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**Summary record of the 1070th meeting**

Topic:
**Succession of States with respect to treaties**

Extract from the Yearbook of the International Law Commission:-
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closely with the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee.

107. Mr. ROSENNE, thanking the observer for the European Committee on Legal Co-operation for his excellent written and oral reports, said they offered the Commission ample food for thought in connexion with both its present and its future programme of work.

108. He especially appreciated the work done by the Committee in co-ordinating the presentation of digests of State practice, which were extremely valuable and had been found useful even outside Europe. He also appreciated the support given by the Committee to the Consolidated Treaty Series now being prepared at Cambridge University, though he wished to draw attention to the fact that Europe was not the only part of the world in which treaty-making had been practised even as far back as 1648.

109. The Commission, which was the only organ with universal responsibility in the field of international law, should always be personally represented at the meetings of inter-governmental bodies with which it maintained relations. He hoped, therefore, that the Chairman of the Commission would be able to attend the next session of the Committee, or send a representative to it.

110. The CHAIRMAN said he too hoped that the Commission could be represented at the Committee's next session.

111. Mr. THIAM said he had listened with the greatest interest to the statement by the representative of the European Committee on Legal Co-operation. He was glad to note that regional organizations in different continents were dealing with the same topics.

112. Like Mr. Ramangasoavina, he hoped that the European Committee on Legal Co-operation would study the question of differences in the interpretation of legal norms and that some form of co-operation on that matter would be established between the secretariat of the Council of Europe and the secretariat of the Organization of African Unity. For although the development of concepts inherited from colonialism was logical and normal in some spheres, such as family law, it was difficult to accept when the differences in interpretation related to fundamental legal principles, particularly human rights, which in developing countries were still very often left to the discretion of governments.

113. Mr. USHAKOV said he warmly thanked the observer for the European Committee on Legal Co-operation for his statement; the whole Commission always greatly appreciated the Committee's work. He regretted that, for health reasons, he had been unable to represent the Commission at the Committee's last session, and hoped that a representative of the Commission would be able to attend its next session.

114. Mr. ALBÓNICO thanked the observer for the European Committee on Legal Co-operation for his report and paid a tribute to the outstanding work done by the Committee, particularly in connexion with the privileges and immunities of international organizations. He noted with pleasure that the close juridical links between Europe and Latin America were being maintained.

The meeting rose at 1.15 p.m.

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## 1070th MEETING

*Monday, 15 June 1970, at 3.15 p.m.*

*Chairman:* Mr. Richard D. KEARNEY

*Present:* Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, 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.

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### 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 1068th meeting)*

1. The CHAIRMAN invited the Commission to resume 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).

2. Mr. AGO said that the Special Rapporteur had submitted admirable reports; generally speaking, he was working on the right lines and should be encouraged to continue in the same way.

3. With regard to the considerations which the Special Rapporteur had set out as an introduction to his second report, he thought that the work of the International Law Association, though useful, left an impression of excessive complexity and a disappointing lack of clarity.

4. As to the relationship between decolonization and succession of States, though he had no wish to minimize the enormous political importance of decolonization, he must stress that decolonization was not a particular aspect of the problem of State succession; it was one of the causes of the birth of new States, but it was from that birth that the problem of succession derived, whether the State was born of decolonization or of some other phenomenon. He would not exclude *a priori* the idea that the creation of new States by decolonization could have special consequences, even in matters of succession, but the general principles were the same, whatever the origin of the new State. It was those principles which the Commission should state, after which it could see

whether there were any cases justifying exceptions to them.

5. Personally he saw hardly any difference, so far as questions of succession were concerned, between the formation of new States as a result of decolonization and their formation as a result of other circumstances, for example, those which had obtained at the birth of such States as Poland and Czechoslovakia or even of former British dominions such as Canada and Australia.

6. The Commission should not allow its vision to be clouded by immediate problems of the day; it should remember that it was working for the future and should therefore not confine itself to cases of formation of States through dismemberment, but also consider the emergence of new States as a result of association or merger, which might very well occur in a few years' time in the very continent where the number of States born of decolonization was greatest. The dominant concern should be to formulate rules applicable to all cases.

7. The Commission should also lay down rules applicable to cases in which succession did not result from the formation of a new entity, but from the transfer of a territory from one entity to another. The general rules would probably be the same, but perhaps separate special rules would have to be laid down.

8. With regard to the articles proposed by the Special Rapporteur, he had the following comments to make. In article 1, he was not sure that that part of the definition which described "succession" as "the replacement of one State by another ... in the competence to conclude treaties with respect to territory" could be retained, since he questioned whether it was possible to conceive of a State which continued to exist as a subject of international law, but did not have competence to conclude treaties. At the same time, he wondered whether there might not be cases in which legal capacity to conclude treaties had subsisted but the physical capacity to apply them had disappeared: for example, in certain cases of occupation, even in peacetime. It would be premature to answer that question immediately, but it would be well to reflect on it.

9. He approved of article 2 unreservedly, but hoped that the Special Rapporteur would later explain in what cases there could be derogation from the general principle laid down, especially in regard to sub-paragraph (*b*). For there were exceptions, as was proved by the existence of the Free Zones of Upper Savoy and the district of Gex, and by cases in which the treaties in question dealt with territorial situations such as a right of passage.

10. With regard to the other articles proposed by the Special Rapporteur, generally speaking he approved of their substance and form, subject to a reservation on article 6.

11. Mr. RUDA said he would confine his remarks to the basic rules in the Special Rapporteur's reports, which were those in articles 6 and 7.

12. With regard to the expression "New States", which was used as the title of Part II (A/CN.4/224), in which articles 6 and 7 were placed, he could accept it with the meaning given to it in article 1 (*e*), on the understanding that, in subsequent parts, the draft would deal with unions of States, federations of States, termination of protectorates and emancipation of trusteeship territories, and that the definition would later be expanded to cover those situations as well.

13. Articles 6 and 7, on which he would comment together, laid down two rules: the first was that a new State was not under an obligation to consider itself a party to the treaties concluded by its predecessor and in force in respect of its territory at the time of succession; the second was that the new State had the right to consider itself a party to multilateral treaties. In other words, there was no transmission of obligations under bilateral treaties, nor was there a transmission of the right to be a party. In the case of multilateral treaties, on the other hand, the new State had the right to notify its succession.

14. That approach, adopted by the Special Rapporteur, was much more realistic than that of the International Law Association (A/CN.4/214, section I.D); it conformed with State practice and with the general law of treaties. It was desirable that a new State should be given the faculty of choosing which instruments to apply to its international existence and which obligations to take over. There should be no question of any presumption against the new State based on failure to make a notification within a reasonable time, as suggested by the International Law Association.

15. He also agreed with the Special Rapporteur in rejecting the idea that new States must be considered automatically bound by multilateral "law-making" instruments. The contractual element was still the basis of the obligations arising under any treaty. There could therefore be no question of imposing on a State treaty obligations which it had not accepted.

16. He believed that the same argument applied to so-called "general" multilateral treaties with regard to which his reservations, expressed at the time when the Commission had dealt with the subject in connexion with the law of treaties, had been strengthened by the proceedings of the Vienna Conference on the Law of Treaties. General international treaties had rightly not been mentioned in the text of article 7. The right of a new State to notify its succession related to all multilateral treaties, whether "general" or not, with the exceptions mentioned in article 7 itself. That being so, it was perhaps unfortunate that a reference to general multilateral treaties had been included in the commentary, thereby introducing an element of confusion.

17. With regard to the foundation of the right of the new State to become a party independently of the consent of the other parties, the Special Rapporteur had adopted the same approach as the International Law Association. The right of the new State to be a party to a treaty was independent of the faculty of participation in accordance with the final clauses of the treaty. The legal nexus established between the treaty and the territory was sufficient and it was therefore not necessary that the notification of succession should be accepted by the other States concerned.

18. For those reasons, he supported the general rule contained in articles 6 and 7; he would comment on the other articles some other time. He was particularly interested in the treaties which constituted an exception to the rule stated in article 6: the category of dispositive treaties, which it was proposed to examine at a later stage.

19. That exception led him to offer a comment on the definition of "succession" in article 1. The Special Rapporteur had defined succession, in the commentary, as "the fact of the replacement of one State by another"; the cases of transmission of rights and obligations as a result of that succession were stated elsewhere, as exceptions to the general rule of non-transmissibility. It seemed strange that "succession", in the municipal law sense of the transmission of rights and obligations, should be an exception to "succession" as understood in international law.

20. Mr. SETTE CÂMARA said that the definitions in article 1 were a considerable improvement on those contained in the Special Rapporteur's first report.[1] The difficult concept of government succession had been dropped and transfer of sovereignty had become the basic notion for the definition of succession.

21. The broad and flexible terms in which the definition of "succession" was now couched had the advantage of covering the different circumstances in which succession took place and not concentrating solely on cases resulting from decolonization. The adoption of an empirical definition, which referred exclusively to the fact of the replacement of one State by another, kept away from the traditional conception of succession as the actual transfer of rights and obligations from predecessor to successor; and it was that conception which contained all the elements of doubt and controversy which the Commission was called upon to resolve.

22. The Special Rapporteur had acted wisely in placing succession squarely in the context of the general law of treaties, thereby excluding any obsolete analogy with problems of succession in municipal law. The municipal law of succession dealt solely with the devolution of rights and obligations by one person to another, independently of the will of the persons concerned and by the force of law alone. By choosing to be directed by the rules of the general law of treaties, the Special Rapporteur had discarded old ideas concerning automatic continuation of the binding force of treaties as a direct effect of succession.

23. Once it was accepted that succession of States with respect to treaties was part of the law of treaties, rights and obligations could not derive from any other source than the will of the contracting States. Without the unilateral declaration dealt with in article 4 of the draft, treaties signed by the predecessor State with third States did not retain their binding force, since they become *res inter alios acta* for the successor State. He fully supported the Special Rapporteur's approach. Decolonization had brought independence to some 55 nations and it would be unthinkable to impose on them the automatic transference of rights and obligations on the analogy of succession in municipal law. No country would accept submission to commitments entered into by another country, or agree to accede to independent life with its hands tied by foreign commitments.

24. The practice of States and of depositaries clearly supported the "clean slate" principle. At the same time, new States should not be encouraged to make *tabula rasa* of all their obligations concerning international co-operation. Consideration should therefore be given to avoiding a text which might discourage the conclusion of devolution agreements once and for all. Some wording should be found which would encourage successor States not to discard their obligations under the so-called legislative treaties.

25. On the question of boundary treaties and dispositive treaties, he could not agree with Mr. Tabibi; if such treaties were to be purely and simply subject to the "clean slate" principle, the door would be opened to territorial chaos. The Special Rapporteur, however, had indicated that that important matter would be dealt with in due course.

26. With regard to article 3, the practice of States and of depositaries supported the conclusion that a devolution agreement could not be considered as creating by itself a legal nexus between the successor State and third States. A devolution agreement was little more than a solemn statement of intention concerning the future maintenance in force of pre-existing treaties concluded by the predecessor State. It could hardly be held that a legal presumption of continuity existed. It should be noted that the United Nations Secretariat, in its recent practice, had limited itself to inviting new States, following devolution agreements, to become parties to amending protocols to international conventions signed by their predecessors.

27. The negative rule in paragraph 1 of article 3 was in conformity with the general law of treaties, according to which treaty obligations and rights could not exist without the direct consent of the parties involved.

28. The theory of novation by tacit consent reflected a residual influence of concepts derived from the municipal law of succession. But if that theory were accepted, it would hardly be possible to ascertain the will of the parties, since the necessary steps of the treaty-making process, such as parliamentary authorization for ratification, and ratification itself, had no part in the frequently hasty exchange of statements by which devolution agreements were made. It would not be reasonable to recognize the validity of the automatic inheritance of a whole mass of treaty obligations and rights, when the law of treaties established very rigid rules for ascertaining the expression of the consent of the State to become a party to a treaty.

29. Although devolution agreements were mere statements of intention, they were still significant, because they served to bridge the gap which must otherwise occur at the moment of independence if all treaty links were automatically severed. The complexity of modern inter-

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

national life and the closely knit fabric of inter-State obligations and rights would make it extremely difficult to reconstitute the net of normally binding treaties within which all new States had to live. Devolution agreements were therefore useful, since they offered new States an expedient and effective means of concluding the treaties indispensable for their everyday life.

30. Some authors maintained that a devolution agreement was necessary to indemnify the predecessor State with regard to treaty obligations, as from the date of independence of the new State. That argument was not convincing, since the general law of treaties would exempt the predecessor State from any obligation concerning the territory of the new State as from the date on which that State had emerged into international life.

31. The two paragraphs of article 3 had been carefully drafted to include only clear and indisputable aspects of devolution agreements, such as the fact that they created no legal nexus between the successor State and third parties and that obligations and rights regarding third States were governed by the provisions of the articles now being drafted. He supported the substance of article 3, but would suggest the introduction of wording that would not completely discourage the conclusion of devolution agreements. Though limited in their scope, those agreements constituted good evidence of the intentions of new States and helped to secure their recognition. He would deal with the other draft articles at a later stage.

32. Mr. ALBÓNICO said he supported the Special Rapporteur's method of treating the problem of succession in general and not simply from the point of view of decolonization.

33. The eight resolutions adopted at Buenos Aires by the International Law Association were based on premises which conflicted with those adopted by the Special Rapporteur; they also conflicted with State practice and occasionally even with the views of authors. The propositions embodied in those resolutions might be desirable as a matter of policy—as the Special Rapporteur had indicated (A/CN.4/214, section I, para. 22)—but not as a rule of law acceptable to the International Law Commission and to States.

34. With regard to the two alternatives presented by the Special Rapporteur in the last paragraph of the introduction to his second report, he believed that the decision should depend on the intrinsic character and purposes of each treaty.

35. He favoured the Special Rapporteur's conclusions based on the rules of the general law of treaties. Those conclusions were also in keeping with the draft declaration adopted, at its 1970 session at Geneva, by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,[2] in particular the part relating to the principle of equal rights and self-determination; the Special Committee had recognized that a colony was a separate entity from its metropolis—an element which had not been taken into consideration by the International Law Association.

36. With regard to individual articles, he supported the definition of "succession" contained in sub-paragraph (*a*) of article 1; he understood that term as referring only to the fact of the replacement of one State by another and not to the transmission of the contents of the treaty. The concept of succession was a specific and not a general concept; it was used for the sake of convenience and must not be confused with the concept of succession in municipal law.

37. The definition of a "new State" in sub-paragraph (*e*) of article 1 was in keeping with the plan of work adopted.

38. He agreed with the Special Rapporteur's decision not to include a definition of a "treaty" and to drop the reference to succession of governments. He also approved of the introduction of the concept of sovereignty, which did not appear in the Special Rapporteur's first report.

39. He noted that, for the time being, the draft did not refer to bilateral treaties and only covered multilateral treaties concluded between States.

40. Although the Special Rapporteur had not asked for comments on article 2, he wished to say that he fully agreed with the contents of that article, which conformed with the principle of "moving treaty frontiers", both in its positive and in its negative aspects.

41. With regard to article 3, he considered that devolution agreements were valid, but created obligations only between the predecessor State and the successor State; for third States they constituted *res inter alios acta*. The predecessor State was freed from liability by virtue of the principle embodied in article 2; the rights and obligations of the successor State resulted from general international law. A devolution agreement effected no more than a transfer of responsibilities and merely expressed the will of the successor State to maintain those treaties of the predecessor State which were applicable to the territory. The registration of a devolution agreement had no automatic effects; it was merely the fulfilment of the obligation created by Article 102 of the United Nations Charter.

42. He accepted the rule in paragraph 2 of article 4 and the exceptions stated in paragraph 3; he had some doubts, however, concerning the exception in sub-paragraph (*d*) of paragraph 3, because nothing was said about how the conduct of the States concerned would be judged.

43. The effects of a unilateral declaration were limited to the party which made it. The position was different from that contemplated in article 25 of the Vienna Convention on the Law of Treaties,[3] in which the treaty was not in force; in the present case the treaty was in force, but only between the predecessor State and a third State.

44. The Special Rapporteur had not asked for comments on article 5. He noted, however, that paragraph 1 of that article was in keeping with article 36 of the Vienna

[2] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, para. 83.

[3] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

Convention on the Law of Treaties and that paragraph 2 conformed with article 35 of that same Convention.

45. Article 6 contained the basic rule. A very clear distinction was drawn between the obligation of succession envisaged in that article and the right to succession contemplated in articles 7 and 8.

46. He noted the adoption by the Special Rapporteur of the *tabula rasa* doctrine, which was the only acceptable one. That doctrine had been applied in some bilateral treaties by Afghanistan, Argentina and Israel; it was also applicable to multilateral treaties, including those which were of a law-making character.

47. With regard to article 7, on the right to notify succession in respect of multilateral treaties, he accepted the rule stated in it only for multilateral treaties of a general character. The treaty must have been internationally in force for the territory in question at the time of the acquisition of independence. If there was no reference to territory, article 29 of the Vienna Convention on the Law of Treaties would apply. The legal nexus between the territory and the treaty must exist at the time of succession for notification to be possible. The right acquired by the successor State was that of notifying its will to commit itself as an independent party to the treaty.

48. Under article 8, on multilateral treaties not yet in force, the successor State could ratify a treaty which had only been signed by the predecessor State. The signature of a treaty gave rise to certain obligations, in accordance with article 18 of the Vienna Convention on the Law of Treaties. He accepted the proposition, in paragraph 2 of article 8, that a new State which established its consent to be bound under the provisions of paragraph 1 should be reckoned as a party for the application of provisions on entry into force.

49. Article 8, as formulated by the Special Rapporteur, differed from the solutions adopted by the International Law Association, which he did not find acceptable. The Association's approach conflicted with the declaration adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, in particular with its statement of the principle of equal rights and self-determination of peoples, according to which the territory of a colony had a legal status separate and distinct from that of the metropolitan country.

50. Subject to those comments, he accepted and supported the six articles on which comments had been requested.

51. Mr. USTOR, after congratulating the Special Rapporteur on his brilliant report, said that in his view the Commission should base its work on article 73 of the Vienna Convention on the Law of Treaties, which stated that "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States...". The Commission now had to answer the questions which might arise in regard to a treaty from a succession of States; it should, however, follow in the cautious path taken by the Vienna Convention and make all necessary reservations concerning boundaries, hostilities, military occupation and the like.

52. The Commission would have to be very clear about what it believed State succession to be and what that term meant in article 73 of the Vienna Convention. That question appeared to have been answered in article 1 of the Special Rapporteur's draft articles and in his commentary thereto. The Special Rapporteur had been right to start from the assumption that it was necessary to consider State succession as a fact, or as several facts; he fully agreed with that interpretation and thought it would even be advisable to state explicitly in article 1 that succession was a fact, and possibly to expand the definition along the lines of that given in the *Dictionnaire de la terminologie du droit international*, quoted in paragraph (1) of the commentary.

53. With regard to articles 3 and 4 on devolution agreements and unilateral declarations, he noted that the commentaries to those articles referred exclusively to cases of "new States", as that term was used in the report (A/CN.4/224, section II). He wondered, therefore, if those articles should not be transferred to the part of the draft which dealt with new States. On the other hand, if the Special Rapporteur believed that such agreements and declarations might also be imaginable in connexion with other situations, that would also have to be explained in the commentary. In general, however, the idea expressed by the Special Rapporteur in article 3 seemed to be consonant with the *pacta tertiis* rule and was accordingly acceptable.

54. Article 4, concerning unilateral declaration by a successor State, provided in paragraph 2 (*c*) that third States had a certain right to object to the provisional participation of a successor State in treaties. That right of objection seemed to be doubtful in the case of multilateral treaties, where the third State had no right of objection, according to article 7, if the successor State declared itself not provisionally but definitely bound. He supported the provision of article 7 concerning the right of a new State to notify its succession in respect of multilateral treaties. In the latter case, a third State had no right to object to the participation of a new State, which could become a party to the treaty independently of the other parties. There, the Special Rapporteur had drawn a correct conclusion, which he thought should be stated clearly in article 7 itself.

55. In that connexion he would venture to go further than the Special Rapporteur. In his opinion, when a new State emerged, it had an inherent right to become a party to any general multilateral treaty, even if its predecessor State had not been a party thereto, since the case was not one of treaty-succession proper. The Vienna Conference had, unfortunately, refused to accept the idea that general multilateral treaties should be open to all States, and it was not accepted in United Nations practice either.

56. He presumed that article 8 was intended to be read together with article 7, which contained certain exceptions in sub-paragraphs (*a*), (*b*) and (*c*) that should also be included in article 8.

57. Lastly, he was in general agreement with the rule in article 6 that there was no obligation on the successor State to assume its predecessor's treaties, although there might be some exceptions, as suggested in paragraph (18) of the commentary. It should be made clear, however, that the rule stated in the article applied only to treaties in their formal sense and not necessarily to the substance of them. And it should also be made clear that, as stated in paragraph (9) of the commentary, the rules of the treaty would also bind new States if they were rules of generally accepted customary law.

58. Mr. ROSENNE, after associating himself with the tributes paid to the Special Rapporteur, said he was in general agreement with most of what was said in his reports, which provided a more realistic answer to contemporary needs than did the resolutions adopted by the International Law Association.

59. He would answer the Special Rapporteur's questions within the framework of his intervention at the 967th meeting,[4] when he had agreed with the statement in paragraph 14 of the Special Rapporteur's first report that: "After all, on the emergence of a new State, the problems of succession which arise in respect of *treaties* are inevitably problems that involve old States no less than the newly emerged one. Succession in respect of a *treaty* is a question which by its very nature involves consensual relations with other existing States and, in the case of some multilateral treaties, a very large number of other States. Today, moreover, on the emergence of a new State the problems of succession will touch just as many recently emerged States as they will 'old' States. The Commission cannot fail to give particular importance to the case of 'new' States because it is both the commonest and the most perplexing form in which the issue of succession arises. But there is a risk that the perspective of the effort at codification might become distorted if succession in respect of treaties were to be approached too much from the viewpoint of the 'new' State alone."[5]

60. He had been unable to accept the view expressed by the Special Rapporteur and some members of the Commission, at its twentieth session, that "in the case of large multilateral treaties an extensive practice indicated that there might exist at least one basic rule: that a new State was entitled, by using one procedure or another, to continue the application of the treaty to its own territory as a party in its own right, independently of the actual provisions of the final clauses of the treaty concerning participation".[6] He had unfortunately been absent when that paragraph of the report had been adopted at the 989th meeting; otherwise he would have expressed reservations concerning it. He would have preferred the idea expressed in paragraph 14 of the Special Rapporteur's first report to be retained.

61. With regard to the general delimitation of the subject-matter now before the Commission, he accepted the principle stated in paragraph 22 of the Special Rapporteur's second report that "the question with which the Commission has to concern itself is believed to be not so much whether decolonization may constitute a special new form of succession as what may be the implications of the principles of the Charter, including 'self-determination', in the modern law concerning succession in respect of treaties." He also agreed with the statement in paragraph 4 of the Special Rapporteur's third report, that the task of codifying the topic was "more one of determining the implications of cases of succession within the law of treaties than of integrating treaties into a general law of State succession." The Commission should, however, have a unitary concept of the element of the fact or facts which set in motion the rules of succession, however formulated.

62. He accepted paragraphs 8 and 9 of the Special Rapporteur's third report, concerning the temporary limitation of Part II of the draft articles to "new States" as defined in article 1 (*e*).

63. With regard to the nature and form of the work, he agreed with the Special Rapporteur that his study of succession in respect of treaties, regarded as a sequel or an addendum to the Vienna Convention, should be cast in the form of draft articles on the model of a convention, leaving open the ultimate form which they might take (A/CN.4/214, paragraph 7). In his opinion, the draft articles should be kept within the general framework characteristic of the Vienna Convention, bearing in mind four points. First, the determining place of the autonomy of the parties should not be impaired. Secondly, account should be taken of the general unwillingness of the Commission, as expressed on various occasions, and subsequently of the Vienna Conference to make any distinction of substance between bilateral and multilateral treaties. Thirdly, account should also be taken of the refusal of the Commission, and of the Vienna Conference, to accept any classification of treaties as a basis for codification; no distinction, therefore, should be made between a *traité-loi* and a *traité-contrat*. In his introductory statement, the Special Rapporteur had hinted that he might feel compelled to abandon those first three points, but he (Mr. Rosenne) felt strongly that they should be retained. Fourthly, it should be clearly recognized, as the Commission itself had decided many years ago, that the codification related to the instrument in which an obligation was embodied and not to the obligation itself.

64. Great care should be taken not to cast the articles or the commentaries in terms according to which depositaries would have wider powers and competence in the case of succession than those normally accorded to them under articles 76 and 77 of the Vienna Convention, in the sense that they might take decisions which would be binding on States independently of the terms of the treaty or the will of the contracting States. On that point he differed from the Special Rapporteur in that, in his opinion, any wider view of the functions of a depositary was not borne out as a matter of general principle, either

[4] See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 139-141, paras. 6-21.

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

[6] *Ibid.*, p. 222, para. 88.

by the Secretariat memorandum of 1962[7] or by the series of studies prepared by the Secretariat.[8] The most that could be said was that in novel situations the Secretary-General and the other depositaries had produced workable solutions which had been consolidated by operation of the principle of tacit consent. In that connexion, the various circular letters issued by the Secretariat were more than mere notifications and amounted to a form of consultation recognized as such by their recipients, who, if they wished to make objections, were free to do so. It should be borne in mind, however, that there was more to depositary practice than might at first appear: in some cases, for example, it might be necessary to consult the United Nations Journal and Press releases, as well as to ascertain the date on which treaties were registered *ex officio* by the Secretary-General.

65. With regard to the introductory part of the draft articles, any difficulties he had with its arrangement were due to the general uncertainty about the fate of the articles in the first report. In his opinion, the Commission should take the Vienna Convention as a model and start with a positive statement as to the treaties and States to which the draft articles were intended to apply, and the exceptions to be made. That might be done by combining an idea similar to that expressed in article 1 of the Vienna Convention with articles 2 and 3 in the Special Rapporteur's first report suitably adapted.

66. With regard to article 1, as it appeared in the Special Rapporteur's second and third reports, he questioned whether sub-paragraphs (*b*), (*c*) and (*f*) were really necessary. Sub-paragraph (*a*), on the other hand, was intended to state in normative terms the actual fact of State succession. However, the two abstract nouns "sovereignty" and "competence" did not facilitate the understanding of that text, and the word "competence", in particular, might have a different meaning from that given it in article 46 of the Vienna Convention. The French version of the second report used the word "*capacité*"; and if that was a conceptual mistranslation it illustrated the difficulty. He suggested that it might be better to explain in the commentary how the Commission understood the concept of succession.

67. In article 3, he noted with appreciation that the title referred to "agreements" rather than to "treaties" for the devolution of treaty obligations. He doubted whether the article was really necessary, however, since it seemed to say that those agreements were to be treated mainly as statements of policy, and if what was involved was really the interpretation of such statements, the article was unnecessary. That form of agreement raised an issue of the mutual responsibility of the two States for the implementation of the treaties concerned, not merely as between the parties to the devolution agreement, but also as between them and the other parties to the treaties. In that connexion, the expression "third States" was one which, in the light of the relevant provisions of the Vienna Convention, called for some reserve and might even be misleading. That notwithstanding, he agreed generally with what the Special Rapporteur had said in the commentary to article 3.

68. He noted that article 4 could refer to two types of unilateral declaration, one of which was couched in general terms, while the other mentioned specific treaties. The former were also statements of policy, but if accepted by the other parties to the treaties, either actively or passively, would lead to the provisional application of the treaty, whereas the second type involved the expression of a State's consent to be bound by a specific treaty. In that connexion too the important problem was that of responsibility for implementation of the treaty vis-à-vis its other parties.

69. With regard to article 6, he recalled that in 1968 he had stated that the concept of succession was inadmissible if it implied some automatic process independent of the consent of the parties.[9] He therefore accepted the proposal.

70. In connexion with article 7, he did not think that in principle it was right to disregard any express terms of a treaty concerning the right of participation, and in that respect there was no difference in principle between bilateral and multilateral treaties as far as substantive law was concerned, though there obviously would be differences with respect to procedure. However, the Secretariat memorandum of 1962 did not appear to indicate to what extent participation clauses played a role, or to what extent the depositary accepted notifications of participation through succession from States which would not have been entitled to accede under the participation clauses, although that was a key issue. If the State concerned would have been entitled to accede, there was little real need for the depositary to consult with the other parties, and for that reason he (Mr. Rosenne) had doubts about paragraphs (2) to (4) of the commentary. He thought that the later Secretariat studies might bring that aspect out more clearly, as was illustrated by the passages relating to private law rights in industrial and intellectual property in Israel, quoted in the 1968 study.[10] His conclusion was that the terms of the participation clause should normally be decisive as to the right to participate, but that its procedural provisions might be waived by tacit consent. That would correspond to article 11 of the Vienna Convention. He also believed that paragraph 139 of the Secretariat memorandum,[11] referred to in paragraph (8) of the commentary to article 7, related to one exceptional instance.

71. He thought that more information was needed on practice in the fringe area in which the new State was not, apparently, entitled to participate under the participation clause. Most of the precedents mentioned in the series of documents before the Commission dealt with

[7] Op. cit., *1962*, vol. II, pp. 106-151.

[8] Documents A/CN.4/149 and 151 (1962), A/CN.4/157 (1963), A/CN.4/200 (1968) and A/CN.4/210 (1969), published in vol. II of *Yearbooks* for the years indicated.

[9] See *Yearbook of the International Law Commission, 1968*, vol. I, p. 139, para. 8.

[10] Op. cit., *1968*, vol. II, p. 15, para. 34 *et seq.* and p. 63, para. 277 *et seq.*

[11] Op. cit., *1962*, vol. II, p. 123.

cases in which there was a considerable overlap. In those cases the difference between succession and accession related essentially to the time from which the participation was effective, in the one case the date of independence of the successor State, in the other the date when the instrument of accession became operative.

72. He had certain reservations concerning article 2, since sub-paragraph (*b*) might not be sufficient to exonerate the predecessor State from further responsibility for the application of the treaty. It was important to keep the draft articles within the framework of the law of treaties as such, and not to glide over into other branches of international law.

73. Lastly, with regard to paragraph (6) of the commentary to article 7, he disagreed with the Special Rapporteur's view that the International Law Association's way of formulating the criterion appeared to be more exact than that used in the Secretary-General's letter, since the expression "internationally in force" referred to the validity of the treaty as between the parties. In his opinion, the approach adopted by the Secretary-General was more pragmatic.

The meeting rose at 6 p.m.

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## 1071st MEETING

*Tuesday, 16 June 1970, at 10.10 a.m.*

*Chairman:* Mr. Richard D. KEARNEY

*Present:* Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, 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.

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### 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]

*(continued)*

1. 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).

2. Mr. CASTAÑEDA said that there was a great wealth of precedent and legal opinion on succession in respect of treaties, but both were far from uniform, so that the whole subject was to some extent in a state of anarchy. It had required a great effort on the part of the Special Rapporteur to analyse and systematize the available material so that he could deduce two or three basic principles from it and formulate—up to the present—some twelve legal rules.

3. He was in full agreement both with the Special Rapporteur's general approach and with the formulation of the articles, so that his remarks would be merely comments, not criticisms.

4. The nature of the Special Rapporteur's reports ensured that the draft would command the approval of the majority of States and would become an international treaty. If the term "progressive" had not been misused, he would describe the draft as progressive. Where two interpretations were possible in regard to a genuinely fundamental question, the Special Rapporteur had invariably adopted the one which responded best to the interests of the international community. The draft was thus progressive by comparison with the reactionary approach to the obligations of newly independent States adopted by the International Law Association.

5. The opinion held for some time by the Secretary-General of the United Nations, which exaggerated the effect produced by devolution agreements, could not be described as progressive. There had thus been no lack of alternative approaches, but the Special Rapporteur had fortunately adopted none of them.

6. He agreed that decolonization should not be dealt with separately as a specific type of succession. But he could not agree with Mr. Ago's view that the fundamental rules would prove to be the same in all cases of succession, whether originating from decolonization or from other causes. The Special Rapporteur's research had shown precisely the contrary.

7. The articles in Part II were, by their very nature, applicable only to new States. But the Special Rapporteur had gone even further and had proposed a new legal concept: that of the "new State" which was, precisely, a State emerging from decolonization. In his commentary to article 1 (additional provisions), he had described a "new State" as "a State which has arisen from a succession where a territory which previously formed part of an existing State has become an independent State" and had gone on to explain that his definition covered "a secession of part of the metropolitan territory of an existing State and the secession or emergence to independence of a colony" (A/CN.4/224). He had expressly excluded from the concept of a "new State" the cases of a union of States, a federation with an existing State and even the termination of certain colonial situations such as trusteeships and protectorates.

8. Again, in his commentary to article 6, the Special Rapporteur had cited, in support of the "clean slate" principle, a passage from McNair which referred to "newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor".[1] It was thus clear that "new States" were exclusively former colonies which had become independent States.

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[1] McNair, *The Law of Treaties* (1961), p. 601.