Document:-

A/CN.4/SR.1155

Summary record of the 1155th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

31. The CHAIRMAN said that, while he fully appreciated Mr. Ushakov's concern that draft articles should be available in advance of the session, he feared that that would rarely be the case, because the time of special rapporteurs was generally in such demand from other quarters.

32. Sir Humphrey WALDOCK said that he too appreciated Mr. Ushakov's concern, but the enormous mass of material behind each of the reports made it very difficult to produce them on time.

33. He hoped that the Commission would be able to concentrate on the more general aspects of the topic and then go on to consider special cases. The main problem, of course, was what to do with special categories of dependent States, though when one looked at the bulk of the material available for each of those categories, they all seemed to be dealt with in the same way.

34. He had been somewhat troubled by some of the modern views taken of the decolonization process, in particular, that of O'Connell, according to which that process was a gradual development towards independence, accompanied by a growing economy and an increase in personality, so that the case might be viewed rather as a change of government than a change of State. He himself did not hold that view, but a number of perplexing problems did arise; for example, when a colonial territory became an associated member of an international organization before attaining independence, and in the case of federations of new States.

35. Mr. AGO, referring to Mr. Ushakov's comments, said that it would certainly be desirable for the Commission to have only complete drafts put before it, but experience had shown that the wider and more complex a topic, the harder it was for special rapporteurs to submit the whole of their work at once. Hence it was not surprising that the Commission had once again to consider a draft piecemeal.

36. Mr. USTOR said that sub-paragraph (*e*) of article 1 in the Special Rapporteur's third report (A/CN.4/224) defined a "new State" very briefly as "a succession where a territory which previously formed part of an existing State has become an independent State". In his opinion, that definition needed completion along the lines of paragraph 9 of the introduction to the report, which read: "The term 'new State' as used in the present articles means a succession where a territory which previously formed part of an existing State has become an independent State. It thus covers a State formed either through the secession of part of the metropolitan territory of an existing State or through the secession or emergence to independence of a colony...".

37. A "new State" might be territory which had previously been part of another State, as in the case of Bangladesh, which had formerly been part of Pakistan. It should be made clear in the definition, therefore, that there need not have been any dissolution or dismemberment of the original State.

38. Sir Humphrey WALDOCK said he would prefer to discuss that point when the Commission came to the question of the dissolution and dismemberment of States. The question was mainly one of terminology; the term "new State" might perhaps be replaced by "newly independent State", for example, although that was a rather heavy phrase from a drafting point of view.

39. Mr. BARTOŠ pointed out that when the independence of India and the creation of Pakistan had been proclaimed,[11] it had been stipulated that India should be regarded as the old State and Pakistan as the new State.

40. That distinction had also been made by the Sixth Committee, which had decided that India retained its membership in the United Nations, whereas Pakistan would have to submit an application for admission. It had also been established that Pakistan was not bound by treaties previously concluded by India. Thus the organs of the United Nations had considered that that delicate question should be dealt with separately in the case of Pakistan, whereas for India it was settled *ipso facto* by the treaty between the United Kindgom and India.

The meeting rose at 12.25 p.m.

[11] See *British and Foreign State Papers*, vol. 147, p. 158.

1155th MEETING

Wednesday, 10 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Casteñeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

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

(continued)

GENERAL DEBATE

1. The CHAIRMAN invited the Commission to begin its general debate on the draft articles prepared by the Special Rapporteur.

2. Mr. TABIBI, after thanking the Special Rapporteur for his lucid and scientific presentation of the topic, said that he could agree with his approach except in the case of one or two articles.

3. He himself had been engaged in the study of State succession since India's accession to independence in 1947, which had affected his own country's treaty relations with the countries of the sub-continent and with the United Kingdom. As a member of the former Sub-Committee on the Succession of States and Governments,

as well as of the Commission itself, he had come to question, to an increasing extent, whether it was either necessary or useful to survey the whole field of State succession in respect of treaties and to establish rules on the model of the Vienna Convention on the Law of Treaties. In his opinion, that would involve the risk of establishing régimes analogous to internal laws, which might only create difficulties instead of solving the problems arising out of succession.

4. He believed that the Commission would be better advised to stay on safer ground and to concentrate its attention on the instructions contained in General Assembly resolutions 1765 (XVII) of 1962 and 1902 (XVIII) of 1963. That would mean attempting to establish rules on succession in respect of treaties based on the practice of the newly independent States. After all, it was only during the United Nations era that any more or less uniform pattern was to be found in the practice, particularly that relating to multilateral treaties.

5. It would be preferable to concentrate on the Special Rapporteur's third, fourth and fifth reports rather than to deal with certain rules contained in his second report (A/CN.4/214),[1] such as article 2 (Area of territory passing from one State to another) and article 3 (Agreements for the devolution of treaty obligations or rights upon a succession) and even, to a certain extent, article 4 (Unilateral declaration by a successor State). He based that view mainly on the fact that in 1963 the Sub-Committee on the Succession of States and Governments, in paragraph 6 of its report, had stressed the "need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II" and recommended that "problems concerning new States should therefore be given special attention" and that "the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter".[2] That had also been the view taken by the General Assembly.

6. The subject of State succession in respect of treaties was difficult and complex; different régimes covered different types of treaty and the practice of States had varied, thereby leading to the establishment of conflicting rules. In particular, the Commission should avoid trying to establish régimes founded on colonial practice, where the basic elements of succession, namely treaties, had in most cases been unequal and illegal, owing to the domination of colonial interests.

7. In his introductory statement, the Special Rapporteur had expressed the view that the solution to the problems of succession in respect of treaties should be sought within the framework of the law of treaties, of which he considered it to be a particular aspect. But the recommendations of the Sub-Committee, adopted by the Commission in 1963, had expressly stated that "succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties".[3]

8. In adopting the draft of the historic Vienna Convention on the Law of Treaties,[4] the Commission had adopted a set of useful rules; but it should be borne in mind that in Part V of that Convention there was a whole series of safeguards and exceptions to those rules such as articles 48 (Error), 49 (Fraud), 50 (Corruption of a representative of a State), 51 (Coercion of a representative of a State), 52 (Coercion of a State by the threat or use of force), 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)), 61 (Supervening impossibility of performance), 62 (Fundamental change of circumstances) and many others. So if the Commission was to look for solutions to the problems of succession within the framework of the Vienna Convention, the question arose whether it should apply the same safeguards and rules of invalidity as were included in that Convention. It would seem that if the rules on Succession were to be based on the Vienna Convention, the Commission would have to adopt what would in effect be another chapter of that Convention and ignore any independent rules on State succession which might exist.

9. With regard to article 1 (Use of terms) in the Special Rapporteur's second report, he thought it could be used provisionally during the discussion, but he would prefer to reserve his comments until the Commission had reviewed the draft articles as a whole.

10. As to article 2 (Area of territory passing from one State to another), the question of boundaries was a highly explosive one in all parts of the world and could not be settled by proposing rules on State succession.

11. When the Special Rapporteur's first and second reports had been before the Sixth Committee in 1968; the Committee had included the following passage in its report to the General Assembly: "On the other hand, it was argued that boundary treaties imposed by colonial Powers against the wishes of the people of subject territories should be regarded as contrary to the rule *pacta sunt servanda*, to the fundamental principle of self-determination, which was a principle of *jus cogens*, and to General Assembly resolutions 1514 (XV) and 1654 (XVI). ... It was believed that since boundary questions were highly political issues, the Commission should refrain from making legal pronouncements when the particular situations involved fell within the competence of other organs of the United Nations."[5] It had been the view of many delegates during the twenty-third and twenty-fourth sessions of the General Assembly that the Commission should either omit article 2 altogether, because of its close connexions with localized and territorial treaties or leave it to be considered with that subject.

---

[1] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 45.

[2] Op. cit., *1963*, vol. II, p. 261.

[3] *Ibid.*, para. 10.

[4] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[5] See *Official Records of the General Assembly, Twenty-third Session, Annexes*, vol. II, agenda item 84, document A/7370, para. 58.

12. He also had reservations on article 3 (Agreements for the devolution of treaty obligations or rights upon a succession) which dealt with an institution favoured mainly by the United Kingdom. Devolution agreements were, in fact, often resorted to by colonial Powers upon the accession to independence of a former colony, in order to obtain concessions contrary to the principle of self-determination and in violation of the interests of third States. Moreover, while multilateral devolution treaties showed a certain uniformity, bilateral devolution treaties were far from uniform, and the practice with respect to them varied considerably.

13. Mr. AGO said that he approved of the approach chosen by the Special Rapporteur for dealing with the topic, namely, as he had stated in his first report (A/CN.4/202),[6] that the solution to the problems of so-called "succession" in respect of treaties was to be sought within the framework of the law of treaties rather than of any general law of "succession". He could not but endorse the argument that that choice was justified not only by the practice of States, but also by the doubts which might be felt as to whether "succession" of States even existed as an institution.

14. The Commission might eventually amend the title of the draft because strictly speaking it did not deal with succession of States, but rather with a question of the law of treaties, namely, what became of a treaty when there was a change in sovereignty over a territory, or when one subject of international law, which had concluded a treaty, or participated in its conclusion, or subsequently acceded to it, was replaced by another subject of international law. The difficulty arose from the fact that that change in the material situation might be due to all sorts of very different events: association, as in the formation of the German Empire and the Italian State; dissociation, of which the Habsburg Empire and the British Empire were examples; separation, as in the formation of a State from a former province or colony; or simply the transfer of a territory of one existing State to another existing State. In that multiplicity of situations it was necessary to take account of the uniform elements —those which were always the same—and the non-uniform elements—those which were not the same in every situation. Different parts of the draft could be devoted to them.

15. In its study of the topic dealt with by Sir Humphrey Waldock and of that entrusted to Mr. Bedjaoui, the Commission should be careful to avoid transferring to international law theories, viewpoints or criteria of internal law. In internal law the question of succession of succession was regulated by legislation which provided, under certain conditions, for the automatic transfer of certain rights and certain obligations from one subject to another. Did the same situation exist between two States in international law? An affirmative answer must probably be given in the case of treaties regulating the situation of certain specific areas, such as the treaties governing the status of the Free Zones around Geneva originally concluded between the Republic of Geneva and the Kingdom of Sardinia, the effects of which had subsequently been transferred to France.

16. It was doubtful whether there were any other comparable examples in international law. In any case one could not speak of a general rule of customary law providing for the transfer of international treaty obligations from one State to another. And that held even more strongly for succession in respect of matters other than treaties. Even in that case, what was sometimes described as a problem of succession was really only a problem of the automatic application of the general rules of customary law to every new State. In fact, on closer inspection, what the Commission was called upon to examine, in certain cases, was the content of certain customary rules, in particular those relating to the treatment of aliens, and their application in various *de facto* conditions. But that was not, strictly speaking, a problem of succession, in other words, of the transmission of rights and obligations from one subject of international law to another.

17. One of the basic difficulties of the topic being dealt with by the Special Rapporteur was to decide what a new State was. The first question that arose was whether there was any great difference in situation as between a new State and any other State. The second question was when a new State existed. For example, it was still being argued whether the Italian State had replaced the Kingdom of Sardinia or merely continued it, and, if so, what was the situation in regard to treaties.

18. He approved of the Special Rapporteur's reservation concerning the law of international organizations. There might be a provision in the constituent instrument of an organization dealing with the case of succession of States which went beyond a mere customary rule. The practices and rules established by each international organization ought to be respected.

19. He also approved of the Special Rapporteur's attitude to devolution agreements. Rights and obligations might result from such agreements for the two parties concerned, but not for third States. The new State might be required to adopt a certain attitude to the former metropolitan State in regard to treaties concluded by it, but third States could not require it to do so. The relationship which came into being between the former metropolitan State and the new State was a bilateral relationship.

20. With regard to unilateral declaration, it was true that there was a basic difference between bilateral and multilateral treaties, as the Special Rapporteur had stated in his second report. In the case of a bilateral treaty, and probably in that of some restricted multilateral treaties, a unilateral declaration was equivalent only to an offer, whereas in the case of general multilateral treaties a sort of offer on the part of former States was presumed to exist in the treaty itself, and the unilateral declaration then constituted a consent, the effect of which was to establish agreement.

21. He approved of the lines on which the Special Rapporteur had decided to deal with the topic and was ready to consider his draft article by article. As he had said before, he considered that it dealt not so much

[6] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 89, para. 9.

with succession in respect of treaties as with certain particular aspects of the law of treaties relating to changes in sovereignty over a particular territory.

22. Mr. REUTER said that he fully approved of the method chosen by the Special Rapporteur. In point of fact, enough arguments could be found in international practice to justify any approach, and the Special Rapporteur had been right to take the law of treaties as the starting point. He had also been right to start from the hypothesis of the new State, which was the simplest and best known.

23. With regard to the substance, there were two principles to be considered: the personality of the State and the absence of effect of treaties with respect to third parties. It was not surprising to find in the articles precisely what had been adopted as a hypothesis, namely, the "clean slate" solution. As Mr. Ago had so rightly said, there was no succession of States with respect to treaties. It was a solution which, for the great majority of new States, satisfied political aspirations, and it took into account the fact that, in matters of succession, everyone still had decolonization in mind. The articles drafted by the Special Rapporteur satisfied the aspirations to decolonization, since they amounted to saying that every new State was born free, without obligations. He approved of the Special Rapporteur's approach in that respect too.

24. There were, however, other difficulties, especially that of the effects of treaties with respect to third parties. When the Commission had considered the draft articles on the law of treaties, it had, so to speak, swept the difficulty aside by proclaiming, without much discussion, the principle of no effects with respect to third parties—no doubt quite rightly since the Vienna Conference has subsequently confirmed that principle. But although new States wished to be born free, they nonetheless found themselves in a *de facto* situation governed by treaties —that of the frontiers within which they were born—and the question arose how that situation should be made mandatory and what exceptions should be provided for. The problem of colonial frontiers was a vast political problem, a real problem which it was no use trying to avoid, even if its study were to lead to the conclusion that it went beyond the framework of the topic with which the Commission was dealing, that it should be dealt with in another context and that, consequently, all possible solutions should be left open.

25. The same applied to certain serious difficulties mentioned by other speakers. Although the Special Rapporteur's article 2, on the "moving treaty frontiers" rule was, quite rightly, based on the personality of the State, it raised a problem which went beyond the law of treaties and even beyond the bounds of legal abstraction—that of the social, sociological, economic and financial realities to be taken into consideration in all changes of States. Of course, those realities were relegated to the background in the problem before the Commission, but there was no ignoring the fact that when Austria had refused, in 1919, to regard itself as the successor to the Habsburg Empire, it had done so for essentially economic and financial reasons.

26. Incidentally, he noted that the Commission was deciding, for the second time, to reserve the "relevant rules" of international organizations. He would have occasion later to ask the Commission to remember that constant position it had taken, which set a kind of boundary to its work of codification before the specific phenomenon, not of international organizations in general, but of each international organization in particular.

27. Mr. QUENTIN-BAXTER, after expressing his appreciation of the Special Rapporteur's excellent reports, said that he too had had certain difficulties when considering the elusive subject of State succession in respect of treaties. As a lawyer accustomed to tracing the thread of his own country's treaty inheritance, he had been struck by the bleakness of the rule propounded in article 13 of the Special Rapporteur's fourth report (A/CN.4/249). In the area of multilateral treaties, the *tabula rasa* principle was not a deprivation for a new State, which could at will establish its right of succession. In the area of bilateral treaties, however, the *tabula rasa* principle, when coupled with the principle of equality between the parties, could denude a new State of all the useful treaty relationships already reflected in its law and practice. Under article 13, the rule of consent negated any inheritance by a transmission to a new State of rights or obligations under a bilateral treaty concluded by its predecessor.

28. That idea was so much at variance with the thinking of administrators that it was necessary to consider the question of the relationship between rules of law and canons of administrative practice. As a practical matter, of course, there could be no doubt that no bilateral treaty could exist without the will of the parties; and, since most bilateral treaties could be denounced at short notice, it would be idle for either party to attempt to enforce a succession to a bilateral treaty. There was, however, a real question whether those practical limitations justified a negative rule of law, or whether the volume of practice favouring continuity should be supported by a legal presumption in favour of continuity.

29. There was no other area of relations between states in which practice was more tolerant, or in which there was a greater need for what the Special Rapporteur had described as a "margin of appreciation". After all behind the question of the revival of bilateral treaties there always stood the shadow of the doctrine of *rebus sic stantibus*. Some years ago, his own Government had invoked an extradition agreement which had been concluded between the United Kingdom and the United States in 1842, or only two years after the founding of the colony of New Zealand. The United States would have been entirely justified in suggesting that, when that treaty had been concluded, it had not been contemplated by the parties that there would ever be a request for extradition by the Government of New Zealand; or, on a more, technical level, the United States could have pointed out that such a request would have to be signed and sealed by a Minister of State in the United Kingdom. In actual practice, however, the fact of State succession was not questioned in such cases and no obstacles were placed in the way of an accomodation between the parties.

30. The legal question, however, was whether that practice, which seemed to be in accordance with the behaviour of States, was based on the belief that there was no presumption of transmission or inheritance in the case of a new State. He did not think that that was the case. In his opinion the new State, as a successor, did inherit something. His own Government, for example, continued to apply a number of bilateral treaties which had been concluded over a century ago, without taking the initiative to consult the other parties as to whether they considered them still in force.

31. Of course, the survival of a bilateral treaty relationship could often be inferred from the conduct of the parties in maintaining a means of implementation under their domestic laws; but even that kind of test might be imperilled by an excessive stress on the concept of novation. For example, in the case of extradition treaties, States had usually acted with special caution. In both the United Kingdom and New Zealand, any such treaty had to be embodied in domestic law as a condition of its enforcement, and it must appear that the treaty had been in force at the moment when its provisions were invoked. It would not be enough to show that, following a succession of States, the treaty *might* still be in force, or that it was being applied *as* if it were in force.

32. The general dilemma was well illustrated by the two aspects of devolution agreements. They had been developed—primarily by the United Kingdom to systematise the practice of the older British dominions on their attainment of separate statehood—to help newly independent States to claim their just inheritance. Understandably, devolution agreements had fallen into disfavour, because they could not bind third parties and because they appeared to fetter the freedom of action of the newly independent State. The still more recent practice of provisional application could be viewed as a makeshift expedient, forced upon new States by the need to reconcile the assertion of their sovereign independence with their desire to claim succession to certain treaty rights and obligations. The object of codification should be to provide a rule which would eliminate this false conflict, and would give new States a sense of unhurried security in reviewing their party inheritance.

33. In any event, it should be stressed that the rule of *tabula rasa* contained in article 6 (A/CN.4/224) might be judged against the background of the commentary to article 13, as well as that to article 6 itself. Once the rule in article 6 was fixed, the rule in article 13 and some other provisions of the draft articles would follow with logical inevitability. Similarly, one might predict that the commentaries to articles still to come would also have a bearing on article 6. He agreed, therefore, with those speakers who thought that it was necessary to see the end of the draft before fully appreciating its beginning.

34. Mr. CASTAÑEDA, referring to article 7, said he did not think that the right of a new State to notify its succession in respect of multilateral treaties could be said to have its legal source in the law of treaties, since such a right might be said to prejudice *res inter alios actae*. In practice, that right had been developed on the basis of legal custom, and its origins must be sought in the law of succession as derived from the practice of States, not in the law of treaties.

35. The CHAIRMAN pointed out that the Special Rapporteur's commentary on article 18 (Former protected States, trusteeships and other dependencies) (A/CN.4/256) opened with the following passage: "A preliminary question may arise as to whether a codification of the law of succession of States in the 1970s should include any provisions regarding dependent territories. A treaty setting out the rules of succession in respect of treaties would not 'bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'. In regard to any previous act, fact or situation the parties would be bound only by rules to which they would be subject under international law independently of the Convention. Having regard, therefore, to the progressive disappearance of dependent territories, and to the modern law regarding self-determination enshrined in the Charter, the omission of provisions concerning dependent territories may be argued to be at once legally justifiable and politically preferable."

36. In his opinion, the restriction of the last sentence to dependent territories placed too great a limitation on the scope of the commentary; it could equally well be phrased: "Having regard to the progressive disappearance of colonies and to the modern law regarding self-determination, the omission of provisions concerning new States could be justified".

37. If the proposed articles came into force as a convention, what would be their effect on the relations between States which were parties to the convention and a new State? He was inclined to think that the Commission would be laying down rules which, in treaty form, would be of a rather peculiar nature, since they referred to problems to which they could not be applied unless they became a part of customary law. That raised the question whether a convention should be adopted merely to promote customary law. The *North Sea Continental Shelf* cases,[7] in particular, provided no support for the idea of "instant" customary law.

38. Sir Humphrey WALDOCK (Special Rapporteur) summing up the general debate, said that the point raised by the Chairman had been raised with regard to the 1969 Vienna Convention on the Law of Treaties and could in fact be raised with regard to almost any codification. Even in the case of the most successful codification conventions, ratifications took a long time, so that the value of the instrument of codification was necessarily limited. The difficulty was inherent in the method of using as an instrument of codification a multilateral treaty of the ordinary kind.

39. That fact, however, did not seriously diminish the value of the work of codification. It was true that, in the *North Sea Continental Shelf* cases, the International Court of Justice had not found that the principle embodied in article 6 of the 1958 Geneva Convention on the

[7] *I.C.J. Reports 1969*, p. 3.

Continental Shelf[8] constituted an expression of a rule of customary international law. There were, however, special factors involved in that particular case which did not apply generally to codification conventions.

40. The International Court of Justice had relied in a recent case on the provisions of one of the articles of the 1969 Vienna Convention on the Law of Treaties, and had considered it an expression of a rule of international law already in force. In State practice, there were even instances of reliance on codification work still in progress in the International Law Commission.

41. Since codification work thus constituted a slightly mysterious process of consolidation of legal opinion with regard to the rules of international law, the Commission would be acting rightly in seeking bases for codification, even if some of the rules it codified would only enter into force as treaty provisions in a rather distant future.

42. To turn to Mr. Tabibi's remarks, he must first dispel a possible misunderstanding. The "moving treaty frontiers" rule reflected in draft article 2 in his second report (A/CN.4/214) had no connexion with the problem of boundary treaties; it was a well-established principle of international law which governed the consequences, with respect to treaties in general, of the passing of an area of territory that was not itself a State under the sovereignty of an already existing State.

43. The point raised by Mr. Tabibi was in fact connected rather with the contents of article 4 (Boundaries resulting from treaties) in his first report (A/CN.4/202). That article made a general reservation with regard to the effect of the draft articles on boundaries established by treaty prior to the occurrence of a succession. The article had, of course, been set aside for the time being, together with a whole group of four articles in his first report, but in due course he would have to make a proposal to deal with its subject-matter.

44. Mr. Tabibi had also raised the question of unequal treaties in connexion with devolution agreements. He himself had endeavoured to steer clear of that problem, which was covered by the Vienna Convention on the Law of Treaties in the provisions on the use of force or coercion in the conclusion of a treaty. He had dealt with devolution agreements only insofar as they affected succession.

45. He had very much appreciated Mr. Ago's exposition. He fully agreed that the Commission must not take as its starting-point the idea that there was an inheritance of treaties; at the same time, he would not go so far as to say that in no case would there be any transmission of rights and obligations. He simply wished to avoid the confusion that would result from municipal law analogies.

46. The important point was the existence of a legal nexus between a treaty and a territory, arising from the fact that the treaty had previously applied to the territory. In the case of a general multilateral treaty that legal nexus gave the new State the right to opt for the continued application of the treaty. During the discussions at a previous session, Mr. Rosenne, then a member of the Commission, had put forward the view that the case was one of novation, that the new State had no actual right in the matter and that the other parties to the multilateral treaty would have to assent to its joining the treaty. State practice, however, was so absolutely uniform that he thought the Commission would agree that there did exist an actual right for the new State. There was thus an element of transmission, because the new State had an option to join the treaty without it being open to the other parties to make any objection. The new State's right was somewhat outside the scope of the rule, governing the law of treaties.

47. In the case of bilateral treaties, the legal nexus arising from the fact that the treaty had previously applied to the territory in question gave rise to a process of novation and not to transmission *ipso jure*. He understood the position taken by Mr. Quentin-Baxter, but thought that modern State practice clearly showed that the case was one of novation. In the case of Australia, Canada and New Zealand, there was also a special factor present in that the British Crown had been the Crown of Australia, Canada and New Zealand before independence and had continued to be the Crown of those countries after independence. That factor introduced a special element into the treaty-making processes—an element which was not present in cases relating to other countries.

48. A number of other points which had been made during the general debate could be dealt with more conveniently in connexion with the discussion of certain specific articles.

49. He realized the importance attached by several members to the problem of objective régimes and localized treaties. He hoped shortly to be able to submit a draft article on that question for the consideration of the Commission.

Draft articles submitted by the Special Rapporteur

ARTICLE 1

50.

Article 1
Use of terms

For the purposes of the present articles:

1. (*a*) "Succession" means the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory;

(*b*) "Successor State" means the State which has replaced another State on the occurrence of a "succession";

(*c*) "Predecessor State" means the State which has been replaced on the occurrence of a "succession";

(*d*) "Vienna Convention" means the Convention on the Law of Treaties adopted at Vienna on 22 May 1969;

(*e*) "New State" means a succession where a territory which previously formed part of an existing State has become an independent State;

(*f*) "Notify succession" and "notification of succession" mean in relation to a treaty any notification or communication made by a successor State whereby on the basis of its predecessor's status as a party, contracting State or signatory to a multilateral treaty, it expresses its consent to be bound by the treaty;

(*g*) "Other State party" means in relation to a successor State another party to a treaty concluded by its predecessor and in force with respect to its territory at the date of the succession.

[8] United Nations, *Treaty Series*, vol. 499, p. 316.

51. The CHAIRMAN invited the Special Rapporteur to introduce article 1, the provisions of which involved fundamental considerations that would affect the course of the Commission's work on all the draft articles.

52. Sir Humphrey WALDOCK (Special Rapporteur) said he would confine his introductory remarks to sub-paragraphs (*a*), (*b*) and (*c*) of article 1, which appeared in his second report (A/CN.4/214), and more particularly to sub-paragraph (*a*). He would introduce the other paragraphs which were contained in subsequent reports at a later stage of the discussion, as necessary.

53. The essential provision was that contained in sub-paragraph (*a*), to the effect that, for the purposes of the draft articles, "succession" meant "the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory". That wording differed from the text he had originally proposed in paragraph 2 (*a*) of article 1 in his first report (A/CN.4/202), which simply referred to the replacement of one State by another in "the competence to conclude treaties with respect to a given territory". He had now introduced the concept of replacement of one State by another "in the sovereignty of territory", in deference to the comments made by some members during the discussion at the Commission's 1968 session.[9] At the same time, he had retained the idea of replacement in the competence to conclude treaties with respect to territory because there were cases in which such replacement might take place regardless of any change of sovereignty.

54. As he has already pointed out, the term "succession" was used in his draft articles as a convenient short term to describe the fact of replacement of one State by another. There was no suggestion of any actual inheritance or transmission of rights and obligations, concerning which there were many conflicting theories in international law. It was in fact a convenient drafting device which would enable the Commission to avoid the confusion that might result from entering into the various theories on transmission or inheritance.

55. A number of speakers during the general debate had commented on the position taken by States in particular cases, such as that of the emergence of the Kingdom of Italy from the Kingdom of Sardinia, and the enlargement of Serbia—or the establishment of Yugoslavia. He himself had preferred not to enter into a discussion of those particular cases, but to concentrate on the rule that could be derived from general State practice. For their own reasons, governments sometimes preferred to speak of the enlargement of a pre-existing country rather than of the creation of a new one, but the Commission should concentrate on endeavouring to discern the right solution and the correct principles to be derived from the general body of State practice, given a particular case of succession.

56. Mr. BARTOŠ said he hoped the Special Rapporteur would take into consideration a theory that had been put forward several times regarding the formation of States, according to which, from the standpoint of internal law a new State was considered to have been created, but as far as participation in international life was concerned, it could be a successor State.

57. That theory could be applied, for example, to Italy as the successor State to the Kingdom of Sardinia or to Yugoslavia as the successor State to Serbia. Three years ago, the United States Supreme Court had ruled that Yugoslavia had succeeded Serbia in respect of the treaties concluded by Serbia, including the treaty concerning the application of the most-favoured-nation clause, which the United States had concluded with Serbia. The Supreme Court had added that the treaties concluded by Serbia remained in effect not only for States Parties to the Treaty of Versailles, but also for those States which, like the United States, had not signed that treaty. It should be noted that, from the standpoint of internal law, the theory of succession had not been invoked.

58. In view of its importance in practice, the theory of succession limited to international relations should at least be mentioned in the Special Rapporteur's commentary.

59. Mr. USHAKOV said that, since article 1 affected the whole of the draft, it would be preferable to consider it as a whole, in the light of all the definitions proposed by the Special Rapporteur in his various reports.

60. Some comments were called for concerning the arrangement of the draft. A number of titles were missing, such as those of Part I and Part II, section 1. Part III, entitled "Particular Categories of Succession", seemed to conflict with Part II, entitled "New States". In fact, as was apparent from the Special Rapporteur's introduction (A/CN.4/256, para. 3), Part III also concerned new States, but set out special rules, whereas Part II contained general rules. The special situations dealt with in Part III really covered all foreseeable cases of new States.

61. Certain questions, such as the problem of "territorial" treaties and the transfer of an area of territory from the sovereignty of one State to that of another, should be dealt with in separate chapters. The latter aspect of the succession of States, which conflicted with the establishment of new States, had so far been dealt with only in article 2. As was clear from the commentary to that article (A/CN.4/214),[10] other provisions would have to be added, setting out the exceptions to the "moving treaty frontiers" rule.

The meeting rose at 1 p.m.

[9] See *Yearbook of International Law Commission, 1968*, vol. I, pp. 130-146.

[10] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 52.

1156th MEETING

Thursday, 11 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsu-