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A/CN.4/SR.1071

Summary record of the 1071st meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

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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.

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.

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.

9. With regard to the use of terms, he welcomed the distinction made by the Special Rapporteur between the actual fact of the replacement of one State by another and the transfer or devolution of the rights and obligations of one State to another. The Special Rapporteur had rightly made it clear in the text of article 1 itself that "succession" referred to the actual fact of replacement, so as to avoid the confusion that might result from the current meaning of the term "succession" in municipal law as the devolution *ipso jure* of rights and obligations on the occurrence of a certain event, a situation which did not obtain in international law.

10. He fully understood the Special Rapporteur's reasons for not formulating the definition of succession solely in terms of a change of sovereignty, because in such cases as the termination of a protectorate or a trusteeship there was no change of sovereignty, since the predecessor State did not exercise sovereignty; there was only a change in the legal competence to conclude treaties in respect of the territory. At the same time, he was not altogether happy about an approach which might have the effect of suggesting that protectorates and trusteeships were permanently legitimate institutions. The few remaining cases of protectorates and trusteeships could at best be regarded as temporarily legitimate.

11. He supported the rule in article 2 (A/CN.4/214) with regard to change of sovereignty; the provisions of that article were consistent with the "moving treaty frontiers" rule.

12. Mr. Ago's remarks on acts of war and occupation in regard to succession[2] were correct. In that connexion it was important to remember the rule of non-recognition of territorial conquests by force. That problem was outside the topic of succession in respect of treaties, however, and even outside the whole subject of the law of treaties. The best solution was that proposed by the Special Rapporteur himself, in paragraph (4) of his commentary to article 1: to formulate "a general article reserving the question of military occupations altogether from the draft, just as such special cases as 'aggression' and the 'outbreak of hostilities' have been reserved from the draft Convention on the law of treaties."

13. Article 3 contained the important rule that a devolution agreement did not by itself bind the successor State vis-à-vis third States. The Special Rapporteur had rightly discarded the idea put forward by the International Law Association that there should be a presumption that the new State was bound by treaties previously in force in respect of its territory, unless it notified its contrary intention within a reasonable period of time. There was no justification for placing the onus of notification upon the successor State. A newly independent State necessarily faced a period of initial disorganization, during which it was difficult for its Ministry of Foreign Affairs to obtain the views of other ministries regarding the advisability of continuing certain treaties in force. The inevitable delays resulting from that natural disorganization should not be allowed to result in the injustice of imposing upon the new State an obligation which, after due consideration, it would not have wished to assume.

14. The Special Rapporteur had very properly adopted the opposite principle: the successor State must express its intention of remaining bound by the treaty. That rule was more in keeping with the general *tabula rasa* principle and was also more realistic and more in keeping with the principle of self-determination. In a working paper submitted to the Commission's 1963 Sub-Committee on Succession of States and Governments,[3] Mr. Bartoš had pointed out the doubtful legal value of devolution agreements, which sometimes represented part of the price that had to be paid by a new State to the former metropolitan Power to obtain its independence. There was no need in the present draft, however, for a specific article on the validity of devolution agreements, because the position was safeguarded by the application of the rules in the Vienna Convention on the Law of Treaties.

15. The rule that a devolution agreement could not of itself operate the transmission to the successor State of rights and obligations resulting from a treaty concluded by the predecessor State had its basis in the *pacta tertiis* rule. As far as third States were concerned, the devolution agreement was *res inter alios acta*. It was, moreover, a general principle of the internal law of practically all countries that a transfer of obligations could not be effected without the consent of the beneficiary.

16. It was true that the law of many countries allowed the opposite operation, namely, the transfer or assignment of a credit, or more generally a right, without the consent of the debtor, as in the case of negotiable instruments. Situations of that type, however, had arisen from the need to facilitate trade transactions, and the possibility of assigning a credit without the consent of the debtor in certain cases must be regarded as a phenomenon peculiar to internal law. But that situation could not be imported into international law. For a State to owe something to a small country was very different from owing something to a great Power. It was unthinkable that an obligation should be assigned without the consent of the debtor party. It was only proper to require the successor State to express clearly its intention to remain bound by the treaties concluded by the predecessor State.

17. He supported the Special Rapporteur's thesis that devolution agreements must be regarded as a mere expression of intention. He also supported his interpretation of the significance and bearing of international practice in the matter and his reasons for not agreeing with the Secretary-General's former practice of considering that devolution agreements could have the effect of making a successor State a party to multilateral treaties signed by the predecessor State.

18. He agreed with Mr. Sette Câmara, however, on the usefulness of devolution agreements as evidence of the intention of successor States and on the need not to

[2] See previous meeting, para. 8.

[3] See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 293-297.

discourage the future conclusion of such agreements.[4] At the same time, it would be a mistake to overlook the dangers to which Mr. Bartoš had drawn attention in his working paper in 1963, which had arisen from the historic conditions under which devolution agreements had been signed.

19. With regard to the definition of a "new State" in sub-paragraph (*e*) of article 1 (A/CN.4/224), he suggested that the rather inadequate wording "'New State' means a succession where a territory which previously formed part of an existing State has become an independent State" should be replaced by language similar to that used in paragraph (2) of the commentary, where a new State was described 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".

20. The essential rules were those contained in articles 6 and 7 (A/CN.4/224). Under article 6, the successor State was not bound by the treaties of the predecessor State, nor was it under an obligation to become a party to those treaties. The article thus expressed the "clean slate" rule, with which he agreed; he also agreed with the Special Rapporteur's interpretation of State practice and of the reasons for not considering multilateral treaties of a legislative character as an exception to the rule.

21. In connexion with the views put forward by Mr. Jenks,[5] he noted the very subtle distinction made by the Special Rapporteur in paragraph (9) of his commentary to article 6 between "the law contained" in a multilateral treaty "in so far as it reflects customary rules", which was binding on the successor State as generally accepted customary law, and the erroneous suggestion that "because a multilateral treaty embodies custom, a new State must be considered as *contractually* bound by the treaty *as a treaty*".

22. He also found it acceptable that the only exception to the *tabula rasa* principle should be that of the so-called "dispositive" or "territorial" treaties which laid down boundaries or established encumbrances or servitudes—though legal opinion did not view with much favour the survival of the concept of servitudes in international law. In any case, those were exceptions and as such must be interpreted in a restrictive manner. There would be no justification for enlarging the scope of the exceptions by way of interpretation.

23. Hence, as the Special Rapporteur had pointed out in paragraph (17) of his commentary to article 6, there was no basis for regarding as dispositive or territorial treaties such instruments as Customs and transit agreements. Those agreements naturally related to a territory in the sense that any international instrument applied to a given territory, but it would be an abuse of language to describe them as "territorial" treaties.

24. Article 7 contained the fundamental rule which enabled the successor State to become, if it so wished, a party to multilateral treaties concluded by the predecessor State, by notifying its intention of doing so. The excellent study of State practice by the Special Rapporteur made a very convincing case for the proposition that the rule in article 7 had become a rule of customary international law. It was a matter for surprise that other scholars—except Zemanek—should not have arrived at the same conclusion. Perhaps that situation could be attributed to the fact that the relevant State practice was very recent, so that the rule of customary law could be said to have only just been established.

25. It was important to note that, in the establishment of the right of the successor State to become a party to multilateral treaties, the will of third States parties to those treaties did not play any part. The position was well illustrated by the practice of the Secretary-General referred to in paragraph (2) of the commentary to article 7. Whenever a former dependency of a party to multilateral treaties of which he was the depositary emerged as an individual State, the Secretary-General wrote to that State inviting it to confirm whether it considered itself to be bound by the treaties in question. The Secretary-General did not consult the other parties before writing, nor did he ask the views of those parties or await their reactions when he notified them of an affirmative reply received from a new State. The Secretary-General acted on the assumption that the successor State was entitled to consider itself bound by the multilateral treaties in question in its own right. There was therefore no question of novation.

26. The question accordingly arose of determining the legal foundation of the rule in article 7. Its foundation was not the law of treaties, since, as Mr. Rosenne had observed, that law was firmly anchored in the principle of the autonomy of the will of the parties, whereas in the case under consideration the will of third States parties to a multilateral treaty did not play any part. There were, of course, considerations of justice and fairness which militated in favour of the proposed rule and it was, moreover, in the interests of the continuity of treaty relations. In any case, the practice of States was uniform in the matter.

27. The Special Rapporteur himself had put forward the concept of a legal nexus between the multilateral treaty and the territory of the new State. Personally, he found it difficult to understand the concept of such a nexus as the legal foundation of the rule in article 7. Every treaty, of course, applied to a specific territory but, except for treaties establishing rights *in rem*, there was no special connexion between a treaty and a territory.

28. There was no basis in the law of treaties for the rule in article 7, since it did not conform with the rules on the effects of treaties. That being so, the only foundation that could be assigned to it was a rule of customary international law deriving from the practice of States. But that practice had evolved in, and belonged to, the sphere of the law of succession more than that of the law of treaties.

29. In any case, as the Special Rapporteur had pointed out in paragraph (8) of his commentary to article 7, the question whether the right stated in article 7 derived from

[4] See previous meeting, paras. 29-31.

[5] See document A/CN.4/224, para. (8) of commentary to article 6.

a principle of the law of treaties or from a principle of "succession" was "primarily a doctrinal question". The different views on the answer to that doctrinal question did not in any way affect either the nature or the scope of the rule which had been proposed by the Special Rapporteur and with which he was in full agreement.

30. With regard to the formulation of article 7, he noted that its provisions were intended to acknowledge the right of the successor State to succeed to the multilateral treaties in question. That being so, the article should have been couched in terms of the statement of the right itself; as drafted, it merely said that the new State was "entitled to notify" that it considered itself a party to the treaty in its own right. That formulation had the disadvantage of placing the emphasis on the notification, which was only an instrument for the existence of the right.

31. He fully agreed with the three exceptions stated in sub-paragraphs (*a*), (*b*) and (*c*), but wished to draw attention to a particular modality of one of those exceptions, which he would illustrate by two examples.

32. The first was drawn from the Buenos Aires Protocol amending the Charter of the Organization of American States,[6] which had recently come into force. The new article 8 laid down the rule that no final decision should be taken with respect to a request for admission to the OAS of a political entity whose territory was subject to a dispute with one or more member States. Perhaps that case might come within the scope of sub-paragraph (*b*), since it related to the "constituent instrument of an international organization", namely, the OAS Charter.

33. His second example was drawn from the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America,[7] article 25 of which precluded the accession to that Treaty of a State whose territory was the subject of a dispute with one or more Latin American States.

34. Mr. CASTRÉN said that he had already made a number of general comments on the definitions in article 1[8] and would now like to state his position on articles 3, 4, 6, 7 and 8. Next year he might deal with articles 2, 5 and 9-12.

35. The principle stated in paragraph 1 of article 3 was correct and should be included in the draft. Devolution agreements could, in fact, be binding only on the parties to them, namely, the predecessor State and the successor State. In paragraph (9) of his commentary to the article, the Special Rapporteur had rightly based that solution on the general rules of international law confirmed by the Vienna Convention on the Law of Treaties and in paragraph (25) he had pointed out that the practice of States with regard to such agreements was too diverse for them to be considered as creating, of themselves, a legal nexus between the successor State and the States linked to the predecessor State by treaties applying to the territory affected by the change of sovereignty.

36. The Special Rapporteur had been right to devote a separate article containing detailed provisions to unilateral declarations by successor States. As he had shown in his commentary to article 4, in the process of decolonization which had followed the Second World War, such declarations had been made by several States which had achieved independence. They had the undoubted advantage of promoting the continuity of contractual relations in the international community of States, and that was generally in the interests of all parties. The practice of the new States had not been entirely uniform in the matter, but some common principles did emerge and it was therefore possible, on the basis of that practice, to frame rules for the guidance of States and for the interpretation of unilateral declarations, which were not always complete or clear. That was the task which the Special Rapporteur had set himself in presenting article 4 to the Commission and he seemed to have been very successful.

37. Of course, article 4 also contained some rules *de lege ferenda*, which were necessary if a complete and satisfactory mechanism was to be established. The new rules were by no means too radical, quite the contrary. Their purpose was merely to ensure that the treaties in question were applied on a provisional basis if no objection had been expressed within a specified time. After reviewing the treaties, the successor State would negotiate with the States which had concluded them with the predecessor State, in order to reach agreement on what should finally be done.

38. Several possibilities were then open to the States concerned: they could terminate the treaty or continue to apply it with or without agreed amendments. For practical reasons, the requirement that third States must communicate their decision within a fairly short time if they were opposed to even the provisional application of the treaties, was justified. If they omitted to do so inadvertently or for some other reason, they might still, under paragraph 3 (*a*), terminate the provisional application of the treaty by simple notification of the successor State. With the other cases of termination of the provisional application referred to in paragraph 3, a complete list of adequately described cases was provided. Sub-paragraph (*d*) might lend itself to divergent interpretations, but it should nevertheless be retained.

39. He also approved of the exceptions to the general rule of provisional application set out in paragraphs 2 (*a*) and (*b*). In paragraph (22) of his commentary, the Special Rapporteur had explained that he had drafted sub-paragraph (*a*) as a precaution, pending the Commission's conclusions as to whether any treaties were succeeded to automatically by a newly independent State. It was interesting that some new States had explained in their declarations that they regarded themselves as bound by certain unspecified treaties in virtue of the rules of customary international law. In his course at the Academy of International Law at The Hague in 1967, Professor Jennings, dealing with State succession and treaties, had expressed the view that there were some

[6] Official Documents of the Organization of American States, document OEA/Ser.A/2.Add.

[7] *Official Records of the General Assembly, Twenty-second Session, Annexes*, Agenda item 91, document A/C.1/946.

[8] See 1067th meeting, paras. 54-56.

treaties—not only "law-making" treaties—such as multilateral conventions of a humanitarian, technical and administrative character, which could be regarded as subject to a régime of continuity and bound new States irrespective of their wishes.[9] Article 4 was therefore fully acceptable.

40. The contents of article 6 should also be approved, both *de lege lata* and *de lege ferenda*. It appeared from the excellent commentary that most authors had accepted the main ideas advocated by the Special Rapporteur. On that point, too, the practice of States was not quite uniform, but should apparently be interpreted to mean that a new State was not bound to apply the treaties concluded by its predecessor or to become a party to such international instruments.

41. The Special Rapporteur had been right to make no difference between multilateral and bilateral treaties in that matter. In paragraph (9) of his commentary to article 6, he rightly pointed out that the solution adopted also applied in the case of multilateral law-making treaties. On the other hand, the right of a new State to succeed to multilateral treaties was in fact a separate problem, and was dealt with in the next article.

42. Although generally favourable to the new States' right of self-determination, he did not subscribe to the extreme applications of the *tabula rasa* theory. He therefore accepted the views expressed by the Special Rapporteur in paragraphs (4)-(7) of the commentary.

43. The description in paragraphs (10)-(14) of the practice followed by the depositaries of certain general conventions was very illuminating and the conclusions drawn on the question whether a new State was automatically bound by those conventions carried conviction.

44. Lastly, he approved of the initial reservation in article 6, because, for the time being, some categories of treaties designated under different names and referred to in paragraph (17) of the commentary had to be taken into account. In paragraphs (16) and (17) of the commentary, the Special Rapporteur noted the differences existing both in doctrine and in practice, particularly with regard to the categories of treaty to which the presumption of succession applied. The final text of article 6 would depend on the examination of that question.

45. Article 7 contained rules which had often been applied in the recent practice of States, as the Special Rapporteur had noted, particularly in paragraph (2) of his commentary. It might therefore be desirable to recognize in the draft the right of a new State to become a party, as such, to a general multilateral treaty by a notification of continuity or succession, although most authors did not expressly affirm such a right. It must be admitted that the legal foundation of that right might lie in the fact that the predecessor State had, by its acts, established a legal nexus between the treaty and the territory, as indicated in paragraph (6) of the commentary.

46. The three conditions laid down in article 7, sub-paragraphs (*a*), (*b*) and (*c*) were acceptable and even necessary. With regard to sub-paragraph (*b*) the Special Rapporteur had, in paragraphs (10) and (11) of the commentary, faithfully described international practice with regard to the acquisition of the status of member of an organization. It was also true that a new State might become a party by succession, as well as by accession, to multilateral treaties adopted within an international organization when they were open to some or even to all non-member States, as indicated in paragraph (18) of the commentary.

47. Article 8, it had been said, should be read in conjunction with the preceding article. He had no hesitation in preferring the much more liberal rule for new States recommended by the Special Rapporteur to the rules drafted by the International Law Association. As was shown in paragraph (3) of the commentary, the rule in paragraph 1 (*a*) of article 8 was in conformity with the undisputed practice of the Secretary-General of the United Nations acting as depositary of multilateral treaties. In the absence of established practice in the matter, the rule in paragraph 1 (*b*) was rather *de lege ferenda* in nature. However, for the reasons given by the Special Rapporteur in paragraph (6) of the commentary, the Commission might adopt that rule of progressive development of international law. The provision in article 8, paragraph 2, was also acceptable, particularly as it was corroborated, at least to some extent, by the practice of the Secretary-General.

48. Some members of the Commission thought that article 8, paragraph 1, was unnecessary because, according to them, everything depended on the content of the treaty. All treaties, however, were not open to all States, and the fact that they were open to the predecessor State did not necessarily mean that the successor State would have the same right to become a party to them. For that reason, in addition to those already mentioned, paragraph 1 of article 8 should be retained.

49. Mr. YASSEEN said he would comment only on the points on which the Special Rapporteur had requested the Commission to give its views,[10] but he wished first to express his admiration for the authority and skill which the Special Rapporteur had once more shown in successfully choosing, where the practice was not uniform, solutions which could be reconciled with the principles required by the interests of the international community.

50. The definition of succession in article 1 was excellent. It was not only a definition, but a real solution, for it avoided the enormous difficulties which would have arisen if the definition had been based on traditional considerations of private law. Instead of starting from the concept of devolution of obligations and rights, which would have given rise to controversies on the determination of cases of succession, the Special Rapporteur had simply taken as his starting point the neutral fact of the replacement of one State by another. It remained to determine and formulate the consequences of that fact. From the technical point of view, it was an extremely skilful solution.

[9] See *Recueil des cours*, 1967, vol. II, p. 444.

[10] See 1067th meeting, para. 40.

51. Article 3 reflected the most general international practice. There were, of course, other practices, but the rule stated in the article was favourable to new States. Without dwelling on the particular case of decolonization, which had been the subject of fairly full discussion at the previous session, it could be said, generally speaking, that a devolution agreement could not have the effect of transferring obligations and rights, first, for the technical reason that States bound to the predecessor State were third States in relation to the successor State, and secondly, because an agreement of that kind concluded between the predecessor State and the successor State was often hastily drafted and covered a great number of treaties without going into the difficulties peculiar to each of them. Hence a solution contrary to that proposed in article 3 could only harm new States. Leaving aside the details and exceptions to which there would be occasion to revert, he therefore approved of the principle stated in that article.

52. The unilateral declaration deserved to have an article to itself. It was the method to be encouraged, because the conclusion of a devolution agreement left doubts regarding the freedom of consent of the successor State, whereas a unilateral declaration was the free act of a sovereign State. The provision that treaties should continue to apply provisionally was not a real derogation from the general principles. The practical value of continuity in international relations was an argument in favour of presuming acceptance of that provision, which, moreover, was accompanied by all the necessary safeguards: the presumption was not irrebuttable.

53. Article 6 was the key article of the draft. The rule it contained, which was borne out by practice, was required by the interests of new States and of the international community. A people could not be bound for ever. At the moment of succession, the new State should have a certain freedom as to the obligations contracted by the predecessor State. The rule gave concrete expression to the sovereignty of the new State. That did not, of course, mean that the new State had no links with the rest of the world; but the rule showed that reliance was placed on its judgement. Once it had become a subject of international law, the State itself decided which obligations should continue to have effect. He wished only that the article had a more prominent place in the draft.

54. Articles 7 and 8 were intended to facilitate access to multilateral treaties. They made no distinction as to the subject of the treaties, but they clearly referred to treaties involving the general interests of the international community; treaties concluded between only four or five States could hardly be called multilateral. The terms, which had a very precise meaning in the law of treaties, could therefore be maintained, and the practice of States could be relied on for the necessary distinctions. An increasingly wide participation in multilateral treaties was in the interests of the international community.

55. By the results of his work submitted to the Commission, the Special Rapporteur had proved that, despite the exceptional difficulty of the subject, it would be possible to conclude a convention in the near future.

56. Mr. ALCÍVAR, after associating himself with the tributes paid to the Special Rapporteur, said that he had at first been inclined to support the view, frequently expressed in the Sixth Committee, that a separate chapter of the draft should be devoted to the problems of decolonization; but he now believed that the Special Rapporteur had adopted the right approach. Moreover, he agreed with the Special Rapporteur that there were no succession problems regarding the former Spanish and Portuguese colonies on the American continent. However, he would not venture to say the same about succession situations which had arisen after independence: for the former Central American Confederation had split up into five independent republics; Gran Colombia had been divided, first, into three States, and then, at the beginning of the present century, the Republic of Panama had been created by secession from Colombian territory.

57. With respect to the definition of "succession" in article 1, the Special Rapporteur had been right to distinguish between municipal and international law, since the transfer of rights and obligations under municipal law, especially in countries of Latin origin, was not governed by the same criteria as succession in international law.

58. He fully agreed with the Special Rapporteur's decision to deal with cases of State succession within the context of the Vienna Convention on the Law of Treaties, rather than to attempt to fit treaties into some general law of State succession.

59. He was prepared to accept the Special Rapporteur's definition of the term "new States" in article 1, sub-paragraph (*e*), but he agreed with Mr. Castañeda that it would be desirable to reflect in that definition the fact stated in paragraph (2) of the commentary, that new States could emerge as the result either of succession or of secession.

60. He fully supported the rule stated in article 3 on agreements for the devolution of treaty obligations or rights upon a succession, though he differed slightly from the Special Rapporteur in that he thought the rule should not be based on customary law alone, but rather on general international law, the sources of which, besides customary law, included treaties, general principles of law and the decisions of international bodies.

61. In article 4, on unilateral declarations, the Special Rapporteur had struck a cautious balance, which he considered absolutely acceptable.

62. Article 6 gave rise to certain questions of particular importance to new States, such as that of frontier treaties, which he hoped that the Special Rapporteur would consider at greater length in the future. He agreed with Mr. Yasseen's observation concerning the position of the article, which, as a rule of a general character, should be given more prominence.

63. He had certain reservations concerning paragraph 1 (*b*) of article 8, which permitted succession to

occur when the predecessor State had signed a treaty without ratifying it.

64. Lastly, he was in agreement with the general plan which the Special Rapporteur had proposed for the draft articles; in principle, that plan was concrete, clear and objective, but he reserved the right to reconsider his views in the light of later discussion.

65. Mr. THIAM thanked the Special Rapporteur for the valuable report he had submitted to the Commission, and congratulated him on his efforts to reconcile the requirements of scientific method with the realities of international life.

66. The difficulties on which the Commission was invited to give its views were of three kinds: first, the difficulties inherent in the very concept of the subject; secondly, difficulties of terminology; and, thirdly, difficulties relating to the principles to be enunciated.

67. With regard to the first kind of difficulties, the question arose whether the problem of succession in respect of treaties was sufficiently homogeneous for systematic study. The variety of concrete situations called for a variety of solutions, but inasmuch as the Special Rapporteur had defined succession as a transfer of sovereignty, power and competence, it was a concept which could be analysed and could lead to very similar solutions.

68. In the case of new States, however, it might be asked whether succession resulting from decolonization was of a sufficiently specific character to be treated separately or whether it should be studied within the general framework of succession in respect of treaties. In his opinion, that form of devolution could be studied within the general framework of succession in respect of treaties, provided that its specific aspects were emphasized in each case. And that was what the Special Rapporteur had done when he had established the difference between successor States and new States, it being possible for a State to be a successor State without being a new State. Another reason for stressing the special aspects of decolonization was that, although devolution agreements, which certain liberal theorists declined to recognize as valid, had in practice been the means of settling a number of succession problems amicably, and in any case could always be challenged, the fact remained that any State which wished to claim that they were void by reason of a defect in consent must be able to do so; hence the draft articles should deal with all the aspects of the matter which affected new States, if not necessarily all successor States.

69. With regard to difficulties of terminology, the Special Rapporteur had asked whether he could use the word "succession" to describe a situation very different from that covered by the term in municipal law. In his view, the essential point was to define the term within the framework of the draft articles in a way which made it quite clear that it only faintly echoed what succession meant in municipal law.

70. In the definition given in article 1, sub-paragraph (*a*) (A/CN.4/214), the word "sovereignty" was perhaps not appropriate; for as international life had become more and more complex, there were, in current parlance, various degrees of sovereignty, and it was difficult to see whether, in using the word "or", the Special Rapporteur had wished to indicate an alternative or the use of synonymous expressions. If it was an alternative, the article could be understood to mean that certain States exercising their sovereignty over a territory were not competent to conclude treaties with respect to that territory or *vice versa*. The wording of the sub-paragraph should therefore be revised, despite the explanations which the Special Rapporteur had given in paragraph (4) of the commentary, where he had explained that he had used the term "sovereignty" in order to exclude situations such as military occupation.

71. With regard to the principles to be enunciated, the difficulty was to formulate a number of principles general enough to be applied to the great majority of cases. The basic principle, stated in article 6 (A/CN.4/224), was sound and in conformity with contemporary international law. It was very rare in practice for successor States to apply fully either the "clean slate" principle or the principle of continuity; they generally proceeded by stages, regarding as null and void treaties incompatible with their independence or their national interests, and maintaining those which had been concluded by the predecessor State in the interests of the successor State.

72. In article 6, therefore, it was more a question of affirming the principle of self-determination, in other words, the principle that a treaty could not be imposed on an independent State which was not a party to it. The Special Rapporteur had very rightly laid down that principle, but it would be advisable also to provide for exceptions and, before going any further, to examine the theory of "local contingencies".

73. On the whole, he approved of the Special Rapporteur's approach and, especially, of the spirit in which he had tackled the problems under study.

Organization of future work

(A/CN.4/L.154)

[Item 8 of the agenda]

(resumed from the 1066th meeting)

74. The CHAIRMAN invited the Commission to consider the Secretary-General's note on the estimated costs of a four-week extension of its 1971 session (A/CN.4/L.154).

75. Mr. USHAKOV said that the estimate appeared to be based on the assumption that the additional meetings would overlap with meetings of the Economic and Social Council. Perhaps the Secretariat could be asked to estimate the cost of an extension which would avoid such overlapping.

76. Mr. ROSENNE said that the Secretariat would have to bear in mind the Commission's long-established practice regarding the dates of its sessions, since it was those dates which might lead to a clash with other meetings in the event of a four-week extension.

77. The CHAIRMAN said that paragraph 2 of the Secretary-General's note included some costs which did not appear to be fully justified; the sum of $98,000 for conference services for a four-week period in July, for example, was surely excessive, since there was usually an overlap of a week or ten days with the Economic and Social Council in July, in any case. He suggested that the Commission defer consideration of the matter.

It was so agreed.

The meeting rose at 12.55 p.m.

1072nd MEETING

Wednesday, 17 June, 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.

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)

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. BARTOŠ, congratulating the Special Rapporteur on the excellent work he had done on a subject rendered very difficult by the diversity of opinion and practice, said he wished to draw his attention to various points, so that he could take them into consideration in his further studies.

3. In article 1 (A/CN.4/214), the definitions in sub-paragraphs (*a*), (*b*) and (*c*) were correct, but called for certain comments. In sub-paragraph (*a*) he would limit the definition of "succession" to the replacement of one State by another in the sovereignty of territory, and add a reservation concerning general and partial replacement.

4. The second part of the definition, relating to the competence to conclude treaties with respect to territory, was less satisfactory, because that competence was not entirely in conformity with the Charter: for it was by virtue of territorial sovereignty that States possessed such competence and under the Charter all States enjoyed equal sovereignty over their territory. True, the Special Rapporteur had explained in the commentary that he had used the phrase "competence to conclude treaties" because it was capable of covering such special cases as mandates, trusteeships and protected States; but that being so, the matter should be dealt with in a separate paragraph or sub-paragraph and not put on the same plane as sovereignty.

5. Sub-paragraph (*c*) raised the question of the distinction that should be made between a new State and a State which had become a successor State after having been part of another State's territory and denied that it was a "new State", claiming that it had formerly been a sovereign State and had merely freed itself from foreign occupation. He had no objection to the wording of sub-paragraph (*c*), but asked the Special Rapporteur to clarify that situation in his commentary.

6. Article 2 raised the question how the continuity of international life could be assured while at the same time taking into account the wishes of the successor State in regard to the obligations assumed by the predecessor State, for succession in respect of treaties affected not only the interests of the predecessor and the successor State, but also the interests of third States and of the general international public order. As he had pointed out in the working paper he had submitted to the Sub-Committee on Succession of States and Governments, [1] and again at the Commission's nineteenth session, when the topic had been divided between two Special Rapporteurs, it was not always a question of succession in respect of treaties, but sometimes of continuity of a status established with respect to a territory before the succession, which had become a rule apart, governing, for example, transit requirements, water supplies, the use of waterways, access to ports, and so on. On that point, the topic should be delimited more precisely between the two Special Rapporteurs.

7. The rules proposed by the Special Rapporteur in article 3 were in conformity with the practice followed until the end of the Second World War and even, quite frequently, after it. But in the case of certain States born of decolonization which did not regard themselves as new States, it was not easy to decide between the interests of the State which had surrendered its sovereignty, of the successor State, of third States parties to treaties with the predecessor State and of the international community, which required the continued application of certain treaties, such as those of a humanitarian character or those relating to the control of drugs or to the law of the sea. Where such treaties were concerned, acceptance of contractual obligations became an international duty for the successor State, which should, at least provisionally, adopt the principle that the general rules of international law which were in the common interest must continue to be applied.

8. With regard to decolonization, the question had been raised whether general rules should be laid down which successor States must apply, or whether the matter

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[1] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 293.