Document:-

A/CN.4/SR.1283

Summary record of the 1283rd meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1974, vol. I

State by force—but rather "incorporation", which would take place in full conformity with the law and with the will of the country incorporated. That case could not be excluded. At the present time, for example, one could not exclude the possibility that certain islands in the Caribbean Sea under the administration of European countries were preparing either to become independent States or to be incorporated into Venezuela. In the latter event, they would not be absorbed by that country by force, but would be incorporated in it of their own free will and in their own interests.

67. It caused him some concern that the Commission still seemed to interpret the notion of a newly independent State as applying solely to States created by decolonization. History provided examples of newly independent States which did not fall into that category, such as Poland and Czechoslovakia, which had been formed from territories separated in 1918 from Hungary, Austria and Germany. There was no reason why such cases should be treated differently from that of Nigeria. Just because many States had recently acceded to independence as a result of the process of decolonization, which was nearly at an end, there was no reason to neglect the other cases of creation of newly independent States. It should be noted, moreover, that the definition of the expression "newly independent State" in article 2, paragraph 1 (*f*), could apply to a case like that of Czechoslovakia.

The meeting rose at 1.5 p.m.

1283rd MEETING

Monday, 24 June 1974, at 3.5 p.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-6; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 26 (Uniting of States) (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 26.

2. Sir Francis VALLAT (Special Rapporteur) said that the problems involved in article 26 were perhaps not quite so complex as they seemed during the discussion.

3. The relationship between article 26 and article 10 would need to be made clear in the commentary. There had been considerable dissent from the view expressed by Mr. Tammes that cases of absorption were covered by article 10.[1] He himself had carefully examined the records of the 1972 discussions and they had strengthened his impression that article 10[2] had been intended to deal solely with transfers of territory. There was also much force in the comment made by several members that the idea of one State taking over another was repugnant to the contemporary international community. If one State voluntarily united with another, the case would be covered by article 26, but absorption was unacceptable, both as a concept and as a term, whether in English or in any other language.

4. With regard to the relationship between articles 25 and 26, those articles had been compared largely because of their proximity in the draft; fundamentally, their provisions were quite different. Article 25 dealt with the case of a newly independent State, while article 26 dealt with a combination of independent States. The Commission had adopted different principles for those two cases. In article 25 the ordinary doctrine of the clean slate was applied; clearly, whether the newly independent State was formed from one territory or several, that doctrine would still be applicable. For the case dealt with in article 26, the applicable principle was that of *ipso jure* continuity. He would consider whether it was advisable to clarify that point further in the commentary.

5. As to the possibility of making provision for further categories, he believed that it would be a mistake to try to develop rules for rare and unusual cases. In the process of codification in its broad sense, there was always a risk in trying to be too detailed. It was generally better to leave a few such cases unanswered, to be dealt with by analogy.

6. He would endeavour to formulate a provision on the possible case, falling between articles 25 and 26, of a former dependent territory being joined with an independent State—a situation that was not clearly covered by the draft. Cases of that kind would probably be rare in the future, since dependent territories were vanishing.

7. He found less difficult, in principle at least, the case of a union formed from parts of the territory of independent States. It seemed to him clear that if, for example, a part of each of three States separated and the three seceding territories immediately formed one new State, the provisions of article 28 would apply. The case had to be treated by analogy with a newly independent State, unless the three seceding territories formed independent States and remained independent for a time before uniting, in which case article 26 would apply.

8. It was always necessary, however, to bear in mind the possibility of new situations arising in the future.

[1] See previous meeting, para. 13.

[2] Formerly article 2; see *Yearbook ... 1972*, vol. I, pp. 43-50, 152-154, 156-158 and 181-182.

There was no certainty that the exact status of the political entities which would emerge in the future would be the same as that of those which had been known in the past.

9. As to the suggestion that various articles in part III should be used for the purposes of article 26, and perhaps also article 27, his own general reaction was that the doctrine of continuity should be applied in a consistent manner. That would not leave much room for the application of the provisions of part III relating to notification of succession. Nevertheless, he would submit to the Drafting Committee texts of possible draft articles, which were bound to be complicated, merely to enable that Committee to study the problem thoroughly.

10. He would not dwell on the various drafting points raised in regard to article 26, all of which would be considered by the Drafting Committee. An important question had arisen, however, regarding the wording of paragraph 1 of the article, which had led some members to doubt whether its provisions applied to bilateral as well as to multilateral treaties. In fact, the plural "other States parties" had been meant to include the singular, so that both classes of treaty were covered. That interpretation was supported by the provisions of paragraph 2 (*c*) which expressly referred to bilateral treaties. Since the main clause of paragraph 2 referred back to paragraph 1, there could be no doubt that the provisions of the latter paragraph dealt with the bilateral treaties mentioned in paragraph 2 (*c*) as well as with the multilateral treaties mentioned in paragraph 2 (*a*) and (*b*).

11. There was general agreement that paragraph 3 was unnecessary and should be omitted.

12. Mr. USHAKOV said that at the previous meeting Mr. Ago had spoken of new States formed from territories detached from a number of States, not from former dependent territories. Article 25 dealt with the case of newly independent States formed from two or more dependent territories, which must be distinguished from cases of the formation of a State on a cultural, linguistic or other basis by the uniting of territories belonging to different States. The formation of a State in that way took place by agreement, not as a result of a liberation struggle. It would be logical for the draft to contain a provision corresponding to article 25 and dealing with the formation of States from two or more territories other than dependent territories. Czechoslovakia belonged to that class of States and the future might furnish other examples.

13. Sir Francis VALLAT said that from the point of view of principle that case did not involve any difficulty. It needed to be dealt with logically in the context of article 28. That article, as it now stood, would not appear to cover the case, if its provisions were read strictly. Hence it would be necessary either to amend article 28 or to introduce a separate article, unless it was thought sufficient to dispose of the matter in the commentary.

14. Mr. USHAKOV said that when the Commission had drawn up article 27, on the dissolution of a State, it had had in mind the normal case in which a State divided by agreement. That was what had happened when the United Arab Republic had split into two States. Article 28, on the other hand, was intended to cover the exceptional case in which part of a State detached itself following a war, as Bangladesh had done.

15. The case of the uniting of States, dealt with in the article under discussion, had to be distinguished from the case of formation of a new State from territories ceded by a number of States, not from dependent territories. He was still convinced that a provision should be drafted to cover the latter case.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 26 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[3]

ARTICLE 27

17. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

Article 27

Dissolution of a State

1. When a State is dissolved and parts of its territory become individual States:

(*a*) any treaty concluded by the predecessor State in respect of its entire territory continues in force in respect of each State emerging from the dissolution;

(*b*) any treaty concluded by the predecessor State in respect only of a particular part of its territory which has become an individual State continues in force in respect of this State alone;

(*c*) any treaty binding upon the predecessor State under article 26 in relation to a particular part of the territory of the predecessor State which has become an individual State continues in force in respect of this State.

2. Paragraph 1 does not apply if:

(*a*) the States concerned otherwise agree; or

(*b*) the application of the treaty in question after the dissolution of the predecessor State would be incompatible with the object and purpose of the treaty or the effect of the dissolution is radically to change the conditions for the operation of the treaty.

18. Sir Francis VALLAT (Special Rapporteur) said that, more than most other articles of the draft, article 27 raised a question of classification and a question of principle.

19. The principle embodied in article 27 was that continuity should apply in the event of the dissolution of a State. There had been no comments by Governments on the details of the article, but he himself had had some doubts about the effects of paragraph 2 (*b*), which did not specify the consequences of the situation it covered. On reflection, however, he thought it might not be necessary to introduce any provision on that point, because it seemed obvious that the treaty would cease to have any effect after the dissolution of the predecessor State.

[3] For resumption of the discussion see 1295th meeting, para. 42.

20. In their comments, a number of Governments had questioned the validity of the distinction made between the dissolution of a State, covered by article 27, and the separation of a part of a State, covered by article 28. It was, in fact, easy to draw a distinction between those two cases: in the event of dissolution, the old State disappeared altogether, whereas in the event of separation, the old State retained its identity and its treaty relations continued. The fact that particular cases were sometimes difficult to classify under one heading or the other did not blur that clear-cut distinction. Hence there was no difficulty of principle involved.

21. It was much more difficult to decide whether it was necessary to have two separate articles to deal with the two cases. The principles that applied were quite distinct: in cases of dissolution the principle of continuity applied, in cases of separation the principle of the clean slate. He had found that problem a difficult one, but in the end he had concluded that the distinction should be maintained, even though it could be said that, in regard to the newly independent States which emerged from the processes of separation and dissolution, there was no difference.

22. Lastly, there was the entirely different question whether the articles in part III should be adapted for the purposes of article 27. In view of the doctrine of continuity applied in article 27, he thought there was perhaps even less room than in article 26 for provisions taken from the articles in part III.

23. Mr. YASSEEN said that the principle of continuity, which was confirmed by article 27 and derived from the principle *pacta sunt servanda*, prevented a State from evading the application of a treaty by dividing. Article 27, like article 26, took due account of the facts of international relations and provided for exceptions to the principle of continuity where the application of the treaty would be incompatible with its object and purpose and where the effect of the new situation was radically to change the conditions for the operation of the treaty. The reason why that solution had not been adopted for newly independent States was that the *pacta sunt servanda* principle could not be applied to them. It was necessary to respect the future of those countries and to leave them free to organize their new existence as they wished.

24. Article 27 was thus perfectly satisfactory. Moreover, there was no reason in legal logic why different solutions should be adopted in articles 27 and 28. The situations resulting from the dissolution of a State and from the separation of part of a State were very similar and should not be treated differently.

25. Mr. TAMMES said that the text of article 27 had originally been drafted for the dissolution of unions.[4] All the precedents on which the article was based, and which were mentioned in the commentary (A/8710/Rev.1, chapter II, section C) constituted examples of unions which had fallen apart and thus disappeared. Cases of the dissolution of a unitary State had not been considered in connexion with the present text; they had been discussed under the clean slate rule of the article which followed, and which was now article 28.

26. The Commission had subsequently dropped the concept of union, because it had found it too difficult to handle for the purposes of an international instrument, but the substance of the article had not been changed. As a result, it now applied to all States, whether unions or unitary States. Hence it was not surprising that a number of Governments had pointed out that while *ipso jure* continuity might be reasonable in the case of dissolution of a union, it was not necessarily so when applied to all States. The Government of the German Democratic Republic—one of the divided States referred to in Sir Humphrey Waldock's fifth report[5]—had rejected continuity in favour of the clean slate rule (A/CN.4/275) and the Special Rapporteur's report showed that the tendency of many of the government comments was in favour of the application of that rule (A/CN.4/278/Add.5, para. 398).

27. In the light of that governmental opposition coming from different quarters, it would not be advisable to generalize a rule that had originally been intended for the case of the dissolution of a union and which, even in that context, had raised doubts in the Commission at the first reading. Moreover, the attempt to generalize the rule was based on insufficient practice and doctrine, as was virtually admitted in paragraph (12) of the commentary. Indeed, after the amended article had come back from the Drafting Committee in 1972, the Special Rapporteur had stated in the Commission that it "might be said to represent progressive development".[6]

28. As he saw it, however, a draft rule of progressive development of international law could not be sustained against a clear trend of opposition from States unless there was a deep conviction that the rule was right and equitable. On that point, the Special Rapporteur had given a balanced account of the conflicting arguments in his report (A/CN.4/278/Add.5, paras. 401 and 402) and had concluded that continuity and stability of treaty relationships should prevail wherever possible.

29. Continuity should indeed prevail wherever possible, but in the case under discussion it was not possible from a legal point of view. The common denominator of all official and non-official criticism was that the Commission could present no conclusive argument to show why the principle of continuity of treaty relations was not applicable in the case of new States resulting from separation. The Special Rapporteur had put forward a strong argument in favour of the clean slate principle for the newly independent State, by pointing out that it had been in the situation of "a dependent territory which, although it may be consulted about the extension of the treaty, does not normally play any part in the actual government of the State concerned, and cannot therefore be regarded as responsible for the conclusion of the treaty as such". He failed to see however, on what basis the Special Rapporteur

[4] Formerly article 20; see *Yearbook ... 1972*, vol. I, pp. 173 *et seq.*

[5] See *Yearbook ... 1972*, vol. II, p. 43, para. 16.

[6] *Yearbook ... 1972*, vol. I, p. 273, para. 53.

proceeded to state that: "The same observation may be made about the position of a part of a State that breaks away and becomes independent". In many cases of separation the seceding State, despite any tensions which might have arisen, had actually shared the responsibility for treaty relations through its representatives in the organs of the State from which it had seceded.

30. He was in favour of merging articles 27 and 28 into a new article which would deal with all cases of States formed through the processes of dissolution or separation, whether the predecessor State survived or not. The merged article would make a distinction between a "new" State and the newly independent State of article 25. In practice, no difference could be made between the cases covered by the present articles 27 and 28, unless the Commission decided to introduce the concept of a union of States.

31. Mr. REUTER said that he understood the Special Rapporteur's doubts, but thought that, from a theoretical point of view, the two cases could be maintained.

32. The introductory phrase of paragraph 1 of article 27 raised a drafting point: the eventuality contemplated was not that of "parts" of the territory of a dissolved State becoming individual States, but of all the parts of its territory becoming States. The phrase might be amended to read: "When a State is dissolved and all of its territory is split up into individual States".

33. That point was related to a fundamental problem which the Commission had not yet examined and was not called upon to solve, but which obliged it to distinguish between two cases: when the territory of a State split into a number of entities, could the international community impose the identity of the former State on one of them, and could that one entity claim such identity? If a country split into one very large part and three small parts, it was quite logical to identify the large part with the former State. But where the new entities were of equal size, it was not very logical to impose the identity of the former State on only one of them or to allow it to claim that identity. It seemed impossible to lay down strict rules on the matter. Common sense might decide in favour of either solution and the Commission should not draw up rules determining which cases came under article 27 and which under article 28. When the Republic of Austria had been created following the dismemberment of the Austro-Hungarian monarchy, there had been serious controversy about the identification of the new Republic with the former Austria.

34. Mr. USHAKOV said it was difficult to distinguish between cases of dissolution and cases of separation. He cited the withdrawal of Singapore from the Federation of Malaysia and the dissolution of the United Arab Republic into two States. In both instances, opinions differed as to the identity and continuity of the States concerned. When India and Pakistan had been created, the United Nations had decided that India should retain the identity of the Indian Empire, whereas Pakistan would have to be admitted to the Organization as a new Member. Such decisions were dictated only by practical or political considerations. Legal considerations could not be the basis for deciding whether a particular case was one of dissolution or of separation.

35. He was not sure that the principle of continuity should be applied to cases of dissolution, and the clean slate principle to cases of separation. Bangladesh, although it had separated from Pakistan, had recognized the continuity of treaties. On the basis of practice, therefore, it might perhaps be simpler to deal with dissolution and separation in a single article confirming the principle of continuity. Then it would not be necessary to assign specific situations either to article 27 or to article 28.

36. Article 27 raised the same difficulties as article 26. The dissolution of a State and the separation of part of a State both produced new States concerning which many problems arose, particularly in regard to the reservations they might make.

37. Mr. KEARNEY said that the question of the interrelationship between articles 27 and 28 was possibly the most difficult problem the Commission would encounter in its consideration of the present draft.

38. With regard to the comments of Governments, paragraph 398 of the report (A/CN.4/278/Add.5) gave a list of States said to favour the clean slate principle with respect to articles 27 and 28. He did not think that the comments of the United States Government had been intended to indicate support of the clean slate principle, since those comments had been to the effect that the distinction between the dissolution of a State and the separation of part of a State was quite nebulous (A/CN.4/275). The United States Government had observed, in effect, that a solution might be found by applying the theory of a newly independent State in any circumstances which would justify such application. In other words, the idea, as he understood it, was that if there was a separation of part of a State under circumstances which would support the thesis that the separated part fell within the definition of a newly independent State, then obviously the rules relating to newly independent States should apply to that separated part.

39. However, that did not necessarily mean that the separation of part of a State would, in the majority of cases, result in the creation of a newly independent State; and if the part which separated did not fall within the definition of a newly independent State, there was no reason why the principle of continuity should not apply to the separated part.

40. In general, the major difficulty lay in drawing the line between what was a separation and what was a dissolution of a State. After the dissolution of the Austro-Hungarian Empire, for example, Austria had taken the position that it was not a successor State in respect of treaties, while Hungary had taken the position that it was a successor State and had maintained certain former treaties of the Austro-Hungarian Empire in force on that basis.

41. He believed it might be better to have rule of continuity which would cover both cases. A provision based on that approach would probably not result in so

many disputes as the attempt to draw a line between dissolution and separation.

42. Mr. QUENTIN-BAXTER said that in his opinion everything that had been said during the first reading of the draft had been completely sound. The broad approach adopted by the Commission on newly independent States had been that in the case of new States emerging from dependent status there would be a clean slate rule, while in other cases there would be a rule of continuity, under the principle, referred to by Mr. Yasseen, of *pacta sunt servanda*.

43. There was general agreement, however, that the price paid for that dichotomy was the need to recognize that there was still a case in which the rule of continuity could not be applied, even if the new international person had not just emerged from a state of dependency, as in the case of Bangladesh.

44. He did not find the difference between articles 27 and 28 at all artificial, since in one case there was an entity which was simply divided, while in the other case there was a part of an entity which had broken off from, and positively repudiated, the entity to which it had formerly belonged.

45. In his opinion, the Commission had been right in making a basic distinction between the clean slate principle and the principle of continuity as it applied in other cases. It was not necessary, however, to make an exception for a State which was not technically, and perhaps not really, emerging from dependency or subjection, but which still felt itself to be so emerging to the extent that it was unwilling to be considered the successor of the entity from which it had separated itself. The question then arose how much the Commission should be concerned about the fact that it was not possible to formulate a rule which would automatically put individual cases into their proper categories.

46. There would always be situations in which States would think of themselves as having rejected the thing to which they had previously belonged, and situations in which they would think of themselves as being a projection or a continuity of the thing to which they had previously belonged. There would always be cases, such as that of the former Austro-Hungarian Empire, in which the decisive judgement of the international community would depend on the way in which the new State chose to think of itself. For those reasons, he did not find anything unsatisfactory in the difference between articles 27 and 28. The practical conclusion seemed to be inescapable: the rule of continuity must apply, except in cases of emergence from dependency and in cases in which the new State rejected what might otherwise have been its heritage.

47. With regard to the drafting of article 27, the only distinction between sub-paragraphs (*b*) and (*c*) of paragraph 1 was that in one case the treaty was concluded by the predecessor State and in the other it was binding on the predecessor State.

48. Article 27 should be understood as having a much more general application than merely the dissolution of what, in fairly recent times, had usually been a union of States.

49. Mr. CALLE Y CALLE said that the case of the dissolution of a State was qualitatively different from that of its disuniting, and he hoped that some mention could be made of those two possibilities. In his opinion, the principle of continuity was perfectly logical in the case of the dissolution of a State, which assumed the prior existence of that entity, but the case was slightly different when there was separation of a newly emerging State.

50. In paragraph 2, it might perhaps be advisable to make it clear that the States which might "otherwise agree" were the States parties to the treaty in question.

51. Mr. EL-ERIAN said he agreed with the Special Rapporteur that a clear distinction should be made between the case of a union of States and the case of a unitary State. What the Commission was dealing with was the case of a State which was a single international person, and in that case there could be no doubt that the old State disappeared and new States emerged; but since the Special Rapporteur had pointed out that it would in any event be necessary to provide for the continuity of treaties in respect of old States, it was obviously important to decide the theoretical question involved.

52. In some cases it was necessary to distinguish between dissolution and separation, but that should not present too many difficulties. All members would agree that the creation of the United Arab Republic in 1958 had been the creation of a new international person, which had been accepted as such by the United Nations. The two partners in that union had wished to merge their identities in a single person, but when the union had been dissolved, they had adopted a pragmatic approach and Syria had resumed its own national identity. In his opinion, therefore, article 27 should be considered as applying to a unitary State and not to a union of States, since it would be difficult to formulate a rule to cover all the possible forms of union that might arise in practice.

53. Mr. ŠAHOVIĆ said he doubted whether sub-paragraph (*c*) of paragraph 1 was justified and whether a distinction should be drawn between the situations contemplated in that sub-paragraph and in sub-paragraph (*b*). The two situations were really analogous: a particular part of the territory of the predecessor State was concerned and the same rule applied in both cases, since the treaty continued in force in respect of that part of the territory of the predecessor State only. Perhaps that point needed further consideration.

The meeting rose at 6 p.m.

1284th MEETING

Tuesday, 25 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoa-