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Summary record of the 1420th meeting

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

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

they had been unable to attend the present meeting, but both would have endorsed the many tributes paid to the memory of a remarkable man. It was difficult to express in more eloquent terms what had already been said by the members of the Commission. While it might perhaps at times have been possible to disagree with Mr. Hambro, no one could question the sincerity of his beliefs or of his arguments in the causes that he had defended. Members of the Office of Legal Affairs, particularly members of the Codification Division who had known Mr. Hambro for many years, had looked on him as not only a scholar and a diplomat but also as a true friend who would always remain alive in their hearts.

43. The CHAIRMAN said he wished to express the Commission's appreciation of the presence at the meeting of H.E. Mr. Johan Cappelen, Permanent Representative of Norway to the United Nations Office at Geneva, Mr. Humbert, Secretary-General of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Ambassador Serup, Head of the Danish Delegation to that Conference, Professor Seyersted, who had worked for so many years with the late Mr. Hambro, and Mr. Schreiber, who had long been the Director of the Division of Human Rights.

44. Mr. CAPPELEN (Permanent representative of Norway to the United Nations Office at Geneva) said that, on behalf of Mrs. Hambro and the Government of Norway, he wished to express his gratitude for the generous tribute paid by the Commission to the memory of his fellow countryman, colleague and friend, Mr. Edvard Hambro. Mrs. Hambro had been deeply touched by the Commission's message to her, by its decision to hold the special meeting and by its thoughtfulness in inviting her to attend. She would indeed have been present, had not an airline strike upset her arrangements to travel to Geneva. She had requested him to inform the Commission that the special meeting was a great encouragement to her. She, more than anyone else, knew what the Commission had meant to her late husband.

45. His Government had also held Edvard Hambro, a brilliant son of Norway, in the highest esteem, and had placed the fullest confidence in him at all times. Speaking as a friend and colleague of Edvard Hambro, he wished to thank all the members of the Commission for the kind words they had spoken about Mr. Hambro, who had always looked forward eagerly to the sessions of the Commission, where he had been able to discuss his beloved subject of international law among kindred spirits greatly admired for their expertise and their personal qualities, and where friendships had been formed that had extended across frontiers and across legal systems. It was therefore especially fitting and moving that the Commission should have decided to pay tribute to the memory of Mr. Hambro at one of its official meetings.

46. Speaking as the official representative of his country, he also wished to express the appreciation and thanks of his Government. Members of the Commission were elected in their personal capacity, but they were none the less nationals of their countries, to which their reputations were a credit. The Government of Norway was therefore highly appreciative of the deep respect shown by members of the Commission for the memory of Mr. Hambro.

47. The CHAIRMAN said that the records of the special meeting would be forwarded to Mrs. Hambro and to the Government of Norway, with an appropriate covering letter.

The meeting rose at 5.10 p.m.

1420th MEETING

Monday, 16 May 1977, at 5.30 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE O (Definition of State debt) [1] (*continued*)

1. Mr. BEDJAOUI (Special Rapporteur), replying to a question raised by Mr. Reuter [2] and several other members of the Commission concerning the source of State debts, said that the question called for two clarifications.

2. First, the topic for which he had been appointed Special Rapporteur in 1967 had then been entitled "Succession in respect of rights and duties resulting from sources other than treaties" and the parallel topic had been entitled "Succession in respect of treaties".[3] Succession of States could be considered either from the point of view of sources or from the point of view of subject-matter. From the point of view of sources, a distinction could be made between succession from treaties and succession resulting from sources other than treaties. From the point of view of the subject-matter of succession, a distinction could be made between succession to treaties and succession to matters other than treaties. But in 1963, the Commission had inadvertently included in the title of one of the topics a reference to the

* Resumed from the 1418th meeting.

[1] For text, see 1416th meeting, para. 1.

[2] 1416th meeting, para. 28.

[3] *Yearbook ... 1976*, vol. II (Part Two), p. 122, document A/31/10, para. 79.

sources of succession, and in the title of the other, a reference to the subject-matter of succession. Not only had the entire topic of State succession thus lacked uniformity, but the study entrusted to him had soon proved not to be feasible. For instance, it would not have been possible to study the fate of State property and debts if it had been settled by a treaty. Consequently, in the first report he had submitted in 1968, he had invited the Commission to apply a single criterion to the delimitation of the two topics relating to State succession. Referring to the subject-matter of succession, the Commission had then adopted the titles "Succession in respect of treaties" and "Succession in respect of matters other than treaties"[4] respectively. There had, however, been nothing to prevent either of the Special Rapporteurs from referring to sources. In that connexion, the fate of State property and debts, considered to be the subject-matter of succession, could be decided either by a legal provision relating to State succession or by a treaty concluded by the predecessor State and the successor State. Mr. Pinto had rightly drawn a parallel with article 12, one of the articles relating to State property which the Commission had adopted provisionally.[5] A comparison with article 13 would have been even more pertinent because, in that provision, the Commission had gone so far as to determine the validity of succession agreements, in other words, the source of the successor State's obligation.

3. The second clarification called for by the question of the source of State debts related to two phases which should be clearly distinguished. The transfer of a debt to the successor State meant an obligation to succeed to an obligation. The source of the predecessor State's obligation could be either a treaty or a quasi-treaty, in other words, a contract concluded by a State with a transnational corporation or a foreign corporation or individual. The predecessor State's obligation therefore had its own source, while the source of the successor State's obligation could be either a rule of international law relating to State succession or an agreement between the predecessor State and the successor State. The pre-existing obligation of the predecessor State, considered to be the State debt, which was the subject-matter of succession, should not be confused with the possible obligation of the successor State to succeed to that obligation of the predecessor State. In the case of succession to State property, the Commission had confined itself to taking for granted the existence of the predecessor State's right to such property. It had not been able to go so far as to take into consideration the source of that right of property or to seek to determine whether that source was valid and legitimate, because it would then have had to trace all the former owners of the property. Since the State's right of property was assumed to be valid and legitimate, the rules relating to succession of States in respect of State property must therefore be limited to determining whether the successor State had the right to succeed to that right. Similarly, succession to debts must involve only the possible obligation of the successor State to succeed to an obligation. In the draft articles on succession of States in respect of treaties,[6] the Commission had also, as a matter of principle, established a presumption of the validity of the treaty and the legitimacy of the succession and it had expressed them in a provision—echoed in draft article 2 on succession of States in respect of matters other than treaties[7]—which stated that only 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, were to be taken into consideration.

4. The problem of the source of the predecessor State's debts therefore had two aspects, namely, that of the legal nature of the obligation, which depended on whether the debt had been contracted by treaty, by quasi-treaty or contract or as a result of judicial or arbitral decision, and that of the validity or lawful character of the source of the obligation. That second point was considered to have been settled. With regard to the first, the fact that he had referred in the definition of State debt, to an obligation "contracted" by the State did not mean that he had been referring to the treaty or contractual nature of the financial obligation of the predecessor State. The word "contract" was used in its usual sense and did not imply a reference to the nature of the source or to the exclusion of certain sources. Moreover, the source was considered to be lawful.

5. He had, however, had to make two exceptions. The first related to "odious" debts, in connexion with which he had alluded to the problem of the lawful character of the debt and its source. The reason why he had referred to such debts was twofold. It was, first, because there was abundant doctrine on the subject and, secondly, because he had not wanted to give the impression, by not dealing with that question at all, that odious debts were normally transferable. Moreover, not all debts of that kind were unlawful. A régime debt could be considered to be odious by the successor State, even if it was not unlawful in origin. At the same time, a war debt could be perfectly lawful and valid if the war had been one of self-defence to repel an aggression.

6. In paragraph 40 of his report (A/CN.4/301 and Add.1), he had made a second exception for delictual or quasi-delictual obligations, which he had very briefly contrasted with the contractual obligations of the predecessor State. In making that comparison, which was one of many comparisons of categories of debts, he had indicated that the Commission did not have to deal with delictual debts. The only purpose of such comparisons was to fix the terminology and show how many different categories of debts there were. He ought probably to have been more exact and less categorical in his assertions. In view of the remarks made by Mr. Castañeda,[8] which he fully supported, he therefore intended to change that part of his report.

7. Summing up, he said that, in dealing with succession of States it was necessary to refer to sources, but only to those sources which had given rise to an obligation on the part of the successor State. It had therefore to be deter-

[4] *Ibid.*, para. 83.

[5] See 1416th meeting, para. 31.

[6] *Ibid.*, foot-note 1.

[7] *Ibid.*, foot-note 2.

[8] 1417th meeting, para. 36.

mined whether what was involved was a customary rule of law relating to State succession, an agreement concluded by the successor State and the predecessor State, or a unilateral decision by the successor State to accept the obligation to assume the debt. In principle, the Commission did not have to deal with the source of the debt since the predecessor State had a financial obligation, whatever its origin might be. He nevertheless agreed with Mr. Castañeda that in general, obligations resulting from something other than voluntarily concluded legal instruments should not be excluded. That did not mean that there was any need to deal with the problem of sources, their nature, their variety and their lawful character. Mr. Castañeda had proposed that the words "financial obligation contracted by the central Government of the State" be replaced by the words "financial obligation chargeable to ...": that wording would suffice to cover all kinds of financial obligations, whatever their origin, assuming that that origin was of a lawful character.

The meeting rose at 5.50 p.m.

1421st MEETING

Tuesday, 17 May 1977, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE O (Definition of State debt) [1] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur), continuing his statement, said he wished to address himself to the question of the status of the subjects concerned, in one way or another, in a succession to State debts, He had identified the debtor State with the help of elements contained in the definition of State debt. Most members of the Commission had expressed their agreement with him, although some had wished to go further and others not so far. For instance, Mr. Ushakov,[2] anticipating chapter II of the report, relating to the creditor third State, would like to make it a requirement that not only the debtor but also the creditor should be a subject of international law. In Mr. Ushakov's view, succession to State debts should be governed by public international law, not by private international law; he saw State debt as an international obligation governed by international law and establishing a relationship solely between subjects of public international law. In a spirit of co-operation, Mr. Ushakov had made a number of ingenious suggestions for improving the definition set forth in article O. Those suggestions were not only extremely interesting but would be most useful to the Drafting Committee. In particular, Mr. Ushakov had suggested that State debt should be defined as a financial obligation of the State vis-à-vis one or more other States or one or more other subjects of international law, or as a financial obligation of the predecessor State vis-à-vis one or more third States. In making that suggestion, Mr. Ushakov had wished to specify that both the debtor and the creditor must be subjects of international law.

2. The status of subject of international law had also been invoked by Mr. Sucharitkul,[3] but in a contrary sense. Mr. Sucharitkul wished to stipulate that State debt could be contracted not only to a creditor third State but also to a private creditor. For the time being, he (the Special Rapporteur) had addressed himself only to the question of the status of the debtor, which must be that of a State, leaving the status of the creditor to a later stage. Mr. Calle y Calle, who shared his view, had considered that the creditor did not necessarily have to be a State, but had added that, in matters of succession of States, it was important first to establish who was the debtor.[4]

3. Mr. Ago [5] had agreed that the debtor must be a State, but had felt that the concept of the State adopted by the Special Rapporteur was a concept of internal rather than international law. Mr. Ago would have preferred a concept of the State similar to that which had been adopted for the subject of State responsibility. Externally, the State would be perceived as a single and indivisible entity, although, internally, it might be made up of a number of separate entities. Just as the wrongful act of a territorial authority was held to be a State responsibility, so would the debts of territorial authorities and public enterprises be regarded, for the purposes of State succession, as State debts. Of course, as he (the Special Rapporteur) had indicated in stressing the limited reliance that could be placed on the criterion of financial autonomy, it was sometimes difficult to state positively that certain local debts or debts of public enterprises were not State debts. However, it was hardly conceivable that every kind of local or public-enterprise debt could be regarded as a State debt at the international level. Problems of State responsibility differed in many respects from those of State succession, especially succession to debts.

4. Mr. Ago's reasoning was based solely on the case of a debt of delictual origin. But practically all debts which

[1] For text, see 1416th meeting, para. 1.

[2] See 1417th meeting, paras. 7 *et seq.*

[3] *Ibid.*, para. 3.

[4] *Ibid.*, para. 5.

[5] *Ibid.*, para. 27.