Document:-

A/CN.4/SR.1072

Summary record of the 1072nd meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1970, **vol. I**

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.

should be left to the discretion of States. But, as Mr. Thiam had pointed out, it was very rare in practice for successor States to apply fully either the *tabula rasa* principle or the principle of continuity.[2] In any case, the question of the devolution of obligations was not purely formal; it was subordinate to the interests and needs of the international community.

9. In the commentary to article 3, two points called for comment. The first was that the Special Rapporteur had quoted the 1947 Order settling the particular cases of India and Pakistan as an example of obligations assumed by governments before independence and taken over by the governments resulting from the arrangements, which had become something like an international treaty; but he had not examined the case of States which had been unable, before independence, to form a government having the capacity to assume contractual obligations, or the question whether there should not be a transition between the achievement of independence and the establishment of a government whose independence would be truly recognized at the international level.

10. The second point concerned the Special Rapporteur's very interesting approach to the *pacta tertiis* rule. It was unfortunate that he had based himself mainly on the practice of the United Kingdom and the Netherlands and on United Nations practice concerning the United Kingdom and the Commonwealth countries. For it was a question which had led to many disputes, not only between third States and successor States, but also between third States and predecessor States, which had been called upon to ensure that the successor State fulfilled the obligations arising from the old treaties. For the present, he thought that the question could only be settled on very general lines. Perhaps some indication could be given of what rules were desirable, but rules valid for all States could not be formulated.

11. It was doubtful whether the rule in article 4 could be applied in practice. Admittedly there were general rules in the matter, but the practice of new States varied widely. The Special Rapporteur had, however, very sensibly outlined the three possible solutions, namely, that the treaties should remain in force, that they should be applied provisionally, or that they should be terminated, and he had given many examples illustrating the evolution of the international rules governing succession in respect of treaties which could be derived from the practice of the new States. Thus the problem was one both of law and of historical evolution. It might, however, be asked whether the principle of the continuity of treaties did not go against the emancipation of the new States, since it maintained, vis-à-vis third parties, the régime in force before independence.

12. As to the corrigendum to article 1 (*f*) (A/CN.4/224/Add.1), the Special Rapporteur had been right to make a distinction between succession in general and succession in the case of new States; but it must again be emphasized that the expression "new States" would not always be well received by States born of decolonization which claimed that they had freed themselves from foreign domination resulting from unlawful occupation of which they had been the victims. Those were cases of revival of a State, not of its liberation.

13. Article 6 was the key to the whole draft. It clearly stated the theory of the will of new States. He agreed with the Special Rapporteur, however, that the right of new States not to consider themselves bound by treaties concluded by the predecessor State did not apply to treaties containing rules of *jus cogens*. A separate subparagraph should therefore be drafted to cover such treaties.

14. He shared the Special Rapporteur's view concerning the right of a new State to notify its succession to multilateral treaties, which was the subject of article 7, but again, except in the case of treaties having the character of *jus cogens*.

15. He was also in favour of granting new States the right, set out in article 8, to establish their consent to be bound by a multilateral treaty which had not been in force at the date of the succession, but that right should be subject to the reservations stated in article 7. Those reservations should be set out in a separate paragraph.

16. Mr. TABIBI said he was in complete agreement with the Special Rapporteur's draft article 1, without which it would, indeed, be difficult to conceive of any model convention on State succession in respect of treaties.

17. He had certain reservations concerning article 2, however, and doubted whether it really belonged among the introductory articles. As at present framed, it might give rise to serious questions in the General Assembly, and on the part of governments, regarding the sovereignty and territorial integrity of small States.

18. In general, he supported article 3, although he questioned whether all devolution agreements should be accepted merely to safeguard the principle of continuity, since many agreements of that kind had been concluded only for political, economic and military purposes. In the past some agreements of that kind had been concluded without taking account of the principle of self-determination and without consulting the third States concerned. For example, the Indian Independence (International Arrangements) Order, 1947, had included a devolution agreement which was contrary to the text of the British-Afghan Treaty for the Establishment of Neighbourly Relations, signed at Kabul in 1921.[3] That treaty, which itself was based on a large number of unjust wars waged during the nineteenth century, had provided that both Parties should consult each other concerning any transfer of territory in the so-called free tribal area, which included some four million inhabitants along the north-west frontier of India, but the United Kingdom had nevertheless unilaterally transferred the whole area to Pakistan.

19. He agreed in general with article 4, though he thought it tended to give too much importance to the unilateral declaration of the successor State and to ignore the need of third States. In particular, the period of three months mentioned in paragraph 2 (*c*) was much too

[2] See previous meeting, para. 71.

[3] League of Nations, *Treaty Series*, vol. XIV, p. 67.

short to meet the requirements of the new Asian and African States: it should be increased to one or two years.

20. Article 5 embodied what he considered to be the cardinal principle of the draft and he supported it fully.

21. Lastly, he was prepared to support article 6. The "clean slate" principle seemed to be in accordance with general practice, although Mr. Bartoš had raised the interesting point that there were certain treaties having the character of *jus cogens* which new States should not attempt to evade. That problem was of particular relevance to his own country, for there were 8 million of its people living within the north-west frontier of Pakistan, for whom Afghanistan sought recognition of the right of self-determination. An additional article might be necessary to cover such cases.

22. The CHAIRMAN,* speaking as a member of the Commission, said he had certain doubts concerning the legal arguments advanced by the Special Rapporteur in support of article 3 (A/CN.4/214/Add.1). In paragraph (9) of his commentary to that article, the Special Rapporteur had correctly pointed out that articles 34-36 of the Vienna Convention on the Law of Treaties[4] were of vital importance in connexion with the legal effects of devolution agreements. He had then gone on to consider the effects of the Vienna Convention from two general viewpoints: first, that of the actual terminology of the devolution agreement and, secondly, that of an assignment by the predecessor State, though he had concluded that neither was sufficient to bring article 34-36 into play.

23. However, some authority was to be found for the assignment theory in O'Connell's latest study of the question, chapter 20 of which opened with the following passage: "The consensual theory of treaty-making which has dominated modern international law inhibits the assignment of treaty rights and duties from one party to a non-contracting party. It must not be thought, however, that an attempted assignment of treaties must always be abortive, for international law takes a liberal attitude towards the creation of *vincula juris* through the processes of tacit consent or novation. Hence, if treaties which would normally lapse on change of sovereignty are assigned to successor States, they may be kept in force by tolerance on the part of the other contractors affected with notice."[5] He would like to have that quotation placed on record to show that there was support for the assignment theory, although he felt that, as far as the Vienna Convention was concerned, that theory was only a red herring.

24. To his mind, the real point was whether any obligation arose for a third State under article 35 of the Vienna Convention and, what was more important, whether any right arose. The whole question turned on the problem of whether the parties to the devolution agreement had intended to accord that right to a third State; it was not, therefore, a matter of assignment, but rather one of the intent of the parties, and in that respect the Special Rapporteur had relied on their intentions, as illustrated in their language, "to make provision *as between themselves for their own obligations and rights*" and "not to make provision for obligations or rights of third States within the meaning of articles 35 and 36 of the Vienna Convention". Yet while many devolution agreements might be couched in obscure language, there were a number which appeared to be fairly clear, especially those concluded by the French Government.

25. The Special Rapporteur had concluded paragraph 9 of his commentary by stating that devolution agreements, according to their terms, dealt "simply with the transfer of the treaty obligations and rights of the predecessor to the successor State"; if that statement was correct, however, those obligations and rights did not exist in a vacuum, but necessarily related to certain treaties, and accordingly, to those third States which had been the parties to the original treaties, as referred to in articles 35 and 36 of the Vienna Convention. That whole line of argument, therefore, led him to believe that some further development of the legal consequences of devolution agreements was necessary if the Vienna Convention was to be taken as a starting point.

26. With regard to article 4 (A/CN.4/214/Add.2), paragraph 1 could only be discussed in the context of the subsequent draft articles. Paragraph 2 raised a number of problems, especially with respect to the exception in subparagraph (*a*) that "the treaty comes into force automatically as between the States concerned under general international law independently of the declaration". He assumed that the contents of that sub-paragraph would be further developed in the course of the subsequent consideration of the draft articles as a whole, since it appeared to refer to dispositive and boundary treaties, which might involve elaborate provisions for implementation through boundary commissions and the like. Certain complications might also arise in connexion with subparagraph (*c*), especially concerning the application of multilateral treaties, though he assumed that that subparagraph was intended to have effects somewhat along the lines of the procedure concerning reservations referred to in article 20, paragraph 4 (*c*), of the Vienna Convention.

27. In article 6 (A/CN.4/224), the Special Rapporteur had adopted an acceptable working position, since obviously some flat rule was called for as a point of departure. The real scope of that article, of course, would be determined by the words "subject to the provisions of the present articles". In that connexion he could only refer to O'Connell's conclusion in chapter 8 of the volume from which he had already quoted: "No coherent doctrine on State succession can be formulated as a result solely of description of what the newly independent States have done, for they have acted in inconsistent fashion. The hypothesis of lapse of treaties, however, has been shown only to compound the diplomatic and administrative problems of the new States themselves, and of the other parties to treaties, and to introduce serious internal contradictions into the practices of government depart-

* Mr. Kearney.

[4] *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).

[5] D. P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. II, p. 352.

ments. The hypothesis of continuity, on the other hand, avoids these difficulties and, provided it allows for the possibility that some treaties lapse in virtue of inconsistency, places the successor State in no more disadvantageous position that does the hypothesis of lapse."[6] He hoped that the Special Rapporteur would bear that quotation in mind when considering what exceptions to the "clean slate" doctrine were required.

28. Lastly, he had no objections to article 7, although it might be desirable to include an additional sub-paragraph to cover cases where multilateral treaties might have special requirements which were not at present covered by sub-paragraphs (*a*), (*b*) and (*c*).

29. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that, with the possible exception of Mr. Rosenne, members had been virtually unanimous in considering that his general approach reflected modern practice and provided a working basis for the Commission's further examination of the topic. There were, of course, points in the draft articles he had so far submitted which might call for modification and refinement in the light of the discussion that had taken place. At the same time, he interpreted the debate as indicating that he should complete the draft on the lines suggested in his reports.

30. At the present stage, none of the members were committed to a particular view, nor, indeed, did he regard himself as committed in any way. Members were clearly entitled to see the whole draft before taking up their final positions on the various articles, including those now being discussed.

31. In his next report, he would probably not present new texts of articles 1 to 12 revised in the light of the discussion. He still had much work to do in preparing further articles on the remaining questions, some of which were difficult and important. He would therefore probably leave the points made during the present discussion and recall them when he came to introduce the present group of articles one by one on the resumption of the Commission's consideration of the topic. For that reason, he did not think it would be useful for him now to comment in any detail on the various suggestions which had been made. Indeed, he needed time in which to reflect on those suggestions.

32. He would therefore confine himself to giving his reactions to certain points which had been raised during the debate. The first related to the use of the term "succession". It was difficult to avoid the use of that word, which appeared in the very title of the topic. Since it had to be used, he thought it must be defined, so as to avoid all confusion with the municipal law concept of succession.

33. Some speakers had expressed a certain regret that the term "succession" did not carry the notion of transmissible rights, but he felt certain that it would create confusion if the term "succession" were not limited to the fact of changes of sovereignty.

34. A number of suggestions of substance had been made regarding the definition of "succession". Members had appreciated his reasons for referring, in that definition, to the competence to conclude treaties with respect to territory as well as to the replacement of one State by another in the sovereignty of territory. Clearly, there was a large overlap between the two notions, but both seemed necessary. In his first report, the definition of "succession" had referred simply to the replacement of one State by another in the possession of competence to conclude treaties.[7] Following the debate on that report, he had decided to insert the reference to replacement in the sovereignty of territory, in order to give effect to views expressed by members of the Commission, although the phrase "competence to conclude treaties" had seemed to him to cover the matter.

35. It had been suggested by Mr. Castañeda, supported by one or two other members, that it was undesirable to take into account the case of protectorates, trusteeships and mandates, because international law was moving away from those concepts. Those members had suggested that, looking to the future, it was desirable to concentrate on changes of sovereignty *stricto sensu*. Although he had no decided views on the question, he thought it was not possible to escape an examination of those cases. Apart from the fact that some examples of protectorates still survived, there was the question of the future application of treaties concluded before or during the existence of a protectorate. With regard to mandates and trusteeships, careful examination would probably show that there was very little difference from the position of colonial territories for the purposes of succession. But he wished to look more closely at the treaty relations of trusteeships before forming a final opinion. In any event, it was his duty to submit to the Commission the relevant material in respect of protectorates, trusteeships and mandates, so that the Commission could take a decision with full knowledge of the matter.

36. Mr. Ago had raised the question whether the effects of occupation should also be dealt with in the context of State succession. His own suggestion was that the draft should include a very general reservation on that point, on the same lines as the reservations with regard to certain matters in the Vienna Convention on the Law of Treaties. The question belonged more properly to a study of occupation as such than to the present topic.

37. The definition of a "new State" was a provisional one, put forward for purposes of study. It would be helpful to clarify the law concerning new States in their pure form first. Other cases, such as that of federations, could then be considered, and the definition could be revised later, in the light of what the Commission decided concerning those other cases.

38. He had not requested comments on article 2, but certain members had referred to that article. He had placed it early in the draft for reasons of convenience of study. The order of the articles was at present very provisional. Ultimately, he expected that there would be a number of introductory articles setting forth general provisions.

[6] *Ibid.*, p. 140.

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

39. With regard to article 2, he differed fundamentally from Mr. Tabibi on the question whether the principle of "moving treaty frontiers" was inconsistent with the United Nations Charter and with modern international law. The Charter contained the principle of self-determination, and self-determination as well as other factors could result in the situations envisaged in article 2. It would not be reasonable to imagine that there would never be any changes in the political map in the future. The subject-matter of article 2 therefore had its place in any draft on State succession.

40. Many members had pointed out that the general reservation regarding the future study of dispositive or territorial treaties applied to article 2 as well. He fully accepted that point and observed that the question might indeed be of particular difficulty in situations falling under article 2.

41. He had been impressed by the fact that most members, representing every different approach to the law, had drawn attention to the point regarding territorial treaties. The question of so-called "objective régimes" had also been raised and some of the examples given by members in the present discussion fell into the category of such régimes. In the discussion of the law of treaties, there had perhaps been a slight majority in the Commission in favour of the notion of objective régimes, but the Commission had decided not to include any provision on them in the law of treaties. The Commission had limited itself to an article which underlined the potential effect of treaties as agents in the formation of customary international law. At the Vienna Conference on the Law of Treaties, there had been no disposition to resurrect the question of objective régimes. It did not follow, however, that the Commission must disregard that notion altogether in the present context.

42. The question of objective régimes might, he thought, present itself from a somewhat different aspect in the case of succession of States. At any rate, in the Åland Islands case[8] the notion of the objective régime had been much stressed by writers—and also by the League of Nations Committee of Jurists—as being the explanation of the succession, which had been admitted in that case. The question required to be studied *de novo* in the context of succession and in his next report he hoped to present the relevant material. The Commission could then examine whether any special principle of continuity existed in the case of objective régimes.

43. A pertinent point had been raised by Mr. Bartoš concerning the delimitation of the two topics of succession in respect of treaties and succession in respect of matters other than treaties. Clearly, there was some overlap between the two topics in that the question arose of succession both in respect of a dispositive treaty as such and in respect of the situation that had resulted from the treaty. But he felt that he could not avoid dealing with the question of boundary and other dispositive treaties in connexion with succession in respect of treaties.

44. With regard to multilateral treaties, Mr. Ustor and others had expressed concern that the rule in article 6, that there was no obligation to become a party, should not affect the position of a new State in relation to the contents of the treaty where the contents embodied rules of customary international law or even rules of *jus cogens*. In that connexion, he pointed out that he had himself drawn a clear distinction between the contents of the treaty and the treaty itself, and had stressed the need not to confuse the obligation to perform the treaty as such with the obligation to conform to the law contained in the treaty.

45. A simple example was provided by the Geneva humanitarian conventions.[9] Those conventions were open to denunciation at short notice, but such denunciation would not affect the validity of the rules of customary international law which they incorporated. Another example was provided by the Genocide Convention,[10] which contained provisions of two distinct types: provisions of humanitarian law and consensual provisions which had been the subject of great controversy. Cases of that type showed the difference between accepting the law expressed in a treaty and accepting the contractual treaty as such.

46. The solution which he had in mind would be on the lines of article 43 of the Vienna Convention on the Law of Treaties, namely, a general reservation regarding "the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

47. With regard to the right of the successor State to notify its will to consider itself a party to a multilateral treaty in its own right, he noted that the great majority of members endorsed the idea that modern treaty practice, notably that of depositaries, supported the view that there now existed a customary right to be a party to certain categories of multilateral treaty.

48. It had been suggested by Mr. Reuter that the right to notify succession was confined to "open" treaties, and by Mr. Rosenne that it was limited to treaties with a very wide participation clause. The practice of the Secretary-General, however, showed that the right of succession had been admitted without regard to the terms of the participation clauses; it seemed rather to be the fact that prior to the succession the territory had been under the treaty régime that generated the right—a right which was independent of the final clauses. Notification of succession thus appeared as an independent institution with its own incidents.

49. It was true that a multilateral treaty was often open to accession on a very broad basis. Even so, most treaties were not fully open, participation being limited to States Members of the United Nations, States members of the specialized agencies and States invited by the General Assembly. In the practice of the Secretary-General, a State had been permitted to notify its succession before it became a Member of the United Nations or of a relevant organization, so that it was not yet eligible for accession

[8] See League of Nations *Official Journal*, 1920, Special Supplement No. 3.

[9] United Nations, *Treaty Series*, vol. 75.

[10] Op. cit., vol. 78, p. 278.

under the final clauses of the treaty. The right thus attached to new States under customary international law and not under the final clauses.

50. On that point, considerable doubt had been expressed by Mr. Rosenne, who did not appear to accept the notion of any separate rules of succession and had suggested that he (the Special Rapporteur) was departing, in that case, from his initial statement that he regarded the Vienna Convention on the Law of Treaties as the basis for his work on the present topic. In Mr. Rosenne's view, the autonomy of the will of the parties was the essential principle of the Vienna Convention, which also exhibited a general tendency to avoid categories of treaty. Mr. Rosenne had further suggested that his (the Special Rapporteur's) proposals by implication attributed to depositaries broader powers than those assigned to them by the Vienna Convention.

51. He did not believe that those arguments were really valid. He had never suggested that the present work would simply consist of fitting cases of succession into the law of treaties. It really consisted of determining the impact of succession on treaties, which were, of course, governed by the law of treaties. He had never excluded the possibility that the fact of a succession might be recognized in international law as having some incidence on the law of treaties.

52. Thus, if the Commission arrived at the conclusion that territorial treaties passed automatically to the successor States in certain conditions, that conclusion would constitute a clear case of succession's having an impact on the law of treaties. Again, if practice showed that there existed in international law a right of a new State to notify its succession to certain categories of multilateral treaty, that, too, would be a case of succession's having an impact on the law of treaties.

53. He did not believe that the Secretary-General, in the practice to which he had referred, had in any way exceeded his powers, or that his own interpretation of the practice suggested that possibility. The depositary was only an administrator of the treaty; he had no powers of decision in the event of a dispute; and he necessarily administered the treaty in accordance with what he conceived to be applicable international law. If the depositary found that, as a development of practice, a certain right appeared to be recognized, he would act accordingly. The interaction of the practice of States and of depositaries could thus produce a rule of customary international law; and in the case now under discussion, a customary right appeared to have emerged from State and depositary practice in a quite unequivocal way. He saw no breach of the principle of autonomy of the will of the parties in that situation, because the consent of States had been given to the customary practice.

54. Members had in general accepted the idea of a customary right in the matter, but some had expressed doubts regarding the necessity of article 8. The Commission would, of course, consider the question of the retention of article 8 more closely at a later stage, but his own feeling was that its provisions were useful as favouring participation in multilateral treaties; those provisions also reflected the legal theory applied by the Secretary-General. Article 8 was, of course, not as important as article 7, in that it dealt with special cases, but he thought that it was, on the whole, worth retaining. On the other hand, he agreed with the point made by Mr. Ustor that the three categories of treaty excepted from the rule in article 7 had also to be excepted from article 8; and a drafting amendment would be needed for that purpose.

55. With regard to articles 7 and 8, Mr. Castañeda had criticized the concept of a legal nexus between the treaty and the territory and had suggested that the reference should rather be to the application of the treaty in respect of the territory. Personally, he felt that the notion of application as the determining element was not very satisfactory and preferred the language used in the Vienna Convention on the Law of Treaties; he had therefore proposed that reference be made rather to the treaty being binding in respect of the territory.

56. In the case envisaged in article 8, the predecessor State had either established its consent to be bound or had given its signature to the treaty in relation to the territory. In short, prior to the succession specific action had been taken in relation to the treaty by the predecessor State in respect of the territory in question. It was that which made it appropriate to authorize the successor State either to notify its succession or, as the case might be, to proceed to ratification.

57. He had been very much enlightened by the views of members; their comments had been most helpful. The discussion gave him the feeling that the Commission was fully launched on a corporate work of codification. There was now a large measure of solidarity within the Commission on the manner of handling the topic and there was also a corporate desire to bring the work to a satisfactory conclusion.

58. Mr. ROSENNE said that, in order to avoid any possible misunderstanding, he must explain that he fully shared the view of all the other members that the two reports submitted by the Special Rapporteur constituted an exceedingly satisfactory basis for the Commission's work on the topic. Because of the lack of time, he had concentrated in his statement essentially on those points on which he differed from the Special Rapporteur; he had not been able to dwell on the very many points on which he agreed with him. Reduced to fundamentals, his difference with the Special Rapporteur related above all to a matter of philosophical approach to the contents of article 7, and to the proper construction to be placed on the practice of depositaries in general, not just of the Secretary-General.

59. Mr. AGO said that he was very grateful to the Special Rapporteur for his comments, which, on the whole, satisfied him completely.

60. With regard to occupation, however, he would not like to be credited with the idea that such a situation constituted a case of succession. What happened in cases of occupation was that certain situations arose, particularly in regard to territorial treaties, in which the rules of succession could be applied by analogy. That was why it might be useful to consider the question, but only from that standpoint.

61. What should be reconsidered was perhaps the reference to succession in the case of States that had lost the competence to conclude treaties, which appeared for the time being in article 1 of the draft. While it was true that the Commission could leave certain situations aside entirely, from the standpoint of competence to conclude treaties, because there was no longer any question of permitting that competence to be impaired, it must not, on the other hand, overlook cases in which a State had retained the competence, but lost the physical capability of implementing certain treaties.

62. Territorial treaties should be regarded as including all treaties which affected a territory in one way or another, not only treaties which established frontiers.

63. Lastly, with regard to the hypothesis of a rule of *jus cogens* inserted in a treaty, it must not be forgotten that such a rule, even if it was stated in a treaty, remained a rule of general international law which was valid independently of the treaty containing it. Moreover, that observation should not be confined to rules of *jus cogens*. Conventions codifying international law often laid down rules which were already in force as customary rules. Hence, even if it was possible to derogate from those rules by treaty, in other words, even if they were not rules of *jus cogens*, observance of such rules was not a question of succession to a treaty, but a simple obligation of every State to obey the general rules of international law, wherever they might be stated.

The meeting rose at 1.10 p.m.

1073rd MEETING

Friday, 19 June 1970, at 10.20 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. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227 and Add.1 and 2)

[Item 2 of the agenda]
(resumed from the 1069th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of item 2 of the agenda.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 61-B (Derogation from the present Part)[1]

2. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 61 B had been referred back to the Drafting Committee, which now proposed the following text:

Article 61-B

Derogation from the present Part

1. Nothing in the provisions of the present Part shall preclude the conclusion of international agreements between States and international organizations having different provisions concerning conferences.

2. The rules of procedure adopted by a conference may differ from the provisions contained in articles....

3. Mr. ROSENNE said it was not possible to adopt article 61-B in its present form. Paragraph 1 departed far too much from article 5[2] and there was no clear reason for that departure; paragraph 2 should be cast in such a way as to establish what was loosely called "the sovereignty of the conference". He therefore suggested that the two paragraphs be reworded on the following lines:

1. Nothing in the present Part shall preclude the conclusion of other international agreements having different provisions concerning representatives of States in organs or at conferences.

2. The provisions of articles ... apply only to the extent that the rules of procedure of a conference do not provide otherwise.

4. Since the two paragraphs dealt with entirely different matters, they should become separate articles.

5. In paragraph 1 he had used the words "other international agreements" without the qualification "between States and international organizations", because there might well be other relevant agreements. He had not limited the scope of the provisions to conferences, but had included representatives to organs as well.

6. His wording for paragraph 2 took into account the fact that the rules of procedure of a conference might well be adopted after the conference had begun. He assumed that the intention was to refer, in the space left blank, only to the articles on the composition and organization of delegations and not to those dealing with privileges and immunities, which were governed by paragraph 1.

7. The question arose whether the scope of paragraph 2 should be limited to conferences. The explanation of the difficulty was perhaps to be found in the fact that, as far as representatives to organs were concerned, the matter was really covered by article 3.

8. He had serious misgivings about the very imperfect drafting techniques being used in Part IV. That part was to some extent self-contained and to some extent intended to be dovetailed with other parts. Some of the

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[1] For previous discussion, see 1069th meeting, paras. 48-68.

[2] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198.