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Summary record of the 1230th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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42. In reply to Mr. Ushakov's question whether sovereignty could be restored if it had terminated lawfully, he cited the case of Poland, which, while taking the view in 1918 that there had been a succession of States, had applied the *tabula rasa* principle and held that it did not derive its rights from the predecessor State.

43. Mr. Kearney had suggested that it might be useful to include in article 7 the notion of a manifestation of intent or act of the predecessor State, to show that a change of sovereignty could be effected by other means than a devolution agreement. He agreed and would ask the Drafting Committee to take that point into account. In certain cases of decolonization, for instance, there might be some kind of charter granted by the former metropolitan Power.

44. He saw no objection to deleting the word "simply" and replacing the word "ratification" by the words "entry into force".

45. He suggested that article 7 might now be referred to the Drafting Committee.

46. Mr. RYBAKOV (Secretary to the Commission) said the Secretariat regretted the omission of the asterisks from the Special Rapporteur's report, which had been unintentional and without the approval of the Codification Division.

47. The CHAIRMAN said that, if there were no objections, article 7 would be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 8

48. *Article 8*

General treatment of public property according to ownership

All other conditions established by the present articles being fulfilled,

- (a) Public or private property of the predecessor State shall pass within the patrimony of the successor State;
- (b) Public property of authorities or bodies other than States shall pass within the juridical order of the successor State;
- (c) Property of the territory affected by the change of sovereignty shall pass within the juridical order of the successor State.

49. The CHAIRMAN invited the Special Rapporteur to introduce article 8.

50. Mr. BEDJAOUI (Special Rapporteur) said that the sole purpose of article 8 was to distinguish, in regard to their treatment, between State property and property which, although public, did not belong to the State.

51. In the case of State property, the situation was simple: it passed within the patrimony of the successor State. He acknowledged that the terminology would have to be changed, because not all legal systems regarded the State as owning a patrimony and in all probability the notion of patrimony was not recognized by international law. With regard to public property of authorities or bodies other than States and property of the territory, it remained the property of those entities, but passed

from the juridical order of the predecessor State into that of the successor State, for purposes of international protection, for example.

52. Article 8, which did not indicate the conditions of transfer, was not a substantive article. It was merely intended to show the difference between the right of ownership and the juridical order. If the Commission thought the article might raise more problems than it solved, he would not press for its retention.

53. In addition, in the light of the discussions held so far, he intended to suggest to the Drafting Committee that the definition of public property, in article 5, be confined to State property, and that public property belonging to authorities, public establishments and so forth should be provisionally left aside. If such a definition were adopted, it would be bound to affect article 8. In the interests of consistency, the Commission should likewise define public debts as being exclusively debts of the State; that would relieve it of the need to consider a whole range of problems to which the international community devoted much attention. In point of fact, public debts were mainly the debts of public establishments, public bodies, public corporations and so on, and rarely debts of the State as such. But perhaps the Commission could later extend its study to public property and public debts other than State property and debts.

54. The CHAIRMAN asked the Special Rapporteur to explain why he now proposed that the notion of "public property" should be replaced by that of "property of the State".

55. Mr. BEDJAOUI (Special Rapporteur) said that the discussions had shown him that it would be very difficult to deal with all public property at the same time and that it might be more useful and more reasonable to proceed by categories, beginning with State property. If the Commission succeeded in working out a certain number of rules of international law concerning such property, it would probably then be able to proceed to consider other public property. The same applied to public debts. For his part, he was prepared either to confine himself for the time being to a single category of public property—State property—or to proceed with the study of all public property as he had originally intended. He would do whatever the Commission wished.⁶

The meeting rose at 5.50 p.m.

⁶ For resumption of the discussion see 1231st meeting, para. 66.

1230th MEETING

Wednesday, 20 June 1973, at 11.50 a.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. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

⁵ For resumption of the discussion see 1239th meeting, para. 18.

Organization of future work

[Item 7 of the agenda]

1. The CHAIRMAN said that a number of decisions had been taken by the officers of the Commission and former chairmen at a meeting that morning. First, the small group which had been appointed to deal with the question of *apartheid* from the point of view of international penal law¹ had already met and would meet again in an attempt to produce a document representing a consensus on that question.

2. Secondly, with regard to the Gilberto Amado memorial lecture, since it had proved impossible, owing to pressure of work at the International Court of Justice, to secure a lecturer from among the member Judges, it had been decided to invite one of the Commission's former members, Mr. Eustathiades, to deliver the lecture. If Mr. Eustathiades were unable to accept that invitation, the memorial lecture would be postponed until the following session, when it could be delivered in connexion with the celebration of the Commission's twenty-fifth anniversary.

3. Thirdly, since it was necessary to appoint a Special Rapporteur to replace Sir Humphrey Waldock for the completion of the draft articles on succession of States in respect of treaties, it was proposed that Sir Francis Vallat be appointed to serve in that capacity.

It was so agreed.

4. Sir Francis VALLAT said he regarded his appointment as a very great honour; he would do his best to follow in the footsteps of Sir Humphrey Waldock and endeavour to bring the draft articles to a fruitful conclusion, with due regard to the comments received from governments.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196)

[Item 3 of the agenda]

(*resumed from the previous meeting*)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

5. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by the Committee (A/CN.4/L.196).

TITLE OF THE DRAFT

6. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed that the draft be entitled: "Draft articles on succession of States in respect of matters other than treaties". It was true that so far the Commission had considered only one aspect of that succession, namely, public property; but at its twentieth session it had expressed the intention to study all aspects of succession in turn, after completing consideration of the aspect to which it had given priority,

mainly for reasons of order and method.² Consequently the draft, when completed, would deal with the whole topic of succession of States in respect of matters other than treaties, and that was, indeed, the subject-matter of the initial provisions which the Committee had grouped together under the heading "Introduction" in document A/CN.4/L.196.

7. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved the title for the draft articles proposed by the Drafting Committee.

It was so agreed.

ARTICLES 1 AND 3³

8. Mr. YASSEEN (Chairman of the Drafting Committee) said he would introduce articles 1 and 3 together, since they were closely linked.

9. The texts proposed read:

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 3

Use of terms

1. For the purposes of the present articles:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(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;

(d) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

10. Paragraph 1 of article 3, which for the time being had no paragraph 2, reproduced *verbatim* four subparagraphs of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties adopted provisionally by the Commission at its twenty-fourth session. Thus the definition of succession of States in article 3, paragraph 1 (a) of the present draft was identical with that adopted at the twenty-fourth session, and did not refer to the effects of succession. The Special Rapporteur had taken the view that those effects should be covered by the definition of succession of States in respect of matters other than treaties, since it was the effects, not the fact of the replacement of one State by another, that were the subject-matter of the study undertaken by the Commission. In his sixth report (A/CN.4/267), the Special Rapporteur had therefore submitted a new definition of succession. In the Drafting Committee, however, he had provisionally accepted the definition

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 221, document A/7209/Rev.1, paras. 78 and 79.

³ For previous discussion see 1219th meeting, para. 20.

¹ See 1228th meeting, paras. 33 and 34.

adopted at the twenty-fourth session, seeing that article 1 of the present draft articles supplemented that definition by stating that "the present articles apply to the effects of succession of States in respect of matters other than treaties".

11. The Drafting Committee considered that the commentary to article 3 should state that the text adopted at the present session was incomplete. It would be advisable to indicate that in the report, by points of suspension following the text. For it would be necessary to add further definitions as the Commission proceeded with the work and possibly a paragraph 2 based on the paragraph 2 adopted at the twenty-fourth session.⁴

12. The Drafting Committee also thought that the report should stress the provisional nature of article 3. Of course, any text adopted by the Commission on first reading was provisional, since the Commission did not produce a final draft until it had received the comments of governments. But in the present case there was more to it than that. With the topic of succession of States in respect of matters other than treaties, the Commission had undertaken the preparation of a set of draft articles which were far-reaching in scope and bristled with difficulties. For the guidance of the reader, and in particular the members of the Sixth Committee of the General Assembly, the Commission had to place general provisions such as article 3 at the beginning of the draft; but it was obvious that it might need to reconsider those provisions and possibly to amend them during the first reading, as it gradually built new material into the structure of the draft. The Commission should reserve that possibility in its report to the General Assembly.

13. With regard to article 1, the Drafting Committee thought the commentary should point out that the Commission could not at present state what matters would be covered by the draft articles other than the particular matter considered at the current session. As a rough guide the commentary might mention the various subjects which the Commission had envisaged at its twentieth session—public debts, legal régime of the predecessor State, territorial problems, status of the inhabitants, and so on.

14. Mr. CALLE y CALLE referring to article 3, paragraph 1(a), said he was sorry the Drafting Committee had decided to revert to the definition used in article 2 of the draft articles on succession of States in respect of treaties. He himself preferred the Special Rapporteur's formulation, since the phrase "replacement of one State by another is the responsibility for the international relations of territory", in the Drafting Committee's version, might seem to apply to the case of a protectorate whose foreign relations were administered by the protecting State.

15. Mr. SETTE CÂMARA said he wished to congratulate the Drafting Committee on having produced a text for article 3 which, while respecting the Special Rapporteur's basic ideas and doctrine, was in line with the text agreed upon by the Commission, at its previous

session, for article 2 of the draft on succession of States in respect of treaties.

16. That text might not be perfect, but the hypothetical case of protectorates, mentioned by Mr. Calle y Calle, was an exceptional one and unlikely to arise in practice.

17. He was pleased to note that the Drafting Committee had decided to include sub-paragraph (d) on the date of the succession of States, since the Special Rapporteur's article 7 had given rise to considerable controversy, whereas the present text was in conformity with that adopted by the Commission at its previous session.

18. Mr. BILGE said that he had no objection to article 1, but he had the most serious reservations about article 3, particularly the definition of "succession of States" given in paragraph 1(a). Succession of States in respect of matters other than treaties was a topic of far wider scope than succession of States in respect of treaties, so the two kinds of succession should not be defined in the same way. Succession in respect of matters other than treaties involved bilateral relations between the predecessor and successor States, which was not the case in succession in respect of treaties, and above all it related to territory and the property in it, more than to international relations.

19. The CHAIRMAN said he was in partial agreement with the new text of article 3 proposed by the Drafting Committee; in particular, he preferred the words "the replacement of one State by another" to the words "the replacement of one sovereignty by another".

20. Nevertheless, he wished to make a reservation with regard to the words "in the responsibility for the international relations of territory", because he believed that succession of States in respect of matters other than treaties should rest on a broader basis than merely responsibility for the international relations of territory. The new text of article 3 was provisional, however, and a more comprehensive definition could always be produced at a later stage.

21. Mr. KEARNEY said that the definition in article 3, paragraph 1(a), was a neutral one, so that it could be determined in the subsequent articles precisely what effects the succession would have on State-owned property in both the predecessor State and third States. The new text did not prejudice the rules concerning State property, and it might well be that after examining them, the Commission would wish to reconsider the definition, not only in terms of State property, but in the context of the draft as a whole.

22. Mr. QUENTIN-BAXTER said that the extensive reports of the Special Rapporteur had been vindicated, because it had been possible, against that rich background, for the Drafting Committee to frame remarkably simple texts which would be of great assistance to the Commission in its future work.

23. He welcomed the Drafting Committee's decision to propose the same definition of "succession of States" as had been adopted in the 1972 draft on succession in respect of treaties. It was true that the subject-matter was now different; it was larger and more amorphous than the subject-matter of succession in respect of treaties.

⁴ See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter II, section C, article 2.

Nevertheless, there was basic value in adopting a single definition for an expression like "succession of States", which was frequently used by international lawyers. It would be an impediment to legal argument if, whenever an international lawyer used the term "succession of States", he had to qualify it in order to show which of two meanings was to be attributed to it. The adoption of two different definitions for the two drafts would lead to confusion of thought and to the emergence of apparent disagreements which did not reflect real differences, but were merely induced by terminology.

24. The text proposed by the Drafting Committee did not affect the position of a small State which entrusted a part or the whole of its international relations to another State. Occasionally, a very small State did seek assistance from a larger State in that manner; the essential point was that a request of that kind was revocable, so that the authority remained with the donor. The text now proposed did not do any injustice to small States, which took such action in the fullness of their own competence and not with any limitation of that competence.

25. Mr. USTOR said he supported the definition in paragraph 1(a) of article 3, which had the merit of being in harmony with the definition in the 1972 draft on succession in respect of treaties.

26. The Drafting Committee's decision was a very important one, in that it not only dealt with the definition of succession of States, but also provided guidance for the Commission's whole work on the present topic. It served to show that, although succession of States could have many aspects and had important repercussions in internal law, the Commission's concern was with the effect of succession on international relations.

27. Mr. USHAKOV said that he had always been in favour of adopting a definition applicable to all aspects of succession of States. Although the definitions proposed in article 3 were preceded by the words "For the purposes of the present articles", their scope was not confined to the draft articles. What was defined was not each aspect of State succession taken separately—succession in respect of treaties, succession to public property, succession to public debts, and so on—but the whole phenomenon of the replacement of one State by another. He agreed that the phrase "replacement . . . in the responsibility for the international relations of territory" might not be perfect, but if the Commission later decided to amend it, it should do so having regard to the phenomenon of succession in general, not just to succession in respect of some particular matter.

28. In the case of protectorates, to which Mr. Calle y Calle had referred, there was no replacement of one State by another. The State which agreed to be protected entrusted certain administrative functions, such as responsibility for international relations, to another State. The reason why the Commission, at its twenty-fourth session, had accepted the idea of replacement in the responsibility for international relations, was that in the case of newly independent States there was no replacement of one sovereignty by another, since the former metropolitan Powers had not exercised sovereignty over their colonies, but had merely administered them. That

was confirmed by Articles 73 and 75 of the United Nations Charter.

29. The definition of succession of States in article 3, paragraph 1(a) was therefore acceptable as a working basis, subject to possible improvement later.

30. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had adopted the definition of succession of States proposed in paragraph 1(a) for the sake of congruity with the draft articles on succession of States in respect of treaties. At its twenty-fourth session, the Commission had thought fit to adopt a neutral definition in order to facilitate its work. He appreciated the concern of Mr. Calle y Calle, but he did not think the formula proposed could be interpreted as referring to the case of protectorates; in such situations, there was no replacement in the responsibility for international relations, only representation for the exercise of those relations. As the words "responsibility for the international relations", it was clearly international relations that were concerned, since succession of States was governed by international law.

31. The definitions adopted by the Commission would still be entirely provisional, like those adopted at the previous session. It went without saying that they could be amended in the light of government comments and of the Commission's subsequent work.

32. Mr. BILGE said he endorsed Mr. Yasseen's last remark. The Commission was still at the very first stage of its study of succession in respect of matters other than treaties. The definitions were bound to be very provisional, and their purpose was only to make it possible to go ahead. Perhaps the two Special Rapporteurs on succession of States could confer on the question of the definitions.

33. The CHAIRMAN said that the two Special Rapporteurs would no doubt consult each other and, at the appropriate stage, agree on the question whether there should be a single definition of succession of States or two definitions, one for each draft.

34. The reservations expressed by certain members having been placed on record, he suggested that articles 1 and 3, as proposed by the Drafting Committee, be provisionally approved.

It was so agreed.

ARTICLE 2⁵

35. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 2 reproduced *verbatim* article 6 of the draft articles on succession of States in respect of treaties. In 1972, some members had expressed doubts about the latter article,⁶ but since it appeared in the draft then adopted, it was essential to include an identical article in the present draft, if only to prevent deductions *a contrario*.

⁵ For previous discussion, see 1219th meeting, para. 20.

⁶ See *Yearbook of the International Law Commission, 1972*, vol. 1, p. 221, 1187th meeting, para. 1 *et seq.*

36. The text proposed for article 2 read:

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.

37. Mr. USHAKOV said that he approved of the substance of article 2, but must renew the objections he had made the previous year to the drafting of the corresponding article of the draft on succession in respect of treaties.

38. The CHAIRMAN, speaking as a member of the Commission, said that he fully supported article 2, although he did not entirely agree with the reason given for its inclusion. The fact that the provision had appeared in the 1972 draft on succession in respect of treaties was not in itself a sufficient argument for its inclusion in the present draft. The two drafts dealt with comparatively different subjects and he was not convinced of the need for strict legal symmetry.

39. Mr. USTOR said that he fully agreed with the content of article 2, but thought it went without saying. To include in the present draft a provision to the effect that the articles dealt only with valid successions would create problems, because no such provision had been included in some other drafts.

40. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 2 provisionally, as proposed by the Drafting Committee.

It was so agreed.

TITLE OF PART I OF THE DRAFT, TITLE OF SECTION 1, AND ARTICLE 4

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed as the title of part I of the draft "Succession to State property", and as the title of section 1 "General provisions". So far, the Commission had discussed public property, to which the Special Rapporteur had devoted his last four reports. Public property comprised State property, the property of authorities or bodies other than States, and the property of the territory concerned. The discussion had shown, however, that the problem was extremely complex and that the difficulties must be taken one by one. The Drafting Committee and the Special Rapporteur accordingly suggested a new approach, as indicated by the title of part I. The Commission would first study State property and then the other kinds of public property.

42. Article 4 formed a corollary to the title of part I. It was very simple and intended solely to indicate that part I concerned the effects of succession of States in respect of State property.

43. The new version of article 4 read:

Article 4

Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

44. Mr. USTOR said he welcomed the Drafting Committee's proposal to restrict the scope of the draft articles in part I to the effects of succession of States in respect of State property.

45. Mr. SETTE CÂMARA said that at a later stage, it might prove convenient to replace article 4 by a simple title. If the provision was retained as a separate article, it would be necessary to have an article of the same kind in each of the following parts.

46. Mr. BEDJAOUÏ (Special Rapporteur) said that article 4 should be left as it was. It applied solely to the part of the draft which dealt with State property. When the Commission had finished considering that part, it would take up the parts which dealt with the other two classes of public property. An article corresponding to article 4 would have to be included in each of them.

47. The CHAIRMAN, speaking as a member of the Commission, said he hoped that, when the Commission had dealt with public property other than State property, it would consider merging all the provisions on public property if it found that the rules governing the public property of other entities were similar to those governing State property.

48. Speaking as Chairman, he suggested that the Commission provisionally approve article 4 and the titles of part I and section 1, as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

1231st MEETING

Thursday, 21 June 1973, at 10.10 a.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. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196; A/CN.4/L.197)

[Item 3 to the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 5¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 5 (A/CN.4/L.196).

¹ For previous discussion see 1223rd meeting, para. 1.