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A/CN.4/SR.1156

Summary record of the 1156th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

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-

ruoka, 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)

ARTICLE 1 (Use of terms) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 1 in the Special Rapporteur's second and third reports (A/CN.4/214 and A/CN.4/224).[2]

2. Sir Humphrey WALDOCK (Special Rapporteur) said he wished to give an immediate reply to the question raised by Mr. Ushakov at the end of the previous meeting on the arrangement or structure of the draft articles. The structure was at present in a very rough form, partly because the draft had developed in sections, and partly because, as a result of the discussions in the Commission on his first report, he had decided to set aside his original proposal for some general provisions (A/CN.4/202) [3] linking the present draft with the provisions of the 1969 Vienna Convention on the Law of Treaties.

3. His own feeling was that the draft would inevitably have to include a few general provisions at the beginning. In the case of the 1969 Vienna Convention, it had been found necessary to include some general provisions both at the beginning and at the end of the text.

4. The general provisions would, for example, specify that certain terms of the law of treaties were used in the present draft with the meanings attached to them by article 2 (Use of Terms) of the Vienna Convention and reserve the question of international organizations on the lines of article 5 of that Convention.[4] Such provisions were essential in order to avoid ambiguities in many parts of the draft.

5. For the time being, however, the general provisions in his first report had been set aside and the Commission now had before it the four articles in his second report, which were admittedly a rather disparate assemblage of provisions. His purpose in drafting that group of articles had been to deal with a number of points which needed closer examination before the Commission could proceed with consideration of the remainder of the draft.

6. With regard to article 2 (Area of territory passing from one State to another), he wished to allay the misgivings expressed by Mr. Ushakov about the character of the "moving treaty frontiers" rule embodied in that article. The rule in question was a well-recognized principle of international law, but it was not so much a dominant principle as a principle which applied in cases not covered by a special rule. The main problem was that of the appreciation of specific cases.

7. His own impression was that the formulation of his proposed article 2 would probably prove sufficient, subject to drafting improvements. Clearly, however, the question was separate from those dealt with in the later articles. It was distinct from the subject of "new States" dealt with in the articles in Part II (A/CN.4/224) and independent of the subject-matter of article 3, on devolution agreements and article 4, on unilateral declarations.

8. The whole of the present Part I, appearing in his second report, would undoubtedly need further thought before a decision was reached on the final arrangement of the articles. He wished to assure Mr. Ushakov that the texts of those articles were purely provisional; they did not prejudice the position of the Commission or of any of its members. His method had always been not to inject his own personal views into draft articles he introduced at the opening stage of the Commission's work; at that stage he aimed to produce a draft that would enable the Commission to discuss all the necessary points. His own ideas invariably evolved as the Commission's work proceeded. It was only at the end of the discussions that a text suitable for submission to governments could be arrived at.

9. With regard to terminology, he had tried to use phrases were not too clumsy for drafting purposes and would prove convenient for the continuation of the Commission's work.

10. On the question of the "new State", he emphasized that the formula he had put forward was provisional, and had been adopted purely for purposes of study. He had concentrated on the concept of the "new State" set out in sub-paragraph (*e*) of article 1, so as to leave aside the question of any special rules that might apply to particular categories, such as former mandates, former trust territories and former protected States. Since those categories were differentiated in the legal literature, it was necessary from a practical point of view to examine whether any special rules existed for them. Of course, the Commission might well find, on examination, that one or other of those categories did not require any special rules and could be covered by the general concept of a "new State". Until its examination was completed, however, it would be necessary for the Commission to deal with the "new State" as defined in sub-paragraph (*e*).

11. He had adopted that approach in order to avoid certain complications which might otherwise arise in the case of unions or federations. For example, on the emergence of the United Republic of Tanzania, and also of the United Arab Republic, a "new State" had certainly come into being as a result of the adoption of a constitution creating a common central organization competent to conduct relations with other States. Nevertheless, for purposes of membership in the United Nations, those cases had been treated as mergers and the question of admission had not arisen. It was in order to avoid such complications at the present stage of the work that he had preferred to isolate the pure case of the "new State".

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[1] For text see previous meeting, para. 50.

[2] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 50 and *1970*, vol. II, p. 28.

[3] Op. cit., *1968*, vol. II, p. 90.

[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), pp. 289 and 290.

12. Mr. USHAKOV said that his remarks at the previous meeting concerning the arrangement of the draft articles had been based on his personal ideas as to how the various categories of new States should be treated, both in Sir Humphrey Waldock's and in Mr. Bedjaoui's draft articles. Each of those categories was governed by different rules and should be treated separately, particularly where the situation of the new States in relation to bilateral treaties was concerned. In the case of multilateral treaties, on the other hand, it should be possible to establish rules which, if not identical, were at least similar and could be applied to all categories of succession. He agreed with Mr. Ago's remarks at the previous meeting concerning the scope of multilateral treaties, which might be binding on only three parties or be of a general or even a universal character. That differentiation would have to be borne in mind in drafting the provisions on multilateral treaties, for it was inconceivable that they should disregard the scope of those treaties.

13. He had often expressed his opposition to the method of drafting texts by reference to previous texts and he hoped that the Special Rapporteur would, in particular, avoid general references to groups of articles.

14. With regard to sub-paragraph (*a*) of article 1, which defined the term "succession", it might be asked whether it would not be better to prepare a single definition, valid for both Mr. Bedjaoui's and Sir Humphrey Waldock's draft. The second part of the proposed definition, "in the competence to conclude treaties with respect to territory", could not be included in a definition applicable to Mr. Bedjaoui's articles.

15. In themselves, the words "replacement ... in the competence to conclude treaties with respect to territory" were not sufficiently explicit, since they required elucidation in the commentary; a good definition should be easily comprehensible.

16. The first part of the proposed definition, "replacement of one State by another in the sovereignty of territory", did not cover certain cases of the formation of States, in particular, formation by fusion or by separation. Moreover, with regard to decolonization, it should be remembered that the sovereignty of metropolitan States did not extend to colonial territories. The General Assembly had endorsed that view in its Declaration on principles of international law concerning friendly relations and co-operation among States.[5]

17. He intended to speak again on sub-paragraph (*a*) and other sub-paragraphs of article 1.

18. Mr. AGO said that he intended to comment on sub-paragraphs (*a*) and (*e*) and, in particular, on the relationship between those two provisions.

19. Sir Humphrey WALDOCK (Special Rapporteur) said he had no objection to the provisions of sub-paragraph (*e*) on the "new State" being discussed together with those of sub-paragraph (*a*) on "succession". It had become clear, however, that the language of sub-paragraph (*e*) would have to be adjusted. It was not satisfactory to say that the term "new State" meant "a succession where a territory...". The opening words should be amended on the following lines: "'New State' means a State arising from a succession where a territory...". He would submit a rewording of the paragraph in due course, but he urged members first to discuss the concept itself in order to facilitate the drafting.

20. Mr. BARTOŠ thought it necessary for the Commission to adopt one and the same conception of decolonization for both sets of draft articles—those submitted by Sir Humphrey Waldock and those submitted by Mr. Bedjaoui. It could not adopt the so-called traditional conception of colonization, but should take into account the view expressed on several occasions by the United Nations that the possession of colonies was illegal, so that no legal sovereignty was exercised over colonial territories.

21. Sir Humphrey WALDOCK (Special Rapporteur) said that in his original draft provision on "succession" in his first report there had been no reference to sovereignty. He had included that reference in the present sub-paragraph (*a*) of article 1 in deference to the strong wishes expressed by many members of the Commission during the discussion of his first report.[6]

22. Mr. USHAKOV, reverting to sub-paragraph (*a*) of article 1, observed that in paragraphs (2) and (3) of his commentary the Special Rapporteur indicated that the concept of succession comprised two elements, first the replacement of one State by another in the sovereignty of territory and secondly the legal consequence of that substitution, which was the transfer of rights and obligations. Perhaps it would be useful to introduce that second element in the definition of the term "succession", though the text proposed by the Special Rapporteur for sub-paragraph (*a*) might be adequate at the present stage of the discussion.

23. According to sub-paragraph (*b*), "successor State" meant "the State which has replaced another State on the occurrence of a succession"; it might be better to consider that a State succeeded another State on the occurrence of a replacement and he therefore suggested that the words "on the occurrence of a succession" be deleted.

24. Referring to the definition of the term "new State" he drew attention to paragraph (2) of the commentary, which stated that the term signified "a State which has arisen from a succession where *a territory which previously formed part of an existing State* has become an independent State". That definition was very restrictive and excluded a number of situations; it did not apply, for example, to the former United Arab Republic. Part II of the draft dealt with a number of cases not covered by the definition. There appeared to be no reason to limit the definition of a "new State" to a certain number of cases only.

25. Sir Humphrey WALDOCK (Special Rapporteur) stressed that the provisions of sub-paragraph (*e*), on the

[5] General Assembly resolution 2625 (XXV), Annex.

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

meaning of the term "new State", had been put forward purely for working purposes. It would be extremely difficult for the Commission to examine the various rules in the later articles if it had to take into account the many subtle questions which arose in connexion with such special categories as unions, dissolutions or dismemberments. He had endeavoured to isolate the pure case of the "new State" in order to provide a convenient framework for the Commission's future discussions. He fully recognized that the language used would have to be adjusted. For example, the words "a territory which previously formed part of an existing State" would probably have to be replaced by some such wording as "a territory for whose international relations a State was formerly responsible".

26. When the Commission had completed its discussion on the rules relating to "new States" as thus defined and on the various special categories, it might find that the particular rules which were specific to those categories amounted to only a few minor points. It would, however, first have to go through the process of considering the "new State" and the various categories in question.

27. It was, of course, possible to adopt another approach and to frame general rules on the "successor State", thus renouncing the whole concept of the "new State". There was a feeling in some newly independent States themselves that the term "new State" was not felicitous and such an approach would take that feeling into account. For his part, he had thought it legitimate, at the present stage, to use the term "new State" as a term of art to facilitate the work of the Commission.

28. Mr. USHAKOV noted that the Special Rapporteur was in favour of limiting the scope of the rules to certain particular categories of new State. For that purpose, either a restrictive definition of the term "new State" could be adopted, or the draft could be subdivided and special rules laid down for each case. He himself would prefer the latter solution.

29. Mr. HAMBRO said that, in view of the great difficulty of framing definitions, he would not at that point press his own views on the suitability or otherwise of some of the language used in the important provisions under discussion.

30. He thanked the Special Rapporteur for his explanations, which showed that the Commission was not at present engaged in the formulation on any definitive conception of the terms under discussion. It was only trying to fashion useful working tools for its deliberations on the topic of succession of States in respect of treaties.

31. On a preliminary basis, he could accept the provisions of sub-paragraphs (*a*), (*b*) and (*c*) of article 1 as a working proposition, on the understanding that they would be reviewed when the Commission had advanced further in its work. He was also prepared to accept the provisions of sub-paragraph (*d*), but tended to agree with Mr. Ushakov that drafting by reference could be dangerous and that the provisions of the draft articles should, as far as possible, be self-contained.

32. With regard to sub-paragraph (*e*), it was necessary to remember that very often a newly independent State was really old in history and civilization, so that it was natural for it to object to the use of the term "new State". Another problem was the difficulty of drafting a provision which allowed for the fact that a "new State" was sometimes formed by the merging of portions of territory taken from two or three pre-existing States.

33. He was not altogether satisfied with the Special Rapporteur's suggested rewording of sub-paragraph (*e*); it was not quite correct to say that a "new State" arose from a succession. The real position was rather that the problems of succession arose from the birth of a "new State".

34. That being said, he wished to express his admiration for the scholarly reports submitted by the Special Rapporteur and for his extremely open mind, which would be of great assistance in leading the Commission through its debates.

35. Mr. USTOR said that article 1 (Use of terms) in the Special Rapporteur's first report had contained a paragraph 1 which stated that the meanings specified for particular terms in article 2 of the draft articles on the Law of Treaties were also to be given to those terms for the purposes of the present articles. No such provision appeared in article 1 in the second report now under discussion, and in view of the objection which had been voiced to drafting by reference it would seem necessary to include in article 1 a series of additional paragraphs reproducing such provisions as those defining the meaning of "treaty", in article 2, paragraph 1 (*a*) of the Vienna Convention on the Law of Treaties.

36. He noted the explanations given by the Special Rapporteur in paragraph (6) of the commentary to article 1 in his second report, and also the more detailed explanations in paragraph 4 of the introduction to his third report (A/CN.4/224) regarding the setting aside of the four articles proposed in the first report. Nevertheless, he thought the Commission would soon have to come to a decision on whether to include in the present draft not only a provision on the use of terms as defined in the Vienna Convention on the Law of Treaties, but also provisions on the scope of the articles and the relevant rules of international organizations. Those decisions would have to be taken before the Drafting Committee could usefully undertake its work.

37. Sir Humphrey WALDOCK (Special Rapporteur) said he intended to submit draft provisions on the points mentioned by Mr. Ustor. The Commission could then discuss those texts and refer them to the Drafting Committee at the appropriate time.

38. Another point which would have to be covered was that of reserving the continued application of the rules of general international law which were set out in the draft articles and which would apply under international law independently of those articles.

39. The CHAIRMAN said that, for the purposes of the present discussion, the Commission could assume, for example, that the term "treaty" was used with the meaning given to it in article 2, paragraph 1 (*a*) of the Vienna Convention on the Law of Treaties.

40. Mr. THIAM said he would not dwell on the subject of definitions, as the Special Rapporteur had indicated that it would be taken up again later.

41. As to substance, the draft was based on a concept which gave deep satisfaction to the new States, and of which he himself fully approved—that of self-determination: no new State was bound by previous treaties, but it could agree to be bound. The draft articles might be expected to be widely approved if the Commission stood by that basic principle throughout.

42. With regard to the definition of "succession", he saw no practical value in a discussion on the use of the term "sovereignty". That a metropolitan State had exercised *de facto* and *de jure* sovereignty over a territory and had assumed responsibility for it in international affairs was simply a fact to be noted. There was all the less point in discussing it because the draft articles recognized the right of new States to self-determination. Nevertheless if some people found the term unacceptable, it should be possible to find another.

43. It had been questioned whether it was appropriate to include a definition of the term "new State", which might soon fall into disuse, in a codification intended for the future, especially since a great many problems had been settled during the last ten years, in which many States had acceded to independence. In his opinion, it would be well to speak of new States and to devote part of the draft especially to the problems relating to them, if only to emphasize the basic fact of decolonization. Furthermore, on the matter of principle, classical international law had long been based on the study of relations between sovereign States and it was not easy to make out when self-determination, which had become the concern of the United Nations, might have begun to influence writers on international law.

44. As to the definition of a "new State", unlike Mr. Ushakov he thought it was too wide, since according to the commentary it covered cases of secession, that was to say the case of States that claimed to have become independent by secession and whose independence was not recognized. However, the Special Rapporteur had pointed out that some special cases would have to be treated separately.

45. To meet the objections of those who were opposed to the use of the term "new State", arguing, with some justification, that new States were often former States whose sovereignty had been interrupted by colonization, perhaps a distinction could be made between "State" and "nation", and the new States spoken of as former nations. The fact that such countries were today independent put them in a position similar to that of the West African States, which had accepted the status of new States while at the same time claiming the rights attached to the principle of self-determination.

46. He agreed with the Special Rapporteur and other members of the Commission that it would be necessary to return to the subject of definitions later, when the rest of the draft was reviewed.

47. Mr. TSURUOKA, referring to sub-paragraph (*a*), said that, unlike Mr. Ushakov, he did not think the capacity to conclude treaties was not, in itself, a precise concept. He doubted, however, whether the two expressions, "sovereignty of territory" and "competence to conclude treaties with respect to territory", could be juxtaposed. Competence to conclude treaties was an integral part of sovereignty. Perhaps it would be possible to replace the word "or" by something more appropriate, or even to drop the reference to sovereignty of territory altogether and only retain the notion of competence to conclude treaties.

48. It was vital to have precise wording for definitions, but the rules governing the problems to be dealt with should be fairly flexible.

49. The Chairman thought that codification, in the form of a convention, of matters directly affecting new States was a sound method. He himself would go further. Such a convention would be open to new States and, pending their becoming parties to it, would give some idea of the existing rules on the subject and serve them as a guide. It would therefore be of practical value in international life.

50. As Mr. Quentin-Baxter had rightly said, the concept of succession contained an idea of transmission of rights and obligations. That also followed from article 9 (A/CN.4/224), for instance, which rightly provided that a new State was considered as maintaining reservations unless it expressed a contrary intention. It was on that basis that Japan had come to request many new States to refrain from invoking article 35 of the General Agreement on Tariffs and Trade against it. No doubt that was a special case, but it was not an isolated one and it should be taken into account in the commentary.

51. He was prepared to proceed with the consideration of the draft articles on the understanding that the Commission would revert to the definitions later.

52. Mr. SETTE CÂMARA, after praising the reports submitted by the Special Rapporteur, said that his approach was a realistic one which met the needs of modern international life. At the present time, when decolonization had brought independence to some sixty nations, it would be very dangerous to look on the problems of succession in respect of treaties with an old municipal law bias and to adhere to the concept of the automatic inheritance of rights and obligations. No country could agree to assume obligations contracted by another country without the direct intervention of its own will, since that would mean entering independent life with its hands tied by foreign commitments.

53. The Special Rapporteur's conclusions were drawn from an impressive mass of experience in which antagonistic positions between predecessor States and successor States were very common. That had led to the formulation of the "clean slate" doctrine. Although in agreement with the Special Rapporteur's line of thinking, he believed that in the future it would be necessary to bring into harmony with the needs of international life the successor State's complete lack of obligations and its almost absolute possession of rights with respect to treaty succession.

54. Article 1 embodied a series of definitions, or terms of art, which were necessary for dealing with such a complex and intricate subject. As compared with the original formulation proposed by the Special Rapporteur in his first report, a considerable improvement had been achieved: the concept of government succession, which

was fraught with additional difficulties, had been dropped and the idea of the transfer of sovereignty had become the basis for defining succession.

55. The broad and flexible language in which the definitions in article 1 were couched had the advantage of covering the different circumstances in which succession took place, while at the same time preventing the Commission's work from being confined solely to cases arising from decolonization. Another advantage of the empirical definition of succession was that it referred exclusively to the material fact of the replacement of one State by another. That would make it unnecessary to deal with the classical conception of succession as the actual transfer of rights and obligations from predecessor to successor, with all the elements of doubt and controversy inherent in such an approach.

56. Article 1 went far beyond a simple explanation of the meaning of the terms used in the draft. The wording of the text and the spirit of the commentary made it clear that the Commission's task was understood to fall within the bounds of the general law of treaties and thus excluded any obsolete analogies with problems of succession in municipal law. Succession in municipal law dealt solely with the devolution from one person to another of rights and obligations by the force of law alone, independently of the will of the persons concerned. Once it was admitted that succession of States in respect of treaties was part of the law of treaties, rights and obligations could not be derived from any other source than the will of the contracting parties as expressly stated.

57. After the first definitions in article 1, as presented in the Special Rapporteur's first and second reports, other terms of art had been added in following reports. The third report (A/CN.4/224) included a definition of the "Vienna Convention" (sub-paragraph (*d*))—which was indispensable in view of the frequent references to such a basic document of the law of treaties—of a "new State" (sub-paragraph (*e*)) and of "notification of succession" (sub-paragraph (*f*)). All those expressions would necessarily appear very often in the course of the Commission's work of codification. In particular, the definition of the term "new State" was very important, since it departed from the general, broad sense of the term so far as to make it mean "a State which has arisen from a succession where *a territory which previously formed part of an existing State* has become an independent State". That definition obviously excluded the cases of a union of States, a federation with an existing State, and accession to independence of a trusteeship territory, a mandated territory or a protected State. The clear characterization of the term "new State" was the cornerstone of the present draft.

58. The definition of "notify succession" and "notification of succession" in sub-paragraph (*f*) was also very important, because it reflected the decisive moment in the treaty-making procedure of a new State—the moment when the element of consent, the will to be bound, was duly expressed.

59. The last addition to article 1 proposed by the Special Rapporteur in his fourth report (A/CN.4/249), namely, sub-paragraph (*g*) defining the expression "other State party", was necessary, since the common idea expressed by the term "third party" did not satisfy the need to cover cases in which reference had to be made to parties to a treaty concluded by the predecessor State and in force with respect to the territory involved. The Special Rapporteur's wording was most ingenious and fully met the needs of the Commission's future drafting.

60. Mr. TAMMES said he was fully satisfied with the definition of "succession" in sub-paragraph (*a*); it was an ingenious formulation and covered all the relevant cases. He thought the term "succession" might be retained, as the one most current in that context in international law, even if it was subsequently concluded that no succession took place in the municipal law sense of the transfer of rights and obligations.

61. Less satisfactory, however, was the use of the word "replacement" in sub-paragraph (*a*), since it was not clear whether one State was replaced by another or whether there was a continuity of the same State despite the drastic changes which might have taken place in its territory. That was a question which was often decided pragmatically or unilaterally; in the case of partition, referred to by Mr. Ushakov, it was not clear for which part of the territory there was a replacement of sovereignty and for which part there was continuity of sovereignty. There were, in fact, no legal criteria for such marginal cases, nor had any been developed by international organizations when adopting their policy for the admission of new members. The present debate would serve a useful purpose by making everybody aware of those problems, even if no solutions for them were known.

62. Mr. AGO said that article 1 went beyond mere definitions and raised very important matters of substance, especially in sub-paragraphs (*a*) and (*e*).

63. The definition of "succession" given in sub-paragraph (*a*) seemed entirely satisfactory. It was understood that the concept of succession differed in international law and internal law, and that the Commission could give the term "succession" a particular meaning, which had been made clear in the general debate. Mr. Ushakov had expressed doubts about the possibility of covering all cases by recourse to the idea of replacement of one State by another in the sovereignty of territory. Those doubts would be justified if sub-paragraph (*a*) had the same wording as sub-paragraph (*e*), which referred to "a territory which previously formed part of an existing State". For it could not be said that a former colony had formed a part of the metropolitan State; on the other hand, it could be acknowledged that the sovereignty of a metropolitan Power had extended to its colonial territories. That had always been the position in international law, so much so that the acquisition of independence was a synonym for liberation from the sovereignty of a particular State. Hence there was nothing against the use of the term "sovereignty".

64. It would not be appropriate to mention only the competence to conclude treaties, as Mr. Tsuruoka had suggested, for two reasons. First, the Special Rapporteur had referred to that competence intentionally, in order to cover the case of States not subject to the sovereignty of another State, that was to say, States which had

existed, but had not been sufficiently independent to have the capacity to conclude international treaties themselves. That was the position of States under a protectorate. Secondly, it would be inappropriate to describe the accession to independence of a territory previously under the sovereignty of another State—no matter whether it was a case of decolonization or something different—simply in terms of replacement in the competence to conclude treaties. The basic phenomenon to be borne in mind was detachment from sovereignty, and it was therefore essential to keep both formulas, even if the necessary explanations had to be given in the commentary.

65. The Special Rapporteur had tried to give definitions which covered all possible cases of succession, except in sub-paragraph (*e*), where his intention had been to refer only to succession due to the birth of a new State. Apart from the question of improving the drafting of the English version, the definition given in that sub-paragraph needed to be supplemented. For as he had just said, the formula "territory which previously formed part" was not applicable in all cases; there, too, it would be better to use some such expression as "previously under the sovereignty". The words "an existing State" should also be reconsidered. In the first place, some States, like Poland, had been formed from parts detached from several different States. Secondly, the State from which the new State had been detached might have ceased to exist, like the Hapsburg Empire from which Czechoslovakia had emerged. It would be better to use a more neutral formula such as "one or more other States".

66. Then there remained the fundamental question whether to use the term "new State" and to retain the definition given in sub-paragraph (*e*), the scope of which was restricted and which was, as the Special Rapporteur had himself admitted, only of practical utility. The use of terms was always a matter of convention, but conventions had their own limits. Although there was a difference between the case of a State created in the territory of a former colony and that of a State which had freed itself from a protectorate, it could hardly be said that one was a new State and the other was not. It was doubtful whether the expression "newly-independent State" could be used. The most important point was that the definition given in sub-paragraph (*e*) excluded, although they were certainly new, States resulting from a fusion, such as the United States of America, Tanzania and many others. He would add that some States which had emerged from a separation, such as Sweden and Norway, did not regard themselves as new States, and many newly-formed States would not agree to be so designated either.

67. In fact, the expression "new State", as used in everyday language, was not a legal expression and it was not necessary for the Commission, whose work was exclusively legal, to use it. Besides, the idea it expressed was very relative, for what was new today would no longer be new in a little while. It would therefore be better to use the expression "successor State" to cover all the cases considered—he asked the Special Rapporteur to study that possibility—and to include a chapter containing the rules applicable to all cases of succession, followed by sets of rules dealing specifically with the different cases one after the other.

68. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself had not been enamoured of the term "new State", but that at the start of his work on the topic he has been pressed to give prominence to new States. He had since come to accept Mr. Ago's view that in a juridical exposition it would be preferable to use a less ambiguous phrase with fewer political overtones. Perhaps the answer could be found in the term "successor State", though some drafting technique might be called for in applying it to the "moving treaty frontiers" principle. He suggested, therefore, that the Commission should use the term "new State" for working purposes when drawing up the general rules and then go on to deal with particular cases.

69. A union was not a "new State"; the United Arab Republic, in fact, had been a fusion of two sovereignties, which had subsequently been dissolved and treated as two separate States.

70. The CHAIRMAN said that in view of those comments he assumed that the term "new State" would not appear as defined at present.

71. Sir Humphrey WALDOCK (Special Rapporteur) said that some speakers had been in favour of the term, but that from a legal point of view it now seemed better to replace it by something else.

The meeting rose at 1.5 p.m.

1157th MEETING

Friday, 12 May 1972, at 10.15 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. 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)

ARTICLE 1 (Use of terms) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of draft article 1 submitted by the Special Rapporteur.

2. Mr. Bartoš said he agreed with the Special Rapporteur's chosen method of work, but not entirely with the doctrine on which he relied. The classical doctrine was that succession, in other words, continuity, occurred

[1] For text see 1155th meeting, para. 50.