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Summary record of the 1068th meeting

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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.

6. He was sure that the former was not the case. It must be recognized that, in the absence of an international government, judicial settlement would always remain one of the possible means, but not the only one, of peaceful settlement of disputes, and that the real reason for the lack of confidence in international tribunals, whether permanent or temporary, was the unorganized state of international society. That was proved by the fact that whenever a group of States really organized themselves and established a compulsory jurisdiction, as the European Economic Community had done, for example, there was no problem of confidence in the court, because the confidence had been there before the court was set up. On the other hand, when confidence among the members of an organization was insufficient, no compulsory jurisdiction, whether permanent or temporary, was ever established, because there was no adequate organic link between the States concerned, even when they belonged to the same region and applied the same legal system. Everyone could remember recent disputes between States having the same legal system and belonging to the same regional group, which had not been submitted to arbitration or even to a conciliation procedure.

7. As to the second possibility, the number of progressive jurists, that was to say those in favour of developing the law to keep pace with future needs and giving contemporary law a modern outlook, was substantial. Those who opposed the jurisdiction of the International Court or of arbitral tribunals because of the way international law would be applied by the judges, would only be justified in doing so if they sought and organized some form of justice acceptable according to their own conception of the law and administered by lawyers trained according their own views. Otherwise it was not the compulsory jurisdiction they were opposing, but the very idea of the application of law and hence its actual existence.

8. The reason for the slow progress of international justice was thus to be found neither in the composition of the courts, since *ex hypothesi* there was no shortage of good judges—the Statute of the Court permitted the formation of special chambers—nor in the state of the law, since both States whose legal system was based on conservative principles and those which believed in the need for other criteria had their judges. The reason was the relatively unorganized state of international society, of which the backwardness of justice was merely a consequence. That gave some ground for optimism, because it was possible to take an inventory of the deep-seated sociological reasons for the lack of organization. Thus it would have to be accepted as a basic idea, both in the work of the International Law Commission and in the duties of the Judges of the Court, that the problem of the substance of the law and the problem of its application would never be solved separately and that nothing would be achieved by laying down abstract rules which took no account of the realities of international life and of the society of States.

9. The CHAIRMAN thanked Mr. Gros on behalf of the Commission for his most interesting address.

Succession of States and governments in respect of treaties

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

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

(resumed from the previous meeting)

10. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second and third reports on succession in respect of treaties (A/CN.4/214 and Add.1 and 2 and A/CN.4/224 and Add.1). .

11. Mr. USHAKOV congratulated the Special Rapporteur on his reports and the statement he had made at the previous meeting. He shared most of the Special Rapporteur's ideas and, on the whole, approved of the articles he had submitted; nevertheless, he had a few general comments to make.

12. First of all, he thought the Special Rapporteur should remain faithful to the law of treaties, as he proposed, but that in certain cases he should go further. In matters of succession it was not sufficient, as it was in the law of treaties, simply to make a distinction between bilateral treaties and multilateral treaties, without taking their content into account.

13. Bilateral treaties generally bound the contracting States as such, but they could also bind a State with respect to only part of its territory: for example, a demilitarized zone or a region crossed by an international river subject to a treaty régime. The difference between those two kinds of bilateral treaty should be taken into consideration where succession was concerned. As to multilateral treaties, some were universal or "open", others were not. There again, the difference should be clearly brought out in the draft articles.

14. Nor did he think that in matters of succession it was possible to adhere strictly to the general notion of a treaty, since succession took different forms according to whether it involved the transfer of part of a territory, the creation of a new State as a result of decolonization, the creation of a State by union or merger, or the division of a State into two or more States. So far, the Special Rapporteur had dealt only with succession in cases of decolonization. He approved of that beginning, but provision had to be made for the other cases as well.

15. With regard to the articles themselves, the definition of "succession" given in sub-paragraph (*a*) of article 1 (A/CN.4/214) should be formulated differently; for although, as the Special Rapporteur stated in paragraph (2) of his commentary, succession denoted the *fact* of the replacement of one State by another in sovereignty, he (Mr. Ushakov) considered that it was that fact which led to succession proper, which was the transfer of the rights and obligations of one State to another when there was a simple substitution of sovereignty, creation of a new State, or cession of part of one State's territory to another.

16. In article 2, the idea expressed in sub-paragraph (*b*) was correct, but it would need to be expanded to take account of the exceptions, that was to say the special

cases in which the treaties of the predecessor State continued to apply: for example, treaties relating to immovable public property, which did not cease to have effects when the part of the territory in which the property was situated passed under the sovereignty of another State.

17. Again, in article 3 (A/CN.4/214/Add.1), the particular cases in which the provisions of the article were not applicable should be specified.

18. Article 4 (A/CN.4/214/Add.2) would be more appropriately placed in the part of the draft relating to succession as a result of decolonization; and although he approved of the idea the article expressed, he thought it should provide for the other cases of succession, such as the transfer of part of a territory.

19. Finally, it would have to be decided whether articles 7-12 (A/CN.4/224 and Add.1) dealt with universal or restricted multilateral treaties; in the latter event, the special cases would have to be provided for as well.

20. Mr. TAMMES, after expressing his admiration for the third report (A/CN.4/224 and Add.1), said that to his mind the Special Rapporteur had raised his most important point in paragraph 23 of the introduction to his second report (A/CN.4/214), where he had stated that "The question for the Commission will be whether to retain this principle" [the "clean slate" principle] "of the traditional law as the underlying norm or to follow the International Law Association and admit a certain presumption in favour of the transmission of the treaties of the predecessor sovereign to a new State". That presumption on the part of the International Law Association had been expressed in the first of eight resolutions adopted by it at its fifty-third conference, held at Buenos Aires in September 1968 (A/CN.4/214, section I, para. 15).

21. In his third report, the Special Rapporteur had decided against such a broad presumption and had based the underlying philosophy of his draft articles on the need for the explicit consent of the successor State to be bound by treaties concluded by its predecessor. The only presumption he had allowed was in article 4, paragraph 2 (*c*), concerning a unilateral declaration by a successor State at the expense of a third State (A/CN.4/214/Add.2).

22. As looked at by the International Law Association, the problem was one which essentially involved a choice between the two principles of continuity and consent. If continuity was to be assured, the consent of the original parties to the treaty ought not to be endangered by the accident of State succession; in other words, unless the predecessor State had included some express provision for a novation of the consent, the latter must be presumed.

23. The Special Rapporteur, on the other hand, seemed to have taken a quite different approach in article 6 (A/CN.4/224), which was closer to the strict rules of the Vienna Convention on the Law of Treaties, to the practice of new States themselves, and to the general idea of free will, freely arrived at without any pressure in the matter of time. He was in full agreement with the principle of the "clean slate" embodied in that article, but that principle had been stripped of any categorical interpretation in paragraph (6) of the commentary, which stated that "a new State may have a clean slate in regard to any *obligation* to continue to be bound by its predecessor's treaties without its necessarily following that the new State is without any *right* to be considered as a party to them".

24. With respect to article 8 and the following articles, the legal nexus, which the Special Rapporteur had referred to as a requirement for the right of a successor State to consent to be bound by a multilateral treaty, seemed to have become thin, since that right was recognized, provided that the predecessor State had expressed its consent, even if the treaty had not been in force at the date when the succession occurred.

25. Since, however, in the modern law of State succession, all analogies with the private law governing inheritance were tending to disappear, he wondered whether that formal legal nexus was really necessary. Was it at all relevant what the former sovereign had decided? It seemed an unsatisfactory solution to make the exercise of the rights of the successor State depend on an act of will based on reasons which might become obsolete after a change of sovereignty. It might be objected that the requirement of a territorial nexus was confirmed by recent practice; but that practice, which had taken the "clean slate" rule as its point of departure, had been influenced by concern lest that section of international legislation be endangered by massive changes of sovereignty. The Special Rapporteur's untraditional interpretation of the "clean slate" rule, therefore, would appear to be aimed at the future extension of international legislation.

26. Mr. TABIBI thanked the Special Rapporteur for having taken into account, in formulating his second and third reports, the views of members of both the Commission and the Sixth Committee. He agreed with him that the topic of State succession in respect of treaties was one of the most complex areas of international law, because of the difficulty of establishing régimes which could be applied to all kinds of situations.

27. He also agreed that there was a marked difference between succession in respect of bilateral treaties and succession in respect of multilateral treaties. The former were concluded for a variety of different purposes pursued by the parties, whereas the latter were concluded on a universal basis and were subject to a certain uniform discipline. Care must be taken, therefore, to make the principles of succession apply to the various situations which might arise under bilateral treaties.

28. The Special Rapporteur had stated that he had based the formulation of his last two reports on the Vienna Convention on the Law of Treaties. He himself, however, thought there was a need for caution in adopting that approach, inasmuch as State succession was essentially a different branch of international law from the law of treaties. The latter dealt with certain known parties, while the former involved parties which had not been in existence at the time when the treaties had been concluded.

29. If it was agreed that the successor State had a fundamental right to accept or to refuse the rights and obligations of the predecessor State, it was also necessary to state the principle that if the successor State willingly accepted the rights and privileges conferred by a treaty, it must also accept the obligations arising from it. However, judging by the practice of States, both before and after the Second World War, it was obvious that many States were prepared to accept the rights and privileges but not the obligations, and it was difficult to find a formula which would apply to both situations under the same rules.

30. On the question of frontier treaties, his views remained the same as those he had expressed at the 965th meeting in 1968.[2] That was a most difficult and complex subject, as had been recognized in the Sixth Committee, and the present differences between great and small Powers throughout the world made it necessary to adopt a very cautious approach.

31. With regard to article 1, he had expressed doubts in 1968 as to whether the original version[3] covered cases of double succession, such as those of India and Pakistan, for example, or Mali and Senegal.

32. As to article 2, he was afraid that if its basic purposes were not clarified, it might be interpreted as including frontier treaties. He would appreciate the Special Rapporteur's views on that point.

33. Mr. KEARNEY said he must pay a tribute to the high level of craftsmanship displayed by the Special Rapporteur in his set of reports.

34. With regard to article 1, on the use of terms, he agreed with the major theses of the definitions, but had some problems regarding the definition of "succession". It was couched in alternative form: "sovereignty of territory" appeared as an alternative to "competence to conclude treaties with respect to territory". That presentation gave rise to difficulties because of the extreme area of overlapping in the two expressions. It was not at all easy to differentiate between the underlying reasons for the two expressions.

35. He believed there were some indications in the commentary to article 1 that the intention had been to use the first expression to cover situations in which sovereignty appeared as one of the aspects, as in article 2, by contrast with the set of problems involved in the relatively small number of cases in which the issue of sovereignty was not involved. He understood that the Special Rapporteur was reserving the second category of cases for treatment later.

36. In article 2, he noted that the rule in sub-paragraph (*b*), that the treaties of the predecessor State "cease to be applicable in respect of that area from the same date", was laid down as a mandatory requirement. He did not think it was possible to be quite so categorical. He was thinking of cases in which an arrangement had been made by the predecessor State and the successor State regarding a transitory period for the territory, such as an agreement in which either explicit or implicit provision had been made for matters such as air transit rights until permanent arrangements could be worked out.

37. Consideration should be given to the desirability of allowing some degree of tolerance in the cases he had mentioned. The same type of problem would probably arise regarding other provisions of the draft.

38. Mr. RAMANGASOAVINA observed that the Special Rapporteur's work on State succession had the same solidity and logic as he had shown in his work on the law of treaties.

39. The Special Rapporteur had not expressly opted for either of the extreme views, namely, the theory of automatic continuity and the voluntarist principle of self-determination. On the contrary he had achieved the *tour de force* of submitting articles which were both logical and cautious and likely to attract support from the advocates of all theories.

40. His position was all the more justified because, owing to the lack of uniform practice, it was impossible to base all the solutions on a single principle. States themselves did not always act rationally: some young States whose law was based on an empirical legal system acted in what could be called a logical manner and made a general declaration of succession at the outset, limited, nevertheless, as to time and subject-matter; others whose law was based on a rational legal system adopted the empirical solution of deciding each case on its merits after exhaustive consideration.

41. In any case, the Special Rapporteur had been right to refer to the law of treaties, even though the Vienna Convention was not yet in force, for that convention was the common denominator of present practice—a kind of customary international law.

42. The definition of State succession given by the Special Rapporteur in article 1 was extremely skilful, since it was compatible with all the theoretical conceptions.

43. On the other hand, article 2, though it seemed harmless enough, left aside a number of cases which might perhaps be marginal, but to which the principle stated in the article could not be applied. One example was the Concordat of 1801, which had never ceased to apply to Alsace-Lorraine despite the historical vicissitudes that territory had undergone. Moreover, the examples given at the end of paragraph (4) of the commentary to article 2 were cases rather of *debellatio*—the abolition of the sovereignty of a State and of the laws in force in it after conquest by another State—than of the transfer of an area of territory.

44. On the whole, however, he approved of the articles proposed by the Special Rapporteur, though he would have some points of detail to raise when the time came.

The meeting rose at 12.50 p.m.

[2] See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 132 and 133, paras. 61-70.

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