Document:-

A/CN4/SR.1160

Summary record of the 1160th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

70. Mr. USHAKOV, explaining his views on the validity of devolution agreements, said that such an agreement concluded between a metropolitan State and a former dependent territory was not binding on the predecessor State and the successor State. But the situation was less clear with regard to devolution agreements concluded when an area of territory was transferred from one State to another or in the case of a union of States or the division of a State. It was important to determine the consequences following from such situations, both for the contracting parties and for third States. For that purpose, articles 34 and 35 of the Vienna Convention on the Law of Treaties might be taken as a basis.

71. Mr. AGO said that the Commission did not have to consider whether an agreement concluded between a metropolitan State and a newly independent State was binding on the two parties; the only question which arose was that of the effects of such an agreement on third parties. The purpose of article 3 was, precisely, to establish that third States were not bound by such an agreement.

72. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ago had stated the position very correctly. Article 3 dealt solely with the effect of devolution agreements in regard to third States. Under the provisions of the Vienna Convention, in no case could an agreement between two States bind a third State; the consent of the third State was necessary. Paragraph 1 of article 3 applied the same rule to devolution agreements.

73. The purpose of paragraph 2 was to state that cases of devolution agreements would be governed by the provisions of the draft articles. Thus, if the case related to a new State, the provisions of Part II would apply.

74. The remarks made by the Chairman when speaking as a member of the Commission had now convinced him that it would be better to introduce the word "only" into the phrase "in consequence of the fact" in the last part of paragraph 1.

75. As to the question of a metropolitan State compelling a successor State to accept certain treaty obligations, no case of that kind had in fact occurred in practice. What had occurred, on the other hand, was that not infrequently a successor State had invoked a devolution agreement when desirous of having a particular treaty continued in force.

The meeting rose at 1 p.m.

1160th MEETING

Wednesday, 17 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, 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]

(continued)

ARTICLE 3 (Agreements for the devolution of treaty obligations or rights upon a succession) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of draft article 3 (A/CN.4/214/Add.1).

2. Mr. USTOR said that the question had been raised during the discussion whether the rule embodied in article 3 was applicable only to devolution agreements such as those concluded by the United Kingdom, France and certain other metropolitan countries with some of their dependent territories on the occasion of their emergence to independence, or whether it was a rule of general validity and as such applied whenever a predecessor State and a successor State concluded an agreement of that kind. One example, that could be given was that of cases to which the "moving treaty frontiers" rule applied. Article 3 was couched in general terms, but the commentary [2] referred only to cases involving new States. He wished to reserve his position on that question until he had heard further explanations from the Special Rapporteur, particularly on State practice in the matter. For the time being, he would examine the rule embodied in article 3 as it applied only to a devolution agreement concluded between a new State and the former colonial Power.

3. The Special Rapporteur's view was summarized at the end of paragraph (25) of the commentary, where it was stated that "devolution agreements, however important as general manifestations of the attitude of successor States to the treaties of their predecessors, should be considered as *res inter alios acta* for the purposes of their relations with third States".

4. That statement, as well as the whole of article 3, referred of course to valid—or rather validated—devolution agreements. That should be stressed because, as mentioned in paragraph (7) of the commentary, the question had been raised of the validity of agreements of that kind, which were usually negotiated and concluded before the dependent territory had gained full independence.

5. Article 3, however, was based on the assumption that a devolution agreement, even if concluded under special and unequal circumstances, could be subsequently approved by the new State, which might regard it as valid because it had a special interest in so doing.

6. The Special Rapporteur's thesis that a devolution agreement did not bind the other parties to the predecessor State's treaties and did not create obligations for the new State towards those other parties, was well supported by State practice. It was also in conformity with the provisions of articles 34 to 36 of the Vienna

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[1] For text see previous meeting, para. 40.

[2] See *Yearbook of the International Law Commission, 1969*, vol. II, pp. 54 *et seq.*

Convention on the Law of Treaties.[3] As a progressive thesis, it deserved the support of the whole Commission.

7. The proposition in paragraph 1 of article 3, meant that the new State was born generally free from treaty obligations, whether or not it had concluded a devolution agreement, subject only to the rules already contained in Part II of the draft and to any further rules that might subsequently be added thereto.

8. His first reaction to paragraph 2 was that it was redundant. If, however, *ex abundanti cautela,* it was desired to retain it, he suggested that the opening word "When" be replaced by some such expression as "Independently of whether...", which would reflect more accurately the real intention of the paragraph.

9. Mr. YASSEEN said that, despite its importance, the practice of making devolution agreements had not become general. He proposed to consider first the validity of such agreements and then their possible effects.

10. In the working paper he had submitted in 1963 to the Sub-Committee on Succession of States and Governments [4] Mr. Bartoš had expressed some doubts, which he himself shared, about the validity of devolution agreements. In paragraph (8) of his commentary to article 3, the Special Rapporteur stated that the question of the validity of devolution agreements would seem to be one which now had to be determined by reference to articles 42 to 53 of the Vienna Convention on the Law of Treaties, which had since been adopted. In his opinion those provisions would not always be sufficient, since they dealt with cases of coercion by the use of force, whereas devolution agreements might be vitiated by coercion of a political or economic nature.

11. With regard to the effects of devolution agreements, on the basis of the general theory of treaties, it might be considered that acceptance by third States could make the treaties covered by the devolution agreement enforceable against the successor State. The main danger was that the devolution agreement might be considered to contain not an offer depending on the will of the offering State, but a final offer. It would not be a unilateral declaration, but an irrevocable offer deriving from a treaty.

12. The reference to devolution agreements in the draft articles would therefore make it necessary to specify that such agreements could not establish a final offer to the detriment of a successor State. That reservation was all the more necessary because it reflected the general practice of States, which had always waited for a fresh expression of the will of the successor State before considering that it was bound by a former bilateral, or even multilateral, treaty.

13. He recognized that a devolution agreement has a negative aspect for the predecessor State; indeed, it could be established by other rules of international law that a predecessor State ceased to be responsible for former treaties in so far as they concerned a territory which had become independent.

14. Mr. BEDJAOUI said he would consider first the real scope of article 3 and then its significance.

15. As the Special Rapporteur had explained, article 3 was based on a practice found mainly in relations between the United Kingdom and its former possessions, though the wording of the article did not indicate its scope precisely. That approach was also shown by the terminology used, since the term "devolution agreement" had generally been used by writers for cases of decolonization.

16. There was, however, nothing to prevent the scope of article 3 from being extended, and the Special Rapporteur seemed to be inviting the Commission to extend it when he stated in his commentary that devolution agreements might be concluded, in principle, whenever a new State was created by agreement. The inference was that they might be concluded where there was a partial transfer of territory, for example.

17. If the term "devolution agreement" appeared to be too closely connected with decolonization, it might be replaced by the expression "a formal arrangement between the predecessor State and the successor State". Another question of terminology had been raised at the previous meeting: that of the use in the French version of the expression "*du seul fait*" in paragraph 1; he would suggest using the words "*par le fait même*", meaning *ipso facto.*

18. With regard to the significance of the article, he observed that it did not provide for the automatic application of former treaties to third States, but made such application dependent on rules stated in later articles. It should therefore be decided, when the time came, precisely which of the articles of the draft were applicable.

19. Unlike Mr. Yasseen, he thought the practice of making devolution agreements was very widespread, if the term was taken to include all treaty rules established by a predecessor State and a successor State to govern relations between the successor State and the rest of the international community. Whether decolonization took place peacefully or not, it always gave rise to treaty rules concerning public property, public debts, nationality, the protection of minorities and acquired rights.

20. In paragraphs (7) and (8) of his commentary to article 3, the Special Rapporteur suggested that the validity of devolution agreements should be determined by reference to articles 42 to 53 of the Vienna Convention on the Law of Treaties. In his own first report on succession of States in respect of matters other than treaties,[5] he had examined that question in connexion with what he had called the "*période suspecte*" preceding independence. It was a question that had various aspects.

21. First, it must be remembered that devolution agreements were very much of a developing character; it had sometimes been contended that they were real international treaties when concluded between an existing State and an emergent State. Their validity should also be considered in the context of self-determination and in

[3] 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. 294.

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

[5] Op. cit., *1968,* vol. II, p. 94.

the light of the precedents cited in the General Assembly and the Security Council. For example, in 1961 the General Assembly had stated, in connexion with the question of Bizerte, that the Franco-Tunisian treaties of 1955 had lapsed, and it had emphasized the developing character of the relations between the former metropolitan Power and the new State.[6] The United Nations had also sometimes intervened during the preparation of a devolution agreement when certain elements of coercion had been too apparent. In face of the refusal of the French and British forces, in 1946, to evacuate Syria and Lebanon until there was a devolution agreement, the majority of the Security Council had considered that the evacuation of those forces should not depend on the continuation or success of the negotiations in progress between the partners.[7]

22. If that problem was later dealt with more fully in the commentary, he would not press for the inclusion in the draft of a rule on the validity of devolution provisions, for that question belonged to a stage prior to the succession of States and came under the law of treaties.

23. The term "third State", as used in article 3, denoted a State party of the treaties concluded by the predecessor State and not a third State with respect to those treaties. Such a State party to the treaties in question was considered, in the article, as a third State with respect to the devolution agreement.

24. In order to examine the rights and obligations deriving from treaties concluded by the predecessor State, it was necessary to see what were the respective positions of the third State, the predecessor State and the successor State. The third State could believe that a change of debtor might injure it and that there could be no *stipulations pour autrui*. Thus, to take an example which, it was true, concerned an international organization, the International Bank for Reconstruction and Development would not agree to a change of debtor unless it had itself taken the necessary formal steps. For a loan it had granted to a dependent territory, the Bank had insisted on an express guarantee from the metropolitan country. It was obvious that a third State would often feel even less bound by the rights than by the obligations deriving, for the successor State, from former treaties. Frequently, despite a devolution agreement, the predecessor State substituted itself for the defaulting successor State to fulfil the latter's obligations. That sometimes happened where a former metropolitan State paid compensation for its own nationals in place of the newly independent State. As to the successor State, it was sometimes unwilling to be bound automatically vis-à-vis third States by virtue of a devolution agreement.

25. Devolution agreements were therefore of limited value, and as the Special Rapporteur said in paragraph (16) of his commentary, their significance was primarily as an indication of the intentions of the newly emerged State in regard to the predecessor's treaties.

26. Relations between the predecessor State and the successor State would depend on a multitude of former treaties generating rights and obligations. To examine in detail what happened to those rights and obligations, as Mr. Hambro had suggested, would mean going beyond the bounds of the Special Rapporteur's subject, which was succession in respect of treaties, in other words, instruments in the formal sense, whereas the topic for which he himself was responsible concerned succession to an instrument taken in the material sense. It was in the context of his own draft articles that the Commission should examine in detail what happened to rights and obligations and the question of their transfer independently of a devolution agreement.

27. Mr. QUENTIN-BAXTER said it was important to remember that devolution agreements had flourished for a brief span during a period of decolonization that was now ending. They could be regarded as reflecting distortions of practice which were attributable to uncertainties of the law. One would not expect devolution agreements to occupy a large place in an instrument which was intended for application in the future.

28. The fact remained, however, that devolution agreements were an important indicator of the assumptions on which the actions of the States concerned were based, and of the doubts felt at the time by those States. It was significant that two terms—"devolution agreement" and "inheritance agreement"—were used in practice. As devolution agreements, the instruments in question appeared to have the effect of binding the hands of the successor States and perhaps even of fettering their sovereignty: hence the reaction by Tanganyika in 1961.

29. There was, however, the other aspect of the question, namely, the desire of the predecessor State that the new State should not come into being without any inheritance. The practice of the United Kingdom, in particular, showed a clear desire that the new State should not be left in a vacuum, and a corresponding belief that the new State was entitled to lay claim to a treaty inheritance.

30. Indeed, the United Kingdom had long continued to inform the international community that its own treaty rights and obligations in respect of a particular territory had ceased "as a result" of applying the relevant treaty instruments to the successor State. There might therefore be advantage in stating a clear rule that the treaty rights and obligations of a predecessor State, in respect of a territory which was the subject of a succession of States, came to an end on the date of that succession.

31. There was perhaps the more reason to state such a rule because, when a dependent territory was moving gradually towards full self-government, the international responsibility of an administering Power often greatly exceeded its remaining constitutional powers in respect of that territory.

32. With regard to paragraph 2, he agreed with Mr. Ustor that the opening word "When" meant in reality "whether or not".

33. Personally, he would prefer a general rule that would combine the contents of paragraph 2 of article 3 with

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[6] See *Official Records of the General Assembly, Third Special Session (August 1961)*, 997th to 1006th plenary meetings and *Official Records of the Security Council, sixteenth year*, 961st to 966th meetings.

[7] See *Official Records of the Security Council, First Year, First Series*, No. 1, pp. 283 *et seq.*

those of paragraph 1 of article 4, so as to cover both devolution agreements and unilateral declarations. The combined provision would state that "whether or not a successor State makes any agreement with a predecessor State or makes or communicates any unilateral declaration of its policy in regard to the maintenance in force of treaties which were applicable in respect of its territory at the date of succession", the rules contained in the subsequent draft articles would apply. The way would then be clear for a separate article dealing with provisional application.

34. Mr. AGO said that the situation created by an agreement between a predecessor State and a new State providing for the devolution of rights and obligations was not quite the same as that created by a unilateral declaration. The declaration was addressed to third States, whereas the devolution agreement only concerned relations between the predecessor State and the successor State. Furthermore, in the latter case the question of the validity of the devolution agreement might arise; the successor State might, in some cases, claim not to be bound by the agreement, whereas it could not go back on a multilateral declaration, which constituted an offer, so that when the third State had expressed its consent, the agreement was concluded.

35. With regard to the question raised by Mr. Bedjaoui, he was inclined to think that all agreements for the devolution of rights and obligations were international agreements, even though one of the parties might be an insurgent movement or an emergent State represented by a provisional government, that was to say, by a subject of international law, nevertheless. In his opinion, the international character of such an agreement would be unaffected even if the metropolitan power had described it as an instrument of internal public law.

36. It was conceivable, too, that the insurgent movement or provisional government might make an agreement with the third State undertaking to accept a treaty concluded between the metropolitan State and that third State. A situation of that kind did not partake of succession from the predecessor State to the successor State, but possibly of succession from the "provisional" subject of international law to the definitive subject. That situation had arisen in Algeria, for example, but the case was obviously outside the scope of the Special Rapporteur's topic.

37. Mr. SETTE CÂMARA said that he agreed with Mr. Ago's remark at the previous meeting that it would be better to speak of devolution of rights and obligations rather than simply of devolution agreements. Some such clarification was necessary when referring to cases outside the United Kingdom practice, in which that meaning had been attached to the expression "devolution agreement".

38. After having examined an impressive mass of material on the practice of States and of depositaries, the Special Rapporteur had expressed the view, in paragraph (25) of his commentary, that the practice of States was "too diverse to admit the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States, in relation to treaties appliable to the successor State's territory prior to its independence".

39. That passage discarded old ideas of tacit novation and reflected the modern view that a devolution agreement was little more than a solemn statement of intention concerning the future maintenance in force of pre-existing treaties concluded by the predecessor State. No legal presumption of continuity could be said to exist, and it had accordingly become the practice of the United Nations Secretariat, in the case of a devolution agreement, simply to invite the new State concerned to become a party to the treaties signed by its predecessor State.

40. The negative rule embodied in paragraph 1 of article 3 was consistent with the philosophy of the draft, which situated the problem of succession in respect of treaties within the scope of the general law of treaties. Since treaty obligations and rights could not exist without the consent of the parties, an expression of the will of the third parties concerned was essential to establish the legal nexus indispensable to create treaty relations.

41. Devolution agreements, despite their limited character as statements of intention, were useful because they helped to avoid the gap that would otherwise occur if, at the moment of independence, all treaty links were to be automatically and unconditionally severed. The complexity of modern international life would make it extremely difficult to reconstitute at once the network of treaties within which every nation normally lived. Devolution agreements opened the way for new States to conclude the treaties necessary for international coexistence.

42. It had been suggested during the discussion that article 3 should be placed in Part II of the draft, which related to new States. It was true that most of the former United Kingdom dependent territories, and some of the French ones, had signed devolution agreements with the metropolitan Power. Nevertheless, since the rule in article 3 was a negative rule relating to the effects of devolution agreements with respect to third parties, it would not be advisable to confine its scope explicitly to new States in the strict sense of the term. Such a formulation might lead to the interpretation that devolution agreements were valid in relation to third parties in cases other than those involving countries that had achieved independence through the process of decolonization.

43. The question of the position of article 3 in the draft should be considered by the Drafting Committee when it came to examine Part II and the definition of the concept of a "new State".

44. Mr. TABIBI said he agreed that it was necessary to state the rule in paragraph 1 of article 3 with respect to multilateral treaties.

45. With regard to devolution agreements, four elements should be considered: the first was the treaty itself; the second was the action taken by the predecessor State; the third was the position of the third State concerned; and the fourth was the position of the successor State.

46. The position of the third State concerned was vital, particularly in the case of bilateral treaties. The third State was equal in status with the predecessor State and its rights could not possibly be affected by the conclusion of a devolution agreement between the predecessor State and the successor State.

47. Devolution agreements were often the price paid for independence and could not therefore be regarded as final. They were not final for the successor State, but they were also not final for the third State concerned, since that State might not wish to be bound by the treaty in relation to the successor State. It was essential to take into account the intention of the third State, and the interests of that State in connexion with the treaty.

48. The text of the treaty itself was particularly important. The provisions of some treaties were personal to the parties to the treaty; in the event of a succession, a treaty of that kind would simply terminate and no devolution was possible.

49. With regard to the scope of the rule in article 3, that should be dealt with in the context of decolonization. It was necessary to study carefully the question whether, in the case of separation of part of the territory of a State, the territory in question constituted a new State.

50. Relations between the predecessor State and the third State were governed by the provisions of the treaty itself and did not come within the scope of the present draft articles.

51. Paragraph 2 of article 3 should be left in abeyance until the Commission had considered the whole of the draft. It would then be possible to determine whether a provision of that kind was really necessary.

52. Mr. BARTOŠ said that, in his 1963 working paper, he had only described the theoretical concepts relating to States by decolonization. At that time the special rapporteurs for the topic of succession of States and Governments had not even been appointed. Although his working paper contained indications of the need to deal with the question, it proposed no practical solution and was of no direct interest for the present discussion.

53. With regard to treaties concluded with an emergent State, a good example was afforded by the case of Yugoslavia during and after the Second World War, when treaties had been concluded by the Allied Powers with both the Royal Government and the revolutionary Government. Again, before the end of the First World War—even during that war—the Czechoslovak nation had been proclaimed a subject of international law and authorized to participate as such in certain conferences. Furthermore, the great Powers had sometimes concluded treaties between themselves regulating the status of emergent or changing States, which were invocable against those States. Those were instances of *stipulations pour autrui*.

54. It was interesting to note that after the Second World War Yugoslavia had announced the discontinuation of its internal legal order, but had recognized the continuation of its internal legal order, particularly with respect to treaties.

55. Although in principle he supported the Special Rapporteur's main ideas, he thought, like Mr. Bedjaoui and Mr. Ago, that they should be expanded in the light of the different suggestions made during the debate.

56. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that some members wished to relate article 3 to the decolonization situation, while others thought that such an application was too limited. After all, the devolution of treaty obligations or rights could occur in other contexts and it was necessary to state the general rule. An obvious example of such a devolution agreement was that concluded on the separation of Singapore from Malaysia. The question was one which would have to be considered by the Drafting Committee, but he personally believed that article 3 should not be limited to cases of devolution connected with former dependent territories.

57. The question was in some degree linked with the problem of the birth of new States—a problem he had steered clear of, since he was aware of the mass of legal speculation concerning the process by which new States came into existence. Moreover, although the original title of item 1 had been "Succession of States and Governments", he had subsequently received strict instructions from the Commission to deal only with the succession of States. There was, of course, always the possibility that a devolution agreement might have been concluded by an insurgent government shortly before the new State attained independence, but he considered it better not to get involved in such complications.

58. Mr. Ushakov had rightly questioned the use of the phrase "third States" in article 3. He himself had, at a later stage, reached the conclusion that that phrase was unsuitable, because it had been used in the Vienna Convention on the Law of Treaties as denoting "a State not a party to the treaty". In this fourh report (A/CN.4/249), therefore, he had proposed the term "other State party".

59. Mr. Ushakov had also questioned the use of the words "present articles" in paragraph 2, but that was merely a provisional term which could be changed at a later stage.

60. Mr. Bedjaoui had taken exception to the reference to a predecessor State's "obligations and rights" in paragraph 1. He had used that expression merely for drafting reasons and it could be reviewed by the Drafting Committee.

61. Mr. Ustor had suggested that paragraph 2 be amended to state that the obligations and rights of the successor State might be determined independently of the existence of a devolution agreement. No doubt the paragraph might be improved, but Mr. Ustor's suggestion seemed to go too far. It was impossible to ignore the significance of a devolution agreement as an instrument for bringing about the novation of a treaty.

62. Lastly, Mr. Quentin-Baxter had repeated his suggestion that there should be some more general rule about the release of the predecessor State from its obligations under a treaty which had been taken over by a successor State. He agreed that that situation deserved consideration, but there were cases in which a predecessor State was not relieved of all its obligations, as, for example, when it was acting as a guarantor for technical assistance activities.

63. The CHAIRMAN suggested that article 3 be referred to the Drafting Committee.

It was so agreed.[8]

[8] For resumption of the discussion see 1177th meeting, para. 52.

ARTICLE 4

64. *Article 4*
Unilateral declaration by a successor State

1. When a successor State communicates to a third State, a party to treaties in force in respect of the successor State's territory prior to independence, a declaration of its will with regard to the maintenance in force of such treaties, the respective obligations and rights of the successor State and the third State are governed by the subsequent articles of the present draft.

2. When a successor State communicates to the third State a declaration expressing its consent to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination, the treaties shall continue to apply provisionally as between the successor State and the third State unless in the case of a particular treaty:

(*a*) The treaty comes into force automatically as between the States concerned under general international law independently of the declaration; or

(*b*) It appears from the treaty or is otherwise established that the application of the treaty in relation to the successor State would be incompatible with its object and purpose; or

(*c*) Within three months of receiving the notification the third State in question has informed the successor State of its objection to such provisional application of the treaty.

3. The provisional application of a treaty as between a successor State and a third State under the present article is terminated if:

(*a*) Subject to any requirement of notice that may have been agreed between them either State communicates to the other its decision to terminate the provisional application of the treaty; or

(*b*) The declaration specified a period for the duration of the provisional application of the treaty and this period has expired; or

(*c*) At any time they mutually agree that the treaty shall thenceforth be considered as terminated or, as the case may be, brought into force between them, whether in full or in modified form; or

(*d*) It appears from the conduct of the States concerned that they must be considered as having agreed to terminate the treaty, or as the case may be, to bring it into force; or

(*e*) The termination of the treaty itself shall have taken place in conformity with its own provisions.[9]

65. The CHAIRMAN invited the Special Rapporteur to introduce article 4 (A/CN.4/214/Add.2).

66. Sir Humphrey WALDOCK (Special Rapporteur), said that article 4 was perhaps not altogether satisfactory, in that it dealt mainly with cases of the provisional application of a treaty; in view of the general title of the article, members might think that it should more clearly cover unilateral declarations which did not envisage the provisional application of a treaty, but were rather aimed at its definitive continuance in force.

67. Unilateral declarations by successor States were a significant phenomenon in modern practice. Some of the declarations stated a policy and amounted to an offer which, when communicated, might constitute one side of an agreement for the continuance of a treaty. It was reasonable to conclude, therefore, that they should not be limited to cases of provisional application of a treaty, but should have a more general scope.

68. There was now a considerable volume of practice in regard to unilateral declarations flowing from the declaration made by the Government of Tanganyika in 1961 and communicated to the Secretary-General of the United Nations. Mr. Quentin-Baxter had suggested that unilateral declarations might be dealt with together with devolution agreements; he himself, however, thought that they were quite different things. A devolution agreement was drawn up as between a predecessor State and a successor State, whereas a unilateral declaration, as Mr. Ago had pointed out, was an act done vis-à-vis other States parties, which might constitute an offer to them to continue treaties in force on a reciprocal basis.

69. He himself had already pointed out that a different technique was employed in the two cases. A devolution agreement was registered with the Secretary-General, as registrar of treaties, who subsequently published it in the Treaty Series in due course, which might often be a more or less considerable interval of time. A unilateral declaration, on the other hand, was sent to the Secretary-General with a specific request that it be circulated to Member States, which meant, in practice, that it was almost immediately submitted to a very large number of States.

70. Mr. USHAKOV said that the words "prior to independence", in paragraph 1, showed that the article was not general in scope, but related to cases of States which had formerly been dependent territories, in other words to cases of decolonization. It would be better to amend the wording so as to say so clearly.

71. Since the Special Rapporteur had said that he had used the expression "obligations and rights of the successor State" only provisionally for the purposes of the draft articles he would not comment on it. In paragraph 1, the words "the subsequent articles" should read "the subsequent paragraphs".

72. Article 4, the drafting of which could be improved, belonged to the chapter on cases of succession arising out of decolonization. Paragraph 2 provided that, by virtue of a unilateral declaration, treaties should be regarded as being provisionally in force between the parties, subject to three exceptions listed in sub-paragraphs (*a*), (*b*) and (*c*). The Special Rapporteur should make it clear which rules of general or contemporary international law were referred to in sub-paragraph (*a*) and to what kind of situation sub-paragraph (*b*) applied. It was, in fact, difficult to see how it could appear from a treaty deemed valid for a previously dependent territory, that its application would be incompatible with its object and purpose once the territory had become independent.

73. In paragraph 3, sub-paragraph (*d*) was not clear. It was open to question whether the conduct of the States concerned could really be regarded as indicating their intention concerning the application of the treaty. There also seemed to be a lack of concordance between sub-paragraphs (*a*) and (*c*). If one of the States could terminate the application of the treaty unilaterally, in accordance with sub-paragraph (*a*) there was no need to provide for the possibility of mutual agreement in sub-paragraph (*c*).

74. Sir Humphrey WALDOCK (Special Rapporteur), said he agreed that it might be desirable to replace the phrase "prior to independence" in paragraph 1 by some less restrictive wording.

[9] For commentary see *Yearbook of the International Law Commission, 1969*, vol. II, pp. 62 *et seq.*

75. In paragraph 2 (*a*), he had used the words "the treaty comes into force automatically" on the assumption that the treaty would be governed by the rules of general international law. Mr. Ushakov might think the "clean-slate" principle should apply in all cases of decolonization, but many new States, such as Tanganyika, had considered some treaties as binding on them under general international law. He had therefore felt bound to include such a provision until the Commission might decide otherwise.

76. With regard to paragraph 2 (*b*), in some cases the application of a treaty in relation to the successor State might indeed be incompatible with its object and purpose. For example, the United Kingdom had extended the European Convention on Human Rights to many of its dependent territories prior to their independence. Some of those territories had expressed their wish to continue to be bound by that Convention after attaining independence, but that had not been possible because the Convention was limited to members of the Council of Europe.

77. Lastly, with regard to paragraph 3, it had seemed to him necessary to list all the different situations in which the provisional application of a treaty would be terminated. It was possible, however, that the list might be reduced at a later stage.

78. Mr. THIAM said he agreed with the Special Rapporteur on the substance of the article. It was quite certain that a new State could only be committed by its own will and that if it wished to be bound by a treaty it had to express that will. The principle of article 4 was therefore acceptable.

79. It was well to state the rule of provisional application in paragraph 2. In most cases new States needed time for reflection before deciding whether to regard themselves as bound by a treaty or to withdraw from it.

80. With regard to the exception provided for in paragraph 2 (*a*), it should be stated clearly which rules of general international law could prevent the provisional application of a treaty; if those rules were valid, it was difficult to see how a treaty could stand against them.

81. The presumption on which paragraph 3 (*d*) was based was too broad, and difficult to apply in practice. It would be better either to amend that provision or to delete it.

82. Lastly, even if the scope of the draft was to be extended to cover new States other than newly independent States, the fact remained that the interests of States springing from decolonization should predominate, in accordance with the Special Rapporteur's first intention.

83. Mr. REUTER said he could accept article 4 provisionally, but noted that it raised serious problems. The first was that of its scope. The article was included among the general provisions, but even if the words "prior to independence" were deleted it was open to question whether, as it stood, it could be applied to a merger of States. He was not expressing an opinion, but a doubt.

84. The article would be clearer and more correct if the title were "Provisional application of the rules of a treaty". For although it certainly dealt with a problem of provisional application, it was not the original treaty, but its rules that were provisionally applied. From the viewpoint adopted by the Commission there was no application of the original treaty; what was applied was an entirely new agreement, a collateral agreement, resulting from an offer and its acceptance.

85. That being so, some substantial drafting changes were inevitable. It was impossible to speak of maintaining the treaty in the proper sense of the term; it was its substantive rules, and perhaps some others, that it was decided to continue to apply provisionally. The successor State did not become provisionally a party to the treaty, but to a new agreement, and that raised all sorts of problems, such as whether to retain or to delete paragraph 3 (*e*). Indeed, in that instance, it was not stated that the rule on the termination of the original treaty would be among those which were provisionally maintained.

86. It was often forgotten that the Vienna Convention on the Law of Treaties opened up the prospect of collateral agreements, as the Special Rapporteur had very clearly explained at the time, in connexion with the effects of treaties for third parties. The Commission would perhaps see later that, in the case of multilateral treaties between States, international organizations could, without becoming parties to the treaty, decide by a collateral agreement concluded between themselves and the parties, to apply certain substantive rules contained in the treaty.

87. He reserved his opinion on the drafting of the article, which would have to be reconsidered when the Commission took up article 7, on the right of a new State to notify its succession in respect of multilateral treaties.

88. The question of rights and obligations, which Mr. Bedjaoui and Mr. Ago had raised in connexion with article 3, was extremely complex. There was on the one hand the treaty, that was to say the complete mechanism, to which there was never any succession, and on the other hand the substantive rules, which might be the subject of other agreements. Was not that the same idea as the rights and obligations referred to by Mr. Bedjaoui and Mr. Ago? In their view, there was the treaty, which gave rise to rights and obligations, which in turn gave rise to situations. That was a very serious fundamental problem, which was bound to lead to much controversy.

The meeting rose at 1.5 p.m.

1161st MEETING

Thursday, 18 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

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