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Summary record of the 1164th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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that no treaty obligation existed without the express consent of the State concerned, which would not be freed from the vestiges of colonialism if it had to consider itself bound, even provisionally, by a treaty it had had no part in concluding.

59. Mr. AGO said he had changed his previous position on the subject of measures to ensure the continuity of treaties of a general character. On second thoughts, he found it impossible to adopt a rule such as that envisaged by the International Law Association. In reality accession to a treaty, even a general treaty, was regulated in the constitutional law of all countries by strict provisions which left no room for presumed or tacit accession. Accession to a general international treaty required a formal act.

60. Mr. BEDJAOUI said that, when applied to the case under consideration, the solution contemplated by the International Law Association gave a different meaning to the silence of new States. In a first phase, that silence constituted a sort of "pause of reflection", but without any presumption of the immediate application of the treaty. It was after a reasonable period of time that the silence of the State, if it continued, was interpreted as meaning that the new State accepted the treaty in question.

61. Mr. ROSSIDES said he fully agreed with Mr. Bartoš and Mr. Bedjaoui as to what decolonization ought to mean with respect to freedom from treaty obligations. It was not his idea that new States should take over irksome financial or economic obligations, but they could surely be expected to continue observance of humanitarian instruments, such as the Hague and Geneva Conventions. A new State was, of course, quite free to repudiate all treaties of the predecessor State the day after independence; but in a spirit of internationalism, continuity of agreements of that kind should be encouraged.

The meeting rose at 6 p.m.

1164th MEETING

Wednesday, 24 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. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, 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 6 (General rule regarding a new State's obligations in respect of its predecessor's treaties) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 6 of the Special Rapporteur's draft (A/CN.4/224).

2. Mr. EL-ERIAN said he would like to comment on three points: first, the nature of the rule contained in article 6; secondly, the position of the rule in the draft as a whole; and, thirdly, the presumption of the new State's tacit consent to assume obligations under its predecessor's treaties.

3. The general rule laid down in the article had been lucidly explained in the Special Rapporteur's very scholarly commentary [2] and it was safe to say that not only was it in conformity with customary international law, but it also reflected the views of the majority of writers and of the Commission itself.

4. With regard to the position of the rule in the draft, Mr. Ushakov had drawn attention to a number of cases which the Commission should bear in mind when considering article 6, but the Special Rapporteur had assured the Commission that those cases would be dealt with in due course. Being a general rule, therefore, article 6 could remain in its present position, particularly as it contained the safeguard clause "Subject to the provisions of the present articles". It might be useful, however, if the commentary contained some reference to the statements of Mr. Ushakov and Mr. Reuter, and to the view of McNair quoted by the Special Rapporteur in paragraph (2) of his commentary.

5. Mr. Rossides and Mr. Yasseen had raised the question whether a new State could be presumed to have accepted its predecessor's obligations if it failed to express any objection. He himself, while favouring the principle of continuity for multilateral treaties, especially those of a law-making character, considered it equally important to bear in mind the principle that a State could not be bound without its explicit consent. In the present case, the Commission was dealing not only with law-making or normative treaties, but also with other treaties concerning administrative arrangements which a new State might wish to replace. He therefore supported article 6 as it stood.

6. Mr. RUDA said that according to the definition of a "new State" in article 1, sub-paragraph (*e*), such a State constituted a new legal person in international law and should be treated as a third State in relation to its predecessor's treaties. The general rule *pacta tertiis nec nocent nec prosunt* would therefore apply and it followed that no obligations could be imposed on a third State, whether old or new, without its consent.

7. Article 35 of the 1969 Vienna Convention on the Law of Treaties [3] had gone even further by providing that no obligation could arise for a third State unless it "expressly accepts that obligation in writing". At that time, the international community had clearly been in agreement about the need to proceed with the utmost

[1] For text see previous meeting, para. 11.

[2] See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 31 *et seq.*

[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.

caution in placing obligations on third States; article 6 was entirely consistent with the rule in the Vienna Convention and was therefore fully acceptable to him.

8. Mr. ALCÍVAR said that when the Commission had considered article 6 in 1970, he had been in agreement with the Special Rapporteur's proposals; on re-considering the article, however, he found that it could not be regarded as a "general rule". In his opinion article 6 was applicable to new States which had formerly been colonies and which, on the entry into force of the United Nations Charter, had become non-self-governing territories, or, in any of the three cases mentioned in Chapter XII of the Charter, had become trust territories. At the same time, he thought the article could only apply to new States which had been formed as a result of a dismemberment, so long as "real", "territorial" and "dispositive" treaties were safeguarded in a separate article.

9. What should be made clear was that a new State began its independent life without any obligation—the "clean slate" rule—to become a party to general multilateral treaties concluded by the predecessor State, but retained its right to become a party by simple notification to the depositary, without requiring the assent of the other parties.

10. As to the question whether a new State was automatically bound by multilateral treaties of a legislative character, he confessed to being much attracted by the affirmative opinion of Jenks, which had been cited by the Special Rapporteur.[4] There could be no doubt that treaties were replacing custom as the principal source of international law, so much so that it was now rules of treaty law which were being converted by custom into rules of customary law; and he certainly could not forget the beautiful theory of Georges Scelle on the expansive force of the law-making treaty. He need hardly say that Jenks's opinion was very close to his own personal views as an active participant in the building of a new international legal order taking precedence over national legal orders, which was the model for a new law to confront the realities of the new world. Nevertheless, he preferred to speak of "rules of general international law" rather than "rules of customary law" and considered that some caution should still be exercised in regard to Professeur Jenks's interpretation.

11. He fully supported article 6 as drafted by the Special Rapporteur, subject to certain minor amendments.

12. Mr. CASTAÑEDA said he entirely agreed with the rule proposed by the Special Rapporteur for article 6, which was based not only on custom and precedent, but also on the principles of equity and justice. In particular, he agreed with the reasons given by the Special Rapporteur for not including within the scope of that article new States which had emerged as a result of fusions, federations and the like.

13. There might seem to be a certain contradiction between articles 6 and 7 since, while the former exempted the new State from obligations in respect of its predecessor's treaties, the latter established the right of the new State to notify its succession in respect of such treaties. However, that lack of full reciprocity was also to be found in municipal law where in some legal systems, an heir could accept a succession under *beneficium inventarii*, or, in other words, could accept the estate without personal liability beyond the value of the estate.

14. With regard to the suggestion by Jenks, referred by the Special Rapporteur in his commentary, that there might have been a tendency to over-emphasize the contractual at the expense of the legislative element in multipartite instruments of a legislative character, he fully agreed with the views stated by the Special Rapporteur,[5] and with those expressed by Mr. Alcívar.

15. Lastly, with regard to the practice of the Swiss Federal Council as depositary of humanitarian Conventions referred to by the Special Rapporteur in paragraph (12) of his commentary, he agreed that there should be no presumption that a new State would accept the obligations of its predecessor, since a new State would have no difficulty in expressing its agreement to be bound by the conventions in question if it so desired.

16. Mr. TAMMES said he agreed with those who believed that article 6 was a necessity in the context of Part II of the present draft. It was clear that the rule it expressed was only complementary to the general rule of consent or self-determination on which the draft was based and that it would be undesirable to replace it by any presumption of consent. He would therefore prefer that the principle underlying article 6 be left as it stood.

17. Mr. USTOR said that members seemed to be virtually unanimous in endorsing article 6, which, as the Special Rapporteur had made convincingly clear, referred to those new States which had emerged through the process of decolonization.

18. The rule stated by the Special Rapporteur had a strong moral foundation and, as Mr. Castañeda had said, corresponded to the principles of equity and justice. New States had complete freedom to continue, or not to continue, to be bound by the obligations assumed by their predecessors.

19. Yet while it was clear that the rule would apply in the case of former colonies, it was not clear how far it would apply in other cases of State succession, such as that of fusion, which had been referred to by Mr. Reuter. In paragraph (18) of his commentary, the Special Rapporteur had referred to the case of "real", "dispositive" or "localized" treaties, which would be the subject of separate examination.

20. There had also been some discussion on whether article 6 would apply to new States which were the result of secession, partition or dismemberment. In those cases, the new States could not say that treaties previously concluded were not their treaties, since their parliaments might contain members who had actually participated in the ratification of those treaties. Such States would obviously not enjoy the same status as a former colony which entered the international forum as a completely new State.

[4] See commentary, para. (8).

[5] *Ibid.*, para. (9).

21. In paragraph (9) of his commentary, the Special Rapporteur had dealt very ably with the problem of assimilating law-making treaties to custom. His solution appeared to be the best one, but he (Mr. Ustor) wondered what would happen in the case of treaties affecting international peace and security, such as disarmament treaties, and treaties for the non-proliferation of nuclear weapons. Should not new States which had become independent as a result of secession or dismemberment be bound by such treaties, regardless of their consent? That was a question which would require closer examination.

22. The CHAIRMAN, speaking as a member of the Commission, said he agreed that article 6 should be retained, although, like Mr. Ushakov, he thought that in the interests of preserving continuity it should be made easier for new States to assume obligations arising from the treaties of their predecessors.

23. He suggested, therefore, that the Drafting Committee be asked to consider replacing the words "a new State is not bound by any treaty" by some slightly less emphatic wording such as "a new State is not bound to maintain in force any treaty ...". He also suggested, in the interests of simplicity, that the second sentence of the article might be combined with the first.

24. Mr. AGO said that the Commission would have to take Mr. Ustor's observations into consideration, though personally he remained convinced that the rule stated in article 6 was applicable even in cases of secession, separation or dismemberment so long as a new State was born. For instance, there had been Czech, Slovak and Galician deputies in the Parliament of the Hapsburg Empire; but the new States which had emerged from the Empire, such as Czechoslovakia and Poland, had not had to consider themselves bound by the treaties in the adoption of which some of their deputies had taken part.

25. The real problem raised by Mr. Ustor was that of the existence or non-existence of a new State in each specific case. When the rule in article 6 did not apply, it was really because in international law, the State concerned was merely the continuation of an already existing State. Hence it was important to stress the notion of a new State rather than seek to apply a principle other than that embodied in article 6.

26. Mr. USTOR, replying to Mr. Ago, said that the question was, indeed, what really constituted a new State. A mere declaration would obviously not be enough; to take an extreme example, if the British Parliament should decide to dismember the United Kingdom into England, Scotland and Wales, would the latter be old States or new ones? If new States, could they say that they were not bound by the treaties concluded by the United Kingdom? The international community had such an abhorrence of a vacuum that it would be extremely difficult for it to accept such a proposition. The problem was admittedly a very complicated one and he hoped that some solution for it could be found.

27. Mr. BARTOŠ said he agreed with Mr. Ago. Some cases of secession had been prompted by the wish to obtain release from international treaties unfavourable to the seceding territories. In some countries, too, it was not parliament which ratified treaties, but the executive power alone; for example, the Head of State. Secessions had sometimes taken place as a reaction against the executive power. Examples were the cases of some of the States which had emerged from the Austro-Hungarian Empire and that of the Norwegian Parliament, which had voted for the dissolution of the real union between Sweden and Norway in protest against the foreign policy of the Stockholm Government. It could not be claimed that States born in such circumstances were bound by the treaties of the predecessor State.

28. Consequently, he was not in favour of Mr. Ustor's idea. If certain treaties offered an advantage for seceding States which had attained their independence, the new States would take steps to become parties to those treaties. Their position would depend, however, on the attitude of the third States which must acknowledge their right to become parties to the former treaties. That applied, in particular, to general multilateral treaties, and even to law-making treaties, which usually made the accession of a new State subject to certain conditions. True open multilateral treaties were very rare in modern times.

29. Mr. USHAKOV said that, to take another extreme case, supposing Tanganyika and Zanzibar, which had merged to form Tanzania, recovered their separate existence, in the opinion of the majority of the Commission the treaties concluded by Tanzania would not be binding on the two new States. Such a consequence would be difficult to accept, especially in the case of general multilateral treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons.

30. Once again he urged the Special Rapporteur to deal separately with the different cases of succession of States, formulating different rules for them if necessary.

31. Sir Humphrey WALDOCK (Special Rapporteur) said he had already recalled his intention of drafting certain articles on the dismemberment and dissolution of unions, but at the present stage he was not in a position to say precisely how they would be framed.

32. Mr. BEDJAOUI, referring to Mr. Ushakov's remarks, said that the situation was not the same when two separate States emerged from a federal State or a confederation by violence as it was when they were born peacefully. It would be unwise not to specify that such States were free to become parties to previous treaties.

33. In the example of Tanzania given by Mr. Ushakov, the new State would be Zanzibar, if it left the union; Tanzania would remain an "old" State. Useful information on the position adopted by Tanzania shortly after if had been formed was to be found in paragraph 168 of the studies prepared by the Secretariat on succession of States in respect of bilateral treaties.[6] Tanzania had declared that treaties in force between Tanganyika or Zanzibar and other States continued in effect "to the extent that their implementation is consistent with the constitutional position established by the articles of Union ... and in accordance with the principles of International Law". If that declaration were applied, *mutatis*

[6] Document A/CN.4/243/Add.1, reproduced in *Yearbook of the International Law Commission, 1971*, vol. II, Part Two.

mutandis, to a possible separation, it could be argued that the circumstances in which a separation occurred might jeopardize the continuity of a treaty. Hence, such a situation should certainly be governed by article 6.

34. Mr. REUTER observed that the members of the Commission were agreed that article 6 applied to cases of dismemberment resulting from decolonization, but several of them had serious reservations concerning other cases of succession.

35. By planning to deal with the special case of the dissolution of a union of States, the Special Rapporteur was calling in question the actual concept of that form of State. If it were considered that a union of States was not a special type of State from the standpoint of international law, endowed with a constitutional structure of its own, but an entity possessing some international personality, although composed of true States, the question of international organizations would also have to be dealt with. Suppose there was an international economic union which had made treaties recognized by all its member States and that it broke up: the question would arise whether the States were bound by those treaties or not. That was another situation which would have to be considered among the special cases Mr. Ushakov wished to be dealt with separately.

36. Sir Humphrey WALDOCK (Special Rapporteur) summing up the discussion, said that Mr. Reuter had clarified the area of agreement very well. The question of the exact scope of article 6 was still subject to some reservations, but in principle it covered new States arising from dependent territories.

37. A number of members thought it should also include new States created by secession, though that was a very difficult area of international law. As to cases of fusion, his commentary on those was already very long. One point was to distinguish the case of States belonging to political unions from that of States belonging to associations of States like the European Economic Community. The EEC had a central organ which possessed a certain power, but its characteristics were those of an intergovernmental organization rather than a union of States. He was of the view that such cases properly came under a different topic, and any discussion of them now might take the Commission too far afield. In any event, when considering the fusion of States and the dissolution of unions, he would have regard to the practice rather than to theory.

38. On the question of presumption in the case of normative treaties, there seemed to be a general feeling that new States should be free to decide whether they would succeed to multilateral treaties, whether normative or not, and that there should be no presumption that they accepted them. He had some sympathy with the general idea that a new State should take over a normative treaty; nevertheless, to oblige it to do so would be somewhat arbitrary, quite apart from the difficulty of formulating a precise definition of such a treaty. Moreover, even if a new State notified the Secretary-General that it considered a certain treaty concluded by its predecessor to have been in force as from the date of its succession, there could still be no presumption of the continuity of the treaty during the interval.

39. At the previous meeting, Mr. Ushakov had interpreted his proposals as based on some form of "hierarchy" of cases of succession; but he could assure Mr. Ushakov that he had had no conception of any such hierarchy in mind when drafting the articles in Part II. Those articles applied to such a large proportion of the modern cases of succession that they were necessarily of a general kind. Cases of fusion, on the other hand, were in practice comparatively few at the present time.

40. On the whole, there seemed to be such a wide measure of agreement about article 6, that it could safely be referred to the Drafting Committee, subject to the necessary reservations.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 6 to the Drafting Committee.

It was so agreed.[7]

ARTICLE 7

42. *Article 7*

Right of a new State to notify its succession in respect of multilateral treaties

A new State, in relation to any multilateral treaty in force in respect of its territory at the date of its succession, is entitled to notify the parties that it considers itself a party to the treaty in its own right unless:

(*a*) The new State's becoming a party would be incompatible with the object and purpose of the particular treaty;

(*b*) The treaty is a constituent instrument of an international organization to which a State may become a party only by the procedure prescribed for the acquisition of membership of the organization;

(*c*) By reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any additional State in the treaty must be considered as requiring the consent of all the parties.[8]

43. The CHAIRMAN invited the Special Rapporteur to introduce article 7 of his draft (A/CN.4/224).

44. Sir Humphrey WALDOCK (Special Rapporteur) said that the provisions of article 7 were a complement to the rule in article 6; to some extent they served to mitigate that rule in that they recognized the right of a new State to notify the existing parties to a multilateral treaty, other than a restricted one, that it considered itself a party to the treaty.

45. Whatever the position might have been in the past, the existence of such a right of notification for the new State was borne out by a custom that was already of long standing and by a voluminous practice. The depositary of the multilateral treaty—in particular, the Secretary-General of the United Nations as depositary—normally circulated such a notification to all the parties to the treaty. No case had come to his attention where any objection to a notification of that kind had been expressed on its being communicated by the depositary to the existing parties.

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[7] For resumption of the discussion see 1181st meeting, para. 58.

[8] For commentary see *Yearbook of the International Law Commission, 1960*, vol. II, pp. 37 *et seq.*

46. It was, of course, possible to regard the case as one of tacit consent resulting from the fact that the existing parties to the treaty had not objected to the notification. That approach would be similar to the solution adopted in the draft articles on bilateral treaties. He awaited the views of members on that point, but personally, as he had explained in his fairly long commentary, he found that modern practice supported the recognition of an actual right for the benefit of the new State.

47. The new State, it was to be assumed, was a State recognized as such. The Commission would be well-advised not to enter into questions of recognition and non-recognition in the present discussion, since to do so would further complicate an already complex subject.

48. Article 7 made provision for three exceptions to the general rule embodied in its opening sentence. The first, contained in sub-paragraph (*a*), related to incompatibility with the object and purpose of the treaty. A typical example was that of a new State which, at the time when it was a dependent territory, had been in principle subject to the régime of a regional treaty to which the metropolitan Power belonged; on attaining independence the new State, which was in a different region of the world, clearly could not consider itself a party to the treaty simply by reason of the treaty's former extension to its territory.

49. The second exception, set out in sub-paragraph (*b*), related to the constituent instruments of international organizations where a procedure for admission to membership existed, however simple that procedure might be. The procedure in question would apply in such cases. In the case of an organization of a "loose" character, the question sometimes arose whether it was a true "organization"; the test, as far as article 7 was concerned, was the element of membership. Where that element was present, the exception in sub-paragraph (*b*) applied.

50. The third exception, set out in sub-paragraph (*c*), related to restricted multilateral treaties. It might perhaps prove necessary to draft further provisions relating to those treaties; the rules applicable to them were closer to those on bilateral treaties.

51. Mr. REUTER said that he had no objection to draft article 7, but doubted the need for it, perhaps because he did not quite understand its bearing. An article of that kind would be necessary only if it introduced some element of novelty: he could see three which might justify its existence.

52. The first was that it would give new States a right which they did not possess. It might he held to contain a substantive rule to the effect that new States could become parties to a treaty which was not open to every State; in other words, it was because they were new that some States would have a right which they would not otherwise enjoy.

53. Of course, such a rule could apply only to States which were really entitled to special attention, and that meant decolonized States; for it was not conceivable that a State which had resulted from a fusion, for example, could have that right if the two States of which it was composed had not previously each enjoyed the right individually. That raised a difficult question in the general law of treaties. Hitherto, even in the Vienna Convention on the Law of Treaties, it had always been accepted that participation in a treaty was determined by the treaty itself, not by some other provision. He willingly acknowledged that that view was too narrow and that the principle of a right of access to a treaty might be laid down. That was the problem of the "all States clause". But that problem, which appeared as a complement to the Vienna Convention, should not be examined in the context of succession.

54. He did not believe, however, that the intention of the article was to give new States a right they would not otherwise possess. For seeing that the article as it stood did not apply to decolonized States only, that right would have very far-reaching consequences for the past: for example, in regard to the right to participate in certain nineteenth-century multilateral conventions, such as those concerning international waterways. He would therefore discard that interpretation.

55. The second element of novelty which the article might introduce lay in procedure, since it provided that a new State could become a party to a treaty merely by notification. It might therefore be assumed that that was one of the other agreed means permitted under article 11 of the Vienna Convention on the Law of Treaties. If that was the case, the novelty was very slight, since any depositary would now interpret a notification, even from a State which was not new, as an accession coming under article 11 of the Vienna Convention.

56. The third element of novelty would relate to the effects of notification, again with the idea of safeguarding the continuity of the treaty. Did notification of the parties produce different effects from ordinary accession, and if so, what were they? One might be retroactive effect to the date of the succession, but the Special Rapporteur had indicated that States should be left entirely free on that point. Moreover, the rights of the other parties to the treaty were involved. If it was a humanitarian convention or an international labour convention, retroactivity did not impair the interests of third States, but if it was a treaty involving reciprocal obligations, the idea of retroactivity seemed arbitrary. He doubted whether it was necessary or possible to introduce it.

57. Other possible effects of notification were conceivable, for example, if the original treaty specified that certain States had special rights. The Special Rapporteur should give some further explanations of that point, which would make it easier to judge the usefulness of article 7.

58. Lastly, under article 7 the notification was addressed to the parties, whereas under article 78 of the Vienna Convention it was normally transmitted to the depositary. Was that due to some idea differing from that of the Vienna Convention or was it merely a matter of drafting?

59. Mr. RAMANGASOAVINA said that article 7 was the logical sequel to the principles stated in articles 5 and 6, according to which no new State could be bound by a treaty without its express consent. Article 7 thus supplemented the preceding articles by making express notification compulsory if a new State was to be bound

by a multilateral treaty which had been in force in respect of its territory at the date of the succession.

60. The new State was perfectly free to notify or not to notify its succession to a treaty. But then the question arose what was the position of that State with respect to a treaty in the absence of notification, where the treaty had been in force in respect of the territory. Either the meaning of the term "notify" should be made clearer or it should be replaced by some term covering all the different means of communicating a State's will to accede to a treaty.

61. The exceptions provided for in sub-paragraphs (*a*), (*b*) and (*c*) were correct, since treaties were subject to certain procedures and the consent of the other parties was necessary. Article 7 was therefore wholly appropriate to the position of any newly independent State, whether it had emerged from a dismemberment, a fusion or a regrouping.

62. Mr. YASSEEN said that article 7 reflected international practice and in some of its aspects even contained an element of progressive development of international law. The abundance of multilateral treaties was a feature of modern times, so it was right to devote a special article to the attitude of new States toward such treaties.

63. Article 7 was not concerned with what a treaty might or might not provide about accession or acceptance, but with a right deriving from the succession and from the link between the treaty and the territory which had become independent. It was the play of those elements which contributed to the creation of a right in favour of new States—of a new rule which enabled them, if they so desired, to consider themselves parties to treaties concluded by their predecessors which had a link with their territory. That was how article 7 could be regarded as contributing to the progressive development of international law. The difference between the new procedure and accession to a treaty lay, perhaps, in its retroactivity, which would provide the continuity essential for an orderly international life.

64. The principle stated in article 7 was indisputable. It was based on a customary rule which recognized, not the actual application of the treaty to new States, but the possibility of future applicability.

65. The exceptions provided for were logical. The first —incompatibility with the object and purpose of the treaty—derived from observance of the treaty itself. The reason for the second was not only that the treaty was the constituent instrument of an international organization, but that the status of a member was necessary and that the constituent instrument laid down a particular procedure for the acquisition of membership. The third exception, which was modelled on a provision concerning reservations in the Vienna Convention on the Law of Treaties,[9] was obviously indispensable, because certain restricted multilateral treaties had only a small field of application, which explained the small number of States that had participated in their negotiation and justified the requirement that the States which had concluded the original treaty must give their consent.

66. Mr. USHAKOV said he thought it would be preferable to make a general reservation concerning international organizations, so as to avoid having to include a reservation in every case where it was required.

67. As it stood, article 7 had little meaning. Any State could at any time notify any other State of whatever it saw fit. The article said nothing about the effects of the notification for third States; it could only be assumed that they would be automatically bound in relation to the notifying State. There was no question, as in article 4, of the consent of the other parties.

68. Another question was whether the article was also applicable to restricted multilateral treaties, for example tripartite treaties? The question did not arise in the case of open treaties, which provided for the participation of the largest possible number of States, but a restricted multilateral treaty was not always open to a new State.

69. Lastly, the exception provided for in sub-paragraph (*c*) was only an exception to the right to notify. But the main problem raised by article 7 was how the parties to the treaty would be bound in relation to the notifying State.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that the statement in article 7 that the new State was entitled to notify the parties to a multilateral treaty "that it considers itself a party to the treaty" was intended to set forth the right of the new State to continue as a party to the treaty. The process was analogous to that of accession, though the procedure was less formal than that of accession. The drafting of the article should perhaps be tightened up to make it clear that the new State established, by means of a notification, its consent to be bound by the treaty.

71. He had given some attention to the temporal question raised by Mr. Reuter and, appended to his commentary to article 12, members would find a special note on the question whether a time-limit should not be set for a new State to make its notification.[10] A new State might remain silent for years; the question would then arise whether it could still consider itself a party to the treaty from the date of succession by making a long-delayed notification.

72. Mr. BILGE asked whether the Special Rapporteur intended to leave open the question whether the new State would become a party from the date of the notification or from the date of the succession.

73. Sir Humphrey WALDOCK (Special Rapporteur) said that the draft articles which followed, particularly article 12 (A/CN.4/224/Add.1) dealing with the legal effects of the notification, gave the answer to that question.

74. The practice of the Secretary-General as depositary was that, unless it appeared otherwise from the declaration of the State concerned, the notification made it a party to the treaty as from the moment of succession.

[9] Article 20, para. 2.

[10] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 60.

Examples could be given of a new State expressing the intention to become a party either before or after that date. In one case, a new State had even stated its intention to consider itself a party to a treaty as from the date on which the treaty had been ratified by the predecessor State. In a number of cases, on the other hand, new States had declared that they considered themselves parties only from the date of notification.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 3; A/CN.4/L.182)

[Item 5 of the agenda]

(resumed from the 1153rd meeting)

75. The CHAIRMAN said that it was necessary to revert briefly to item 5 of the agenda in order to enable the Secretariat to begin its preparatory work on the Commission's report.

76. Members had received the observations of governments which had been circulated as documents A/CN.4/253 and Add.1 to 3. If there were no objections he would assume that, in conformity with past practice, the Commission agreed that those observations should be annexed to its report on the work of the present session.

It was so agreed.[11]

The meeting rose at 1.5 p.m.

[11] For resumption of the discussion see 1182nd meeting.

1165th MEETING

Thursday, 25 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, 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]

(resumed from the previous meeting)

ARTICLE 7 (Right of a new State to notify its succession in respect of multilateral treaties) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 7 of the Special Rapporteur's draft (A/CN.4/224).

[1] For text, see previous meeting, para. 42.

2. Mr. TSURUOKA said he could accept article 7 as interpreted by the Special Rapporteur when introducing it, and in view of the fact that the term "new State" was provisional. He wished, however, to raise two questions.

3. The first was whether the right of a new State to become a party to a multilateral treaty was accompanied by an obligation of the other parties to that treaty to recognize the effect of the notification. In other words, had the other parties no right to object or to make reservations?

4. The second question was whether it would not be advisable to set a reasonably long time-limit within which the new State must notify its intentions.

5. He approved of the three exceptions specified in the article. With regard to sub-paragraph (*a*), however, the question arose what would happen if the parties to a treaty were not unanimous in considering that its object and purpose were incompatible with the new State's participation. Similarly, with regard to sub-paragraph (*c*), the parties to a treaty might differ as to whether it did or did not fall within the category of treaties covered by the exception. Those questions would no doubt be settled later, but the Commission should bear them in mind and it would be helpful if the Special Rapporteur would give his opinion on them.

6. Mr. BEDJAOUI said he did not agree with those who believed that article 7 was of little use. An article of that kind was not merely useful, it was necessary as a complement to article 6 and should therefore be retained. There were four questions he would like to examine: the nature and origin of the right accorded to the successor State; the field of application of that right; the nature of the instruments to which it was applicable; and the effects of recognition of that right.

7. The right provided for in article 7 was derived from the law of State succession, not from the law of treaties. It was not available to any and every new State. To take the example given by Mr. Reuter at the previous meeting, a State which had emerged from a fusion could not be permitted to notify its accession to a multilateral treaty unless the two previous States, or one of them, had been a party to it.

8. The previous application of a treaty to the territory of a new State was thus a prerequisite for the creation of that State's right to notify its succession to the treaty. Moreover, article 7 used the expressions "notify its succession" and "any multilateral treaty in force in respect of its territory". The previous application of a treaty to a particular territory conferred on the sovereign which took it over as the result of a succession an open right to maintain that treaty.

9. That right was justifiable, since the new State was not entirely alien to the sphere of territorial application of the treaty, which might have left its mark on the territory in question. The right was also welcome because it made possible, with due respect for and in harmony with the sovereignty of the new State, the continuity of application of multilateral treaties which all members desired, as had become clear while article 6 was being considered. Article 7 should therefore be read in close conjunction with article 6, to which it was the comple-