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Summary record of the 1220th meeting

Topic:
Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-
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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.

that the Commission's final position on article 3, on the use of terms, should be reserved.

10. The Special Rapporteur's sixth report, subsumed much of the material in his earlier reports. He supported the Special Rapporteur's empirical approach, which was the only one possible for dealing with the present topic.

11. He endorsed the five main ideas on which the draft was based: first, the idea that certain property followed the territory and was so closely linked to it that it should remain unaffected by succession; secondly, the idea that the successor State's sovereignty had an immediate impact, and immediate effects, on the territory in respect of which the succession took place; thirdly, the proposition that a successor State succeeded to certain duties as well as certain rights; fourthly, the idea that property of the successor State situated outside its territory should be the subject of separate treatment; and fifthly, the right of eminent domain in relation to "concessions".

12. He also endorsed four of the criteria which the Special Rapporteur had put forward for determining whether there would be succession to property, namely, the principle of equitable apportionment; the concept of the economic contribution of a territory; the geographical location of the territory; and the origin of the property.

13. He foresaw certain problems, however, with regard to the Special Rapporteur's proposed fifth criterion, relating to the viability of a State unit, or each of the State units, on a severance. It was difficult to see how that criterion would work in practice. If a State broke up into two units, it could well happen that the smaller or less populated one was more viable than the larger or more populated one. The question would then arise whether, under the proposed criterion, the public debt of the original State would have to be broken up in such a way as to place the greater burden upon the more viable State. Perhaps the Special Rapporteur would wish to clarify that point when introducing the appropriate article.

14. In any event, none of the proposed criteria had an absolute character; they would all have to be reviewed in the context of each particular succession and in the light of the circumstances—political, economic and geographical—of each case.

15. That being said, he wished to make some comments on certain points of terminology. First, the expression "nexly independent" was not very apt in the present context. A blanket reference to "newly independent States" would obscure the difference between a State which had emerged for the first time and a State which had spent a century or more under colonial rule, but had been an independent State before colonization. A State of that kind had enjoyed international personality before becoming a colony, when its sovereignty had been submerged by a foreign power, by conquest or treaty or both. Its case was different from that of a State created on a territory which had never constituted an international entity.

16. In some of the articles it was not clear whether differences in terminology reflected actual differences in legal content. Problems of interpretation could arise in such cases, so that more precise wording was desirable. For example, article 9 stated that certain property "shall devolve... to the successor State", but in article 8, sub-paragraph (*a*) the expression used was "shall pass within the patrimony of the successor State", and in article 13, paragraph 1, it was "shall pass into the patrimony". Article 14, paragraph 1, stated that certain items "follow the transferred territory". In article 8, sub-paragraphs (*b*) and (*c*), the expression used was "shall pass within the juridical order of the successor State", whereas version B of article 37 read: "shall be incorporated... in the juridical order of the successor State". Article 34 stated that the successor State "shall be automatically and fully subrogated to" certain property rights. Article 40, paragraph 1, provided that the legal status of certain property "shall not be affected by the change of sovereignty", but article 37 stated that "The change of sovereignty shall leave intact the ownership...".

17. Another case in which some greater degree of uniformity could perhaps be introduced in order to facilitate understanding, related to the formula used in articles 6, 26 and 40: "shall be transferred to the successor State". In article 38, paragraph 1, the wording used was "shall be transferred *ipso jure* to the successor State". The difference should, of course, be retained if there was a difference in the intended meaning, but not otherwise.

18. The question also arose of the difference between the transfer mentioned in those articles and the concepts underlying the words "shall... be allocated" in article 13, paragraph 2, "shall receive", in article 21, paragraph 1, and "shall take over" in article 24, paragraph 2. It was not certain whether there was any difference in intended meaning between those three expressions.

19. Similar differences arose with regard to certain descriptive terms relating to property. Article 11, paragraph 1, referred to "the patrimony" of a territory. In article 31, paragraph 1, there was a reference to "property belonging to" a territory. In article 34, the expression "patrimonial rights" was used, whereas version A of article 37 referred to "patrimonial property, rights and interests". Article 9, however, spoke of "property necessary for the exercise of sovereignty".

20. That last group of terms created a special difficulty, because it showed that in some of the articles, the distinction between ownership and sovereignty had become blurred. Ownership was mentioned in a number of places where the intention had been to refer to sovereignty. The two concepts should be kept separate. Ownership of property implied *jus utendi*, *jus fruendi* and *jus abutendi*; sovereignty implied legislative, executive and judicial powers. A clearer distinction should be made between sovereignty, the attribute of a State, and simple ownership.

21. Lastly, he would welcome some clarification of the difference between "public funds" dealt with in article 13, and the "currency, gold and foreign exchange reserves" referred to in article 12.

22. Mr. KEARNEY said that he too wished to congratulate the Special Rapporteur on his excellent reports,

the sixth of which constituted a substantial development and refinement of the theses expounded in the earlier reports.

23. By way of general comment, he wished to stress that the Commission's purpose in dealing with the present topic was essentially to draw up a set of residuary rules. The draft articles now under discussion would apply only to the cases of succession that would arise most often in the future as a result of a union of States, the dissolution of a State, or a transfer of territory from one State to another. In those cases, it was likely that the States concerned would make the necessary arrangements by agreement, and their agreement would be governed by the law of treaties.

24. Because of the enormous range of possible situations, it would be impossible to draft detailed rules to cover all eventualities. For example, in the case of the dissolution of a State which had a weather reporting satellite in orbit, it would be extremely difficult to apply the principle of equitable apportionment, except by a balancing of different categories of property.

25. The residuary rules to be embodied in the draft articles would serve to cover any gaps that might exist in the agreements concluded between the States concerned. In framing those rules, it would not be the Commission's objective to produce certain particular economic or social effects, or to ensure the maintenance or amendment of any form of political philosophy.

26. The Commission's principal objective should be to frame a set of rules which would allow a succession to take place with the minimum of dispute. Although the analogy was, of course, only partial, he might mention the work of the United Nations Commission on International Trade Law (UNCITRAL) on the revision of the international instruments governing bills of lading. For a long time there had been doctrinal and other disputes between shipping (maritime carrier) interests and shipper (cargo) interests and the major aim in revising the international instruments was to reduce friction between two sets of interests, as an effective way of reducing maritime transport costs.

27. By the same token, the Commission's aim should be to reduce the possibilities of friction between the predecessor State and the successor State and between either of those States and a third State. The only way to arrive at that result was to provide as precise a set of rules as possible.

28. There was one point, however, to which he wished to draw particular attention: the need to introduce some impartial method for the settlement of disputes, particularly if the concept of equitable apportionment was included in the draft. Clearly, it would be very hard for the parties themselves to decide what constituted equitable apportionment in the very complex situations which arose.

29. He had been very interested to hear Mr. Pinto's comments on terminology problems, because he himself had precisely the same difficulties. Part of the trouble was due to the use of code law concepts to express some of the rules. "Patrimony", for example, was more a code law than a common law concept. In any case, he supported Mr. Pinto's plea for greater uniformity in terminology.

30. With regard to articles 1, 2 and 3, he had no objection to the first two being referred to the Drafting Committee, since they were similar to the corresponding articles 1 and 6 of the 1972 draft on succession of States in respect of treaties.

31. With regard to article 3, it was highly desirable that the same type of definition should be used in sub-paragraph (*a*) as had been adopted at the previous session in article 2, paragraph 1 (*b*) of the draft on succession of States in respect of treaties. One important difference between the two texts was that in the definition of "succession of States" relating to treaties, no reference was made to sovereignty, since the Commission had decided to exclude that concept.

32. The reference in article 3, sub-paragraph (*a*), to "practical effects" on the rights and obligations of each of the two States concerned raised another problem. That wording could lead to confusion, since the purpose of the draft was to deal with the legal effects of the replacement of one State by another in the responsibility for the international relations of territory.

33. Mr. USHAKOV congratulated the Special Rapporteur on the excellent work he had already accomplished, despite the difficulty of his task. His sixth report showed considerable progress. Although the Commission had not been able to examine his earlier reports, the Special Rapporteur had succeeded in improving and developing them, and the number of articles he proposed had increased from 4 to 15 and now to 40. Moreover, in his sixth report, the Special Rapporteur had distinguished between various cases of succession, whereas his previous report (A/CN.4/259) had attempted to deal with all the possible types of succession indiscriminately.

34. Before examining the draft article by article, the Commission should consider a number of general questions. It was regrettable that the Special Rapporteur had been unable to participate in the work of the Commission's twenty-fourth session, first because the Commission had been deprived of his valuable assistance when examining Sir Humphrey Waldock's draft, and secondly, because the Special Rapporteur had sometimes adopted, on certain general questions, a position contrary to that taken by the Commission. For instance, the definition proposed by Sir Humphrey Waldock for the expression "succession of States",[3] which applied only to cases of succession in respect of treaties, had finally been replaced by a general definition applicable to both aspects of succession of States. Nevertheless, the Special Rapporteur now proposed a new definition, as he was, of course, entitled to do. The Commission, however, would find itself in a delicate position, because if it accepted the Special Rapporteur's definition, it would be obliged to review the position it had adopted last year. True, the Commission had the right to change its position, but it would have been better if the Special Rapporteur's view had been put forward the previous year.

[3] *Ibid.*, *1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, II, art.1.

35. The definition of the expression "public property" should also be considered as a preliminary general question. The whole draft dealt with succession to public property and it was essential to be clear from the outset as to the meaning of that expression, which was defined in article 5. Later on, the Commission would have to decide whether the expression "public property" covered not only property, but also rights and interests; he himself thought it did not. For the time being, he merely noted that the definition was drafted in a negative form which he considered unsatisfactory: public property meant all property which was "not under private ownership". In his opinion, public property meant State property.

36. It was also essential to determine in advance what cases of succession were envisaged. He noticed that the Special Rapporteur had not followed exactly the classification adopted by the Commission in its draft on succession in respect of treaties, and that might oblige the Commission to review its position. The Commission had decided to distinguish between cases of transfer of territory and cases of the emergence of a new State, which covered the birth of a newly-independent State, and the unification, dissolution or severance of States. In his opinion, that arrangement was also valid for the present draft, but the Special Rapporteur had sometimes departed widely from it, as was clear from paragraphs (5) and (6) of his commentary to article 9 (sixth report). The difference was particularly marked in sub-paragraphs (*c*) and (*d*) of paragraph 110; the cases listed there had no equivalent in the draft on succession of States in respect of treaties. The sub-category in sub-paragraph (*d*), of succession without the creation of a State but entailing the disappearance of the predecessor, was unacceptable, particularly the case of partition among several States; in fact, under contemporary international law, it was illegal.

37. Before the draft was examined article by article, it should also be considered whether the future instrument should lay down strict peremptory rules or merely residuary rules. For instance, the question arose whether matters of succession, particularly succession to public property, could be settled by treaty between the two States concerned. In his opinion, that possibility, which had been mentioned by the Special Rapporteur, should be expressly provided for. Thus, in the event of a partial transfer of territory from State A to State B, if public property situated in a third State gave rise to a dispute, States A and B should be able to settle the question by agreement between themselves. Furthermore, the rules of international law should apply only if no agreement was concluded. But none of the forty articles proposed mentioned that procedure, though it was widely accepted in international law.

38. His last general comment concerned legal drafting technique. In order to understand the articles proposed by the Special Rapporteur, it was necessary, in nearly every case, to refer to the title of the article or section of the draft. For example, article 12, entitled "Currency and the privilege of issue", was comprehensible only in the light of the title of the section in which it was included, which was "Partial transfer of territory". In the draft on succession of States in respect of treaties, the corresponding article, article 10, could be understood independently of the title. It should be noted that, in general, except in the case of the Vienna Convention on Consular Relations,[4] titles disappeared when the text was adopted by a plenipotentiary conference. Their sole purpose was to facilitate the preparatory work.

39. Mr. AGO said it was essential for the Commission to know exactly what it was trying to do, so as to have a criterion to apply when it came to consider individual points in the draft.

40. In the Special Rapporteur's first two reports,[5] following the Commission's decision, the plan had been to divide the topic of succession of States into two parts according to the source of the rights and obligations relating to succession—rights and obligations deriving from treaties and rights and obligations deriving from general international law. That distinction was clear, but unfortunately it was hardly practicable. The distinction which had replaced it was not so clear. In the sixth report several concepts remained vague. The Special Rapporteur said that, since the work on succession in respect of treaties had shown that the treaty was not considered as a source of rights and obligations, but as subject-matter of succession, the topic had had to be divided up according to the subject of succession—on the one hand the treaty and on the other hand other matters, which, according to the Special Rapporteur, were property, debts, legislation, nationality, acquired rights, etc. But when he gave a definition, such as that of succession of States in article 3, sub-paragraph (*a*), for example, the Special Rapporteur did not specify what rights and obligations were meant. In any case he had carefully avoided qualifying them as "international". Nor did he specify the source of those rights and obligations. He had certainly had treaty sources in mind in addition to customary international law, so the first thing the Commission had to decide was whether to codify only customary general rules on succession of States, or also to include all that was most frequently provided for in treaties.

41. The Special Rapporteur had probably opted for the latter course, but it was difficult to see how disparate rules appearing in different treaties could be converted into general rules of universal application, not to mention the fact that States generally preferred to settle certain questions specifically by special agreement. The Commission would be called upon as it were to codify residuary rules to be applied in the rare, but possible cases—which would have to be specified— in which there was no agreement. But that might create the impression that there was a whole body of rules governing the subject in general international law, which could be going too far.

42. It was important not to lose sight of the basic principle of the freedom of States. But some of the draft articles seemed to define the normal exercise of the State's sovereignty and the freedom inherent in it, rather than set out rules on succession of States. It must not be

[4] United Nations, *Treaty Series*, vol. 596, p. 262.

[5] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 94, document A/CN.4/204 and *1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

supposed that every exercise of freedom by a State was the result of some concession of international law. For example, the privilege of issuing currency, referred to in article 12, paragraph 1, did not derive from a rule of international law, as might be supposed from reading that paragraph. It derived from the internal sovereignty of the State; it was a faculty enjoyed by the State, but not one granted to it by the international law governing succession of States.

43. Another very important question was the distinction between sovereignty and ownership. Sovereignty was a matter of international law, whereas ownership was a matter of internal law. That did not mean that international law could not intervene to establish how ownership could be transferred in certain cases, but the Commission, when examining the draft articles, should constantly ask itself whether it was dealing with a case of sovereignty or a case of ownership; in other words, whether the State should be considered, in each particular case, as a subject of international law or a subject of internal law.

44. General rules should not be laid down without conclusive evidence that there were generally accepted criteria to justify them.

45. Mr. TSURUOKA said that the Commission's task was to draft articles which would offer satisfactory solutions for the predecessor State, the successor State and third States. The articles should be simply and clearly worded so as to constitute a useful legal instrument that was easy to apply.

46. A closer parallelism with the draft articles on succession in respect of treaties was desirable, both in regard to terminology and in order to avoid any gaps or duplication. In addition, the meaning and scope of such expressions as "public property" and "rights and obligations" should be defined.

47. In his draft articles the Special Rapporteur had emphasized the relations between the predecessor State and the successor State, but it frequently happened that the interests of third States were also involved. To ensure that such States did not have to suffer through the refusal of a successor State or a predecessor State to honour obligations it did not consider to be incumbent on it, public property should also include obligations, debts and property in third States.

48. Articles 1 and 2 could be referred to the Drafting Committee. As to article 3, he preferred the definition of "succession of States" given in the draft on succession of States in respect of treaties.

The meeting rose at 1 p.m.

1221st MEETING

Wednesday, 6 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later: Mr. Jorge CASTAÑEDA

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

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 the present articles),

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

ARTICLE 3 (Use of terms) *(continued)*

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 articles 1, 2 and 3.

2. Mr. HAMBRO said that, while he had listened to the debate with interest and admiration, he could not help fearing that the Commission was attempting to do too much. Like Odysseus of old, it seemed to be embarking on a long and perilous voyage through uncharted seas strewn with rocks and shoals. As Mr. Yasseen had remarked at the previous meeting, there was a danger that it might never reach its goal unless it began to consider the individual articles immediately.

3. He was glad to note that the Special Rapporteur, in his sixth report, had abandoned some of the ideological and political considerations which had appeared in his first report[1] and had adopted a more simplified and pragmatic approach. Like Mr. Reuter, he was also glad that the Special Rapporteur had agreed not to concentrate too much on questions of decolonization, since there were other forms of State succession which were of equal importance.

4. Even if some of the problems connected with the topic should prove impossible to solve at present because the law concerning them was not yet settled, he was confident that useful work could still be done and that the final, collective report would stand as a monument to the Special Rapporteur's industry and imagination.

5. Mr. RAMANGASOAVINA said that the Special Rapporteur had done excellent work, which was all the more admirable because there was virtually no doctrine or jurisprudence on the topic, so that the credit for it belonged entirely to him. His sixth report showed a definite improvement in both quantity and quality over his previous reports. He had taken into account the views expressed in the International Law Commission and the Sixth Committee of the General Assembly and, in order not to impede the progress of the Commission's work, had avoided the controversial issues raised by the defini-

[1] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 94, document A/CN.4/204.