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Summary record of the 1219th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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the entry into force of the most-favoured-nation clause and after its entry into force. That point would be dealt with in a later article, on the contingent character of the clause. He agreed with Mr. Kearney that it would be better to replace the words "right to claim" by the words "right to enjoy".

61. He agreed with Mr. Ramangasoavina that the most-favoured-nation clause should be embodied in treaties between States and that it could not be inferred from a mere oral agreement or by other means. Some saving clause should therefore be included in the draft, on the lines of those contained in articles 1 and 3 of the Vienna Convention on the Law of Treaties.[8]

62. Mr. Ushakov had made the important observation that the most-favoured-nation clause could create rights only in a particular domain or specific field.

63. He was grateful to Mr. Elias for his proposal for an additional definition, which should certainly be considered by the Drafting Committee.

64. Mr. Martínez Moreno had rightly underlined the importance of a reference to administrative acts.

65. He noted that Mr. Reuter had reaffirmed the need for a saving clause along the lines of those in the Vienna Convention on the Law of Treaties.

66. He agreed in principle with the comments by Sir Francis Vallat.

67. Lastly, he agreed with the Chairman that the "practice" referred to in article 5 was always of a bilateral nature, and hoped that that point would be clearly reflected either in the article itself or in the commentary.

68. Mr. YASSEEN said that, like Mr. Martínez Moreno, he believed that not only the legislative and executive powers, but also the judicial power could establish legal rules on the treatment to be accorded to a third State, since judicial decisions were a source of law. Consequently, both in article 3 and in article 5, the enumeration of the different means of according certain treatment to a third State should either be exhaustive, or be drafted in general, unambiguous language. Of course, if the definition in article 3 was sufficiently clear and complete, it would not be necessary to include the enumeration in the following articles.

69. Mr. RAMANGASOAVINA said that he had not meant to suggest that the various possibilities to which he had referred should all be mentioned in article 5. On the contrary, he thought the provision was already drafted in sufficiently flexible terms to cover the different practices of States.

70. The CHAIRMAN suggested that article 5 be referred to the Drafting Committee.

It was so agreed.[9]

71. Sir Francis VALLAT observed that articles 2, 3, 4 and 5 had now been referred to the Drafting Committee. However, since all those articles bore a certain relationship to article 1, he proposed that the Drafting Committee be asked to consider, at least provisionally, the latter article as well.

72. Mr. BARTOŠ said it was the Commission's practice not to consider the definitions article until after it had examined all the other articles in a draft. Examination of the whole draft might lead it to omit or amend provisional definitions.

73. Mr. USTOR (Special Rapporteur) said that Mr. Bartoš was certainly right in saying that it was the Commission's practice to consider the article on definitions only after it had completed its discussion of the other articles. But the Drafting Committee could, of course, consider article 1 provisionally, on the understanding that it could be subsequently revised.

74. He suggested that the Drafting Committee should be empowered to submit saving clauses to the Commission, of the kind mentioned during the discussion.

75. The CHAIRMAN said he took it that the Special Rapporteur's suggestions were acceptable to the Commission.

It was so agreed.

The meeting rose at 12.45 p.m.

1219th MEETING

Monday, 4 June 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Welcome to Mr. Calle y Calle

1. The CHAIRMAN welcomed Mr. Calle y Calle, who had been elected a member of the Commission to fill one of the casual vacancies which had occurred since the last session.

2. Mr. CALLE y CALLE, thanking the Chairman, said it was an honour and a privilege for him to participate in the work of the Commission. His country had an old legal tradition and, like all developing countries, was deeply interested in the progressive development of international law. In Joining the Commission, he wished to pay a tribute to two of his Latin American predecessors, Mr. Ruda, who was now a judge of the International Court of Justice, and Mr. Alcívar, whose memory was particularly dear to him.

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[8] 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.

[9] For resumption of the discussion see 1238th meeting, para. 33.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

3. The CHAIRMAN invited the Commission to take up the topic of succession of States in respect of matters other than treaties and asked the Special Rapporteur to introduce his sixth report (A/CN.4/267).

4. Mr. BEDJAOUI (Special Rapporteur), drawing attention to the difficulties presented by the study of succession of States in respect of matters other than treaties, said he greatly hoped that his sixth report, and the previous reports he had submitted, would help to make the work a little easier. His reports, however, covered only a small part of the topic: succession to public property.

5. The subject presented many difficulties. They were due, in the first place, to the fact that the conduct of States in regard to succession was contradictory and that it was difficult to deduce rules from the practice. In addition, the topic of succession of States was closely connected with certain concepts of international law, such as the State, sovereignty and territory. If, contrary to the view strongly upheld by certain jurists, such as Professor Charles Chaumont, an international community existed, that community consisted essentially of States, which came into being, changed and disappeared. The State was a living entity, changing and temporary. Many events could affect a State, its territory, its sovereignty or its population and lead to dismemberment, fusion, union, secession, a partial transfer of territory or independence. Such events in fact made up the web of history and the raw material for the theory of State succession.

6. It should also be noted that the topic of succession of States and, more particularly, succession in respect of matters other than treaties, had not been the subject of any attempt at codification on the part of official or private bodies. The literature on the subject was also very meagre; most treatises and manuals of international law barely touched on the problem, as though it presented no difficulties. Some writers did not mention it at all, because, like Ian Brownlie, they considered that there were no rules, and others like Guggenheim and Cavaré, rejected the expression "succession of States" as being incorrect. As to the Secretariat's studies on succession of States,[1] unfortunately they were far from constituting a rich source of documentation concerning public property. On the other hand, treaty precedents and diplomatic texts were abundant and varied, but they sometimes lacked rigour.

7. Another source of difficulties was the fact that the topic, although it belonged to international law, was not foreign to internal law. It might therefore be asked whether the public property of the State should be considered in the light of the traditional distinction made by certain systems of internal law between property in the public domain and property in the private domain of the State. He had avoided using that distinction, because some contemporary systems of law did not recognize it. Doubt might also be cast on the advisability of tackling the subject from the point of view of international law rather than that of internal law.

8. Finally, succession to public property touched on economic, financial and monetary questions, which complicated the study of the subject. One example was the liquidation of the Austro-Hungarian Bank, which had been a particularly arduous operation.

9. In matters of succession of States, although it was considered that succession to public property was governed by international law, it was recognized that there was no transfer of sovereignty, but replacement of one sovereignty by another, which meant the automatic removal of the material support of the former sovereignty. The result was a replacement of the old State by the new State in the right to public ownership. The right to public property would therefore be the effect of the birth of a new subject of international law, not the result of a succession of States; it would be an attribute of the new sovereignty. Hence the theory of succession of States would not apply to the rights and obligations of the successor State, and international law would merely recognize the validity of the internal legal order of the successor State within the framework of the international legal order. There would thus be a gratuitous and immediate substitution of the successor State in rights to public property.

10. That theory was somewhat academic; it could not conceive of sovereignty without a set of attributes which made it possible to exercise. And apart from the fact that there had been governments in exile or without territory, certain questions remained unanswered. For instance, if the successor State automatically acquired public ownership solely by reason of its own sovereignty, how did it acquire property situated outside the territory which had undergone a change of sovereignty?

11. The theory had some justification when it came to defining or to determining public property, which involved practical application of the internal law of the successor State. For there was no definition of public property taken from international law, and the practice clearly showed that it was the internal legal order of the successor State which was decisive in that respect.

12. In his third and fourth reports[2] he had tried to present the subject without any theoretical systematization. He had drafted fifteen articles dealing with public property, without specifying the type of succession. That method had one disadvantage, which had appeared later and which he had tried to correct in his sixth report. In that report he had taken account, as far as possible, of the discussion in the Commission in 1972 on the related topic of succession of States in respect of treaties. He had drafted separate provisions for each type

[1] *Yearbook of the International Law Commission, 1962*, vol. II, p. 131, document A/CN.4/151 and *1970*, vol. II, p. 170, document A/CN.4/232.

[2] *Yearbook of the International Law Commission, 1970*, vol. II, p. 131, document A/CN.4/226 and *1970*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

of succession of State. The following five cases could be considered: succession of a State without the creation or disappearance of a State—for example, partial transfer; creation of a State without the disappearance of the predecessor State—for example, a newly independent State; creation of a State with the disappearance of the predecessor State—for example, union or fusion, disappearance of the predecessor State without creation of a State—for example, absorption or partition; and secession, which was a particular case of the creation of a newly independent State.

13. In the draft articles adopted by the Commission on succession of States in respect of treaties, succession of States meant "the replacement of one State by another in the responsibility for the international relations of territory".[3] That definition deliberately left aside the transmission of rights and obligations as a legal consequence considered incidental to the replacement. At the twenty-seventh session of the General Assembly, the Sixth Committee, in its report to the General Assembly had stressed the difference between transfer of sovereignty and substitution of sovereignty, and had specified that succession of States, for the purposes of the draft articles, was not a transfer of sovereignty over territory, but the replacement of one sovereignty by another, thus excluding all questions of devolution of rights and obligations as a legal incident of that replacement.[4]

14. That definition, however, did not seem applicable to the present topic, because the rights and obligations were no longer an incident, but the principal. During the discussion of Sir Humphrey Waldock's draft at the twenty-fourth session of the Commission, in 1972, Mr. Ushakov had suggested preparing a definition which would be valid for both topics.[5] The Commission had not adopted his suggestion, believing that it would only lead to abstractions of doubtful utility. Consequently, he had proposed in his sixth report a definition of the term "succession of States" for the purposes of his draft. He had simply considered succession as the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of the predecessor State and the successor State for the territory affected by the change of sovereignty.

15. To understand what was meant by "succession of States in respect of matters other than treaties", it must be remembered that the topic had first been entitled "Succession of States in respect of rights and duties resulting from sources other than treaties". It had subsequently been found that the meaning of the term "treaty" differed according to whether it referred to a subject of succession, as in the topic assigned to Sir Humphrey Waldock, or to an instrument of succession, as in the topic assigned to himself. The Commission had therefore decided to distinguish between succession of States in respect of treaties and succession of States in respect of matters other than treaties. In both cases the succession must be governed by rules, but both kinds of succession could have their origin in a treaty, since both succession to treaties and succession to public property or public debts could take place by treaty.

16. The definition of "public property", which was very complex, was contained in article 5. For the time being it was enough to say that three kinds of public property could be considered: the property of the State, the property of the territory affected by the change of sovereignty and the property of public institutions or establishments or of territorial or local communities. Although the topic was succession of States, it could not be confined to the first category of public property. With regard to the régime governing such property, roughly speaking it could be noted that sometimes it passed to the successor States and sometimes it was not affected by the change of sovereignty so far as the law of property was concerned, although it was affected in regard to the territorial jurisdiction of the State.

17. Introducing the first three articles of his draft, he said that article 1, entitled "Scope of the present articles", was modelled on article 1 of the draft on succession of States in respect of treaties[6] adopted by the Commission.

18. Article 2 should not give rise to any difficulty either, because it reproduced the text of article 6 of the same draft. He had dropped the draft article 1 proposed in his fourth report (A/CN.4/247 and Add.1), in favour of the text already adopted by the Commission.

19. Article 3 was not yet complete. In it, he had proposed his own definition of the term "succession of States", whereas the definitions of the terms "predecessor State" and "successor State" were those adopted by the Commission on the proposal of Sir Humphrey Waldock. Those three definitions would be supplemented by others, as the need would surely arise.

20. The first three articles he proposed were as follows:

Article 1
Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2
Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article 3
Use of terms

For the purposes of the present articles:

(*a*) "*Succession of States*" means the replacement of one sovereignty by another with regard to its practical effects on the rights

[3] See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter II, section C, article 2, paragraph 1 (*b*).

[4] See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 35.

[5] See *Yearbook of the International Law Commission, 1972*, vol. I, p. 33, 1156th meeting, para. 14.

[6] *Ibid., 1972*, vol. II, document A/8710/Rev.1, chapter II, section C.

and obligations of each for the territory affected by the change of sovereignty;

(*b*) "*Predecessor State*" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "*Successor State*" means the State which has replaced another State on the occurrence of a succession of States.

21. Mr. SETTE CÂMARA said he was sure that all members were grateful to the Special Rapporteur for his extremely interesting report. As the Special Rapporteur had pointed out, the topic was a particularly difficult one and no attempt had hitherto been made to codify it, even by academic bodies. He proposed that the Commission consider the draft in the Special Rapporteur's sixth report article by article.

22. Mr. USHAKOV said he thought it would be better to have a general discussion before examining the draft articles.

23. The CHAIRMAN suggested that the Commission should have a general discussion and then consider the Special Rapporteur's first three articles.

24. Mr. YASSEEN said that, since the topic of succession of States in respect of matters other than treaties was not governed by any general theory and had not yet been the subject of any attempt at codification even at the academic level, it would be better to follow the empirical method proposed by the Special Rapporteur and, as each article was considered, try to find solutions in international practice which could be adopted as rules applicable to questions of succession in respect of matters other than treaties. That would not exclude the possibility of making general comments.

25. Mr. AGO said he agreed with Mr. Ushakov that the Commission should first hold a general discussion on the topic as a whole and, in particular, on the criteria on which the Special Rapporteur had based his approach to it; the discussion should also cover the way in which the two parts of the topic of succession of States—succession in respect of treaties and succession in respect of matters other than treaties—fitted in with each other. There were two questions of a general nature to be considered: the subject-matter as a whole, and the first three articles on succession to public property, which was only one chapter of the general topic. That procedure would not cause any delay; on the contrary, it would enable the Commission to make faster progress by proceeding in more orderly fashion.

26. Mr. BARTOŠ said he was in favour of examining the draft article by article, but allowing members to express their views on the general principles evoked by the consideration of any particular article. It was obvious that with decolonization, national liberation movements and the proclamation of the right of peoples to self-determination, profound changes had been taking place in international law for some years and that new questions were arising, such as that of the continuity of relations between the former metropolitan State and its liberated or emancipated territories. Those major questions should be considered more closely, but in order to save time, it would be better to do so as each article came up for examination.

27. Mr. HAMBRO, after complimenting the Special Rapporteur on his extremely interesting and learned report, said that Mr. Bartoš's comments were most judicious. He was afraid that if the Commission embarked on a general discussion it would only repeat what had already been said in previous years. He hoped, therefore, that the Commission would consider the Special Rapporteur's draft, article by article.

28. Mr. USHAKOV said he had not proposed that the Commission should engage in a theoretical discussion, but simply that members should comment on the draft as a whole, since that might help the Special Rapporteur in his future work.

29. Mr. REUTER said it would no doubt be useful if each member made some general comments, though it was important that the specific problems should be tackled as soon as possible. The Special Rapporteur's report raised two main questions: first, the different cases of succession to be distinguished and, secondly, the definition of matters other than treaties.

30. With regard to the first question, he did not underestimate the historical, practical and theoretical importance of decolonization, but there were other cases of succession to be considered and the Commission should continually ask itself whether the provisions it adopted were also applicable to the other cases. It was possible that tomorrow the trend would be towards centralization and the formation of economic or political unions. The Commission would remember that it was cases of fusion which had caused it the greatest difficulties when considering succession in respect of treaties.

31. With regard to the second question, the Special Rapporteur had included property among matters other than treaties. He did not contest that decision, but he was not sure about all the elements which made up property. In his previous reports, the Special Rapporteur had spoken of succession to territory—the territory itself provided material for succession—whereas in his sixth report, it was the territory that defined the succession. He saw no objection to that, but he wondered whether the existing property might not include some items which, though closely linked with the territory, were not territorial property. For example, international law recognized certain rights linked with territory, which it did not characterize as territorial rights—the continental shelf, special fishing rights, etc. If those were to be included in succession to property, that would mean that property was defined in the first place by international law, whereas the most important problem to which the Special Rapporteur had devoted his study and which constituted the real difficulty of the subject, was that of property as defined in the first place by internal law.

32. The Special Rapporteur made a distinction between the kinds of property defined by internal law according to whether the property was situated in the territory of the State, in which case the solution was simple, or situated in the territory of a third State, in which case the solution was less simple. The Commission would have to consider some difficult concepts of attachment and formulate criteria for economic attachment. In some cases relating to debts or loans, it might have to go into

questions of economic participation or another aspect of attachment: maximum utility. That would be pioneer work. For that reason, he was prepared to follow the empirical method proposed by the Special Rapporteur.

33. Sir Francis VALLAT said that, as a new member, he would appreciate it if the Commission would first express its views on the substance of the draft articles as a whole.

34. The CHAIRMAN suggested that the Commission first hold a general discussion on the topic as a whole, on the understanding that members would be free to speak on the first three articles if they so desired.

It was so agreed.

The meeting rose at 4.50 p.m.

1220th MEETING

Tuesday 5 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 1 (Scope of present articles)

ARTICLE 2 (Cases of succession of States covered by the present articles) *and*

ARTICLE 3 (Use of terms)

1. The CHAIRMAN invited the Commission to continue its general discussion on the Special Rapporteur's sixth report (A/CN.4/267) and consideration of draft articles 1, 2 and 3.

2. Mr. YASSEEN said he would refrain from general comments, because he found it difficult to take a general position on the practical problems raised by the topic. Like the Special Rapporteur, he believed that an empirical approach would be best. Solutions would have to be sought in the scanty and varied practice. The draft submitted by the Special Rapporteur would no doubt give rise to long discussions in the Commission, but that should not apply to the preliminary provisions, articles 1 to 3.

3. Article 1 appeared to be self-evident, but was nevertheless necessary in order to define the scope of the draft; it corresponded perfectly to the task entrusted to the Special Rapporteur and could be referred to the Drafting Committee.

4. Article 2 was taken from the draft on succession of States in respect of treaties,[1] so its terms had already been considered by the Commission in 1972. At that time, he had been one of those who had considered the provision superfluous in Sir Humphrey Waldock's draft, not because they did not approve of its content, but because they considered it obvious that the draft could only apply to situations that were in conformity with international law. But the Commission had decided otherwise and its decision concerning the draft adopted in 1972 applied also to the present draft.

5. With regard to article 2, he congratulated the Special Rapporteur on the general broad-mindedness he had shown. A Special Rapporteur had to try to reflect the position of the Commission, and Mr. Bedjaoui had shown great understanding in dropping some of the formulas he had proposed and replacing them by those adopted by the Commission in the draft on succession of States in respect of treaties. That applied to article 2, which should therefore not give rise to any difficulty and could also be simply referred to the Drafting Committee.

6. Article 3, entitled "Use of terms", contained three sub-paragraphs. In sub-paragraph (*a*), the Special Rapporteur proposed a definition of the expression "succession of States" which did not correspond to the one adopted in the draft on succession of States in respect of treaties.[2] His reasons for doing so were given in paragraphs 1-5 of the commentary to the article. In point of fact, the two definitions differed mainly as to the angle from which they viewed the concept of succession of States. The definition adopted for succession of States in respect of treaties reflected more the Commission's concern to adopt a particular method of work than any desire to state a position of principle. As to the new definition proposed by the Special Rapporteur, he would rather defer a decision on its merits and its accuracy until all the draft articles had been examined. In any case, it was the Commission's usual practice to examine the definitions only at that stage, because they might need to be amended in the light of its examination of a draft.

7. Consideration of the other two sub-paragraphs of article 3, which defined the expressions "predecessor State" and "successor State" should also be left till later. Moreover, article 3 was not complete, since the Special Rapporteur had stated his intention of including other definitions in it.

8. Mr. PINTO said he associated himself with the tributes paid to the Special Rapporteur's series of erudite reports. The area they covered was almost uncharted and precedents were hard to find. The Special Rapporteur had provided the Commission with valuable guidance in dealing with an extremely difficult topic.

9. He supported Mr. Yasseen's suggestion that articles 1 and 2 should be referred to the Drafting Committee and

[1] See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter II, section C, article 6.

[2] *Ibid.*, article 2.