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Summary record of the 702nd meeting

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State had acted in full awareness of the fact creating a right to denounce; otherwise the provisions of the article would not apply.

88. Mr. AGO had criticized the use of the term " fact " in the opening sentence of the article, but that was perhaps a matter of drafting and could be dealt with by the Drafting Committee.

89. Most members seemed to have rejected the suggestion that sub-paragraph (*a*) should be confined to express waivers, on the ground that that would be unduly restrictive because of the possibility of clearly implied waivers. On the other hand, he thought it would be appropriate to stipulate, as Mr. Ago had suggested, that the waiver must have been freely made.

90. He was not sure whether the Chairman's suggestion for redrafting sub-paragraph (*b*) would remove all the difficulties. He himself had suggested incorporating sub-paragraph (*b*) in sub-paragraph (*c*) for the same kind of reason as that given by Mr. Bartoš. As at present worded, sub-paragraph (*b*) might not always meet the case; for example, when there was some question of the severance of certain provisions. He had also been troubled by the kind of situation that could arise if there had been a breach of a treaty, when it would be clearly unreasonable to deprive a State of the right to denounce because it had tried to induce the other party to fulfil its obligations under the treaty. Thus some qualification of the wording used in sub-paragraph (*b*) would appear to be necessary. Perhaps some more general formulation could be devised by the Drafting Committee, combining sub-paragraphs (*b*) and (*c*).

91. As far as sub-paragraph (*c*) was concerned, he would have been content to retain the word " precluded " but if it was not generally acceptable, some other formulation might be devised to express the principle applied by the International Court in the *Temple* case and in the case of the *Arbitral Award made by the King of Spain*, as well as that emphasized by Judge Alfaro in his extremely interesting separate opinion. Again the matter was largely one of drafting.

92. An objection had been made to the reference to " essential validity " in sub-paragraph (*c*); the expression did appear in the title of section II and should be self-explanatory, but it could be replaced by an indication of the provisions to which article 4 related.

93. The point made by Mr. Verdross about the renunciation of certain rights under a treaty had come up during the discussion of some of the articles in section III concerning termination, and would have to be left aside for consideration at a later stage.

94. The CHAIRMAN suggested that article 4 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

The meeting rose at 6 p.m.

702nd MEETING

Tuesday, 18 June 1963, at 10 a.m.

Chairman: Mr Eduardo JIMÉNEZ de ARÉCHAGA

Succession of States and Governments: Report of the Sub-Committee (A/CN.4/160)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Chairman of the Sub-Committee on Succession of States and Governments to present the Sub-Committee's report (A/CN.4/160).

2. Mr. LACHS, Chairman of the Sub-Committee on Succession of States and Governments, said that the Sub-Committee had held a few preliminary meetings during the Commission's fourteenth session and had met again in January 1963. It was in compliance with the Commission's instructions of 26 June 1962 that he now submitted the Sub-Committee's report.

3. The results of the Sub-Committee's work were set out in the conclusions and recommendations contained in paragraphs 5 to 18. The Sub-Committee had reached its conclusions after very thorough discussion based on memoranda submitted by a number of its members. Before agreement could be reached, certain issues of substance and procedure had had to be settled.

4. The first of those issues had been whether succession of States and succession of governments should be treated as one topic or as two, and in the latter case, which should receive priority. It had been unanimously agreed that special attention should be given to problems arising out of the birth of new States and that issues connected with succession of Governments should be examined only in so far as was necessary to complement the study of what was regarded as the main subject. The Sub-Committee had then proceeded to consider the headings under which the subject should be studied, and from the much larger number originally contemplated, had reduced them to three. It had also made a detailed breakdown of the subject comprising four aspects. Special attention had been devoted to succession in relation to treaties and members of the Sub-Committee had dwelt at length on the general issue of universal and partial succession and on the types of treaty involved. The Commission's objective had been defined, in paragraph 8, as a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles having regard to new developments in international law.

5. The Sub-Committee had also made certain procedural recommendations for co-ordinating the work of the Special Rapporteur on State succession and that of the Special Rapporteurs on the law of treaties, State responsibility and relations between States and inter-governmental organizations.

6. The Sub-Committee was grateful to the Secretariat for its valuable studies: " The succession of States in

relation to membership in the United Nations" (A/CN.4/149), "The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (A/CN.4/150) and the "Digest of decisions of international tribunals relating to State succession" (A/CN.4/151). He hoped that, with the material that would be forthcoming from Governments in response to the requests addressed to them, further studies would be prepared by the Secretariat for 1964.

7. On all the issues to which he had already referred, the Sub-Committee had reached its decisions unanimously; there had, however, been differences of opinion on two points. The first was mentioned in paragraph 7 of the report and was merely a question of emphasis; the second, mentioned in paragraph 14, related to adjudicative procedures for the settlement of disputes. At its tenth meeting, held on 6 June 1963, the Sub-Committee had decided to leave the report as it stood.

8. He had unfortunately been prevented from attending the meetings held by the Sub-Committee in January 1963, when the work had been most ably directed by Mr. Castrén, the Acting Chairman. He thanked all the members of the Sub-Committee for their constructive co-operation.

9. There was no need to dwell on the importance of the topic of succession of States; it involved serious issues of the substitution, continuation, change and extinction of rights and duties. He was confident that the report he had presented would assist the Commission in dealing with the topic.

10. Mr. CASTRÉN praised Mr. Lach's report which was perfectly clear and complete. As the Commission could see, the Sub-Committee had not expressed any opinion on questions of substance; it had only produced a draft general plan of work outlining the scope of the subject and the approach to it, the objectives, questions of priority and the connexion between State succession and other subjects on the Commission's agenda. In conformity with its terms of reference, it had paid special attention to problems concerning the new States and to the development of international law in the matter of State succession. Opinion had been divided on some points and the future Special Rapporteur would have to consider whether the controversial issues should be examined.

11. Mr. VERDROSS, after congratulating the Chairman and Acting Chairman of the Sub-Committee on their work, said he would make only two comments. First, he considered that the work should be confined to succession of States, to the exclusion of succession of governments; for when governments changed, the State's international personality did not change, nor did its rights and duties. The problem of State succession arose only if a State ceased to exist or if a territory passed from one State to another. In the case of succession through revolution there might of course be analogous problems, but the analogy was remote and such cases should be studied separately.

12. Secondly, the problem of succession of States, which had been placed on the Commission's agenda on his own proposal, was the most controversial in general international law. For there was no continuous practice; the cases which had occurred were so different that it was difficult to find general rules, though admittedly it might be said that there were few established rules in international law. In that field more than in others, the future special rapporteur and the Commission would accordingly have to work on *lex ferenda* and find reasonable solutions that met the needs of modern international society.

13. Mr. EL-ERIAN said that he had already expressed his views on the substance on the topic of State succession during the meetings of the Sub-Committee; he would now comment briefly on the Sub-Committee's work. It was particularly encouraging and gratifying to note that the Sub-Committee had reached unanimous agreement on all questions, with the exception of one question of emphasis and one of procedure. It was his understanding that the Sub-Committee's conclusions constituted, to quote the words of Sir Humphrey Waldock during the discussion of the report of the Sub-Committee on State responsibility, "a general directive rather than a strait-jacket for the future Special Rapporteur" (686th meeting, para. 41). Sir Humphrey had added that his own experience was that thorough consideration of a topic was apt to reveal points which had not previously been contemplated. Those words applied equally well to the report on State succession. It was understood by all that the Sub-Committee's report was only a preliminary study and that the final form of the work would have to await a more detailed examination of the subject.

14. He would welcome the appointment, as Special Rapporteur, of Mr. Lachs, the Chairman of the Sub-Committee on Succession of States and Governments.

15. Mr. AGO congratulated the Sub-Committee on the excellent report before the Commission, and said that its preparatory work would facilitate the Commission's task. It was not possible to discuss the programme of work in detail at present, so he would confine himself to some immediate reactions on reading the report.

16. He fully approved of what was said about the scope of the subject and the approach to it, and the need to pay special attention to problems arising as a result of the birth of such an impressive number of new States. The problem of State succession had never been so important before, so far as its scope was concerned, but for all that he could not fully endorse Mr. Verdross's opinion. In its present-day form, the problem was perhaps not so very different from what it had been in former times.

17. Indeed, he was not at all sure that there had been any period in history during which the problem of State succession had not arisen at all. The history of the last two centuries was characterized by constant territorial changes, and hardly showed any long period that was free from problems of State succession. Before

stating that the Commission's work should be mainly *de lege ferenda*, it was therefore essential to go deeply into past practice. He was glad to note the Sub-Committee's proposal that the Secretariat should prepare a preliminary digest of State practice; that would bring out the elements of the existing situation. The Commission would then be able to do whatever was necessary in regard to the creation of new law.

18. With regard to questions of priority, he approved of the Sub-Committee's recommendation; he also thought it important to avoid overlapping, and gave two examples. Sub-paragraph (*b*), *ratione materiae*, (paragraph 15 of the report) contained a reference to torts; there might indeed be a problem of succession of States relating to a matter of international responsibility. On the other hand, in the application of the rules governing State succession there might be breaches of international obligations concerning the succession of States from which problems of responsibility might arise. Because the two topics were inter-related, he welcomed the Sub-Committee's proposal concerning close contact between the special rapporteurs.

19. The broad outline in paragraph 13 seemed to cover the whole of the subject-matter, but it might be questioned whether the order was logical, in particular that of items (i) and (ii). He quite understood that for practical reasons succession in respect of treaties had been put first, but from the point of view of system, the problem of succession in respect of rights and duties deriving from general rules of international law should have priority. In addition, it might be advisable at a later stage to distinguish between succession in respect of rights and duties resulting from general rules, and succession in respect of rights and duties deriving from very special sources, such as an international award.

20. The detailed breakdown of the subject contained some very interesting suggestions, but they, too, should be regarded as very general and provisional.

21. With regard to the origin of succession (paragraph 15 (*a*)), he doubted whether there were really any rules to be established; was it not rather a theoretical and systematic description of the difficult cases in which succession might occur that was required ?

22. Some reservations might also be entered in regard to the *ratione materiae* section, where the list began with " treaties ", which was hardly consistent with a distinction based on the rights and duties in question.

23. There were problems of succession which related to the substitution of one State for another in respect of truly international rights and duties, but there were others which related rather to the internal legal order of the new State — public property, nationality, and so on. That distinction should be made clearer.

24. In paragraph 15 (*d*), which concerned territorial effects, the distinction drawn was not very clear; no doubt it would become clearer when the subject was discussed.

25. Sir Humphrey WALDOCK said that he did not wish, at that stage, to comment in any detail on the excellent report which had just been submitted — a report which gave the Commission the assurance that it would be able to carry out satisfactory work on a most difficult topic.

26. He agreed with Mr. Ago that the Commission should not, at the very outset of its work, try to persuade itself that it was dealing with a subject that was really quite different from what it had been in the past. There was a great deal of previous practice on State succession and the essential problems that now had to be faced were the same as they had been before. Of course there were some new aspects and a new spirit in international relations, and those matters would be taken into account in formulating the principles of State succession, but it would be wrong to regard what had happened in the past as no longer germane to the subject.

27. The topics of State succession and the law of treaties overlapped at a number of points. One was the not very important question of the extinction of a State; that was hardly likely to raise any major problems. Another was the articles on the application of treaties, which he would be submitting to the Commission at its next session, in particular the provisions on the territorial application of treaties, which touched upon State succession. His understanding was that, for the purposes of his next report, as, indeed, of the report which he had submitted at the present session, he must reserve for the Special Rapporteur on State succession all questions which were essentially concerned with that subject.

28. There were some points, however, on which co-ordination would be necessary. For example, he understood that the Sub-Committee on Succession of States and its Chairman had considered that, in connexion with State succession, it might be necessary to draw a distinction between various kinds of treaties — a distinction which the Commission had so far tried to avoid. Some co-ordination would therefore be necessary if the reports on the two topics were not to be out of line with one another.

29. The Commission would also have to arrange its future programme so as to allow for the possibility of having to reach decisions on the subject of succession to treaties before it had completed its work on the law of treaties, but it had ample time to do so as he would be submitting a further report at the next session and it would be some time before government comments were received. It was desirable that the question of succession to treaties should, in the interval, have reached an advanced stage before a decision was taken on the report on the Law of Treaties.

30. The report before the Commission was a valuable document which would be of great assistance to all concerned with the subject of State succession and would provide an excellent basis for the Commission's work.

31. Mr. BARTOŠ said that he had been a member of the Sub-Committee and had taken part in drafting its report, which he approved without reservation. He would like, however, to comment briefly on the exchange of views between Mr. Verdross and Mr. Ago. It was true

that *historia magistra vitae est*, but in history, as in all the social sciences, rules were not always absolute, because of the constant change in circumstances and conditions. Realities must not be ignored, but the international order, international *jus cogens*, had undergone so many changes that the nineteenth and the early twentieth century could not always be accepted as the only guide.

32. It was true that the emancipation of Latin America, the unification of Italy and Germany and the dissolution of the Austro-Hungarian and Ottoman empires had supplied so many examples and solutions in matters of State succession that they could not be overlooked. On the other hand, what had formerly been no more than political aspirations had since become rules of law. For example, the principle of nationhood had been transformed into the right of self-determination. Similarly, continuity and changes in the social order had formerly been bound up with established rights. Today, the political and social situation was such that, without abandoning what practice had confirmed, it was necessary to work out rules and solutions in keeping with the various existing situations. In their studies on State succession, the future special rapporteur and the Commission should accordingly devote much of their time to drafting provisions for the progressive development of international law.

33. In his own statements in the Sub-Committee he had spoken of treaties only in connexion with the emancipation of colonial peoples, but the special rapporteur and the Commission would have to solve many other important problems, both legal and political, and their task would not be easy. Naturally, their first duty would be to study the past, if only to discover how far it was possible to adopt, or necessary to abandon, what it offered in order to satisfy the real needs of the present international community.

34. Mr. YASSEEN congratulated the Sub-Committee on its report, which would provide a starting point for the future special rapporteur. He would confine himself to a few general comments. The report quite properly suggested that succession of States should be treated separately from succession of governments. He also approved of the proposal that the Special Rapporteur on succession of States should be entrusted with the important problem of succession to treaties.

35. In consequence of the phenomenon of decolonization and the emancipation of peoples in general, succession of States had acquired the greatest importance. It was debatable whether rules on the subject should be based solely on existing practice, or whether new conditions should also be taken into account. As Mr. Bartoš had said, there were some rules which must be studied and identified, if only to determine whether they were still applicable. But it was difficult to take rules applicable to former situations and apply them forthwith to a new phenomenon. Decolonization presupposed the existence of a strong party and a weak party. International Law was no longer what it had been in the past; the strong State could no longer impose its views, for it was required to respect the principles laid down in the United Nations Charter; force was no longer a legitimate instrument of national policy.

36. It might be asked whether the Commission should aim at drafting a multilateral convention or a code on State succession. He himself would prefer a general convention, for it was necessary to safeguard the interests of weak States — former colonies and former mandated territories or protectorates.

37. Succession of States, especially in the sphere of decolonization or the emancipation of peoples, could give rise to unequal treaties concluded between parties which were unequal both in fact and in law. That inequality was shown by differences in legal status such as those between a colonizer and a colony, a mandate holder and a mandated territory or a protecting Power and a protectorate. A general convention on succession of States should, above all, prevent such inequality from leading to abuses or the exploitation of weak States by means of bilateral treaties.

38. Mr. de LUNA said that a significant change had taken place in the nature of the problem of succession of States and governments. The Latin American States, for example, on gaining their independence, had not adopted in international politics a totally different conception from that of their former metropolitan State, in other words, the conception of international law which had prevailed at the time.

39. But that was not exactly the case today, for international law had become more universal and, as Mr. Yasseen had said, the emancipation of the new States had produced new phenomena — recognition of the principle of the sovereign equality of States, of the right to self-determination which, incidentally, had older origins, and of the right to natural resources and economic independence, the outlawing of war and the concept of peaceful co-existence. When the Sixth Committee had wished to discuss peaceful co-existence in 1961, a large number of States had declined to accept the term, which, they claimed, had undesirable political overtones. But now the situation had changed. International law was clearly tending towards social justice among all nations. True, the old law of State succession, which had followed the private law rules of succession because the State had been regarded as the monarch's property, need not be rejected in its entirety. But nascent and as yet uncertain rules must be clarified, and there must be no hesitation in proposing the rules which the international community would need in the future. Both should be judged according to how they served the interests of the international community.

40. The CHAIRMAN, speaking as a member of the Commission, congratulated the members of the Sub-Committee on their valuable memoranda, which had helped to produce an admirable report. He was particularly interested in the method of work adopted by the Sub-Committee, which should prove useful both to the Commission and to scholars generally.

41. He agreed that priority should be given to the question of succession of States to treaties; in that connexion the excellent study by Mr. Bartoš was very

thought-provoking. He wished, however, to utter a word of warning, based on Latin-American experience. It was understandable that the initial reaction of a newly independent State should be to repudiate utterly all treaties entered into by the former metropolitan country. But after a century of independence, it had begun to be realized in Latin America that not all treaty inheritance was damaging; many of the treaties entered into by the old Spanish empire with other States in order to protect its possessions were now being invoked by the Latin American countries themselves in order, for example, to confirm historic rights over waters, rivers, territories and other forms of state domain. He did not know whether the same conditions applied in the new States, but if so, Latin American experience warranted advice against total repudiation.

42. By adopting the report before it the Commission, as in the case of the Sub-Committee on State Responsibility, would be approving the method of work, the scope of the subject and the approach; it would not be pre-judging any substantive issue.

43. He hoped that, after the Chairman of the Sub-Committee had wound up the debate, the Commission would be able to appoint the special rapporteur for succession of States.

44. Mr. LIANG, Secretary to the Commission, said he was glad the Sub-Committee attached so much importance to the contribution the Secretariat could make to the work of codifying the law on state succession. As would be seen from section II of the Sub-Committee's report, the Secretariat had been asked to prepare, if possible by the sixteenth session, first, an analytical restatement of the material furnished by governments, secondly, a working paper covering the practice of the specialized agencies and other international organizations, and thirdly, a revised version of the " Digest of the Decisions of International Tribunals relating to State Succession " (A/CN.4/151).

45. As far as the first item was concerned, only twelve governments had so far furnished the material requested by the Secretariat following the preliminary discussion on state succession at the fourteenth session; two had replied that they had none to send. The time-limit for submission of the material had been set at 15 July and it had been suggested in the Sub-Committee that a reminder be sent to those governments which had not yet answered.

46. The work on the second item had been put in hand and he hoped it would be completed by the following session, but it would, of course, involve a good deal of correspondence and checking that would take a considerable amount of time.

47. He agreed with Mr. Ago that for the purpose of studying state succession it would be essential to assemble material on state practice and that the task should be carried out by the Secretariat. However, it would be well to bear in mind the point made by John Bassett Moore in the introduction to his *Digest of International Law*[1] about state practice not being as concrete as might be expected. Moore cautioned his readers against taking everything in his Digest as state practice, and pointed out that it was necessary to distinguish carefully between evidence of state practice and state practice itself.

48. It would not be possible to cover the whole field in a digest if a reasonably exhaustive analysis was required, and the special rapporteur would have to inform the Secretariat of the intended scope of his report.

49. Mr. LACHS, speaking on behalf of the Sub-Committee, thanked the Commission for its appreciative comments on the report. As Mr. Ago had questioned the wisdom of the order of priorities suggested in paragraph 13, he should perhaps assure him that the question had been discussed at length in the Sub-Committee and that the conclusions reached had been the outcome of careful consideration.

50. Perhaps the matter of the consequences of international instruments for States and other beneficiaries, mentioned by Mr. Ago, had not been adequately covered, but it certainly had been raised in the Sub-Committee and borne in mind during its discussions.

51. Criticism of the break-down of the subject, particularly sub-paragraph (*a*) of paragraph 15, had perhaps been prompted by the erroneous assumption that the Sub-Committee had sought in that sub-paragraph to establish principles, whereas all it had done had been to list certain situations to be considered.

52. The inclusion of treaties in sub-paragraph (*b*) had been criticized on the ground that they had no place among the topics mentioned, but treaties could be considered from both the formal and the substantive point of view. That criticism impelled him to point out that it was impossible to avoid some overlapping in any kind of classification; there seemed to be no way of escaping a charge either of repetition or of omission. The list of subjects in sub-paragraph (*b*) should not be viewed too narrowly. The same considerations applied to sub-paragraph (*d*), regarding which Mr. Ago had answered his own question; the purpose of the study would be to examine the effects of succession from the territorial point of view.

53. It had been useful to hear the comments of the two special rapporteurs most closely concerned, namely, Mr. Ago and Sir Humphrey Waldock, who would have to work in close collaboration with the special rapporteur to be appointed on state succession. Sir Humphrey Waldock was quite right in thinking that some kind of timetable would have to be drawn up, particularly for those parts of their respective reports which covered much the same ground, though from a different standpoint.

54. He was glad that mention had been made of the important relationship between state practice and codification and progressive development, which of course had relevance to all topics dealt with by the Commission. Proper use must be made of the lessons of history, whether remote or recent, but without projecting them into the future, and just as rules deriving from the past

[1] Washington, Government Printing Office.

which could not be adequate for contemporary needs must be rejected, so, too, it was undesirable to codify what was not yet ripe.

55. Paragraph 8 of the Committee's report seemed to him to provide adequate guidance, and in arriving at that conclusion, the Sub-Committee had been greatly assisted by Mr. Castrén's valuable and interesting paper (A/CN.4/SC.2/WP.4). But of course the Sub-Committee had only put forward a set of guiding principles, which would inevitably have to be adjusted as the work proceeded and were not intended to restrict the Special Rapporteur's freedom. On the whole members of the Commission seemed to approve of the objectives stated, and their comments had been mainly directed to amplifying or rendering more precise the Sub-Committee's proposed outline of the work.

56. As only twelve governments had replied to the Secretariat's questionnaire, he suggested that the time-limit should be extended to 1 January 1964, since otherwise governments might regard themselves as exonerated from the obligation to furnish material.

57. Mr. AMADO welcomed the scientific rigor of Mr. Lachs' report and of the memoranda submitted by some members of the Commission. The writers had kept within the limits imposed by their knowledge of the facts, and had not yielded to the temptation, which had sometimes arisen since the Commission had been set up, to introduce considerations of ethics or good intentions.

58. The object of the report was to show the present state of jurisprudence and legal practice. That was no easy task; the memorandum submitted by Mr. Bartoš, for example, showed how complex the theory was.

59. The problem of the succession of States and governments lay not so much in relations between the successor State and the State which it succeeded, as in relations between the successor State and third parties; that was the most important aspect of the matter from the point of view of international law.

60. At the present time the problem was dominated by the historical upheaval of decolonization and the birth of new States. When Brazil had become independent, international life had been less complex. The United States had not yet played any part in international politics and the principle actors had been France and England. But now, when the process of decolonization was not yet quite complete, an entirely different problem arose for those seeking to codify the rules of law in face of that new phenomenon. Rules must be found which corresponded to the new development without conflicting with the rules of classical international law, and a system must be worked out which States could accept. He was confident that the Commission and its rapporteurs would be equal to that task. For the time being it was merely a matter of drawing up a table of contents — a list of questions to be taken up. The scope of the study should be limited, and the first report should therefore be a preliminary one defining the stages of the work.

61. There was one further practical point: it was difficult to see how the special rapporteurs could keep in close touch with one another and co-ordinate their work so as to avoid overlapping, as recommended in paragraphs 11 and 12 of the report. He feared that such consultations might hardly be possible in practice.

62. The CHAIRMAN said it was clear from the Sub-Committee's report that it was not seeking to prejudge the final form the Special Rapporteur's study would take, but was simply giving him some general guidance which should suffice for the time being. Presumably all the necessary co-ordination between the Special Rapporteurs on the Law of Treaties, State Responsibility and State Succession could be arranged by correspondence or if the need arose, by special meetings, possibly immediately before the Commission's own sessions.

63. He suggested that, as it had done with the report of the Sub-Committee on State Responsibility, the Commission should approve the report on state succession on the understanding that it represented an outline programme of work without prejudice to the position of any member in regard to the substance of any of the questions mentioned in that programme, and that the outline would serve as a guide to the Special Rapporteur without, however, obliging him to adjust his work to it in every detail.

It was so agreed.

64. The CHAIRMAN suggested that, in accordance with Mr. Lachs' proposal, the time-limit for submission by governments of material concerning state succession should be extended to 1 January 1964.

It was so agreed.

65. The CHAIRMAN said that it remained for the Commission to appoint the Special Rapporteur for Succession of States and Governments. Mr. Lachs, Chairman of the Sub-Committee, had already been mentioned as the member best qualified to undertake the task.

Mr. Lachs was appointed Special Rapporteur on Succession of States and Governments by acclamation.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

66. The CHAIRMAN invited the Commission to consider article 2 in section I of the Special Rapporteur's second report (A/CN.4/156).

Article 2 (The presumption in favour of the validity of a treaty)

67. Sir Humphrey WALDOCK, Special Rapporteur, said that article 2 spoke for itself; because sections II and III were concerned with the grounds on which a treaty could be held to be either initially invalid or subsequently terminated, and because there had been many instances of one-sided or unjustified assertions of a right to be released from a treaty, it had seemed to him desirable to establish at the beginning of the draft that the presumption was always in favour of the validity of the treaty if it had been negotiated, concluded and

brought into force in accordance with the provisions of Part I. To some extent the article was of a formal character, but it did have a place in the draft.

68. He would have no objection to dropping the word "essential" in sub-paragraph (*a*), since the aspect of validity being dealt with was sufficiently explained by the reference to section II.

69. Mr. de LUNA, referring to the expression "essential validity" in sub-paragraph (*a*), said that a treaty might be non-existent, void or voidable, but in the matter of validity there was no half-way position: a treaty was either valid or it was not. A voidable treaty was binding so long as it had not been anulled in accordance with the procedure laid down in the rules of international law. He therefore proposed that the adjective "essential" should be deleted.

70. Mr. CASTRÉN thought that article 2 was unnecessary. He understood the intention of the Special Rapporteur who, with the sanctity of treaties in mind, had wished to establish a presumption in favour of the validity of treaties, as he explained in his commentary, but no one disputed that the validity of treaties was the rule, and their non-validity a very rare exception. Besides, the rule laid down in article 2 was immediately weakened by the two exceptions stated in sub-paragraphs (*a*) and (*b*). He thought it would suffice if the presumption in favour of the validity of treaties were mentioned in the introduction to Part II.

71. Mr. VERDROSS found the wording of article 2 too timid. For if a treaty did not lack essential validity and if it had not ceased to be in force under the rules set out in section III, it must be valid. One could not speak of a presumption of validity. If the article was to be retained, it should be explicitly stated that such treaties were valid.

72. Mr. CADIEUX proposed, as an intermediate solution, that only the first part of the article, stating the presumption of validity, should be retained, without mentioning the circumstances in which the validity of a treaty could be contested.

73. Mr. YASSEEN thought that article 2 was unnecessary, since its provisions followed quite clearly from the rules already accepted by the Commission.

74. Mr. TUNKIN agreed that article 2 was unnecessary. A treaty was either valid or it was not, and there could be no question of presumption, a proposition that belonged in a thesis on logic, but not in a set of legal rules. The point could be dealt with in the commentary.

75. The CHAIRMAN, speaking as a member of the Commission, said he found it difficult to admit that the principle of validity could be defined in terms of a presumption, a concept which in civil law referred to rules for dispensing with evidence. He was therefore in favour of deleting the article.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that perhaps the article had not been well drafted and should refer to section IV also, since it was concerned with the procedure for establishing invalidity, but his purpose had been to indicate that the burden lay on the party wishing to contest the validity of a treaty. It was true that some authorities had put the principle of *pacta sunt servanda* at the beginning of their studies on the law of treaties, but the proper place for an article on that subject would be in his third report on the application of treaties.

77. Mr. ROSENNE said he shared the Special Rapporteur's desire to include such an article in the draft, so as to achieve the right balance.

78. Mr. AMADO said that Mr. Rosenne's argument did not convince him that article 2 was useful. The articles stated a truism, and moreover the notion of presumption could be held to be a dangerous one in law. He wished, however, to commend the conscientiousness of the Special Rapporteur, who in his desire to omit nothing had felt bound to include an article on that question in his draft.

79. Mr. GROS said that the Special Rapporteur's second statement had fully convinced him that article 2 was useful. If the Commission had discussed the articles in their logical order, taking article 2 after article 1, which contained the definitions, it would have seemed perfectly natural to state an essential principle after adopting those definitions. Even leaving aside the idea of presumption, the Commission would have found it natural to state the rule that a treaty was binding on the parties subject to the special provisions on the essential validity and termination of treaties contained in the subsequent articles. As the Special Rapporteur had stated, it might be necessary to repeat some obvious truths, even though they were self-evident to the members of the Commission. He was therefore in favour of retaining article 2, subject to the deletion of the words "presumed to be valid and".

80. Mr. BRIGGS said he had been convinced by the arguments put forward by the Special Rapporteur and Mr. Gros that something on the lines of article 2 must be retained, but as the former had already suggested, it should certainly make a reference to section IV. It did not seem to him from a reading of article 2 that validity was being made dependent on a presumption, as the Chairman appeared to think.

81. Mr. de LUNA supported the remarks of Mr. Gros and Mr. Briggs. The Commission could ask the Drafting Committee to re-word article 2 in the light of the discussion. As to deleting an article which stated a principle that was self-evident at least to the members of the Commission, he pointed out that codes contained a number of self-evident rules which it was nevertheless necessary to state in order to fill gaps. Moreover, experience had shown that however obvious they might be, such truths were contested. After all, bad faith was not always absent from international relations.

82. Mr. PAL considered that either the content of article 2 should be transferred to section IV, or the reference to a presumption should be deleted.

83. Mr. TUNKIN said that if article 2 were not omitted, the only course open to the Commission would be to state the principle *pacta sunt servanda*, in which case article 2 might read: " Every treaty entered into and brought into force in accordance with the provisions of Part I is valid and binding upon the parties unless etc." The title would also have to be amended to read: " The binding force of treaties."

84. Sir Humphrey WALDOCK, Special Rapporteur, said that article 2 was not concerned with the principle *pacta sunt servanda*, according to which the parties were bound to execute the treaty. There were various grounds on which a valid treaty that was in force need not be executed. Such cases would come within the compass of his next report.

85. Mr. AMADO thought article 2 amounted to stating that the international law of treaties was governed by the rule *pacta sunt servanda*. But why state a self-evident principle ? He proposed that if article 2 were not deleted, because some members wished to retain it, the decision on the matter should at least be deferred until the next session.

86. Mr. TUNKIN said he would be able to accept article 2 if it were re-drafted to state that a treaty which was valid and in force was binding and must be observed by the parties.

87. Mr. TSURUOKA supported Mr. de Luna's proposal; he thought it was mainly a matter of drafting.

88. The CHAIRMAN suggested that article 2 be referred to the Drafting Committee for re-drafting. The Commission could then finally decide, on the basis of a new text, whether the article should be retained or not.

It was so agreed.

The metting rose at 12.40 p.m.

703rd MEETING

Wednesday, 19 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to resume consideration of article 14 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 14 (CONFLICT WITH A PRIOR TREATY) (*resumed from the 687th meeting*)

2. Sir Humphrey WALDOCK, Special Rapporteur, said it appeared from the earlier discussion of article 14 that the Commission was disposed to accept the view that a conflict with a prior treaty raised questions of priority rather than of nullity. Some members had considered that article 14 belonged in Part III of his report because it was concerned with the interpretation of the two treaties, and that it should be considered at the next session.

3. He appreciated the reason why Mr. Tunkin had said that article 14 did not go far enough to cover treaties of a special type, some provisions of which might be of a nature similar to *jus cogens*, and had quoted the recent agreement on the neutrality of Laos [1] as an example. That type of treaty had been touched on in the commentary but, as he had pointed out, it did not raise the question of nullity so much as the question whether the parties intended to impose some limitation on their future capacity to conclude agreements on a particular matter, such as the neutralization of a territory or part of a territory.

4. After the Commission had postponed consideration of article 14, Mr. Pal and the Chairman had jointly proposed an amendment to paragraph 2 (*a*), adding the following sentence:

> " Provided, however, that if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty, of such a kind as to frustrate the object and purpose of the earlier treaty, then any party to it whose interests are seriously affected shall be entitled to invoke the nullity of the second treaty."

5. That was a substantial amendment, which would considerably change article 14 by introducing the possibility of the second treaty being nullified; and its application was not limited to a special kind of treaty. Such a general exception to the provision in paragraph 2 (*a*) seemed dangerously wide and would embrace, for example, ordinary commercial treaties. Attractive as the idea might seem that certain conflicts could entail nullity, he questioned whether it could be accepted at the present stage of development. It seemed fair to say that the amendment went beyond the provisions of the Charter, which provided only for the primacy of the Charter over other treaties, not for other treaties being nullified in the event of a conflict with the Charter.

6. The question on which the Commission must try to reach a conclusion was whether a case of conflict between two treaties should be regarded as essentially raising an issue of priority. If it was so regarded, and the later treaty did essentially violate obligations assumed under the earlier one, that would raise a question of responsibility, but the later treaty would not be nullified, as between the parties to it, so long as it was not contrary to *jus cogens*. Under article 14 in its present form, the parties to the later treaty remained under the obligation to execute the earlier one in respect of any of the parties to it which had not become parties to the later treaty.

7. Mr. PAL explained that the purpose of the amendment, which had been couched in cautious language, was to deal with cases in which the later treaty not only

[1] *Command papers*, H.M. Stationery Office, London, Cmd. 9239, pp. 18 ff.