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Summary record of the 1177th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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it would be necessary to include a reservation to article 2 and whether that question should be a controlling or a secondary issue.

97. Mr. USTOR, Chairman of the Drafting Committee, suggested that the Commission dispose of article 2 and reserve its position on the question whether to include a general article on the question of the lawfulness of the transfer of territory.

98. Mr. BARTOŠ said that in article 2 the transfer of sovereignty and the transfer of administration had been seriously confused. When a territory was placed under the administration of a State, the latter did not exercise sovereignty over that territory and could not transfer it. It could relinquish its administration, which then passed to another State, but that did not mean that there was a succession of States. The case was therefore completely extraneous to succession and should be considered separately. History furnished many examples of territories placed under the administration, but not the sovereignty, of a State. One administering State had often been replaced by another without there being any succession. He would have no objection to article 2 if the words "or administration" were deleted.

99. Sir Humphrey WALDOCK (Special Rapporteur), said that article 2 did not cover the transfer of territory from one administering State to another; it dealt with the case where territory which was not under the sovereignty of any State was administered by a State as a trusteeship or non-self-governing territory and subsequently became a part of another State. He might refer, for example, to the situation which had existed when part of the Cameroons had become part of Nigeria.

100. He agreed that the words "transfer of territory" in the title were unfortunate, since the principle embodied in article 2 applied equally to cases where there was no real transfer. His original language, in fact, had referred to the "passing of territory".

101. Mr. Ushakov had suggested the deletion of the words "from one State to another" in the title; that was a possible solution, but the rule would not then correctly represent the situation of the passing of territory. The purpose of the article was merely to indicate that territory had moved from the treaty régime of one State to that of another. The present provisions were correct, but he personally did not like the use of the word "transfer".

102. The question remained whether a general article could be drafted to safeguard the point of the lawfulness of a transfer of territory. As Special Rapporteur, he had originally provided for two alternatives, first that of a negative reservation and, secondly, that of a more affirmative one. He personally favoured the negative reservation and was prepared to produce a text along those lines.

103. The CHAIRMAN said that it would undoubtedly be better to consider a concrete text rather than continue to discuss the question in abstract terms. He suggested, therefore, that the Commission defer its decision on article 2 until it had had an opportunity to examine the Special Rapporteur's new text.

104. Mr. TABIBI said that he supported that suggestion.

It was so agreed.

The meeting rose at 1.5 p.m.

1177th MEETING

Monday, 12 June 1972, at 3.20 p.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. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Organization of future work

[Item 7 of the agenda]

STATEMENT BY THE LEGAL COUNSEL

1. The CHAIRMAN said that the Commission was fortunate in having with it Mr. Constantin Stavropoulos, the Legal Counsel of the United Nations. He invited Mr. Stavropoulos to address the Commission.

2. Mr. STAVROPOULOS (Legal Counsel) said that he would like first to congratulate members on their election to the Commission for the term starting on 1 January 1972. As in the elections which had taken place in 1948, 1953, 1956, 1961 and 1966, the General Assembly, in its wisdom, had elected in 1971 candidates who possessed the "qualifications required" in the highest degree, and had ensured the representation in the Commission "of the main forms of civilization and of the principal legal systems of the world".[1]

3. The Commission was in an excellent position to take a new and important step forward during the next five years in its task of promoting the progressive development of international law and its codification. As he had stated in 1971 in his introduction to the Secretariat's "Survey of International Law" (A/CN.4/245), much had already been done by the Commission during the past twenty-three years, particularly in regard to the law of the sea, diplomatic and consular law and the law of treaties, but much still remained to be done.

4. It would be the Commission's privilege to take up the Olympic torch and to remove from some other fields of international law the uncertainties attached to unwritten rules and to adjust them, where appropriate, to the current needs of an interdependent international community seeking peace and security and economic and social progress.

5. He was happy to inform the Commission that a new and up-to-date edition of the booklet entitled "The Work of the International Law Commission" [2] would be published very shortly, in accordance with the Commission's recommendation of 1970 on the occasion of the celebration of the twenty-fifth anniversary of the United Nations.

[1] See *Statute of the International Law Commission*, article 8.

[2] United Nations publication, Sales No. F.67.V.4.

6. As the Commission was aware, the main achievements of the Sixth Committee of the General Assembly at its last session related to certain aspects of what was generally known as "diplomatic law". In its resolution 2780 (XXVI) of 3 December 1971, the General Assembly had expressed the desire that an international convention should be elaborated and concluded expeditiously on the basis of the draft articles on representation of States in their relations with international organizations, prepared by the Commission. That convention should codify the status, privileges and immunities of missions to international organizations and delegations to organs or international organizations and to conferences convened under their auspices. The adoption of such a convention would add a fresh chapter to the contemporary diplomatic law which had been codified by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

7. With regard to the procedure, however, the General Assembly had postponed its decision. In view of the hesitation of some delegations, based mainly, although not exclusively, on financial considerations, it had been decided to reflect further on the matter. The item had been included in the provisional agenda for the next session of the General Assembly and in the meantime Member States, together with Switzerland as a host State, had been invited to submit their written comments and observations, not only on the draft articles themselves, but also on the procedure to be adopted for the elaboration and conclusion of the convention.

8. In the light of experience, he personally agreed with the recommendation of the Commission to convene an international conference of plenipotentiaries. Certainly the financial aspects should be studied seriously with a view to reducing expenses to a minimum, but such aspects should not be the decisive factor. Since a plenipotentiary conference was a specialized conference, it was always a more appropriate forum for concluding codification conventions than the Sixth Commission of the General Assembly.

9. In response to a widespread and growing concern for the protection of diplomats and the security of missions, the General Assembly, at its last session, had also taken a number of important steps relating to the implementation of some existing rules of "diplomatic law". In endorsing the initiative taken by the Commission, it had requested the Commission to prepare a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law. Again, in resolution 2819 (XXVI) it had decided to establish a "Committee on Relations with the Host Country" [3] to deal with the question of the security of missions and the safety of their personnel, as well as all the categories of issues previously considered by the Informal Joint Committee on Host Country Relations.[4]

10. The newly established Committee on Relations with the Host Country was also authorized to study the Convention on the Privileges and Immunities of the United Nations and to consider and advise the host country on issues arising in connexion with the implementation of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.[5]

11. The Commission had decided to give priority, at its present session, to the preparation of sets of draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, and on succession in respect of treaties.[6] It had already taken steps to comply with the General Assembly's request on the first of those two topics by establishing a Working Group to prepare a preliminary draft for submission to the Commission and, in due course, to the General Assembly.

12. In preparing draft articles on succession in respect of treaties, the Commission was embarking on one of the main topics of its current programme of work. He was sure that, on the basis of the successive illuminating reports by the Special Rapporteur, the Commission would be able to submit a preliminary draft on the topic to the next session of the General Assembly. He was pleased to note that the various studies by the Secretariat of the practice of States and depositaries in the matter of succession in respect of treaties had already proved useful for the work of the Commission.

13. As for the other main topics on the Commission's current programme, succession in respect of matters other than treaties, treaties concluded between States and international organizations or between two or more international organizations, the most-favoured-nation clause and, in particular, State responsibility continued to be regarded by the General Assembly as topics meriting codification as soon as possible.

14. He was fully aware that codification was a very lengthy process and that, in a ten-week annual session, the Commission could not undertake the codification of all those important and different subjects at once. However, he would be failing in his duty if he did not call the Commission's attention to the expectations of the General Assembly. The Commission could perhaps examine those aspects of the codification process and of its methods of work which might be and should be improved. More frequent recourse to working groups would probably prove a valuable means of achieving the desired improvement.

15. In that connexion, he believed that the Commission should not unduly delay the review of its long-term programme. The Survey and the written observations thereon submitted by the members of the Commission provided a sound basis for such a review. The matter, however, could be postponed until 1973 because the Commission had to give priority at its present session to the completion of the two provisional sets of draft articles on the protection of diplomats and succession in respect of

[3] See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 29*, p. 138, para. 5.

[4] *Ibid.*, para. 7.

[5] *Ibid.*

[6] See 1149th meeting, para. 46.

treaties, for submission to the forthcoming session of the General Assembly.

16. With regard to other chapters of international law, he would like to point out that two important instruments had been adopted in 1971 in connexion with outer space and disarmament, namely, the Convention on International Liability for Damage caused by Space Objects [7] and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.[8] Such United Nations bodies as the Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee, the Sub-Committee on the Peaceful Uses of the Sea-Bed and UNCITRAL were continuing their efforts to deal with the subjects allocated to them.

17. The CHAIRMAN thanked the Legal Counsel for his interesting and informative statement.

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 and 2; A/CN.4/L.183 and L.184)

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

(resumed from the previous meeting)

Draft articles proposed by the Drafting Committee *(continued)*

ARTICLE 2 (Transfer of territory from one State to another) *(continued)*

18. The CHAIRMAN invited the Commission to continue its consideration of article 2.

19. Mr. ALCÍVAR said that at the last meeting, speaking also on behalf of Mr. Castañeda, he had reserved his position with respect to article 2 (A/CN.4/L.183), since he had considered it necessary to insert the word "lawfully" before the words "becomes part of another State" in paragraph 1. He was, however, prepared to consider some general provision, such as that proposed by the Special Rapporteur (A/CN.4/L.184).

20. Mr. CASTAÑEDA said that he fully agreed with Mr. Alcívar that some reference to the lawfulness of the transfer of territory was particularly necessary in article 2. It was not sufficient to assume, as some members had done, that the lawfulness of the transfer was implicit in the article; the Commission was engaged in a work of legislation and it was necessary that it should say definitely what it meant.

21. He would be prepared to accept a general article of the type proposed by the Special Rapporteur (A/CN.4/L.184) but failing that, he would suggest that article 2 should contain a new paragraph 2 stating that the rules set forth in paragraph 1 would not apply if the transfer of territory had not been made in conformity with the purposes and principles of the United Nations.

22. Mr. TABIBI said that he agreed with Mr. Castañeda that it would be better to include a reservation concerning the lawfulness of the transfer in article 2 itself. He would have no objection to a general article such as that proposed by the Special Rapporteur, though the reference to the Charter in both alternatives A and B of that text should be expanded to include other resolutions and declarations by the United Nations on the subject, as well as principles of general international law which had existed even before the founding of the United Nations.

23. Sir Humphrey WALDOCK (Special Rapporteur), said that he had prepared his general article (A/CN.4/L.184) as a possible means of covering the question of "lawfulness", in order to present the Commission with an alternative way of dealing with the problem in case a compromise should prove necessary.

24. In the Drafting Committee, considerable doubt had been expressed as to the wisdom of including an express reference in article 2 to the lawfulness of the transfer of territory, particularly if such a reference were not included in other articles, such as those concerning the union and separation of States. He thought that the Commission would be more likely to find common ground on the basis of a general reservation than by including a reference to lawfulness in article 2.

25. Mr. AGO said he fully supported what the Special Rapporteur and the Chairman had said. He himself would prefer that the question should not be mentioned in the draft. It was an obvious truth, which went without saying.

26. If, however, the Commission insisted on stating it, it should do so in a general provision since, as the Chairman had rightly said, the question could arise in situations other than the one dealt with in article 2. If the Commission spoke of lawfulness only in article 2, thereby implying that it was not concerned with the lawfulness of succession in the cases covered by the other articles, it might be inferred that those articles related to unlawful situations also, which was absurd. He therefore proposed that nothing be said in article 2 and that the question be considered generally, perhaps by adding a provision to article 0 or by making a separate article.

27. The CHAIRMAN said that if the Commission proposed to hold a general debate on the two alternatives proposed by the Special Rapporteur, it would probably need more time to study them.

28. Mr. CASTAÑEDA said that he could understand that a reservation concerning the lawfulness of the transfer might not be necessary in all the draft articles, but he felt strongly that article 2 was the one which might give rise to most doubts in that respect.

29. He hoped, therefore, that the Commission would at least give some consideration to his proposal for a new paragraph 2 as a working hypothesis. For that paragraph, he would propose the following English text: "Paragraph 1 does not apply when the territory became part of another State by means and in a manner incompatible with the Charter of the United Nations".

30. He would suggest that article 2 be kept in abeyance until the Commission had considered the question of a

[7] See *Official Records of the General Assembly, Twenty-sixth session, Supplement No. 29*, p. 25, annex to resolution 2777 (XXVI).

[8] *Ibid.*, p. 30, annex to resolution 2826 (XXVI).

general reservation. If the general article proposed by the Special Rapporteur were not approved, he would wish to reserve his position with respect to his own proposal.

31. Mr. HAMBRO said that he fully agreed with Mr. Ago that it was unnecessary to include any provision concerning the lawfulness of the transfer, but that if such a provision were included, it should be stated as a general rule.

32. Mr. YASSEEN said that the Commission, like any legislator, had to legislate on the basis of lawfulness. The transfers referred to in article 2 could only be lawful transfers; no member of the Commission disputed that. It would be dangerous to mention lawfulness only in article 2. A general reservation might be useful, but it was not necessary.

33. If, however, the Commission still wished to specify that the situations covered by the draft articles were lawful situations, it should refer not only to the Charter but to the whole of international law, using some such formula as "in accordance with the rules of international law, including the Charter of the United Nations".

34. Mr. USHAKOV said that it would be premature to amend article 2 now or to put the amendments to the vote, since it was the Commission's practice merely to approve articles at the present stage of its work, and not to adopt them until it considered its report to the General Assembly. So long as the text of an article was only provisional, any member of the Commission had a right to propose amendments later. Indeed, it frequently happened that articles already approved had later to be amended in the light of other articles. It would be better therefore to accept article 2 provisionally, without prejudice to any amendment that might be adopted later.

35. The substance of article 2 raised no difficulty. It went without saying that it was concerned only with lawful situations. In his view, it was not necessary to say so specifically but he was prepared to consider later the general provision proposed by the Special Rapporteur (A/CN.4/L.184).

36. Mr. ALCÍVAR said that he fully supported the statement by Mr. Castañeda. He would reserve his position with respect to article 2 until the Commission had considered the general article proposed by the Special Rapporteur.

37. Mr. NAGENDRA SINGH said he feared that the proposal to add a separate paragraph to article 2 would mean placing altogether too much emphasis on that article and neglecting the other articles where too the reservation should apply. In fact they were talking throughout about the normal legitimate event of a transfer of territory, and the entire régime of State succession to treaties had to respect the Charter. The reservation must therefore apply to the whole régime visualized in the draft and not to any one particular article. In his opinion, it would be better to have a general reservation, such as that proposed by the Special Rapporteur in his alternative B.

38. Mr. USTOR (Chairman of the Drafting Committee) said he had omitted to mention that the Drafting Committee had proposed the deletion of the words "from one State to another" in the title of article 2. The title should accordingly read simply: "Transfer of territory".

39. The CHAIRMAN, speaking as a member of the Commission, said that personally he doubted whether the introductory clause in paragraph 1 of the Drafting Committee's text for article 2 was an improvement on the original text, which read: "When an area of territory, which is not itself organized as a State possessing treaty-making competence, passes under the sovereignty of an already existing State...". In his opinion, that formulation was clearer for the purpose of introducing the "moving treaty-frontiers" principle, which had been referred to by Mr. Tammes in connexion with the incorporation into the Kingdom of Sardinia in 1860 and 1861 of a number of pre-existing Italian States.[9]

40. He agreed with Mr. Bartoš that the reference, in the Drafting Committee's text, to territory under the "administration" of a State [10] raised a whole series of problems, such as, for example, those to be found in connexion with military occupation. In particular, he felt that the words "possessing treaty-making competence" in the original formula should be retained.

41. Paragraph 2 of the Drafting Committee's text read: "Paragraph 1 is without prejudice to the provisions of article 22 [Territorial treaties]". That paragraph was necessary, but it might very well apply to a large number of other articles also.

42. Mr. USHAKOV said the reason why the Drafting Committee had replaced the phrase "When an area of territory, which is not itself organized as a State possessing treaty-making competence", which appeared in the original wording, by the phrase "When territory under the sovereignty or administration of a State" was in order to cover the case of a non-independent territory which, after having been under the administration of a metropolitan State without being an integral part of its territory, become an integral part of the territory of another State. In such a case, there was no transfer properly speaking from one State to another.

43. However, if the expression "under the administration of a State" was not clear and might give rise to difficulties of interpretation, perhaps the Drafting Committee could find a better formula.

44. The CHAIRMAN said he had wondered whether it had been the intention of the Drafting Committee, by adopting the language "When territory under the sovereignty or administration of a State becomes part of another State", to eliminate the need for the additional article for inclusion at the end of part II which was proposed in the Special Rapporteur's fifth report (A/CN.4/256/Add.1, p. 30). That article referred to States, other than unions of States, which were formed from two or more territories.

45. Mr. USTOR (Chairman of the Drafting Committee) said that the use of the word "transfer" in the title of the Drafting Committee's text for article 2 showed that it referred to the passing of territory from the sovereignty

[9] See 1158th meeting, para. 23.

[10] See 1176th meeting, para. 98.

of one State to that of another. That word itself excluded the Chairman's hypothesis.

46. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself was not enamoured of the present draft and thought that his original text was a more correct presentation of the principle involved. He also preferred the words "passes under the sovereignty", which was a very neutral phrase and did not necessarily include unlawful situations.

47. He hardly felt that the present text could apply to cases of military occupation, but that possibility could be covered by a proper definition of State succession.

48. He would suggest that article 2 might now be referred to the Drafting Committee for final retouching.

49. Mr. BARTOŠ said he was glad the point he had made at the previous meeting about the difference between sovereignty and administration of a State had been noted by the Chairman. As long, however, as the terms "sovereignty" and "administration" were used together, he would be unable to approve article 2.

50. Mr. REUTER suggested that a possible wording might be: "over which a State exercises sovereignty or in a similar situation". Most trusteeship agreements stipulated that the administering Power should exercise its sovereignty over the territory under trusteeship by treating it as an integral part of its own territory, but it was never stated that it was really part of the administering Power's territory. It was therefore important to avoid using the term "administration".

51. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 2 back to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[11]

ARTICLE 3 [12]

52. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 3:

Article 3

Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties in consequence only of the fact that the predecessor and successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present articles.

53. A correction had been made to the text as given in document A/CN.4/L.183: the words "prior to that succession" in paragraph 2 had been replaced by the words "at the date of that succession".

54. The end of the title had been changed from "upon a succession" to "from a predecessor to a successor State", which was thought to be clearer.

55. The text of the article was very similar to that of the draft originally submitted to the Commission by the Special Rapporteur in his second report.[13] The Drafting Committee had modified the wording of the French version a little and had brought the English version of paragraph 1 into line with the French by inserting the word "only" after the words "in consequence".

56. In paragraph 2, the opening phrase had been replaced by the words "Notwithstanding the conclusion of such an agreement", in order to emphasize that the devolution agreement could not of itself transmit to the successor State vis-à-vis third States any treaty obligations or rights which would not in any event pass to it under general international law. The wording had also been simplified by using the phrase "the effects of a succession of States".

57. Mr. USHAKOV said that there appeared to be a discrepancy between the English and the French versions of the title: in English, the first word of the title was "Agreements" but in French it was "*Traités*".

58. The CHAIRMAN said that, in English, it was customary to speak of "devolution agreements".

59. Sir Humphrey WALDOCK (Special Rapporteur) said that it was preferable to use the weaker word "agreements". Under the Vienna Convention the expression "treaty" was defined in terms of an international agreement. It should also be remembered that some doubts had been expressed regarding the international character of a devolution agreement signed by a colony with its metropolitan Power.

60. Mr. USHAKOV suggested that, in the French title, the word "*Traités*" be replaced by the word "*Accords*".

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 3 subject to that change in the French version of the title.

Article 3 was approved.[14]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 19 (Formation of unions of States)

62. The CHAIRMAN invited the Special Rapporteur to introduce his article on unions of States (A/CN.4/256/Add.1)

Article 19

Formation of unions of States

Alternative A

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to

[11] For resumption of the discussion, see 1181st meeting, para. 44.

[12] For previous discussion, see 1159th meeting, paras. 40-75, and 1160th meeting, paras. 1-63.

[13] See *Yearbook of the International Law Commission 1969*, vol. II, p. 54.

[14] For resumption of the discussion, see 1181st meeting, para. 49.

the formation of the union continue in force between the union of States and such other States parties unless:

(*a*) The object and purpose of the particular treaty are incompatible with the constituent instrument of the union; or

(*b*) The union of States and the other States parties to the treaty otherwise agree.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States.

Alternative B

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the union of States and such other States parties if

(*a*) In the case of multilateral treaties other than those referred to in article 7 (*a*), (*b*) and (*c*), the union of States notifies the other States parties that it considers itself a party to the treaty;

(*b*) In the case of other treaties, the union of States and the other States parties

(i) Expressly so agree; or

(ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States. (A/C.4/256/Add.1.)

64. Sir Humphrey WALDOCK (Special Rapporteur) said that he had submitted two alternative texts for article 19, which differed as to substance and not merely as to drafting; they represented two different approaches to the solution of the problem.

65. He had also put forward, for addition to article 1 (Use of terms), a paragraph on the term "union of States" which read:

"Union of States" means a federal or other union formed by the uniting of two or more States which thereafter constitute separate political divisions of the united State so formed, exercising within their respective territories the governmental powers prescribed by the constitution. (A/CN.4/256/Add.1.)

66. As indicated in that paragraph, the term "union of States" was used to mean a union formed of entities which, prior to union, were themselves States. The question of composite States formed of two or more territories, not pre-existing States, raised problems that were not identical with those of unions of States; he had submitted draft article "Excursus A" (A/CN.4/256/Add.1) to deal with that question. The commentaries to that article, as well as those to article 19, should be borne in mind during the present discussion.

67. Unions of States involved considerable difficulties, partly because of the many different kinds of unions; a certain type of economic union was tending to become more common, for example. His own approach had been to regard intergovernmental unions as falling outside the scope of the draft, which should cover only constitutional unions.

68. The problem of associated States had been mentioned by some speakers but he was reluctant to introduce that problem into article 19. Associations usually related to former territories which were not previously States, and it would therefore be difficult to deal with them under the heading of "Unions of States".

69. On the basis of the somewhat varied practice in the matter, which was analysed in the commentary, he had put forward two alternative texts for unions of States: alternative A was based on the concept of *ipso jure* continuity, whereas alternative B was based on consent. If, as he believed, the Commission preferred alternative A, it would not be necessary to examine very closely the text of alternative B, which did not perhaps go into enough detail; he had not attempted, for example, to deal there with the question of restricted treaties.

70. In discussing article 19, members should perhaps take up the concept of the definition of "union of States" put forward by him, rather than its actual wording. That wording was appropriate for the formation of unions, dealt with in article 19, but might prove less appropriate for the situations dealt with in article 20 (Dissolution of a union of States) (A/CN.4/256/Add.2).

71. Mr. USHAKOV said that under the terms of paragraph 2, the wording of which was identical in both alternatives, treaties which continued in force in accordance with paragraph 1 were binding only in relation to that part of the union of States in respect of which the particular treaty had been in force prior to the formation of the union, unless it was otherwise agreed. He wondered whether, in the case of multilateral treaties, the provision would have the same effects in both alternatives. In particular, he would like to know why the Special Rapporteur had laid down the principle that treaties continued in force only in relation to that part of the union in respect of which they had previously been in force, even though in the case of multilateral treaties it frequently happened that all the merging States were parties to them.

72. Sir Humphrey WALDOCK (Special Rapporteur), said that, in conformity with what he had found in State practice, he had framed paragraph 2 in identical terms for both alternative texts. The effect of that provision would be that, where continuity existed, whether *ipso jure* or by consent, each treaty was binding only in relation to that part of the union of States in respect of which it had been in force prior to the formation of the union, unless the States concerned otherwise agreed. Possibly that principle should not apply, in the case of alternative B, where restricted treaties were concerned. As he had stated in his introductory remarks, he had not taken into account the complications arising from restricted treaties when he had drawn up alternative text B.

73. Mr. AGO said that he would confine himself to commenting on a few preliminary questions which the Commission would have to settle before drawing up any real rules. The Special Rapporteur's task had been

complicated by the diversity of the situations to be considered and by the poverty of the legal language.

74. The term "union of States" was very ambiguous because as a general rule it was applied primarily to organizations like the League of Nations or the United Nations, which were specifically excluded from the present topic. The unions dealt with in article 19 were not unions in international law, but unions in constitutional law which, seen from outside, appeared to form a single State. That was why he was very dubious about the use of the term "union of States".

75. When two or more States entered into an association, the results could be very different according to the case. The Swiss cantons, for instance, retained, to some extent, a separate international personality; Bavaria had enjoyed some limited international capacity and had still been a subject of international law in the German Empire; but the constituent States of the United States of America were States only under constitutional law. In the case of Italy, the former States had disappeared even from the constitutional order and had been replaced by provinces with completely different limitations. Allowance must therefore be made both for forms of association which did not lead to the establishment of a completely unitary new State and for those which did.

76. In the French version of the definition of the term "union of States", the expression "*pouvoirs exécutifs*" was inadequate, since the political divisions of the united State normally exercised legislative powers as well.

77. Mr. REUTER said that the French version of the article did not accurately reflect the English version and expressions like "*état unifié*" should not be taken literally.

78. Referring to Mr. Ago's comments, he said that what the Commission had to consider was the situation where a single State was formed from two or more States. The Special Rapporteur had rightly not committed himself as to whether the component entities retained or lost their status as States. His proposed text seemed to cover both possibilities.

79. Any other situation must be deliberately excluded because it would belong, not to succession of States, but to succession of a State to an international organization. That was why the term "union of States", which used to be applied to international organizations, must be avoided; it was too general for the single case being considered by the Commission. Personally he would prefer the term "composite State"; there was no need to specify what composed it, once it was formed, the essential point was that it was States that had formed it.

80. The CHAIRMAN asked whether he was correct in thinking that what Mr. Reuter was proposing amounted to saying that a "union of States" means a State formed by uniting two or more States.

81. Mr. REUTER said he would prefer to speak of "a composite State" (*état composé*) rather than "a union of States".

82. Mr. USTOR, Chairman of the Drafting Committee, said that the concluding sentence of paragraph 50 of the commentary (A/CN.4/256/Add.1) showed that the term "union of States" covered only unions where the element of "separateness" of the constituent units was present after the formation of the Union. The term would thus exclude the case where there was a complete absorption of the constituent States in a new unitary State. Certainly, alternative A could not stand if such a case were included. With alternative text B, on the other hand, it might be possible to reword the definition of "union of States" so as to cover both the case where the element of "separateness" was present after the formation of the union, and the case of complete absorption.

The meeting rose at 6 p.m.

1178th MEETING

Tuesday, 13 June 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. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, 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 and 2; A/CN.4/L.183; A/CN.4/L.184)

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

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 19 (Formation of unions of States)
and
ADDITIONAL PROVISION FOR INCLUSION IN ARTICLE 1 (Use of terms) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 19, together with the new paragraph on "union of States" for addition to article 1, submitted by the Special Rapporteur in his fifth report (A/CN.4/256/Add.1).

2. Mr. SETTE CÂMARA said that, in the suggested additional definition for article 1, he doubted the need to retain the words "federal or other" before the words "union formed by the uniting of two or more States...". As was stated in paragraph 40 of the commentary, the Special Rapporteur had accepted the view of the Committee of the International Law Association "that the variety of constitutional forms on which unions rest, with their different gradations of federation, do not make it easy to draw neat distinctions between federal and other unions". The Special Rapporteur had accordingly expressed his preference for a single solution to be applied to all unions, without distinction. In those circumstances, retention of the words "federal or other" could be misleading, since it might give the impression that the two categories of unions were going to be treated differently, which was not the case.