starting point must be retained, on the understanding that the definition could subsequently be supplemented or abridged according to the final content of the complete draft.

46. Article 3 was another example of the excellence of the method proposed by the Special Rapporteur; for in dealing with the question of devolution agreements, the crux of the problem, which was the position in regard to third States, had to be tackled at the outset.

47. He approved of the Special Rapporteur's method of work, which was not based on preconceived ideas and allowed full latitude for the subsequent statement of the general ideas and principles which would emerge from the debates and from examination of the specific provisions, but which it would be premature to consider at present.

48. Mr. CASTRÉN said he wished to congratulate the Special Rapporteur on the twelve excellent articles, with their detailed and persuasive commentaries, which he had submitted to the Commission in his second and third reports on succession in respect of treaties.

49. The two reports began with a clear and useful introduction which showed that the Special Rapporteur had rightly given special attention to the recent studies of the International Law Association on the same problems, while maintaining an independent attitude. He (Mr. Castrén) largely shared the opinions expressed by the Special Rapporteur in paragraphs 19, 20 and 21 of his second report with regard to decolonization and the position of new States.

50. On the question raised at the end of paragraph 23, namely, whether the traditional principle of self-determination should be retained as the underlying norm, in other words, whether the successor State had absolute discretion to regard itself as not being bound by the treaties of the predecessor State, or whether a certain presumption should be admitted in favour of the transmission of those treaties, as proposed by the International Law Association, his view was that everything depended on the nature of the treaty and other circumstances of the case, but that the presumption would be in favour of the absolute discretion of the successor State; that seemed to accord with the practice of several States and with the practice followed after the Second World War at the time of decolonization.

51. The most interesting part of the introduction to the third report was paragraph 5, where the Special Rapporteur developed the idea that the topic under study had to be oriented closely to that of the general law of treaties and that the present draft must be such that it

could be read together with the Vienna Convention on the Law of Treaties.

52. The Special Rapporteur had certainly had good reasons for basing his draft articles primarily on State practice, as he had indicated in his third report, and he (Mr. Castrén) had no doubt that the Special Rapporteur had also carefully studied the literature, including the works of certain authors, as the references in his report suggested.

53. Like the Special Rapporteur, he thought that the topic should for the time being be confined to treaties between States and that the question of international organizations should be left aside. He also shared the view that succession in respect of treaties was a special problem and that analogies derived, for example, from succession to public property should therefore be avoided. The plan of work which the Special Rapporteur had proposed to the Commission was carefully thought out and his programme was much more comprehensive than might be thought.

54. With regard to article 1, the Special Rapporteur had made several improvements to the wording proposed in his first report,[5] probably as a result of the Commission's discussion of the subject in 1968. For instance, he had deleted paragraph 1 of his former text, which had referred to terms defined in article 2 of the draft articles on the law of treaties, had deleted the references to governments, and had amended the title of the report accordingly.

55. At the present stage of codification it would suffice to deal only with State succession. The terms "successor State" and "predecessor State" were simple and were adequately defined in sub-paragraphs (*b*) and (*c*) of the new article 1. The definition of the term "succession", in sub-paragraph (*a*), had been expanded and clarified; it was now stated that it meant the replacement of one State by another *in the sovereignty of territory* and in the competence to conclude treaties with respect to territory. He believed, like the Special Rapporteur, that it was preferable, for the reasons stated in paragraphs (2) and (3) of the commentary to article 1, at least for the time being, not to use the term "succession" in a wider sense and speak, by analogy with internal law, of a transfer to the successor State, by the operation of international law, of rights or obligations arising under the treaties of the predecessor State.

56. He welcomed the fact that, in his third report, the Special Rapporteur had added three definitions to article 1, and he approved of their wording. The Special Rapporteur had rightly taken the view that the expression "new State", defined in sub-paragraph (*e*), should be sufficiently wide to include all cases of secession of part of the territory of an existing State, and not only cases of accession of a colony to independence. Like the Special Rapporteur, he thought that the terms at present included in article 1 were sufficient for the time being and that the Commission could add others as its work progressed.

[5] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 90.

57. Mr. REUTER said that the qualities of the Special Rapporteur were familiar to all who had followed his work on the law of treaties. His approach to the problem of State succession seemed to have had two sources of inspiration, by which he had been guided equally, even if their consequences did not always coincide. The first was reliance on experience and facts and the avoidance of premature formulas and over-generalizations; the second was the voice of logic. He would confine his remarks to the concern for logic, for on the five questions submitted to the Commission, he agreed on the whole with the Special Rapporteur's point of view and with the general way in which he had defined his method and his subject.

58. The Special Rapporteur had approached his subject in the general context of the law of treaties and made special reference to the provisions of the Vienna Convention. It might well be asked, however, whether some of the formulations in that Convention ought not to be considered more closely, without, of course, going so far as to modify them.

59. The central idea behind the Special Rapporteur's work, so far as logic was concerned, was that treaties produced no effects with respect to third parties. The logic of that premise was that if the successor State was a new State, it became a third party; consequently, the provisions of the Vienna Convention would apply and everything followed from that.

60. Mindful of his other source of inspiration, however, the Special Rapporteur had recalled the formulas he had suggested to the Commission, when it had been studying the law of treaties, for limiting that absence of effect of treaties with respect to third parties where objective situations and real rights were concerned—formulas which the Commission had quickly rejected. But those formulas might perhaps have contained an element of truth, and that was no doubt why the Special Rapporteur was raising the same problems again by pointing out the difficulties involved in succession in respect of boundaries and dispositive treaties.

61. That being so, article 2 was perhaps less simple than it appeared. It was not necessarily the case that a treaty which altered the boundaries between two States was applicable as against third parties. The Special Rapporteur had put forward some explanations which certainly held good in practice, but they did not remove the difficulty regarding principles. Of course, to agree that such treaties were applicable as against third parties would mean entering a residual area, left aside at Vienna, in which treaties produced certain effects with respect to third parties.

62. In particular, when it came to dealing with the question of treaties and international organizations, many would disagree that an international organization, which could not participate in a treaty such as the one establishing it, was a third party where that kind of treaty was concerned. That definitely called in question one of the principles of the Vienna Convention, even though there was no question of rejecting that principle, but merely of going into it more deeply.

63. Moreover, in taking up the question of multilateral treaties, the Special Rapporteur referred, quite logically, to the rather vague notion of open multilateral treaties, contemplated in the Vienna Convention. But the right of the successor State to accede to such treaties could have no connexion with the alleged right of succession. The successor State became a party to the open multilateral treaty because it was an open treaty. On that interpretation, it was not certain that article 8, for example, was essential.

64. It was also understandable that the Special Rapporteur had been far more cautious with regard to bilateral treaties, since in the case of open multilateral treaties it was clear that the problem of State succession could be got round by invoking the general principles of the law of treaties.

65. Of course, it would be possible to accept a less logical idea and say, not indeed that a notification of acceptance was unnecessary, but perhaps that, contrary to the ordinary rule, when the successor State notified its consent to succeed to an open multilateral treaty, the notification had the effect of making the acceptance retroactive from the actual date of independence. If all the objections connected with the problem of non-retroactivity were thus disposed of, a new element more specifically connected with the situation of the successor State would certainly be introduced. Those were extremely difficult questions which he was not able to answer at the present stage.

The meeting rose at 1 p.m.

1068th MEETING

Thursday, 11 June 1970, at 10.20 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Co-operation with other bodies

[Item 6 of the agenda]

STATEMENT BY A JUDGE OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN said he had pleasure in welcoming Mr. André Gros, a former member of the Commission, who, since 1964, had been a Judge of the International Court of Justice. He invited Mr. Gros to address the Commission.

2. Mr. GROS, speaking as a Judge of the International Court of Justice, said that the principle of contacts between the Court and the International Law Commission, unanimously accepted by the Court three years previously, was useful only if those contacts related to legal problems of common interest to the Judges of the Court and the members of the Commission. It was on that understanding that he wished to make a few remarks to the Commission on the state of international justice at a time when preparations were being made to celebrate the twenty-fifth anniversary of the United Nations, the twenty-fifth anniversary of the International Court of Justice and the fiftieth anniversary of the creation of the first permanent court of international justice. It was, indeed, particularly fitting to consider the realities of international life in those commemorative years. Like the other judges who had visited the Commission he would, of course, be expressing his own personal views.

3. The Institute of International Law, at its 1959 session, had adopted unanimously, on the basis of a report by Mr. Jenks, a resolution on the compulsory jurisdiction of international courts and tribunals,[1] in which it had noted that "the development of such jurisdiction lags seriously behind the needs of a satisfactory administration of international justice", affirmed that "recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act" but "constitutes a normal method of settlement of legal disputes", and emphasized "the importance of confidence as a factor in the wider acceptance of international jurisdiction".

4. It was on the last point in particular that he wished to enlarge, for the members of the International Law Commission were well-informed persons who had an immense role to play in their respective countries and in their international activities for the development of international law, and the substance of the law and jurisdiction were two faces of the same coin.

5. He wondered whether the efforts of the international legal world might not have been partly nullified, as far as the problem of international justice was concerned, by the fact that, since the 1959 resolution, there had been no real collective research into the deep-seated causes of the uneasiness concerning the acceptance of international jurisdiction to which the Institute had drawn attention. He doubted whether the difficult problems that arose could best be solved by the discreet silence with which some jurists wished to cover the grave delay about which the Institute was concerned. It would be better to investigate the causes and see whether the lack of confidence related to the courts and their procedure, or to the present state of the law and its ability to keep pace with future needs.

[1] See *Annuaire de l'Institut de droit international, 1959*, vol. II, p. 380.