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Summary record of the 963rd meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1968, vol. I

963rd MEETING

Thursday, 27 June 1968, at 10 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in respect of Rights and Duties resulting from Sources other than Treaties

(A/CN.4/204)

(Item 1 (*b*) of the agenda)

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's report on item 1 (*b*) of the agenda (A/CN.4/204) and the questionnaire he had submitted at the previous meeting (para. 1).

2. Mr. EL-ERIAN said he agreed that, as stated in paragraph 21 of the report, for the purposes of the present study it was more useful to apply the criterion of subject-matter than that of source, and that the title should be amended to read "Succession of States in matters other than treaties". He also agreed that the Commission should envisage the preparation of a draft convention, for the reasons given by the Special Rapporteur. Of course, there were difficulties involved, particularly difficulties of a political nature, but that seemed to be all the more reason for the Commission to meet the need for a convention and remove the sources of friction created by succession problems. With the spirit of conciliation manifest in the Commission over the past few years, he was confident that agreement could be reached on some of the issues which at present seemed highly controversial.

3. With regard to the Commission's method of work, he thought that it could usefully combine codification with progressive development. Codification would in any case involve some progressive development, especially as the succession of States was one of the least developed subjects in international law. The wording of article 15 of the Commission's Statute reflected the belief that the two approaches must inevitably overlap.

4. The newly independent States had a special interest in the subject of succession, and the recommendation in General Assembly resolution 1902 (XVIII) that the Commission should continue its work on the succession of States "with appropriate reference to the views of States which have achieved independence since the Second World War" had been prompted by recognition of that special interest. The Sub-Committee on Succession of States and Governments had also emphasized the need to pay special attention to succession problems arising as a result of the birth of so many new States since the Second World War.[1]

5. Mr. KEARNEY said he doubted whether general rules of international law on succession could be most efficiently drafted by focusing attention primarily on aspects of decolonization, and whether such rules would then be applicable to problems arising in the foreseeable and unforeseeable future. The Special Rapporteur had implied that rules of succession deriving from experience gained during the period of decolonization would be more pertinent to future problems than the traditional rules in that field of international law. But the process of decolonization was nearing its end and other kinds of succession problem would arise in the future. The Commission would have to decide whether it wished to formulate a set of rules laying down principles of succession which past experience had shown to be applicable to most major problems arising from a change of authority in a particular geographical area, or to draw up a *lex specialis* for specific problems arising out of the decolonization process.

6. Many problems resulting from that process remained unsolved and the establishment of rules for their settlement would be a reasonable and valuable objective for the Commission. But it would be limited in scope, effect and usefulness in time. Decolonization had been a major feature of succession problems since the Second World War, but it would be wrong to assume that the establishment of rules for settling a certain type of problem would meet all future needs in matters of succession. The disappearance of colonies would not produce a system of States of fixed size and character, since the principles of self-determination and sovereign equality were dynamic, not static. The fusion and dissolution of States would continue as the consequence of a variety of political and economic pressures. He did not think that the Commission should limit its objective to a set of rules governing only one aspect of succession, or concentrate on the present situation and ignore the demands of the future.

7. Moreover, by ignoring the traditional rules of succession the Commission would be wasting much valuable experience, thus making its work more difficult and less useful. Countries which merged or separated, whether they were ex-colonies or not, faced substantially the same succession problems. Much of the experience and innovation since the Second World War did not involve newly-independent countries: quite novel economic arrangements had, for instance, been worked out in Central America and in Europe, and rules had been drawn up for the settlement of such complicated problems as Germany's external debts. The Commission should therefore take advantage of all available experience and base any rules it formulated on the study of existing practice and legal principles. If it concentrated only on specific aspects of succession, it would produce an ephemeral and unbalanced set of rules.

8. Sir Humphrey WALDOCK said he preferred the amended title suggested by Mr. Bedjaoui for his report; perhaps the title of his own report should be adjusted accordingly, to read "Succession of States in the matter

[1] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 261, para. 6.

of treaties". It seemed impossible to avoid using the word "succession", since it was already established by tradition in international law and municipal law, although it had the disadvantage of seeming to beg the question. However, the Commission would try to work out rules for the solution of problems resulting from changes of sovereignty in a particular piece of territory, and it might be found that some principles of succession appeared among those rules. It was difficult at the present stage of the work to discuss the extent to which the notion of succession could be admitted in international law.

9. It would be unwise for the Commission to try to define succession at the present stage. He agreed with Mr. Ago that the Commission's practice was to be more concerned with the meaning attached to a term in a particular convention than with an objective definition that was academically and legally valid as an absolute definition. It might, for instance, be desirable to regard succession as a change in competence to conclude treaties with respect to a particular piece of territory. He had adopted that meaning for the purposes of his own study, but might well have to change it. It should not be assumed that a word given a certain connotation in a convention must necessarily have precisely the same connotation in other contexts. The way in which the Commission used the word "succession" would largely depend on the rules it formulated for the settlement of succession problems.

10. Speakers had rightly pointed out that it was inevitable that there should be a link between the codification and the progressive development of international law, and he agreed that codification *per se* had proved in practice not to be the Commission's function. The Commission, equally, should not think too much of progressive development as an independent function of the Commission, since it was not a legislative body and all progressive development must have its roots in the existing law. Members seemed to agree that the Commission's work on succession should take the form of draft articles. It was always easier to discuss a subject in general terms than to define the law in a given situation. But in the work of the Commission and in the case of succession especially, it was important to isolate what was accepted in the international community as law, from practices followed merely for reasons of policy or expediency.

11. It also seemed to be generally agreed that account should be taken of the different types of situation resulting from changes of sovereignty in a particular territory. However, he did not think it would be very useful to make a special study of the sources and types of succession, since a great deal had already been written on that subject. Although it might prove necessary to have special rules for dealing with special types of case, each case tended to have special features, as Mr. Bartoš had rightly pointed out, and cases were often complex, so that little would be gained by trying to fit them into anything but broad categories. It would in any event be impossible to provide for all contingencies in advance.

12. He agreed with Mr. Kearney that the Commission should not focus its attention specifically on new States. Although their problems and practices were bound to dominate the Commission's work on succession and had actually prompted the relevant General Assembly directive to the Commission, it would be a mistake to try to isolate decolonization as a specific aspect of the succession of States. Decolonization was only one process which had given rise to succession problems and it had taken different forms. Nevertheless, that process now took place in substantially different international circumstances from those of the nineteenth century, and the new elements would have to be taken into account as he had emphasized in his own report.

13. Judicial settlement of disputes was a question that should be considered in due course, but not immediately. It had been the Commission's practice not to deal with the general clauses of judicial settlement agreements, but to leave them, together with the final clauses, for elaboration at diplomatic conferences. As Mr. Rosenne had pointed out, it might be found necessary in some cases to consider whether special settlement machinery could be provided, but it would be wise at that stage to leave the question of the settlement of disputes to be examined only in the context of particular problems.

14. The subjects suggested by Mr. Bedjaoui for study during the coming year seemed quite appropriate, and he saw no reason why the question of natural resources, proposed for special consideration by Mr. Bartoš, should not be included under the heading of "property".

15. Mr. YASSEEN said he did not think the new title proposed by the Special Rapporteur for the subject entrusted to him could give rise to any objections; it faithfully reflected the Commission's intentions.

16. As to the general definition of succession of States and the use of the term "succession", it was not the only case in which public international law had borrowed an expression from private law. Everyone knew what was meant and there was no risk of confusion. A substitute term would be difficult to find. It would be better to retain the word "succession".

17. The Commission should not change its method of work. It should undertake the codification and progressive development of international law simultaneously. The Special Rapporteur could propose solutions involving the progressive development of international law provided they were based on the recognized principles and general rules of the international legal order. The fact that Governments could submit their comments to the Commission assured them that the work would not be purely theoretical; there was thus no danger of departing from the realities of the international situation.

18. As to the form to be adopted, he was in favour of a draft convention.

19. The fifth and sixth questions listed by the Special Rapporteur raised the problem of the attention to be given to decolonization. It was the phenomenon of decolonization that made the subject of State succession so important at the present time. The movement towards the emancipation of peoples was so vast and its problems so different in degree that it might produce a difference in kind Formerly, in the nineteenth century for example, emancipation had been bilateral. Today, decolonization was no longer only a matter between the metropolitan Power and the people gaining its freedom; it had become an international problem, for it was one of the aims of the interna-

tional community and took place under its supervision. That role of the international community was the basis of the general rules of State succession in the sphere of decolonization. The international community intervened to prevent a *de facto* and necessarily provisional settlement —usually the outcome of an attempt by the colonial Power to maintain its prerogatives—from taking the place of a permanent solution of the problems of State succession. State succession in the context of decolonization therefore deserved special study. Decolonization might be only a passing phenomenon, but the problems it raised were vital; they could affect not only the present, but also the future of many peoples.

20. The question of the judicial settlement of disputes was not peculiar to State succession, so it was not essential to consider it specially in the context of that topic.

21. The proposed order of priority was acceptable. Nevertheless he stressed the particular importance of the question of natural resources, which had already been examined by some international organs.

22. Mr. CASTRÉN said that the title given to the subject was not very felicitous and he therefore agreed with previous speakers that it should be replaced by the new title proposed by the Special Rapporteur.

23. The word "succession" had been criticized because what took place was not always a genuine succession. The term "succession of States" could apply to the legal effects or consequences of a territorial change, that was to say the transfer of sovereignty from one State to another. But that did not cover every case. The term had always been used, however, and the Commission could include in its draft an article 1 explaining the meaning attributed to it. Each Special Rapporteur should study the question of the definition in the context of his own subject. The Commission need not devote much time to that theoretical aspect of the topic.

24. The method of work adopted should combine codification with the progressive development of international law.

25. For the time being, the Commission should reserve its position regarding the form its work was to take, but to begin with, it could instruct the Special Rapporteur to draft a set of articles suitable for an international convention.

26. The various types of State succession should, of course, be taken into consideration and all the necessary conclusions drawn from their classification.

27. The Special Rapporteur had proposed three ways of treating the specific problems of new States. He personally was opposed to the second, and preferred the first to the third, provided the wording was slightly altered to say that the succession of States should be studied "with special attention to problems relating to the new States" rather than "mainly from the angle of the specific problems of the new States".

28. While not overlooking the usefulness of providing procedures for the settlement of disputes, he did not think that question need be examined for the time being. The Commission could study the matter when it had the substantive articles of the draft before it.

29. As to the order of priority, the Commission could very well begin with public property and public debts, dealing also with the question of natural resources mentioned by Mr. Bartoš.

30. Mr. AGO said that the Commission should be careful not to over-emphasize the differences between the old and new theories of State succession. There had always been new States. The decolonization of Latin America and that of Asia and Africa were not the only cases of the emancipation of territories and the creation of new States. Italy, Greece, Yugoslavia, Hungary, Romania, Bulgaria, Albania and others, had all had to fight against foreign domination. The problems of the new State succeeding the old ruling Power appeared in much the same terms, whether the countries concerned were those European countries or the countries of Latin America, Africa or Asia. Today, of course, the situation was different; events took place in the climate of the United Nations and the international community had more responsibility. But that did not mean that the old rules were no longer valid.

31. In addition, it must not be forgotten that the Commission had to work for the future; it had to formulate rules which would be applicable to all future problems of State succession, not merely to the possibly important, but nevertheless transient, problems of decolonization. Succession of States was not the same thing as decolonization; it was a consequence of decolonization, just as it was a consequence of any other transfer of sovereignty from one State to another.

32. It had been said that in cases other than decolonization, State succession was of a bilateral nature. But even in those cases, consideration had to be given, not only to relations between the old sovereign and the new State, but also to relations between the new State and third States. That was the whole content of the subject for which Sir Humphrey Waldock was responsible. Even Mr. Bedjaoui's subject was not confined to relations between the new State and the former metropolitan Power; it essentially affected relations between the new State and its own nationals, as well as relations with other private persons who were not necessarily nationals of the former metropolitan Power. Problems of boundaries, and even more so problems of servitudes, might have nothing to do with relations between the former metropolitan Power and the new State.

33. In short, it should not be thought that decolonization problems were really new or that problems of State succession were necessarily connected with relations between the new State and the old metropolitan Power.

34. Mr. ROSENNE said he would like to reply to some of the points in the Special Rapporteur's questionnaire that he had not dealt with in his statement at the previous meeting.

35. With regard to question 2, the general definition of State succession, it was essential that the same basic ideas should underlie the use of the term "succession" in the two substantive reports on items 1 (*a*) and 1 (*b*) of the agenda, though there could be differences of detail between them. Also, it would no doubt be generally agreep

that what was envisaged was an agreed use of the term "succession" and not an objective and general definition.

36. If the matter was believed to be sufficiently urgent, the Commission might consider holding a preliminary tentative discussion on the basis of article 1, paragraph 2 (*a*), in Sir Humphrey Waldock's report (A/CN.4/202), which provided the beginnings of a definition. Such a discussion would make it possible to reach agreement on the meaning of "succession" in sufficiently general terms to provide directives for both Special Rapporteurs.

37. With regard to question 6, the specific problems of new States, it should be realized that the problems involved were not confined to those arising between new States and third States. There could also arise, under the heading of State succession, questions of the relationship between new States and international organizations, or between the former metropolitan State and third States or international organizations. He would not even exclude relationships between new States themselves, since they too could involve elements of State succession.

38. The problem would perhaps be brought into sharper focus if, instead of speaking of "Specific problems of the new States", the Special Rapporteur adopted the heading of section I, sub-section A, of the 1963 report of the Sub-Committee on Succession of States and Governments, namely, "Special attention to problems in respect of new States".[2]

39. If, however, the Special Rapporteur insisted on a reply to question 6 in the form in which it had been put, he would himself prefer the third choice, but dropping the word "occasionally", so that "the most striking specific elements" would be mentioned and, "in connexion with certain matters and whenever necessary, a specific rule for a particular type of State succession would be worked out".

40. With regard to question 7, he must point out that the issue was not the judicial settlement of disputes in general, which was far too vast and imprecise a subject to be dealt with in the framework of any single topic. The position was made clear by the relevant passage of the 1963 report of the Commission's Sub-Committee on Succession of States and Governments, where it was recorded that some members—himself included—had "expressed the view that the Special Rapporteur should be asked to consider whether some particular system for the settlement of disputes should be an integral part of the régime of succession".[3] Once that question was answered, there remained the problem of choosing a system for the settlement of disputes, and for the solution of that problem there was considerable United Nations experience on which to draw.

41. With regard to question 8, he agreed with Sir Humphrey Waldock that, especially in the light of the Special Rapporteur's report, the question of natural resources could come within the scope of "public property".

42. Mr. BEDJAOUI (Special Rapporteur) said he was concerned about how the Commission could organize its work so as to progress fairly rapidly with the study of State succession, a vast and complicated subject which had been on the Commission's programme since the beginning, but which it had so far only touched on very briefly in 1962 and 1963. Some priority should probably be given to State succession in the matter of treaties, which might be of importance for the second session of the United Nations Conference on the Law of Treaties.

43. The Commission had only three sessions left before the term of office of its present members expired. That was not much time in view of the method usually followed, which was to have two readings separated by a period for reflexion during which Governments were invited to submit their comments. The idea of holding extra winter sessions did not seem to have been ruled out, and might be a means of achieving results more quickly.

44. With regard to State succession in matters other than treaties, he was at the Commission's disposal to deal with any particular aspect the majority of the members might wish. Mr. Bartoš had suggested examining problems relating to natural resources. He (Mr. Bedjaoui) therefore proposed that that question be studied together with public property and public debts, as suggested earlier, and that the subject be expanded to include all problems of succession to economic resources. That would make it possible to include private property and private debts. His proposal was in line with the comments of Sir Humphrey Waldock, who thought it would be difficult to consider property problems without referring to natural resources. He (Mr. Bedjaoui) could submit a report on that subject to the Commission at its twenty-first session for detailed study.

45. With regard to the prominence to be given to the specific problems of the new States, it was simply a question of emphasis. He had never intended to draw up a kind of decolonization charter. No member of the Commission had suggested that such problems should be minimized, let alone forgotten. In any case, the Commission was bound to pay special attention to those problems since the General Assembly had twice asked it to do so.

46. The solution would probably be to draw up rules that were as general as possible, for there was no denying that "modern" successions and classic successions had various points in common, but variations would have to be introduced as the work progressed. It would then be important to indicate the major problems.

47. Although the decolonization process was already nearly completed, some countries had not yet achieved independence; moreover, in nearly all cases, there was a mass of matters in dispute between the newly independent State and the old metropolitan Power, which were nowhere near settlement. For example, over twenty years after independence, India and Pakistan were still arguing with the United Kingdom over the India Office Library. The countries of North Africa still had outstanding problems with the old metropolitan Power; that was perfectly natural, for a mesh of highly complicated and sometimes long-established links could not be severed immediately.

[2] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 261.

[3] *Ibid.*, p. 261, para. 14.

Many problems also arose in relations between each new State and States other than the former metropolitan Power. Consequently, the Commission's work, though belated, would not be in vain.

48. He agreed that the Commission's work should not be based entirely on the new States, but the reason for that attitude was not that decolonization had come to an end or that the Commission should concentrate on successions of the traditional type or successions which might occur in the future in the form of integrations. The Commission must not evade the present. Mr. Ago had rightly pointed out that the case of new States was very old, but he (Mr. Bedjaoui) drew a sharp distinction between, for example, the States created in Europe by the Treaty of Versailles, the case of which had been governed by rather special rules based on the principle of nationality, and the States created after the Second World War as a result of decolonization. In his view, the Commission should consider all cases, but give special attention to the case of decolonization.

49. He had dealt in turn with questions 8 and 6 of his questionnaire, which he regarded as the most important, and had received sufficiently clear replies from members of the Commission on questions 1 to 4. With regard to question 5, origins and types of State succession, the consensus of opinion in the Commission appeared to be that each Special Rapporteur should consider it independently and draw his own conclusions, after which the Commission would, if necessary, reconcile their points of view. He agreed that there was no need to devote a special heading to that question.

50. With regard to question 7, the judicial settlement of disputes, he had included it for the sake of completeness, but fully realized that the Commission could not prejudge the issue at that stage. As the work progressed and its outlines became clearer, the Commission could decide whether provision should be made for a special system for the settlement of disputes arising out of State successions.

51. Mr. USHAKOV said he wished to supplement the comments he had made at the 961st meeting [4] by stating his position on the various questions in the questionnaire.

52. With regard to question 1, he preferred the new title.

53. As to question 2, there was no need for the Commission to attempt a general definition of State succession, which would hardly be of practical interest in connexion with a future convention.

54. With regard to question 3, the method of work, he was in favour of combining codification with the progressive development of international law.

55. On question 4, the form of the work, his preference was for a draft convention, which for the time being could be presented simply as a set of draft articles.

56. As to question 5, the origins and types of State succession, there was no need to examine those problems as such, although it would be helpful if each Special Rapporteur would draw up an outline classification for his own part of the subject.

57. Question 6 was the most awkward. Anything connected with new States created by decolonization formed part of the wider topic of the birth of new States. Undoubtedly there were general problems which concerned all new States, but whether one liked it or not, the birth of a new State through decolonization gave rise to specific problems which must be given special attention in accordance with the resolutions of the General Assembly and earlier decisions of the Commission. The question was really one of priority: the problems peculiar to new States created by decolonization should be considered first even though there were general problems common to all new States.

58. Question 7, the judicial settlement of disputes, could be left aside for the moment. However, the Special Rapporteur must be completely free to suggest a possibility of settlement if he thought it necessary.

59. Question 8 raised the very important issue of what subject was to be prepared for the Commission's next session. In his view, all the problems connected with the subject should be investigated; it was difficult to pick out any particular part. It was essential, for both the future and the present, to prepare a comprehensive draft which dealt with all the problems, including territorial problems. Some territorial questions might perhaps be outside the scope of State succession in matters other than treaties, but there were others which should be dealt with under that heading. However, if the Special Rapporteur preferred to deal first with a part of the subject, such as succession to economic resources, the Commission should allow him full freedom to direct his work as he saw fit.

60. Quite apart from the points raised in the questionnaire, he wished to stress that the question of the relationship between treaties and the rules to be formulated by the Special Rapporteur within the framework of his subject appeared in a different light depending on whether the new State was created by decolonization or in some other way. The general rule was that treaties concluded by the predecessor State were valid for the successor State; that rule could be included in the draft being prepared by the Special Rapporteur on State succession in the matter of treaties. From that point of view, a devolution treaty itself was valid. But for new States created by decolonization the position was quite different. The ideas expressed by the Special Rapporteur in paragraph 35 of his report, and developed in paragraph 70, were perfectly correct. Existing treaties quickly lost their validity for that particular category of State. In that respect, he shared the view expressed by Mr. Bartoš at the 960th meeting[5] that the problems of new States created by decolonization should be settled by reference to the general principles of international law rather than to treaty rules. For those new States, it could be laid down as the principal and prevailing rule that, in conformity with practice, treaties were not automatically valid for the successor State.

The meeting rose at 1 p.m.

[4] See para. 66 *et seq.*

[5] See para. 46 *et seq.*