Document:-

A/CN.4/SR.966

Summary record of the 966th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1968, vol. I

boundary treaty itself, which in many cases called for termination under certain conditions; and in giving precedence to the minority views of some jurists in the name of stability, he undermined the *jus cogens* principle of self-determination. His views, as expressed in that article and in the commentary, conflicted with the doctrine of "revindication", under which a country could reclaim something that it had once held as of right, particularly if backed by the right of self-determination.

70. The principal aim now was the preservation of peace and stability. The Commission's approach should therefore be in line with the views of Mr. Cukwurah, who, in his book "The Settlement of Boundary Disputes in International Law",[13] had stated that "In conformity with the United Nations Charter, and in order to achieve the kind of 'stability and finality' [discussed in Chapter V], international boundary disputes must be settled peacefully". If the machinery for the pacific settlement of disputes set up by the Charter was not made use of, and boundary treaties were protected under such a rule as that contained in article 4, peace would be endangered.

71. Mr. EUSTATHIADES warmly congratulated the Special Rapporteur on his report, and on his supplementary oral statement. Like the Special Rapporteur, and for the same reasons, he thought that the solution to the problems of succession with respect to treaties must at the present time be sought within the framework of the law of treaties rather than that of any general law relating to State succession. It should be added that for succession with respect to treaties there were certain commonly accepted general rules, but that was not so certain with regard to State succession in general. That was a further reason for separate treatment, in addition to the competence of Sir Humphrey Waldock and the expediency of dividing up the work.

72. As to the form of the draft articles, they would in any case constitute an independent instrument, but they could appear in any one of three possible ways: they could be linked, as a protocol, to the future convention on the law of treaties or to a general convention on State succession, or they could constitute an entirely separate instrument. Although the Special Rapporteur had not definitely pronounced in favour of one of these solutions, he had indicated his preference for a protocol to the convention on the law of treaties.

73. As to the question of the succession of Governments, the recommendation of the Sub-Committee [14] should be followed, and the Special Rapporteur should accordingly include some provisions on that subject in his draft, or at least note certain distinctions between succession of States and succession of Governments.

74. The problem of new States was perhaps less acute in succession with respect to treaties than in succession in general. He therefore approved of paragraphs 13 and 14 of the introduction, but he agreed with Mr. Tabibi that due attention should be given to the new problems and factors arising from the appearance of new States.

75. Some priority must obviously be given to doctrine and recent practice. He did not think the differences were so great that certain common rules could not be derived.

76. In connexion with the entirely correct statement in paragraph 16 of his report, the Special Rapporteur might perhaps wish to insert in the draft a clause to the effect that the provisions of the convention were without prejudice to special arrangements. That would perhaps make it possible to ignore the political considerations which might have led to such special arrangements.

77. With reference to the remarks of the Special Rapporteur, he asked whether the latter was proposing to deal with the difference between bilateral and multilateral treaties at a later stage. As to the idea that succession with respect to treaties was an international matter, whereas the subject assigned to Mr. Bedjaoui belonged rather to the internal sphere, he hoped that the Special Rapporteur would amplify what he had merely outlined in his oral statement, namely, that it was not a question of substance, but only of form.

78. Lastly, the definition of State succession contained in article 1 of the draft dealt with succession in regard to future treaties; the right of the new State or Government to participate in an existing treaty should perhaps also be considered. It might be possible to find a single formula to cover both eventualities. That was a question to be examined at a later stage.

The meeting rose at 6 p.m.

966th MEETING

Tuesday, 2 July 1968, at 10 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, 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 Treaties

(A/CN.4/200 and Add.1-2; A/CN.4/202)

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

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's report (A/CN.4/202) on item 1 (*a*) of the agenda.

2. Mr. CASTRÉN said that a general discussion based on the excellent first report submitted by the Special Rapporteur would help the Commission to decide how it should tackle the subject and on which problems it should concentrate its attention.

[13] A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law* (1967), Manchester University Press.

[14] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 261, para. 9.

3. In the first place, the Commission could confirm its earlier decision to deal only with succession of States in respect of treaties and to leave succession of Governments aside.[1] The title of the draft should be amended accordingly.

4. The question of the scope of the draft was more important. In paragraphs 9 to 11 of his report, the Special Rapporteur explained why he believed that the solution of the problems of succession in respect of treaties was to be sought within the framework of the law of treaties rather than of any general law of State succession. With that idea in mind, the Special Rapporteur was submitting a set of articles intended to supplement the codification of the law of treaties. He (Mr. Castrén) did not deny the need to continue that work of codification, and on the whole he could accept the articles proposed. Nevertheless, he thought the Commission should go further and take up the programme it had adopted in 1963. It should study the possibility of carrying out a codification directed towards the progressive development of international law by establishing certain general rules within the framework of the law of succession to treaties.

5. The different theories on the subject could hardly provide guidance for the Commission, let alone solutions for the difficult problems involved. It would therefore be better to rely on practice, diverse though it might be. Treaties were the main, but could not be taken as the only source, because they too varied widely; certain general principles of international law also seemed applicable to succession to treaties.

6. The form of the draft would depend on the nature of the rules to be drawn up; that question should therefore be left open for the moment. The Special Rapporteur had proposed an independent instrument rather than an addendum or protocol to the future convention on the law of treaties, even if the draft was intended merely to supplement that convention.

7. He agreed with the view expressed by the Special Rapporteur on the question of "new" States in paragraph 14 of the report, and on that point he reminded the Commission of his remarks on item 1 (*b*) of the agenda at the 961st meeting.[2] He also agreed with what the Special Rapporteur said in paragraphs 15 and 16 of his report on the value of earlier and later precedents, the importance of the principles of the United Nations Charter and the distinction to be drawn between practice which was an expression simply of policy and practice from which a legal obligation or right could be inferred.

8. With regard to the articles and commentaries, he noted that article 1, paragraph 1, referred to the draft articles on the law of treaties. If, as stated in paragraph 11 of the report, the draft was intended as an autonomous instrument, it would probably be better not to refer to other international instruments, but to reproduce the relevant texts.

9. He too believed that municipal law analogies should be treated with caution in international law, as stated in paragraph (4) of the commentary.

10. Before seeing the texts of all the other articles, he could not say whether the provisions in articles 2 and 3 were necessary.

11. With regard to article 4, both the text itself and paragraph (1) of the commentary showed that the article was simply a reservation. No position was taken on the question of the permanence of boundaries. He personally continued to uphold the very important principle of the stability of boundaries based on a treaty, though he admitted that exceptions were possible in special situations. But those exceptions originated outside the sphere of State succession. In paragraph (2) of the commentary, the Special Rapporteur said that "boundaries established by treaties remain untouched by the mere fact of a succession" and, later on, that the rule "does not touch the application of the principle of self-determination in any given case". In paragraph (3) of the commentary, the Special Rapporteur said that the question of succession to "localised" treaties was controversial; he (Mr. Castrén) agreed that those treaties should be considered later.

12. Mr. REUTER said he wished to take the present opportunity, which was the first he had had, of paying a cordial tribute to the Special Rapporteur, who quite apart from his superior learning, had always displayed the qualities of seriousness, modesty and courtesy in the service of the Commission and had tried to reconcile the views of his colleagues rather than to impose his own.

13. With regard to the substance of the report, he would leave details aside for the moment, though he agreed with Mr. Castrén that the Commission should restrict itself to succession of States and though he knew there would be much to say about article 4 particularly. In his view, the essential point was how the structure of the future draft would fit together the two fundamental topics associated in it: State succession and the law of treaties.

14. The Commission had decided to consider the problems of State succession in respect of treaties separately, mainly, it seemed, in the hope of being able to examine a few articles at the present session; the subject had offered a fairly natural sequel to the matters examined in connexion with the law of treaties. But the opinions expressed by the Special Rapporteur in his report, especially in paragraph 9 and the following paragraphs, and in his oral statement,[3] as well as several of the opening statements by members of the Commission, suggested a desire to consider the subject in the light of the law of treaties: that was a fundamental issue on which the Commission would have to take the decision.

15. He himself was quite willing to accept the Special Rapporteur's choice, but only in regard to method. It was natural to start from what was certain and go on to explore what was less certain; that was the rule of scientific inquiry. The law of treaties offered a sound and convenient basis. In particular, the Commission would find it useful to adopt the terminology and limitations which had already been worked out, and seemed likely to be accepted by the Vienna Conference. Perhaps the Special Rapporteur's choice was only of a methodological and exploratory nature. But he (Mr. Reuter), could not agree to that choice

[1] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, para. 57.

[2] See paras. 2 *et seq.*

[3] See previous meeting, para. 40.

being regarded as final until the Commission had a clearer idea of where its study of the problems of State succession as a whole was going to lead.

16. The Commission was at present inclined to attach great importance to the problems of State succession resulting from decolonization, and that was perfectly legitimate. He had unfortunately been unable to attend the whole of the debate on item 1 (*b*) of the agenda, but would point out that decolonization, as understood by the United Nations, was almost finished. If the Commission concentrated too much on those problems, it might not be laying sound foundations for the future. It was by no means certain that in the next twenty years the problems of State succession would be essentially problems of decolonization in the United Nations sense of the term. Problems of federalism were very likely to arise, while other concepts might perhaps come to the fore, such as human rights or the right of self-determination; perhaps there would be other lines of development. The future could not be foreseen.

17. To be able to take a more definite position at that stage, it would also be necessary to have some idea what contribution the study of State succession would make to the law of treaties. The Special Rapporteur had already pointed out that succession to treaties would raise thorny problems, such as the classification of treaties and the question of reservations. If the Commission could make some sort of subject-index of the major problems of the law of treaties which would appear in a new light as a result of being examined in conjunction with the problems of State succession, that would be a great step forward. He therefore hoped that the other members of the Commission, and particularly the Special Rapporteur, would explain which were the major questions they thought should be dealt with in the succeeding articles of the draft.

18. Mr. ALBÓNICO said he agreed with the Special Rapporteur's decision to concentrate on the topic of State succession rather than succession of States and Governments, and also with his view that the study should not be approached exclusively from the point of view of the "new" State, because of the "risk that the perspective of the effort at codification might become distorted".

19. He could not, however, agree with the view expressed in paragraph 9 of the report that "the solution of the problems of so called 'succession' in respect of treaties is today to be sought within the framework of the law of treaties rather than of any general law of 'succession'". It was a matter of vital importance for all States, both old and new, that the study should be undertaken in connexion with the succession of States, as the Commission itself had agreed in 1963 and 1966, rather than in the context of the law of treaties as recommended by the Special Rapporteur.

20. If the problem were approached from the point of view of the law of treaties, the general principle would be that, subject to certain exceptions which confirmed the rule, a party that consented to be bound by a treaty did so both on its own behalf and on behalf of its successors. In any event, article 25 of the draft convention on the law of treaties laid down the principle that a treaty was binding upon each party in respect of its entire territory.[4]

21. If the problem were approached from the standpoint of succession, however, the emphasis would be on the change which took place when the sovereignty of the predecessor State was replaced by that of the successor State. Since the successor State was a separate legal entity, the rule would be exactly the opposite to that which would apply under the law of treaties: there would be no transfer of obligations and rights to a State which had not been a party to the negotiation, signature or ratification of the treaty. There were only three exceptions to that rule: first, treaties affecting the status of the territory transferred, such as those relating to boundaries, rivers and means of communication; secondly, treaty provisions which had become binding as recognized principles of customary international law, such as those embodied in the Hague Conventions on the Laws and Customs of War; and thirdly, multilateral treaties which laid down rules for a group of States and which were binding upon the successors of any member of the group.

22. In paragraph (1) of the commentary on article 69 of its final draft on the law of treaties,[5] the Commission had stated that "for the reasons explained in paragraphs 29-31 of the Introduction to the present chapter of this Report" it had decided not to include any provisions relating to "the succession of States with respect to treaties". Paragraph 30 of the introduction to that draft [6] quoted a passage from the 1963 report in which the Commission had said that it "did not think that any useful provisions could be formulated on this question without taking into account the problem of the succession of States to treaty rights and obligations". The Commission had thus always clearly intended to consider the topic of State succession in respect of treaties by reference to succession of States.

23. It was particularly important that the Commission should take a position on the preliminary issue of its approach to the whole subject because, depending on its choice, diametrically opposite conclusions would follow. If the problems of item 1 (*a*) were approached from the treaty standpoint, there would be a broad measure of transmission of rights and obligations; if they were regarded as problems of State succession, there was no obligation under international law, except in the case of the three exceptions he had mentioned and those could be restricted if the vital and permanent interests of a State so required.

24. Mr. KEARNEY said he wished to raise the question of the form the draft was to take, although that question was usually left until a later stage. His reason for doing so was that there appeared to be an inclination to frame the provisions on State succession in respect of treaties in a manner suited to a draft convention. He had serious doubts about the advisability of that approach, partly because of the difficulties which would arise in any endeavour to make a convention of that type effective.

[4] A/CONF.39/C.1/L.370.

[5] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 267.

[6] *Ibid.*, p. 177, para. 30.

25. The vast majority of former colonies and protectorates were now independent States. Their succession or non-succession to treaties had now taken place, or was taking place, in accordance with certain formulas which had either been agreed by the parties concerned or been unilaterally adopted by the successor States. Those formulas fell into some half-dozen categories, ranging from the universal acceptance of all treaties to the "clean slate" principle under which there was no succession whatsoever. As a result, succession had taken place in a varying manner with respect to varying types of treaties. If the Commission were now to prepare a draft convention, the question was bound to arise whether the draft articles would apply to the wide range of positions already taken by successor States.

26. The Commission could, of course, work on the assumption that its draft articles would not have any retrospective effect. But if the intention was to prepare a draft convention that was applicable only to the future, the problem would arise how it was to be enforced on the new States or merged States of the future. It was doubtful whether a new State which came into existence after the adoption of such a convention would be bound by the rules embodied in it, whether its predecessor State was a party to the convention or not. And the Commission could not embody in the draft a mandatory requirement that new States came into existence subject to the rules included in the draft; the experience of the past twenty years clearly showed that there was no basis in State practice for any such mandatory requirement.

27. Similar problems would arise in the event of a merger or dissolution of States. In every case, a situation would arise in which the predecessor State was bound by the rules embodied in the draft articles, but the successor State was not. There were, it was true, a few cases in which an obligation was imposed upon a State by international law in such circumstances. Those cases, however, related to humanitarian conventions such as that on the treatment of prisoners of war: a State was bound to abide by its obligations under those conventions, regardless of the position taken by its enemy. The matter of succession could hardly be regarded as sufficiently important to the community of nations to justify such a unilateral obligation being imposed on one of the States parties to the transaction of succession, namely, the predecessor State.

28. Under draft article 4, for example, on boundaries resulting from treaties, great complications would arise from a situation in which the predecessor State or States remained bound by the boundary treaty, while a successor State could disregard it. To take the case of two States which renounced by treaty their respective claims to a particular territory, and assuming that both States had signed the future convention on succession of States in respect of treaties, if, later, a portion of one of those States broke away and established itself as a new State, it might assert that it was not bound either by the convention on succession or by the boundary treaty between the original two States, and then lay claim to the territory to which its predecessor State had renounced all claim.

29. Another serious difficulty would arise if any attempt was made to formulate precise rules in the matter. The Commission would have to take into account the experience of the new States, in conformity with the General Assembly resolutions; but the practice of those States in the last twenty years had been so varied that it would be extremely difficult to distil any precise rules from it. Even the States which had adopted the "clean slate" position had decided to succeed to a number of treaties, and those which had adopted the principle of universal succession had made exceptions to its application.

30. In between those two extreme positions, a great many new States could be classified in a variety of "pick and choose" categories. Some had adopted the Nyerere formula of 1961 and laid down a specified period for the review of all outstanding treaties, which in most cases automatically lapsed if not taken up by the new State before the expiry of that period. Other new States had adopted the Zambia formula, which assumed the continued application of many pre-independence treaties, but laid down an unlimited period of review to determine which had lapsed. Yet other new States had not made any statements, but had in practice adopted those treaties which they had found suited to their needs.

31. Amazing as it might seem, that wide variety of approaches had, on the whole, worked rather well. Succession had taken place on a pragmatic basis and the other States concerned had shown a considerable regard for the wishes of the new States. There had not been many disputes regarding the validity of the approaches adopted by the new States. The legal advisers of the foreign ministries of the other States had not shown much inclination to engage in such disputes, which had been largely confined to academic circles; indeed, the foreign ministries had been very co-operative and accommodating.

32. In the circumstances, he doubted the wisdom of replacing those satisfactory "give-and-take" policies by a system of treaty rules. The best course would seem to be to preserve a flexible approach and lay down certain principles in non-treaty form, by a resolution of the General Assembly or some other appropriate means.

33. The method of preparing a draft convention had proved to be by far the best way of establishing the rules of international law on a universal basis. It was not, however, suitable in the present instance, because of the problem of formulating rules covering a very wide variety of practice; and there was also the crucial problem of determining how the new rules would be made effective. The Commission should therefore exercise great caution before deciding on the form the draft should take.

34. Mr. CASTAÑEDA said he would follow the example set by Sir Humphrey Waldock in the discussion on item 1 (*b*) of the agenda, and not try to reach final conclusions on questions of substance at once, in case he might have to change his mind later.

35. The Special Rapporteur thought that the basic question was whether succession in respect of treaties was part of the law of treaties or whether it belonged essentially to the general law of State succession; he had decided in favour of the first alternative, his main reason being that the practice of succession was so diverse that no fundamental principle emerged from it which could provide a logical and specific solution for each individual

case. And the reason for that was that no one knew to what extent international law recognized succession as a specific legal institution.

36. Hence it was not simply a question of method. Ultimately, the correct approach to succession to treaties would depend on whether the legal phenomena which occurred in connexion with treaties as a result of a succession were governed juridically by the general rules of the law of treaties, or whether some specific succession rules were needed.

37. The Commission was not yet far enough into the subject to know whether any rules could be deduced. What took place at the time of succession was at least governed by a principle, but he was not sure whether that principle could be explained solely by the law of treaties. In all cases of succession to treaties, particularly to multilateral treaties, regardless of whether the succession took place by dismemberment or by decolonization, the provisions of the instruments considered and the facts of the situation clearly showed that a right of succession was created in favour of the successor State. That right could be established by a devolution treaty or a devolution clause in a broader treaty, or by a unilateral declaration by the successor State, or when the question of succession to treaties was regulated by the law of the predecessor State or that of the successor State.

38. In all such cases there was clearly a right to succeed, but not an obligation. It was the practice of the International Labour Organisation that contained what most closely resembled an obligation for the successor State; for that organization, when admitting a new State, asked it to recognize that it continued to be bound by the international labour conventions in force in its territory before independence. That was really a kind of pressure on States, rather similar to what Mr. Ago had spoken of at the 959th meeting [7] in connexion with the ratification of conventions.

39. Apart from that special case, State succession seemed to create a right of the successor State to succeed to the multilateral treaties which the predecessor State had applied in the territory before independence. Whether that constituted a rule or a principle, or merely a description of the facts, the problem still arose whether it was explained solely by the rules of the law of treaties.

40. The successor State had been *res inter alios acta,* or more correctly, had not even been in existence when the treaty had been concluded. Yet it acquired a right, not to accede *ex novo* to treaties, but to the devolution of the rights and obligations under treaties concluded before its existence. He did not see how the law of treaties could explain the origin of such a right or of other complex phenomena which occurred in connexion with succession to multilateral treaties, and even more to bilateral treaties.

41. It might perhaps be necessary to postulate a general law of succession. If so, it might not be justified to consider succession in respect of treaties within the framework of the law of treaties, rather than of the general law of State succession. He was far from certain about that point, and would confine himself to putting the question to the Special Rapporteur.

42. Mr. TAMMES said that succession in respect of treaties was marked by a general tendency to continuity of international rights and duties, unlike succession in other matters, which meant the dissolution of a legal order and its replacement by a more equitable division of power and resources.

43. In view of that difference and of the ambiguity of the expression "State succession", the Special Rapporteur had acted wisely in limiting the use of the term "succession" to the replacement of one State by another "in the possession of the competence to conclude treaties with respect to a given territory". It was appropriate to refer to that competence, and not to sovereignty, because it was not uncommon for a temporary régime, such as the administrative jurisdiction of an international organization, to be replaced by the permanent sovereignty of a State or for such sovereignty to be temporarily replaced by an international régime. The characteristic phenomenon of succession with respect to treaties was the transfer of the treaty-making power, quite apart from questions of sovereignty.

44. No distinction had been made in that connexion between succession of States and succession of Governments, apparently in accordance with the practice of what had become known as "evolutionary independence", as opposed to "revolutionary independence".

45. Where independence had been attained by evolution, the identity of the local government in its treaty-making capacity had existed before independence. The territory and the government had remained the same throughout the whole process, and the independent States had continued to enjoy the same international rights and to be under the same obligations as before independence. It was recognized that the position was thenceforward preserved by direct links with other countries instead of through the medium of the metropolitan country, but an exception was admitted for peace treaties and such treaties as the Briand-Kellogg Pact, for which it was not easy to distinguish between metropolitan and colonial territories. Territorial application clauses had been introduced into treaties in order to secure the participation of dependent territories in treaty-making rather than to notify the contracting parties of the exact extent of the territorial application of a treaty.

46. In the case of revolutionary secession, on the other hand, the new State began a life of its own without that long preparatory period of autonomy in international relations. It was therefore logical for a tendency to emerge in favour of the "clean slate" approach. However, that approach was tempered by the political and social pressures from depositaries and by the devolution agreements directed at the continuation of treaties from which the new States had as much to gain as to lose. The practice of successor States had been to resort to accession in the case of multilateral treaties; they had also tended to maintain such bilateral instruments as extradition treaties, bilateral treaties not being open to accession. There was even a proposal pending before the Vienna Conference which would give all States the right to participate in general multilateral treaties.[8]

[7] See para. 62 *et seq.*

47. There was also a general tendency, in cases of merger, for the existing rights and duties to remain intact and to be taken over by the newly consolidated entity.

48. The broad picture was thus an encouraging one, and it was possible to subscribe to the estimate by a writer that "The deposit of declarations of succession tends to occur in waves", but that "Clearly the pressure in the direction of continuity is mounting, and it is possible to predict that within ten years the picture will be one of virtually complete continuity, achieved either by declarations of succession or by accessions. Much depends upon the guidance offered by the United Nations and other international organizations, and the extent to which they maintain the momentum."[9]

49. One point, however, gave cause for hesitation and that was the problem of boundaries resulting from treaties, which the Special Rapporteur had reserved under his proposed article 4.

50. The Special Rapporteur on item 1 (*b*) of the agenda had pointed out in his report (A/CN.4/204, para. 122) that both the United Nations Charter and the Charter of the Organization of African Unity[10] proclaimed the principle of respect for the territorial integrity of States. Nevertheless, personal and executory relationships often went together with the delimitation of a factual and legal situation, and a successor State often did not wish to inherit certain burdens without careful consideration. It was worth noting that article 59 of the draft convention on the law of treaties, in the form in which it had been approved by the Committee of the Whole of the Vienna Conference,[11] stated in paragraph 2 (*a*) that "A fundamental change of circumstances may not be invoked ... as a ground for terminating or withdrawing from a treaty establishing a boundary".

51. Mr. USHAKOV said that, since the discussion was still general and not on the articles themselves, he would confine himself to the three main questions raised by the Special Rapporteur in the introduction to his report (A/CN.4/202).

52. Many members of the Commission had taken the view that the question of succession of Governments should be left aside for the moment. He shared that view, which was in conformity with the recommendation made by the Sub-Committee on the Succession of States and Governments in 1963.[12]

53. It had also been asked whether succession to treaties came within the framework of the law of treaties or within that of some general law of succession. Either approach would do, merely for teaching purposes; but for drawing up a set of draft articles, it was questionable whether the general rules of the law of treaties could be taken as a basis. If they could, the draft articles would be unnecessary, since it would be sufficient to refer to the convention being drafted by the Vienna Conference. Personally, he thought that succession to treaties had its specific problems and should be dealth with on the basis of the particular needs of State succession.

54. The question could be approached from the angle of the various possible origins of succession. In the case of cession of a portion of a territory, what was involved was not succession to treaties in general, but succession to certain rights and obligations resulting from certain treaties and concerning that portion of territory. When a new State was born, the question took a different form according to whether the new State had been created by a merger of States, the division of a State or decolonization. In cases of merger, there was nearly always full successsion to all the treaties which had bound the predecessor States to third States. When a State was divided, the rights and duties ran with the territory of which each of the new States had inherited a part. When succession resulted from decolonization, the question was whether the new State was bound by the treaties concluded by the former metropolitan Power. As Mr. Castañeda had rightly pointed out, although the new State had, in fact, the right to succeed to treaties, it was under no obligation to do so. Such should be the basis of the subject of succession to treaties, which ought therefore to be studied within the general framework of State succession and not within that of the law of treaties.

55. Paragraphs 13 and 14 of the report dealt with problems concerning new States. In his view, there was no doubt that States created by decolonization had specific problems which ought to be taken into consideration. There again, those problems should be examined with reference to the origin of the succession.

56. Mr. BARTOŠ said that the first question which arose was whether the succession problems of newly independent States called for special rules or not. There were certain rules now universally recognized both in practice and in theory, and the Commission had to decide whether those rules alone should be taken into consideration in solving the problems of State succession resulting from decolonization.

57. The rules of international law on State succession in modern times must first satisfy the higher norms of *jus cogens* relating to decolonization, because those were the fundamental laws of the international community. The majority of the Commission was known to hold the view that the international norms of *jus cogens* applied even to contractual relationships anterior to the establishment of the *jus cogens*.

58. A new State could not call itself truly emancipated if it had to remain bound by undertakings entered into before its independence in the interest of the colonial Power. It was therefore necessary to distinguish between treaties which were to some extent colonial in character and those which were not. He did not support the *tabula rasa* principle, but he thought that treaties of a colonial character should be subject to the principle of *rebus sic stantibus*, since decolonization constituted a fundamental change of circumstances and called for a corresponding adaptation.

59. With regard to acquired rights, he was not opposed to the application of the general rules of international

[8] A/CONF.39/C.1/L.370, proposed new article 5 *bis*.

[9] See D. P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. II, p. 229.

[10] See United Nations, *Treaty Series*, vol. 479, p. 70.

[11] A/CONF.39/C.1/L.370/Add.6.

[12] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 261, para. 9.

law, provided they were adapted to the needs of contemporary law. Such adaptation was not contrary to the basic rules of the law of nations, of which decolonization was today one of the main principles.

60. With regard to article 4 of the draft, it should be noted that the frontiers of States created by decolonization were often former administrative boundaries fixed by the old colonial Power, which might sometimes have altered them only a few years before decolonization. The question of the moment to be taken as a basis for determining the final boundary was more political than legal. He would certainly make every reservation on the existence of any right of the colonial Power in regard to the territory of the former colony, particularly as to the fixing of boundaries. The system of the Treaty of Versailles had recognized the existence of disputed zones whose inhabitants had been able to exercise an option by plebiscite. That might only have been a palliative, but it was an improvement on the previous system, which was set out and accepted in article 4 of the draft.

61. The principle stated in article 4 should not constitute an absolute rule to be applied without taking account of various political and legal factors and without considering the legitimate aspirations and wishes of those concerned in accordance with the United Nations Charter.

The meeting rose at 12.55 p.m.

967th MEETING

Wednesday, 3 July 1968, at 10 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, 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 Treaties

(A/CN.4/200 and Add.1-2; A/CN.4/202)

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

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's report on succession of States and Governments in respect of treaties (A/CN.4/202).

2. Mr. TSURUOKA said that the purpose of the Commission's work was to provide the international community with a legal instrument that would ensure adequate protection for the lawful interests not only of the parties concerned, but also of third States and of the international community as a whole. That meant that the instrument would be valuable only if it was practical and easy to handle.

3. As to the scope of the study, it seemed that so far consideration had been confined to the question what the rights and obligations of a new State would be with respect to existing treaties. It might be worthwhile to extend the study to cover the process of State succession, and to specify, in particular, what political entity was qualified to succeed to a State and when and how succession took place.

4. Mr. Castañeda's comment that a State had a right, but not an obligation, to succeed to existing treaties deserved careful examination. It might be asked whether that was really a legal rule yet, whether it applied to all bilateral and multilateral treaties of whatever kind, and whether certain cases ought not to be reserved. For such a categorical statement would mean that the other parties had no say in the matter and were bound to agree to the accession of new States to treaties, even if their accession was accompanied by reservations and conditions. That, it seemed to him, was going too far.

5. As to what form the Commission's work should take, it was too early to reach a final decision. Mr. Kearney had pointed out that a convention would have serious disadvantages, because the new State would not be a party to it and would not be bound by its provisions, whereas the predecessor State would be bound, so that the positions of the two States or political entities concerned would be out of balance. There was already a whole network of bilateral and multilateral treaties in force, and Mr. Kearney's point applied just as much to those treaties as to a future convention on succession to treaties. The question therefore arose whether the subject of succession to treaties had a special character which justified special treatment.

6. Mr. ROSENNE said that the Special Rapporteur's report provided a valuable basis for a preliminary discussion.

7. The topic of succession in respect of treaties had some elements in common with the other aspects of succession, which the Commission had recently discussed, but it also had some special features. It was not inherently a problem of decolonization, as was the topic of succession in matters other than treaties, though the urgency of the problem, as distinct from the problem itself, derived exclusively from the process of decolonization, and the political and institutional framework in which decolonization was taking place provided the only sure ground on which the Commission could situate its work.

8. His study of what had occurred during the past twenty years had confirmed his view that the concept of succession was inadmissible if it implied some automatic process brought about by operation of law, which was independent of the consent of the parties. For that reason alone—because of its implication that something happened automatically—he would like the term "succession" to be jettisoned.

9. The Commission's decision to appoint two Special Rapporteurs showed that the subject should be treated in its own right, and the choice of Sir Humphrey Waldock showed that the Commission believed that the starting