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Summary record of the 1154th meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
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consultation between the Working Group, the Commission and Member Governments.

46. Mr. USHAKOV said he regarded all the working papers as of equal value and it was only by an oversight that he had omitted to mention the draft submitted by Uruguay.

47. The CHAIRMAN said he thought that the Working Group would inevitably report back to the Commission for guidance, though in view of the Commission's timetable, he was not certain whether it would be possible for it to report its general conclusions to the Commission and receive further instructions if draft articles were to be reproduced during the current session.

48. Without pronouncing on the different procedural ideas which had been advanced, he thought that the General Assembly had certainly desired the Commission to go ahead with all speed. Perhaps the Secretariat could prepare a working paper reproducing articles of the 1971 OAS Convention to prevent and punish acts of terrorism, the 1970 ICAO Convention for the suppression of unlawful seizure of aircraft, and his own draft, side by side.

49. Mr. TSURUOKA said he thought that the proposals put forward by Uruguay, Denmark and Italy for the protection of diplomats should also be considered.

50. Mr. TAMMES suggested that the Working Group might also study the Convention governing the specific aspects of refugee problems in Africa, adopted by the Organization of African Unity in September 1969.⁸ The approach of that Convention to the problem of political refugees differed completely from the approach adopted in the Chairman's draft.

51. Mr. USHAKOV said that the Working Group was free to make use of any document it considered useful.

52. Mr. AGO said that the Commission should not consider itself bound by any draft. The documents before it might help the Working Group, but to give it formal terms of reference would impair its efficiency. Its first task would be to determine what should be included in the draft articles, in what order and for what reasons.

53. Mr. BARTOŠ said that the Working Group should consider not only the problems dealt with in the working papers before the Commission, but also the ideas connected with them, and was free to take up any point it thought useful for the accomplishment of its task.

54. Mr. CASTAÑEDA asked whether any formal decision had been taken on the Working Group's terms of reference.

55. The CHAIRMAN replied that it was his understanding that the Working Group had been instructed to produce a set of draft articles in accordance with the terms of General Assembly resolution 2780 (XXVI).

56. Mr. CASTAÑEDA said he wished his opposition to that decision to be noted in the record.⁹

The meeting rose at 6 p.m.

⁸ See *International Legal Materials*, vol. VIII, number 6, November 1969, p. 1288.

⁹ For resumption of the discussion on item 5 of the agenda see 1182nd meeting.

1154th MEETING

Tuesday, 9 May 1972, at 11 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of Treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (a) of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce the topic of succession of States in respect of treaties, which was item 1 (a) on the Commission's agenda.

2. Sir Humphrey WALDOCK (Special Rapporteur) said that, although much of the abundant material on succession of States in respect of treaties was available in the Commission's printed Yearbooks, some of it was to be found only in mimeographed documents. To facilitate discussion it was therefore desirable, even essential, that members of the Commission, particularly the newer members, should be provided with a list or index of the basic documents, showing where they could be found.

3. Again, since the draft articles to be considered at the present session appeared in his four last reports, it would be useful to have them reproduced in a single paper, without the commentaries, for easy reference during the discussions. Perhaps the Secretariat could arrange for the two necessary papers to be issued.

4. The topic of succession of States in respect of treaties had been under consideration by the Commission for many years. At the present stages, he wished only to recall the Commission's decisions on the topic at its fifteenth session, in 1963. At that session, the Commission had had before it the report of its Sub-Committee on Succession of States and Governments,¹ containing the records of the Sub-Committee's proceedings and a series of memoranda submitted by members of the Sub-Committee. It was on the basis of that report that the Commission had decided on its approach to the whole subject of State succession. It had decided that the subject should be subdivided into three topics: State succession in respect of treaties, State succession in respect of matters other than treaties and State succession in respect of membership of international organizations, and that the third of those topics should be left aside for the time being, except, of course, insofar as the constituent instruments of international organizations were themselves

¹ See *Yearbook of the International Law Commission*, 1963, vol. II, p. 260.

important treaties and as such came within the scope of the first topic.

5. He was now introducing, in effect, a series of five reports, of which the fifth was not yet completed. The first report (A/CN.4/202)² was of a preliminary character; its purpose had been to explain the manner in which he had then proposed to approach the topic. It contained four draft articles, but after a brief discussion in the Commission, those articles had been left aside for the time being. Some of the ideas contained in the first report, however, particularly in its introduction, still remained valid; many of them were reflected in the accounts of the Commission's debates.

6. It would be convenient for members to refer to the summary of his own proposals and of the Commission's debate on them contained in the Commission's 1970 report.³ That summary covered the contents of his first three reports and constituted a convenient introduction to the topic.

7. In the introduction to his first report, he had raised a number of important issues. After its discussion the Commission had approved his own general approach to the topic and he had therefore continued his work on the same lines. In particular, he had not approached the topic of State succession in respect of treaties from the standpoint of any general theory of succession. Many writers in the nineteenth century had dealt with the subject on the lines of universal succession on the pattern of municipal law. He had found, however, that their approach was not suited to international law, the diversity of State practice with regard to both bilateral and multilateral treaties made it impossible to erect a general conception of succession and then apply it to each particular case. State practice in the matter was in reality quite pragmatic.

8. His own conclusion had been that the best manner of dealing with the topic of succession of States in respect of treaties was to consider it as a special aspect of the law of treaties; it was treaties that were the subject-matter of the topic, and treaties were governed by the law of treaties. It was within the framework of the law of treaties that the solutions to the various problems would have to be sought, while giving due consideration to the impact of State succession; the principles and rules governing State succession and the law of treaties respectively would thus have to be interlinked.

9. The first question which arose for the purposes of the present discussion was that of terminology. It would be seen from paragraph 1 (a) of his draft article 1, on the use of terms (A/CN.4/214)⁴ that the term "succession" would be used throughout the draft as meaning "the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory". As was shown by paragraphs 1 (b) and 1 (c) of the same draft article, the use made of the terms "successor State" and "predecessor

State" conformed to the meaning thus attached to the term "succession".

10. That terminology focused attention on the mere fact of replacement of one State by another; it did not commit the Commission in any way with regard to the legal consequences of any particular kind of succession. It was important to bear that point in mind because, in the past, too many assumptions had been made which were certainly not compatible with the present State practice, in particular with regard to multilateral treaties.

11. He would suggest that the Commission take a tentative decision on the use of the terms "succession", "successor State" and "predecessor State" in that way, as terms of art. Such a decision would be of great help for drafting purposes, since it would provide the Commission with a firm terminology. Some ambiguity was involved because in municipal law the term "succession" meant a great deal more and implied the transfer of rights and obligations. Under his proposals, there would, of course, be no such implication in international law.

12. When the Commission had reached its conclusions on the whole range of problems involved in the topic of succession of States in respect of treaties, it would no doubt wish to scrutinize its terminology once more. His own feeling, however, was that the use of the term "succession" which he had suggested would prove the most convenient.

13. In view of what he had said about his approach to the topic, it was natural that the draft articles he now proposed should be drafted against the background of the provisions of the 1969 Vienna Convention on the Law of Treaties,⁵ although, of course, they constituted an autonomous body of articles which could stand on their own. The terminology of the Vienna Convention had been used throughout the draft articles and their provisions had been drafted so as to be consistent with those of the Vienna Convention. It would have been extremely inelegant to have adopted any other approach.

14. He had, for example, assumed that certain reservations included in the Vienna Convention on the Law of Treaties would also apply in the present instance. The scope of that Convention was confined to written instruments and to treaties between States; moreover, treaties that were the constituent instruments of international organizations and treaties concluded within such organizations had also been made subject to the particular rules of the organization. Working on the assumption that those reservations applied to the present topic, he had formulated his draft articles without making any reference to the important practice of the International Labour Organisation with regard to succession in respect of treaties.

15. In the five reports he had so far submitted, he had presented eighteen draft articles to the Commission. The first four were contained in his second report (A/CN.4/214) and dealt with a number of general questions. Article 1 (Use of terms) would have to be expanded as

² Op. cit., 1968, vol. II, p. 87.

³ Op. cit., 1970, vol. II, p. 301.

⁴ Op. cit., 1969, vol. II, p. 50.

⁵ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

the Commission advanced in its work, so as to include provisions to cover such additional terms as became necessary. Article 2 (Area of territory passing from one State to another) dealt with the application of the "moving treaty frontiers" rule. Article 3 dealt with devolution agreements and article 4 with the question of unilateral declarations by successor States.

16. His third report (A/CN.4/224)⁶ contained eight draft articles, numbered 5 to 12, on the position of new States with regard to multilateral treaties. The position of those States in regard to bilateral treaties was dealt with in articles 13 to 17, which appeared in his fourth report (A/CN.4/249).

17. He had considered it necessary to isolate the basic rules applicable to newly independent States. The Commission would thus deal first with the problems of succession in respect of treaties as they arose for new States. Once the Commission had examined those rules, it would be in a better position to deal with the question of any modifications or additions to the general rules that might be necessary for particular categories of succession, such as succession in the case of former dependent territories, succession in the case of a union of States, and succession in the case of dismemberment of a State.

18. His fifth report (A/CN.4/256) dealt with a special category of succession: that of former protected States, trusteeships and other dependencies. The subject was dealt with in only one article—article 18—but an extensive commentary was attached.

19. He was engaged in the preparation of articles and commentaries on succession in the case of unions or federations of States and in the case of the dissolution of a union or the dismemberment of a State. He expected that material to be circulated to members in the various languages in the very near future.

20. He was also preparing draft provisions on "dispositive", "localized" or "territorial" treaties. That work had been rendered more delicate by the Commission's discussions on "objective" treaties in the course of its work on the law of treaties. Another great difficulty was the tremendous number of details to be gone through.

21. Lastly, he wished to draw attention to the valuable Secretariat studies reproduced in the 1962, 1963 and 1968 *Yearbooks* of the Commission and in the volume entitled "Materials on succession of States",⁷ on which he had drawn largely for evidence of State practice. He had also consulted the legal literature, which was extensive, but wished to mention particularly the remarkable study by the International Law Association,⁸ which included the interim report of its Committee on the Succession of new States prepared for its 1968 Conference, the report of the same Committee for the 1970 Conference,⁹ and a small book on the effect of independence on treaties.

⁶ See *Yearbook of the International Law Commission, 1970, vol. II*, p. 25.

⁷ United Nations, *Legislative Series*, ST/LEG/SER.B/14 (United Nations publication, Sales No. E/F.68.V.5).

⁸ See International Law Association, *Report of the Forty-third Conference (Buenos Aires) (1968)*, p. 589.

⁹ See International Law Association, *Report of the Forty-fourth Conference (The Hague), 1970*, p. 101.

22. Mr. RYBAKOV (Secretary to the Commission) said that the Secretariat would prepare the two papers requested by Sir Humphrey Waldock¹⁰ as quickly as possible.

23. The CHAIRMAN said it was normal practice for the Commission not to take up the question of definitions until the substance of draft articles had been discussed. He asked whether Sir Humphrey Waldock was proposing a departure from that practice.

24. Sir Humphrey WALDOCK said that the question of terminology was essential in his approach to the topic; he considered it important, therefore, to obtain as much agreement as possible about the definitions used, since they were bound to dominate the subsequent discussion.

25. In reply to a question by Mr. Reuter, he said he would try to provide the Commission with texts for the later articles, so that they might be dealt with at the present session. Those articles would refer mainly to unions and federations of States, the dissolution and dismemberment of States, and localized and dispositive treaties.

26. The CHAIRMAN said that, on an earlier occasion, doubts had been expressed in the Commission as to whether article 6 (A/CN.4/224) would be acceptable if the rule on dispositive treaties proved to be unacceptable; the discussion of article 6 would therefore be difficult if the latter text was not yet available.

27. Sir Humphrey WALDOCK said that article 6 included reservations which would cover any conclusions reached with respect to territorial treaties.

28. Mr. USHAKOV said that it was unfortunate that the Commission did not have before it all the reports on succession of States in respect of treaties and that the fifth report had not been circulated some weeks before the beginning of the session. He had made a similar observation the previous year with regard to the draft articles on relations between States and international organizations.

29. The Commission needed a general view of the whole of Sir Humphrey Waldock's draft, the more so because the topic with which it dealt was entirely new, whereas the draft considered the previous year had drawn on familiar concepts of diplomatic law, so that members of the Commission could more easily foresee the content of the articles still to come.

30. The Commission should have been able to have some idea of the results of the method followed by the Special Rapporteur before it began to consider the draft article by article. Part II of the draft contained general rules on the succession of new States, while Part III was devoted to special rules applicable to certain particular types of new State. Personally he thought that each particular situation, such as decolonization, fusion of States and the division of a State into two or more States, required quite different rules. As the Commission had only an incomplete draft before it, there was no alternative but to examine it article by article.

¹⁰ Circulated as conference room documents only.

31. The CHAIRMAN said that, while he fully appreciated Mr. Ushakov's concern that draft articles should be available in advance of the session, he feared that that would rarely be the case, because the time of special rapporteurs was generally in such demand from other quarters.

32. Sir Humphrey WALDOCK said that he too appreciated Mr. Ushakov's concern, but the enormous mass of material behind each of the reports made it very difficult to produce them on time.

33. He hoped that the Commission would be able to concentrate on the more general aspects of the topic and then go on to consider special cases. The main problem, of course, was what to do with special categories of dependent States, though when one looked at the bulk of the material available for each of those categories, they all seemed to be dealt with in the same way.

34. He had been somewhat troubled by some of the modern views taken of the decolonization process, in particular, that of O'Connell, according to which that process was a gradual development towards independence, accompanied by a growing economy and an increase in personality, so that the case might be viewed rather as a change of government than a change of State. He himself did not hold that view, but a number of perplexing problems did arise; for example, when a colonial territory became an associated member of an international organization before attaining independence, and in the case of federations of new States.

35. Mr. AGO, referring to Mr. Ushakov's comments, said that it would certainly be desirable for the Commission to have only complete drafts put before it, but experience had shown that the wider and more complex a topic, the harder it was for special rapporteurs to submit the whole of their work at once. Hence it was not surprising that the Commission had once again to consider a draft piecemeal.

36. Mr. USTOR said that sub-paragraph (e) of article 1 in the Special Rapporteur's third report (A/CN.4/224) defined a "new State" very briefly as "a succession where a territory which previously formed part of an existing State has become an independent State". In his opinion, that definition needed completion along the lines of paragraph 9 of the introduction to the report, which read: "The term 'new State' as used in the present articles means a succession where a territory which previously formed part of an existing State has become an independent State. It thus covers a State formed either through the secession of part of the metropolitan territory of an existing State or through the secession or emergence to independence of a colony...".

37. A "new State" might be territory which had previously been part of another State, as in the case of Bangladesh, which had formerly been part of Pakistan. It should be made clear in the definition, therefore, that there need not have been any dissolution or dismemberment of the original State.

38. Sir Humphrey WALDOCK said he would prefer to discuss that point when the Commission came to the question of the dissolution and dismemberment of States. The question was mainly one of terminology; the term

"new State" might perhaps be replaced by "newly independent State", for example, although that was a rather heavy phrase from a drafting point of view.

39. Mr. BARTOŠ pointed out that when the independence of India and the creation of Pakistan had been proclaimed,¹¹ it had been stipulated that India should be regarded as the old State and Pakistan as the new State.

40. That distinction had also been made by the Sixth Committee, which had decided that India retained its membership in the United Nations, whereas Pakistan would have to submit an application for admission. It had also been established that Pakistan was not bound by treaties previously concluded by India. Thus the organs of the United Nations had considered that that delicate question should be dealt with separately in the case of Pakistan, whereas for India it was settled *ipso facto* by the treaty between the United Kingdom and India.

The meeting rose at 12.25 p.m.

¹¹ See *British and Foreign State Papers*, vol. 147, p. 158.

1155th MEETING

Wednesday, 10 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Casteñeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (a) of the agenda]

(continued)

GENERAL DEBATE

1. The CHAIRMAN invited the Commission to begin its general debate on the draft articles prepared by the Special Rapporteur.

2. Mr. TABIBI, after thanking the Special Rapporteur for his lucid and scientific presentation of the topic, said that he could agree with his approach except in the case of one or two articles.

3. He himself had been engaged in the study of State succession since India's accession to independence in 1947, which had affected his own country's treaty relations with the countries of the sub-continent and with the United Kingdom. As a member of the former Sub-Committee on the Succession of States and Governments,