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A/CN.4/L.183/Add.3

Draft articles on succession in respect of treaties adopted by the Drafting Committee on first reading: texts of articles 1 (quinquies), 8 (bis) and 9 to 11 - reproduced in A/CN.4/SR.1187

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

most enlightening report on the Committee's activities and for his kind invitation. He hoped to attend one of the Committee's forthcoming meetings.

63. Sir Humphrey WALDOCK expressed his appreciation of the statement just made on the valuable activities of the European Committee on Legal Co-operation, which showed the vigour of the Legal Department headed by Mr. Golsong.

64. Mr. BILGE thanked the observer for the European Committee for his kind words and congratulated him on his excellent statement.

65. Mr. ELIAS expressed his appreciation of the award to a young Nigerian jurist of the first fellowship given to a national of a developing country to study the work of the Council of Europe. There was a real need for developing countries to understand the Council's work and he hoped that the experiment would continue.

66. Mr. TAMMES, speaking also on behalf of Mr. Reuter, thanked the observer for the European Committee on Legal Co-operation for his interesting report. The work undertaken by the Committee on the legal aspects of ecological problems should inspire the Commission in dealing with that topic at some future time.

67. Mr. SETTE CÂMARA, speaking also on behalf of the other Latin American members of the Commission, expressed appreciation of the lucid and succinct statement made by the observer for the European Committee on Legal Co-operation. It was gratifying to find that the Committee was engaged in a study of the complex legal issues underlying the problem of pollution, which the Commission itself would certainly have to study before long.

68. The presence at the Commission's meetings of the observers for the Inter-American Juridical Committee and the European Committee on Legal Co-operation provided welcome evidence of the progressive universalization of international law.

69. Mr. USTOR expressed his admiration of the legal work of the Council of Europe and of the energy displayed by Mr. Golsong and the legal department which he directed.

70. Mr. USHAKOV associated himself with the tributes paid to the observer for the European Committee.

71. Mr. BARTOŠ congratulated Mr. Golsong on his outstanding statement and expressed his admiration for the work of the European Committee, which had duly sent its legal publications to members of the Commission.

72. He hoped that the European Committee would make it possible for European States not belonging to the Council of Europe to accede to the conventions it drew up.

73. Mr. RAMANGASOAVINA, speaking also on behalf of Mr. Yasseen, associated himself with the tributes paid to the observer for the European Committee on Legal Co-operation for his clear and interesting statement.

74. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation and the observer for the Inter-American Juridical Committee, who would be leaving Geneva shortly, for their attendance at the session.

The meeting rose at 1.10 p.m.

1187th MEETING

Monday, 26 June 1972, at 3.10 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, 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 and Add.1 to 3; A/CN.4/L.183 and Add.1 to 3; A/CN.4/L.184 and L.185)

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

(resumed from the 1181st meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 1 *(quinquies)*

1. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 1 (*quinquies*):

Article 1 (quinquies)
Limitation of the present articles to lawful situations

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

2. Article 1 *(quinquies)* belonged in Part I (General provisions). It dealt with the limitation of the draft articles to lawful situations, a matter which had been raised by several members, in particular during the Commission's consideration of the two texts for draft article 2 submitted by the Drafting Committee on first and second readings. The text now proposed by the Committee was short and self-explanatory. It was the result of a delicate compromise achieved after lengthy discussions and he hoped the Commission would approve it—on a provisional basis, of course, like all the other articles under consideration at that stage.

3. Mr. TABIBI said he supported article 1 *(quinquies)*.

4. Mr. USHAKOV said he had some doubts about the title, particularly in its French version. The wording seemed much too vague.

5. Mr. SETTE CÂMARA agreed that the title was not satisfactory. It seemed strange for the Commission to

state specifically that the draft dealt with lawful and not with unlawful situations. Perhaps the best course was to use a shorter title, which would simply refer to the limitation of the scope of the draft articles.

6. Sir Humphrey WALDOCK (Special Rapporteur) pointed out that there was already an article on the scope of the draft.[1] He suggested that the criticism of the title might be met by amending it to read "Cases of succession of States covered by the present articles".

7. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 1 *(quinquies)* with the title amended as suggested by the Special Rapporteur.

It was so agreed.

ARTICLE 8 *(bis)*

8. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 8 *(bis)*:

Article 8 (bis)
Ratification, acceptance or approval of a treaty signed by the predecessor State

1. If before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification and the signature had reference to the territory to which the succession of States relates, the successor State may ratify the treaty and thereby establish its status:

(*a*) As a party, subject to the provisions of article 7, paragraphs 2 and 3;

(*b*) As a contracting State, subject to the provisions of article 8, paragraphs 2, 3 and 4.

2. A successor State may establish its status as a party or, as the case may be, contracting State to a multilateral treaty by acceptance or approval under conditions similar to those which apply to ratification.

9. Article 8 *(bis)* belonged in Part III (Newly independent States). The Commission had already approved three articles in that part, namely, articles 6, 7 and 8.[2] The Drafting Committee had reached the conclusion that those articles, as well as articles 8 *(bis)* and 9 to 11 (A/CN.4/L.183/Add.3) which it was now proposing to the Commission, should be grouped in a section 1 to be entitled "Multilateral treaties". In view of that decision, the Committee considered it unnecessary to repeat the word "multilateral" in the titles of each of the articles and it accordingly proposed that that word should be deleted from the titles of articles 7 and 8 which the Commission had already approved.

10. With regard to the text of article 8 *(bis)*, when he had introduced article 8 (A/CN.4/L.183/Add.2) he had drawn the Commission's attention to paragraph 1 (*b*) of the original text of that article[3] as submitted by the Special Rapporteur in his third report;[4] that paragraph specified that a new State could, on its own behalf, establish its consent to be bound by a multilateral treaty not in force at the date of succession if the predecessor State had, before that date, signed the treaty subject to ratification, acceptance or approval. The Drafting Committee had taken the view that the case envisaged in paragraph 1 (*b*), although it had become of marginal importance since the adoption of a procedure for new accessions to the League of Nations closed treaties, was worth providing for in the draft articles.

11. In its discussion of the text of article 8 the Commission had observed, however, that the question of a successor State's ratifying a treaty on the basis of its predecessor's signature arose with respect to all multilateral treaties, whether in force or not. The Drafting Committee had therefore agreed to remove paragraph 1 (*b*) from article 8 and propose a new article 8 *(bis)* dealing with multilateral treaties in force and multilateral treaties not in force: it was that article which was now before the Commission.

12. Paragraph 1 (*a*) of the proposed text covered the case of treaties already in force, as shown by the use of the term "party". Paragraph 1 (*b*) covered the case of treaties not yet in force, as shown by the use of the term "contracting State". The expression "under conditions similar to those which apply to ratification", in paragraph 2, had been taken from article 14, paragraph 2, of the Vienna Convention on the Law of Treaties.[5]

13. The Drafting Committee was fully aware that several members of the Commission held that the successor State derived no right from the mere fact that the predecessor State had signed a treaty subject to ratification or approval. The Committee believed, nevertheless, that article 8 *(bis)* should be included in the draft in order to enable governments to express their views on the matter.

14. Mr. USHAKOV, supported by Mr. REUTER, said that the words "*et que la signature concernait le territoire*" were an inadequate rendering into French of the phrase "and the signature had reference to the territory" in the opening sentence of paragraph 1.

15. The CHAIRMAN said he was not altogether satisfied with the English text either. The underlying idea was very difficult to express.

16. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the passage in question be replaced by the words "and by the signature intended that the treaty should extend to the territory". That wording would give more explicit expression to the idea that the real intention of the signature was to extend the treaty to the territory.

17. Mr. REUTER said he reserved his position with regard to the French translation of that passage. He thought it would be better to refer to the intention shown by the predecessor State than to the physical act of signature. He also pointed out that, under the Vienna Conven-

[1] Article 0, approved at the 1176th meeting; see paras. 21 *et seq.*

[2] See 1181st meeting, paras. 58 *et seq.*

[3] *Ibid.*, para. 76.

[4] See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 43-44.

[5] 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. 291.

tion, initialling was equivalent to signature for expressing consent to be bound.[6]

18. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the change of wording in paragraph 1 proposed by the Special Rapporteur.

It was so agreed.

19. Mr. REUTER said he doubted whether the expression "*peut établir sa qualité*" in the French text of paragraphs 1 and 2 was satisfactory. It implied that the successor State could prove its status as a party independently of article 2, whereas the idea was that it could "acquire" the status of a party.

20. Sir Humphrey WALDOCK (Special Rapporteur) pointed out that the word "establish" was used in a number of articles of the Vienna Convention, in particular, article 16. It had already been used in articles 7 and 8 of the present draft in connexion with the action taken by a newly independent State to avail itself of its right to become a party or a contracting State to a treaty. It was true that the English verb "to establish", as well as the French verb "*établir*", also meant "to prove", but that was not the sense in which it was being used in the present context or in the articles of the Vienna Convention to which he had referred.

21. Mr. USTOR (Chairman of the Drafting Committee) pointed out that if the French expression "*peut établir sa qualité*", which had been criticized by Mr. Reuter, was altered in article 8 *(bis)*, a similar change might be necessary in articles 7 and 8, which had already been approved by the Commission.

22. Sir Humphrey WALDOCK (Special Rapporteur) said it was important that no change should be made in either the English or the French text of articles 7 and 8 as already approved. Those articles had been deliberately couched in language which avoided any suggestion that the State concerned was becoming a new party to the treaty.

23. Mr. YASSEEN observed that the term "establish" had acquired a special sense in the Vienna Convention and had already given rise to long discussions in the Commission. In the case under consideration, the successor State did, to a certain extent, prove its status by ratifying the treaty, so that the word "establish" could well be retained.

24. Sir Humphrey WALDOCK (Special Rapporteur) urged that the expression "establish its status" be retained in both paragraphs of article 8 *(bis)*.

25. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 8 *(bis)*, with the amendment to paragraph 1 already adopted. He would also take it that the Commission approved the consequential change in the titles of articles 7 and 8, namely, the deletion of the word "multilateral" from those titles.

It was so agreed.

[6] *Ibid.*, p. 290, article 12.

ARTICLE 9[7]

26. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 9:

Article 9
Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States unless:

(*a*) In notifying its succession to the treaty, it expresses a contrary intention or formulates a new reservation which relates to the same subject-matter and is incompatible with the said reservation; or

(*b*) The said reservation must be considered as applicable only in relation to the predecessor State.

2. When establishing its status as a party or a contracting State to a multilateral treaty under article 7 or 8, a newly independent State may formulate a new reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under sub-paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

3. (*a*) When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4 of the Vienna Convention on the Law of Treaties apply.

(*b*) However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

27. During the Commission's discussion of the Special Rapporteur's reports, several members had expressed their opposition to the method of drafting by reference. In deference to their views, the Drafting Committee had dropped some of the references to specific provisions of the Vienna Convention contained in the previous text of article 9 as submitted in the Special Rapporteur's third report (A/CN.4/224).[8] The Committee had eliminated the reference to article 19 of the Vienna Convention by reproducing the relevant provisions of that article in paragraph 2, sub-paragraphs (*a*), (*b*) and (*c*) of the text now under discussion. The majority of the Committee had considered, however, that the references to articles 20, 21 and 22, and to article 23, paragraphs 1 and 4, of the Vienna Convention should be retained. The reproduction of all those provisions would have made the text of article 9 unduly long and cumbersome; moreover, the inclusion of some references in article 9 would give governments a reason to express their views on the whole question of drafting by reference.

28. In paragraph 1 of the article, the Committee had considered it unnecessary to include the phrase "made in conformity with article 11" after the words "by a notifi-

[7] For previous discussion see 1166th meeting, paras. 84 *et seq.* and 1167th meeting.

[8] See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 46-47.

cation of succession"; it was obvious that the notification would be in conformity with article 11, since that was, precisely, the article which dealt with notification of succession. The Committee accordingly suggested that the Commission should delete that phrase from paragraph 1 of articles 7 and 8, as approved at the 1181st meeting.

29. Paragraph 1 (*a*) of the Special Rapporteur's original text of article 9 provided that the successor State would not be considered as maintaining any previous reservations applicable in respect of the territory if it formulated different reservations. Several members had expressed the view that the test of compatibility between the two sets of reservations was preferable. The Drafting Committee had accordingly used the wording "or formulates a new reservation which relates to the same subject-matter and is incompatible with the said reservation". The words "the said reservation" were intended to refer to the previous reservation.

30. In paragraph 3 (*a*), the Committee had included the words "on the Law of Treaties" after the words "the Vienna Convention". Since the draft would contain only a few references to the Vienna Convention, the Committee had considered that it was unnecessary to define that expression in article 1; hence the full title would have to be given each time the Vienna Convention was mentioned in the draft.

31. Mr. USHAKOV observed that the French text of paragraph 1 would be closer to the English if the expression "*applicable à l'égard de son territoire*" were replaced by "*applicable à l'égard du territoire en question*".

32. As to the references to the Vienna Convention, he had no objection to including them in paragraph 3, but the Commission might find itself obliged, when it came to the second reading, to replace them by a text reproducing the relevant provisions of that Convention.

Article 9 was approved.

ARTICLE 10 [9]

33. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 10:

Article 10
Consent to be bound by part of a treaty and choice between differing provisions

1. Except as provided in paragraphs 2 and 3, when a newly independent State establishes its status as a party or contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining the predecessor State's:

(*a*) consent, in conformity with the treaty, to be bound only by part of its provisions; or

(*b*) choice, in conformity with the treaty, between differing provisions.

2. When so establishing its status as a party or contracting State, a newly independent State may, however, declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

3. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any such choice.

34. The Committee had shortened the title by deleting the opening words "Succession in respect of". It had made only a few changes in the text of the article, most of them in order to bring it into line with articles already approved by the Commission. In paragraph 1 (*a*) and in the title, the Committee had replaced the words "an election to be bound" by the words "consent to be bound", the formula used in the corresponding provisions of article 17 of the Vienna Convention on the Law of Treaties.

35. Mr. USHAKOV asked whether it would not be better to replace the word "*qualité*" by "*statut*" in the French text of paragraphs 1 and 2.

36. Mr. REUTER said that while "*qualité*" was unsatisfactory, "*statut*" was worse.

37. Sir Humphrey WALDOCK (Special Rapporteur) said that, in the Drafting Committee, Mr. Ago and some other members had expressed the view that the term "*qualité*" was the closest French word to the English "status".

Article 10 was approved.

ARTICLE 11 [10]

38. Mr. USTOR (Chairman of the Drafting Committee) said the Committee proposed the following title and text for article 11:

Article 11
Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 7 or 8 must be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State making it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(*a*) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

39. The Drafting Committee had shortened the original title, "Procedure for notifying succession in respect of a multilateral treaty", to "Notification of succession". The Committee had also rearranged the provisions of the article in the interests of clarity. It had added paragraph 3 (*b*), relating to the receipt of the notification of succession by the State concerned or by the depositary, and paragraph 3 (*c*) relating to communication of the notification by the depositary to the State concerned. The Committee wished to emphasize that the provisions

[9] For previous discussion see 1168th meeting.

[10] For previous discussion see 1168th meeting, paras. 38 *et seq.*

of those paragraphs related to the date at which the notification was considered as having been made and not to the legal effects of notification. Those legal effects would form the subject-matter of another article.

40. Mr. USHAKOV, supported by Mr. REUTER, maintained that paragraph 2 referred to the action of the State's representative, not the action of the State itself, and suggested that the word "making" be replaced by a word such as "communicating" or "transmitting".

41. The CHAIRMAN, speaking as a member of the Commission, said that in the case of a treaty that was not of great importance, the procedure might well be for a First Secretary to bring the instrument of notification together with his Ambassador's full powers. Perhaps the difficulty could be overcome by saying that the representative who signed the notification had to produce the full powers.

42. Mr. THIAM pointed out that, according to paragraph 2, if the notification was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, it was made, that was to say "communicated", by a representative of the State. He would have to produce full powers for that purpose, because the notification would not have been signed by any of the three persons covered by the first alternative.

43. Mr. RAMANGASOAVINA said that he agreed with Mr. Thiam, but would accept the text proposed by the Drafting Committee.

44. Sir Humphrey WALDOCK (Special Rapporteur) said that the purpose of the provision was to deal with the frequent case in which the instrument of notification was not signed by the Head of State, the Head of Government or Minister for Foreign Affairs and was delivered by an ambassador or permanent representative. The ambassador or permanent representative then had to produce his full powers, if called upon to do so.

45. He suggested that the words "the representative of the State making it may be called upon..." should be replaced by some formula modelled on the last sentence of article 67, paragraph 2 of the Vienna Convention on the Law of Treaties, such as: "the representative of the State communicating the notification may be called upon...".

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 11 with the amendment to paragraph 2 proposed by the Special Rapporteur.

It was so agreed.

Draft articles submitted by the Special Rapporteur *(continued)*

ARTICLE 21

47. *Article 21*

Other dismemberments of a State into two or more States

1. When part of a State, which is not a Union of States, becomes another State either by separating from it or as a result of the division of that State, the rules in paragraphs 2 and 3 govern the effects of that succession of States on treaties which at the date of the separation or division were in force in respect of that part.

2. The obligations and rights of the successor State and of other States parties under any such treaty shall be determined by application of the relevant provisions of articles 7 to 17 of the present articles.

3. In the case of a separation, any such treaty remains in force as between the predecessor State and other States parties in relation to the remaining territory of the predecessor State unless it appears from the provisions or from the object and purpose of the treaty that:

(*a*) It was intended to relate only to the part which has separated from the predecessor State;

(*b*) The effect of the separation is radically to transform the obligations and rights provided for in the treaty; or

(*c*) It is otherwise agreed.

48. The CHAIRMAN invited the Special Rapporteur to introduce article 21 of his draft (A/CN.4/256/Add.3).

49. Sir Humphrey WALDOCK (Special Rapporteur) said that, in his fairly long commentary to article 21, he had examined such practice and views as existed on the question of dismemberment. His research had led to the conclusion that there was not much evidence of a special category of State succession in cases of dismemberment other than the dissolution of a Union.

50. Nor was there any evidence of a special category of "division" of a State in those cases where the process of dissolution resulted in the complete extinction of the previously existing State. In practice, that was an extremely rare phenomenon. For historical and political reasons, one or other of the territories usually claimed that it continued the old State. Cases of that kind consequently presented themselves as the emergence of one or more new States by way of separation from the old State.

51. In the concluding paragraphs of the commentary he had examined the modern examples of what had sometimes been called the two Germanies, the two Koreas and the two Viet-Nams. So many special factors were involved in those cases, however, that it was not easy to discern any particular category, and they were complicated by the issue of non-recognition. The ultimate implications of those examples in terms of State succession had not yet become clear.

52. The result of his research was expressed in the provisions of article 21, namely, that the rules relating to newly independent States should be applied where the separated States were concerned. Some qualification of the rules was necessary, however, with respect to the part that was regarded as the continuation of the previous State; for the truncation of its territory might seriously affect some of the treaties previously in force with respect to the whole territory. Hence the provisions of paragraph 3.

53. Mr. USHAKOV said that there appeared to be some inconsistency between the title and the text of article 21. The title referred to the dismemberment of a State "into two or more" States, whereas the text did not refer to cases in which a State broke up into more than two parts.

54. Sir Humphrey WALDOCK (Special Rapporteur) said that the possibility of more than one part of a State breaking away from it was implicit in paragraphs 1

and 3. The words "When part of a State ... becomes another State..." could refer to more than one territory which broke away from the main body of the State.

55. Mr. TABIBI said he fully agreed that new States resulting from the dismemberment of a State should be covered by articles 7 to 17 and that the predecessor State, which continued its existence, should continue to be bound by its treaty obligations. Past and present practice and theory generally supported those provisions.

56. It was not clear from paragraph 3 (*a*), however, whether a treaty that related only to the part which had separated from the predecessor State remained in force for that part, or whether it lapsed altogether. If it was intended that the treaty should remain in force, paragraph 3 (*a*) weakened the whole article, was contrary to the "clean slate" principle, and prejudged the rules on territorial treaties that would be discussed by the Commission under article 22.

57. He suggested that the word "other" should be deleted from the title, because it gave the impression that dismemberments of a State had been dealt with in earlier articles.

58. Lastly, he wished to comment on the inclusion of Bangladesh as an example of a dismemberment in paragraph (14) of the commentary. As he had already stated during the discussion of article 20, because of the historical background and geographical situation of East Bengal, the case of Bangladesh should be considered as a dissolution of a Union of States rather than as a case of dismemberment. The Moslem League leaders, in the Lahore resolution of 1940, had supported the creation of a Pakistan consisting of four component parts, each having a separate administration, namely, the North-West Frontier Province, Sind, Punjab and East Bengal. That resolution had been adopted because the peoples of the four units had separate racial, linguistic and cultural heritages. When the military régime had taken over in 1955 and abolished the independence of the western units, the people of all four units had resisted and the autonomy of the western provinces had finally been recognized. Even now, the Punjab, Sind and the North-West Frontier each had their own legislative assembly and their own separate government and administration. He wished to make it clear, however, that Afghanistan did not recognize the North-West Frontier as part of Pakistan. Bangladesh had separated from Pakistan because it had aspired to full internal freedom, while wishing to maintain loose links with West Pakistan. For those reasons, he maintained that it should be considered as a case of dissolution of a Union of States, and not as a case of dismemberment.

59. Sir Humphrey WALDOCK (Special Rapporteur) said there seemed to be some misunderstanding. Paragraph 3 (*a*) dealt only with the predecessor State, that was to say the State which continued to exist as an international personality and whose treaties consequently continued to attach to it. The only question was the possible effect of the separation on certain treaties.

60. So far as Bangladesh was concerned, although Pakistan as originally constituted had had two recognizable halves, it was not a Union of States as defined in the draft articles. In order, therefore, to maintain the logic of the draft articles, the case of Bangladesh must, in that context, be viewed as a dismemberment.

61. Mr. TAMMES said that draft article 21 and the commentary reflected the practice of abrupt changes, since most of the secessions and dismemberments described had been the result of wars, violence, revolutionary movements or outside interference. It was understandable that, in such cases of rupture of constitutional ties, the seceding State would not be particularly favourably disposed towards continuation of treaties entered into by the predecessor State. Article 21 respected that position and proposed the "clean slate" rule, which adequately reflected the political realities of such cases.

62. There were, however, cases in which dismemberment had been the result of a peaceful and evolutionary process, but which would still be covered by the definition in paragraph 1. Examples of such dismemberment were the separation of Norway and Sweden, the attainment of independence by Iceland, and the attainment of independence by Egypt and the former British Dominions from the United Kingdom and by Brazil from Portugal. All those were cases of friendly separation, in which continuity of treaty relationships used to be the rule. There might indeed be cases of secession covered by article 20 in which there would be little reason to apply the principle of *ipso jure* continuity, and cases of secession covered by article 21 in which there would be little reason to apply the "clean slate" rule.

63. He did not wish to propose that there should be another rule covering cases of dismemberment of a peaceful and evolutionary nature, but he would suggest that the Commission should leave it to the newly independent State to determine for itself whether or not it wished succession to be governed by articles 7 to 17.

64. Mr. USHAKOV said that article 21 covered the case in which a State, one part of which had separated off to form another State, continued to exist as a subject of international law, becoming the predecessor State. But it did not cover the possibility of a State's breaking up into two or more new States without the original State subsisting. Since the article provided that, following such a separation, part of the territory of a unitary State became a newly independent State, which would then be covered by draft articles 7 to 17, its purpose could only be to establish the situation of the predecessor State. The key paragraph was paragraph 3, which dealt with that situation. However, the case in which the original State no longer existed, and there was consequently no predecessor State, was not covered by article 21.

65. As to the drafting, it was hard to see why the Special Rapporteur had mentioned both separation and division in paragraph 1, since the article covered only separation. When a division took place, there was no longer an original State. Moreover, since the original State had been a unitary State, treaties existing before the separation of part of its territory had been in force in respect of the whole territory and not only "in respect of that part", as stated in paragraph 1. In paragraph 3, it was ambiguous to speak in the same sentence of the "predecessor State" and the "remaining territory of the

predecessor State". It might be better to call the predecessor State something else.

66. Sir Humphrey WALDOCK (Special Rapporteur) said that the problem might be solved by referring in paragraph 1 to the "division and extinction of that State", and then in paragraph 2 to the "rights of a successor State", because paragraph 2 was meant to cover extinction as well as division. In the case of extinction there was more than one successor State and no continuation of the predecessor State. There were several ways of looking at the situation, but the only conclusion that could be drawn from practice was that there was a tendency for one entity to cling to the personality of the former State and thus to be regarded as a predecessor State for the purposes of the law.

67. Mr. BILGE asked the Special Rapporteur whether he had used the expression "in force in respect of that part" in a sense different from that of the expression "in respect of the territory" used in all the other articles, or whether it was merely a drafting point.

68. Sir Humphrey WALDOCK (Special Rapporteur) said that the phrase "treaties ... in force in respect of that part" in paragraph 1 referred to treaties in force in respect of the original State. It might perhaps be more correct to say "in respect of that part of the territory".

69. Mr. USHAKOV said that in the case of a unitary State, only localized treaties applied to one part of the territory alone. The expression "in force in respect of that part" was therefore not appropriate. If, as the Special Rapporteur said, paragraph 2 covered both the case of separation, in which the original State subsisted and the case of complete division, in which it did not subsist, it would be difficult to accept the "clean slate" principle in the latter case, because under some treaties—commercial treaties, for example—obligations which were sometimes of a very concrete nature continued to exist between the various States resulting from the division and third States.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that the "clean slate" principle was a very inexact expression. The rules in articles 7 to 17, while they imposed no obligation, provided a basis for the continuity of both multilateral and bilateral treaties. If there was a complete split, with extinction of the original State, both parts would be placed in a completely different situation. It would be difficult to require the new States to take over the obligations of the previous State despite the radical change in their situation. Fortunately, such cases did not arise in practice.

71. The CHAIRMAN asked whether there was any way of objectively defining extinction. It would be hard to apply the purely subjective rule that whenever a division of a State occurred the status of any treaties in force depended on whether one or another of the resultant States asserted its claim to be a continuation of the original State.

72. Sir Humphrey WALDOCK (Special Rapporteur) said two factors were involved—the assertion of a claim by the new entity and recognition by the international community. It might be argued that, in the case of Bangladesh for example, where there was a major division of territory, it ought to be irrelevant whether one of the resultant States chose to call itself by the former name or not, since the effects of division were so radical that the whole situation was transformed.

73. The CHAIRMAN asked whether that meant that States which had treaties with Pakistan were free to say that those treaties had ceased to apply.

74. Sir Humphrey WALDOCK (Special Rapporteur) said that the attitude taken by the World Health Organization and the International Labour Organisation could be taken as a pointer to how to deal with that situation. What had formerly been West Pakistan was being treated as Pakistan, and the other half of the country as a new State.

75. The CHAIRMAN observed that if the article referred to division and extinction of the former State without defining extinction, the question whether the former State continued to exist or not would be open to dispute.

76. Mr. USHAKOV said he agreed with the view Mr. Ustor had expressed on previous occasions that it was necessary to take into account cases in which the division took place by mutual consent, obligations towards third States being shared among the States resulting from the division by means of a devolution treaty. In the absence of such consent there was not a division, but a separation.

77. Sir Humphrey WALDOCK (Special Rapporteur) said that, under the rules established by the law of treaties, a devolution treaty could not by itself create a sufficient legal nexus for continuity. The expression of consent to be bound was required for that purpose. In cases of the kind Mr. Ushakov had in mind, there was usually some kind of settlement, also involving third States.

78. Mr. USHAKOV said that although there might be some doubt about succession in respect of treaties, in respect of matters other than treaties third States retained certain obligations towards new States, for example, with regard to debts to be shared out among several successor States. It was perhaps worth considering whether the same did not apply to treaties.

The meeting rose at 6.5 p.m.

1188th MEETING

Tuesday, 27 June 1972, at 9.40 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
