Document:-

A/CN.4/SR.1180

Summary record of the 1180th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

and was likely to create confusion, whereas the term "union of States" was to be found in every textbook of international law.

62. The CHAIRMAN, speaking as a member of the Commission, said that when he had referred to a "unitary State" he had meant a unified State.

63. With regard to the question of associated States, he understood that it required extensive treatment, and that could perhaps be given better in the commentary than in the article itself.

64. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to refer article 19 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[21]

ADDITIONAL ARTICLE FOR INCLUSION AT THE END OF PART II (Excursus A)

65. *Excursus A*

States, other than unions of States, which are formed from two or more territories

When a new State has been formed from two or more territories, not themselves States, treaties which are continued in force under the provisions of articles 7 to 17 are considered as applicable in respect to the entire territory of the successor State unless:

(*a*) It appears from the particular treaty or is otherwise established that such application would be incompatible with the object and purpose of the treaty;

(*b*) In the case of a multilateral treaty other than one referred to in article 7 (*c*), the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(*c*) In the case of a multilateral treaty of the kind referred to in article 7 (*c*), the successor State and the other States parties otherwise agree;

(*d*) In the case of a bilateral treaty, the successor State and the other States party otherwise agree. (A/CN.4/256/Add.1).

66. The CHAIRMAN invited the Special Rapporteur to introduce the additional article in excursus A of his fifth report (A/CN.4/256/Add.1).

67. Sir Humphrey WALDOCK (Special Rapporteur) said that he had explained in a fairly extensive commentary (A/CN.4/256/Add.1) his reasons for submitting an additional article to deal with States, other than unions of States, formed from two or more territories which prior to the union had not themselves been sovereign States.

68. The fundamental problem which arose was whether a distinction should be drawn between a union of States formed from two or more pre-existing sovereign States and a State, which could be either a unitary State or a federation, which was simply composed of territories. Even where the component territories had a distinct identity in the federal structure, no problem of international existence arose. He therefore believed that the case envisaged in his excursus A constituted merely a separate type of newly independent State and as such should be covered by an additional article to be included in part II of the draft.

69. Mr. SETTE CÂMARA said that he fully agreed with the Special Rapporteur's approach. The whole of the rationale for the rule in article 19, on unions of States, rested on the fact that such unions consisted of former independent sovereign States having each a patrimony of treaties which ought to continue in the interests of the other parties to the treaties and of the international community as a whole. A union of territories such as that envisaged in excursus A, on the other hand, fell within the principles of part II of the draft.

70. Mr. USHAKOV said that the proposed additional article was acceptable but might be unnecessary if the case of a State composed of two or more territories were included in the notion of newly independent State.

71. If the article was retained, it would be advisable to make a slight drafting change in sub-paragraph (*a*) so as to make clear the exact meaning of the words "such application".

72. He reserved his position with regard to the definition of the term "newly independent State".

The meeting rose at 1 p.m.

1180th MEETING

Thursday, 15 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.

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)

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

(continued)

EXCURSUS A—ADDITIONAL ARTICLE FOR INCLUSION IN PART II (States, other than unions of States, which are formed from two or more Territories) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of excursus A, the additional article for inclusion in Part II, submitted by the Special Rapporteur in his fifth report (A/CN.4/256/Add.1).

2. Mr. TAMMES said that, when he had spoken on article 19 at a previous meeting, he had made some very general and preliminary remarks with regard to excursus A.[1] Its structure was similar to that of alternative A for article 19, in that a presumption was laid down in favour of the application of the treaty to the whole territory, unless it was otherwise agreed by the interested

[21] For resumption of the discussion, see 1196 th meeting, para. 38.

[1] See 1178th meeting, para. 19.

parties. Although he had not favoured a presumption of that kind in the case of article 19, he saw no harm in adopting it for excursus A.

3. He had a number of reasons for so doing. First, sub-paragraphs (*d*) and (*c*) made continuity dependent on an agreement between the successor State and the other State or States parties, where bilateral treaties or restricted multilateral treaties were concerned; since, for those categories of treaties, the consent of all the parties would in all cases be necessary, the parties would have an opportunity of considering whether the treaty should apply to the entire territory of the union or only to part of it. Secondly, sub-paragraph (*b*) provided for the possibility of a further territorial restriction. And thirdly, the presumption was also subject to the reservations specified in sub-paragraph (*a*) regarding incompatibility with the object and purpose of the treaty.

4. He did not, however, favour dealing with the matter in a separate article; he believed that the essence of excursus A could be conveniently amalgamated with the substance of article 19, as in the formula suggested by the International Law Association and reproduced in paragraph 29 of the Special Rapporteur's commentary to article 19 (A/CN.4/256/Add.1).

5. There were also sound reasons for not making too strict a distinction between unions of States and unions of territories. History provided examples of what might be called mixed cases. For instance, in 1918, when the union between Iceland and Denmark had been formed, Iceland was not a State but a territory forming part of Denmark.

6. He did not believe that many cases were likely to arise in the future of the simultaneous emergence into independence of a group of former dependent territories close enough to each other for it to be logical for them to constitute a single State. Since the hypothesis on which excursus A was based thus belonged rather to the past, it did not appear necessary to retain its provisions in the form of a distinct and separate article.

7. Sir Humphrey WALDOCK (Special Rapporteur) said that he had considered the last point raised by Mr. Tammes when drafting article 19 and excursus A, and also when preparing article 20.

8. There was a very real distinction between the cases envisaged in excursus A and those contemplated in article 19. The latter provision dealt with the formation of a union consisting of units which had participated in the treaty-making process. In the cases covered by excursus A, the problem was that of determining the manner in which the plurality of the territories affected the application to the new State formed by their merger of the rules for newly-independent States laid down in articles 7 to 17.

9. The case of Iceland was a special one, in that almost immediately after the union of 1918 it had achieved international personality, and foreign States had negotiated treaties with it during the period of the union.

10. If the provisions of article 19 were to be based on the principle of consent, it would be comparatively easy to amalgamate them with those relating to States formed from two or more territories. Since, however, the majority of the Commission had favoured basing the provisions of article 19 on the principle of *ipso jure* continuity, it would be necessary to have a separate provision on the lines of excursus A.

11. Mr. QUENTIN-BAXTER said that he was in full agreement with the very practical and useful rule embodied in excursus A, and with the relationship between that rule and the provisions of article 19 in alternative A. The distinction drawn between unions of States and the cases covered in excursus A was a valid one.

12. The CHAIRMAN, speaking as a member of the Commission, said that excursus A was a useful addition to the draft, even though it was likely to be applied only on comparatively rare occasions. It was desirable to lay down in the draft a series of rules for as wide a variety of situations as possible, in order to avoid any gaps or confusion in practice.

13. With regard to the text, he had no serious problems but felt that some clarification was needed regarding the relationship between sub-paragraph (*a*), on incompatibility with the object and purpose of the treaty, and sub-paragraphs (*a*) and (*b*) of paragraph 1 of article 13. As he understood those last two provisions, an express or implied agreement by the parties to apply a bilateral treaty would rule out any question of incompatibility.

14. Speaking as Chairman, he said that if there were no further comment, he would take it that the Commission agreed to refer excursus A to the Drafting Committee.

It was so agreed.[2]

ARTICLE 20

15. *Article 20*

Dissolution of a union of States

Alternative A

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States:

(*a*) Any treaty concluded by the union with reference to the union as a whole continues in force in respect of each such State;

(*b*) Any treaty concluded by the union with reference to any particular political division of the union which has since become a separate State continues in force in respect only of that State;

(*c*) Any treaty binding upon the union under article 19 in relation to any particular political division of the union which has since become a separate State continues in force only in respect of that State.

2. Sub-paragraphs (*a*) and (*b*) of paragraph 1 do not apply if the object and purpose of the treaty are compatible only with the continued existence of the Union of States.

3. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraphs 1 and 2 apply also in relation to this State.

Alternative B

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States, treaties binding upon the union at the date of its dissolution continue in force between any such successor State and other States parties thereto if:

[2] For resumption of the discussion, see 1196th meeting, where excursus A becomes article 17 *(quinquies)*.

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

(*b*) In the case of other treaties, the successor State 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. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraph 1 apply also in relation to this State.[3]

16. The CHAIRMAN invited the Special Rapporteur to introduce article 20 of his draft (A/CN.4/256/Add.2).

17. Sir Humphrey WALDOCK (Special Rapporteur) said that article 20 dealt with a case which was the obverse of that dealt with in article 19, on unions of States. It related only to the dissolution of unions; he was preparing another article, which would be numbered article 21, to deal with other forms of dismemberment, such as secession from a State and the splitting apart of a State.

18. Article 20 raised the problem of the definition of "union of States". As he had already pointed out in introducing that definition, it would be necessary to reword it so as to cover satisfactorily both article 19 and article 20, and such cases as the union between Iceland and Denmark in 1918, which was a union created not from two pre-existing States but from a State and a territory detached from that same State. The case was one of what used to be called in traditional textbooks a "real union"; it had a single crown and a single organ to exercise treaty-making powers, but there was a very distinct separation of identities between Iceland and Denmark.

19. There was not a very large practice on the subject. The question arose, as it had done in the case of article 19, whether that practice pointed to a rule of *ipso jure* continuity or to a rule based on consent. In fact, it provided elements of both. In view of the pragmatic position usually taken by the States concerned, it was often difficult to discern whether the action taken in a particular case represented an arrangement by consent of the parties or a recognition of some form of *ipso jure* continuity rule. That was why he had submitted two alternative texts: alternative A based on the *ipso jure* approach and alternative B based on the element of consent. It would be for the Commission to choose between them.

20. Mr. TAMMES said that as far as he was concerned, there could be no question of a choice between alternatives A and B. Alternative A simply did not work in practice, so that the text in alternative B would have to be used.

21. As shown by the opening words of paragraph 1 in both alternatives, when a union of States was dissolved, its constituent political divisions became separate States. They became in fact new States, since they had not been States while they were mere political divisions of the union.

22. That being so, and in view of the clear provisions included in the articles on new States, he did not see how it would be possible to formulate a rule, such as that contained in alternative A, which imposed on a new State the treaties by which it would be bound in the future. Such a rule would be contrary to the basic philosophy of the draft.

23. Moreover, it should be remembered that a new State, such as a constituent State of a dissolved union, would not be bound by the future instrument on succession of States in respect of treaties, except to the extent that any of the rules therein contained was considered as declaratory of already existing customary international law. Clearly, no such claim could conceivably be made on behalf of the rule embodied in alternative A. The scanty, contradictory and ephemeral practice described in the commentary patently demonstrated that such was not the case.

24. In the circumstances, the only solution to the problem raised in article 20 was to rely on the old device of consent and to recognize that a new State could not be bound without its consent. He accordingly urged the Commission to adopt alternative B.

25. Mr. HAMBRO said that he agreed with Mr. Tammes and supported alternative B.

26. The remarks which he had made during the discussion on article 19 were equally valid for article 20.[4]

27. Sir Humphrey WALDOCK (Special Rapporteur) said that in the discussion on article 20, just as in the discussion on article 19, the Commission had arrived at a cross-roads. It would have to decide whether it would allow the element of personality of States to have an impact on the rules of succession.

28. In article 19, the majority of the Commission had accepted that, in the case of a union of States, where in the past the component units had constituted international entities, the *ipso jure* rule applied. Similarly, with regard to the question of the dissolution of a union, dealt with in article 20, the question arose whether the existence of a trace of international personality would affect the situation.

29. Mr. NAGENDRA SINGH said that, although with regard to article 19 he maintained his preference for alternative A, he was prepared to accept alternative B as far as article 20 was concerned.

30. The position with regard to dissolution was different from that which obtained with regard to the formation of a union. On the dissolution of a union of States, the component units emerged as entirely new legal entities and constituted new States. With regard to new States, the principle of consent was paramount; a new State must be allowed to choose the treaty relations by which it wished to be bound. The text in alternative B answered that need.

31. Mr. USHAKOV said that the situations created by the dissolution of a union of States were even more complex than those arising from the formation of unions of States. In other words, the problems raised by

[3] For commentary see document A/CN.4/256/Add.2.

[4] See 1178th meeting, paras. 46-49.

article 20 were even more difficult to resolve than those raised by article 19.

32. The first was how to make a distinction between dissolution and division. The Commission had already decided that a State that had seceded—in other words, where an existing State had been divided into two separate States—was in a similar situation to newly independent States in general. Where the entities were politically separate and had the capacity to conclude treaties, the situation was clear, but where it was only in one and the same State that they could be considered as political entities, it was more difficult. In the case of Bangladesh, for example, was it a separation, a division or a dissolution?

33. Secondly, neither alternative A nor alternative B satisfactorily answered the question whether, after a complete dissolution, the principle of *ipso jure* continuity or the "clean slate" principle should be applied. According to paragraph 1 (*a*) of alternative A, any treaty concluded by the union with reference to the union as a whole continued in force in respect of each of the constituent States. That was the principle of *ipso jure* continuity. But that rule was not applicable to commercial or economic treaties, for example. It was inconceivable that, after a dissolution, the same obligations would be shared between two or more successor States in respect of which the treaty concluded in the name of the union would remain in force. Paragraph 2, which contained the proviso that the treaty would not remain in force if its object and purpose were compatible only with the continued existence of the union of States, did not solve the problem, since it ignored the rights and obligations of the third State towards the States arising from the dissolution.

34. The situation contemplated in paragraph 1 (*b*) of alternative B was equally ambiguous. A third State would no longer be bound by a trade treaty, for example, in respect of two or more States arising from a dissolution. Consequently, apart from the simple case in which only one entity broke off from a union, neither alternative A nor alternative B dealt satisfactorily with the problems that arose after a complete dissolution.

35. With regard to the form of the article, paragraph 3 of alternative A and paragraph 2 of alternative B appeared to be superfluous, since the case of the separation of one of the constituent political divisions of a union was already covered in paragraph 1 of both alternatives. Paragraph 1 (*b*) of alternative A dealt with a different situation, since treaties concluded by the union with reference to any particular political division of the union were localized treaties.

36. It would be as well to define clearly the concept of political division within a State; it was a political rather than a legal concept and the Special Rapporteur had not provided any definition. The Special Rapporteur and the Drafting Committee should give some thought to the question and perhaps draft a separate provision concerning such entities.

37. Mr. RAMANGASOAVINA said that, as the Special Rapporteur had pointed out, article 20 and article 19 were complementary. Just as he had preferred alternative A of article 19, he also preferred alternative A of article 20, which endorsed the principle of *ipso jure* continuity. He wished, however, to make two observations.

38. Alternative A of article 20 should include the same saving clause as was contained in paragraph 1 (*b*) of alternative A for article 19, recognizing the right of States to express their will with regard to the treaties. Secondly, in paragraph 3, a State leaving a union because it had not approved the conclusion, by the union, of a treaty affecting the union as a whole must be given the possibility of expressing its will not to be bound by the treaty in question, as it otherwise would be under the terms of paragraph 1 (*a*). Even if that possibility existed in law, it should be specified in paragraph 3.

39. Mr. AGO said that, like Mr. Ushakov, he found neither of the two proposed alternatives fully satisfactory. As in article 19, it was easier for him to accept alternative B but, however strange it might seem, he found alternative A more acceptable in article 20 than in article 19, for the simple reason that it was easier to pass from the general to the particular than from the particular to the general. It was logical that the parties of a whole, of a composite entity, should each remain bound by a treaty concluded for the entity as a whole, but it was not logical that a large entity should inherit obligations flowing from treaties concluded by a small entity.

40. As in the case of article 19, he felt that different provisions should be formulated to cover the different cases of a community of States, a composite State and a unitary State. Alternative A could be applied without difficulty to a community of States and to a composite State, but not so easily to a unitary State. The term "union of States" did not cover all possible cases and was not applicable to a unitary State; it would therefore have to be changed.

41. The same applied to the French expression "*entité politique*", which did not properly convey the idea of "division"; moreover, the division might not be "political", but in the case of a unitary State, for example, administrative. There again a drafting change was necessary.

42. The wording of paragraph 1 (*c*) should also be amended to indicate more clearly that it referred to "ephemeral" unions.

43. In alternative A, the key to the article was paragraph 2, which was a saving clause, and for third States as well. The condition it laid down for the continuation in force of the treaty—compatibility of the object and purpose of the treaty with the continued existence of the union of States—was more concrete than that laid down in the corresponding provision of article 19—compatibility of the object and purpose of the treaty with the constituent instrument of the union; but again, it was not entirely sufficient. For instance, should a third State which has concluded a treaty with a union of States containing the most-favoured-nation clause continue to apply that clause to all the parties, after the dissolution, even though there was no real incompatibility with the dissolution? Yet again, if the third State granted certain advantages to a particular territory of the union in exchange for other advantages granted by the union,

should it continue to grant those advantages to the territory once it had become independent, when it would no longer obtain anything in exchange from the union? That showed that it was very difficult to formulate a single provision to cover all the possible cases.

44. The case contemplated in paragraph 3 would appear to be secession. The Commission had already decided that a State resulting from secession was in the same situation as a newly independent State. Whatever meaning was given to the term "union of States", there would be scarcely any difference.

45. For those reasons, he considered that the proposed article 20 constituted a good working basis but needed to be considerably developed.

46. Mr. REUTER said that he fully shared the views expressed by Mr. Ushakov and Mr. Ago. Article 20 was not as straightforward as article 19 and, as far as the two proposed alternatives were concerned, it would be simpler if the Commission were to adopt alternative B in both cases. That would not satisfy him entirely from a practical standpoint, however, which was why he had expressed a preference for alternative A of article 19, though not without some misgivings.[5]

47. The main difference between articles 19 and 20 was due to the fact that all the situations dealt with in article 19 originated in a treaty. The problems raised by article 19 seemed to fall within the province of the traditional law of treaties and could be summarized in a single question: could a State release itself from one treaty by means of a new treaty?

48. Article 20, on the other hand, did not seem to be limited to any treaty. It could not be maintained that the dissolution of a union of States always resulted from a treaty, although that was more often the case. That was why he found it difficult to consider article 20 from the same standpoint as article 19.

49. The Commission might be able to find more generally acceptable solutions if it approached the problem, not from the standpoint of the law of treaties, or at least not from that of the succession of States, but from that of the theory of responsibility. It could, for instance, adopt the approach that a State incurred responsibility when its behaviour made the application of a particular treaty impossible. The basic principle in matters of responsibility was that of *restitutio in integrum*; equivalent restitution was admissible only in case of material impossibility. If the problem were approached in that light, new prospects of solving it should emerge.

50. Nevertheless, he was not prepared to take a definite position on articles 19 and 20 until he knew the Commission's attitude to localized treaties. Say a union of States acceded to the Treaty on the Non-Proliferation of Nuclear Weapons,[6] would that be considered a localized treaty, or would a dissolution of the union be sufficient to release the States from their obligations?

51. In a few clearly defined cases the Commission should accept the idea of a right of *ipso jure* succession. Thus, in some cases the parties should be under an obligation to negotiate in good faith an adjustment of the treaties in order that they might continue in force. That was the rule in GATT. Moreover, it had been recognized by the International Court of Justice, in the "North Sea Continental Shelf" case, where it had laid down the principle that, in a stalemate situation, the parties were under an obligation to negotiate in accordance with legal rules, but rules reflecting equitable principles.[7] Such an approach could throw fresh light on a number of problems, though some treaties were so ill-adapted to a new situation that they ought to disappear altogether.

52. Mr. BARTOŠ said that he accepted the rules laid down in article 20 but would like to draw attention to a few exceptional situations. For example, a political division detached from a union could transmit some of its treaties to a unitary State. France had been a unitary State since the Revolution, but for purely political reasons connected with the special position of Alsace and Lorraine, had agreed after the First World War that the Concordat which had been applicable to them before 1918 should continue in force. Conversely, the most-favoured-nation clause which had applied to relations between France and the Grand Duchy of Baden had, by the 1871 Treaty of Frankfort,[8] been extended to the whole of the German Empire when Baden had been integrated into it. France had recognized that kind of succession in respect of treaties. Obviously, in neither case had there been an *ipso jure* succession but negotiation between the States concerned, culminating in the Treaties of Versailles and Frankfort respectively.

53. Yugoslavia had succeeded to Serbia in all treaty matters. The Concordat applicable to Montenegro had, however, been an exception, since Yugoslavia had tacitly agreed that it should continue in force. That had led to repercussions on relations between Hungary and the Vatican, since part of the territory concerned had been under the jurisdiction of the Archdiocese of Hungary and some people had claimed that such jurisdiction continued in accordance with the Concordat between Hungary and the Vatican. The problem had not been settled until after the Second World War.

54. In practice, then, some unitary States had made political concessions to other subjects of international law, thereby derogating from the principle of the unitary application of treaties. It was therefore essential for the Commission to realize that the rules which it was preparing did not have a general and absolute force, as was shown by examples from the past.

55. Mr. USTOR said that since he had already made it clear why he favoured alternative A for article 19,[9] it was only logical that he should favour alternative A for article 20 as well.

---

[5] See 1178th meeting, para. 161.

[6] See *Official Records of the General Assembly, Twenty-second Session, Supplement No. 16A*, resolution 2373 (XXII), p. 5.

[7] *I.C.J. Reports 1969*, p. 54.

[8] de Martens; *Nouveau recueil général de traités, 1874*, vol. XIX, p. 188.

[9] See 1178th meeting, paras. 77-81.

56. It had been said that alternative A would not work well in practice, but the Special Rapporteur's commentary showed that it had worked in the case of Hungary, since Hungary had continued to consider itself bound by treaties concluded during the Austro-Hungarian Monarchy after the dissolution of the monarchy in 1918 (A/CN.4/256/Add.2, para. 7). There might, of course, be many different cases and it would be difficult to draw the line between them, but in those which could be assimilated to the case of the Austro-Hungarian Monarchy, he felt that alternative A stated the law as it stood, and should be adopted.

57. The real problem, however, was that dealt with in paragraph 2, the case where there was a gap in continuity. There he shared the view expressed by Mr. Reuter [10] that it might be desirable to refer to the general principle of the duty of States to co-operate with each other. And it might be that from that principle derived the duty of States, in such situations, to adjust their legal position and to find agreed solutions which would enable them to continue with the necessary changes, the legal relations which existed before the dissolution between the union and third States.

58. Mr. Reuter had mentioned the possibility that in the case of the dissolution of a union of States the separate members might conclude a devolution agreement to provide for the future of the existing treaties.[11] He suggested, therefore, that the Commission look again at the article on devolution agreements which it had already adopted, and decide whether it would apply in the case of article 20.

59. Mr. BILGE said that he was in favour of alternative A of article 20, for the reasons stated by Mr. Ustor; he had already opted for alternative A of article 19. The two articles were inter-related, but their relationship could be made even closer. For example, the definition of the term "union of States" at the beginning of article 19 could be so worded as to apply equally well to article 20.

60. Some speakers had asked whether a new State could be bound by obligations contracted by the union of which it had previously been a part. But first it should be noted that it was not really a new State. The case was that of a union of States consisting of separate political divisions which generally established their consent to the conclusion of treaties by the union. That was obviously so for the treaties referred to in sub-paragraphs (*b*) and (*c*) of paragraph 1. As for treaties concluded by the union for the whole of its territory, it was clear that the political divisions of the union participated in the negotiations in some way or other, in accordance with constitutional law. Even if some cases might not be covered by the saving clause in paragraph 2, that was no great cause for concern, because extreme cases would always defy even the most carefully drafted rules.

61. Mr. CASTAÑEDA said that for article 19 he had supported alternative B. Although he supported the principle of continuity, he felt it was inadvisable to lay too much emphasis on it.

62. The formula proposed in alternative A of article 20, however, seemed to him to be somewhat more restrictive with respect to continuity than that set forth in article 19. The exception provided for in paragraph 1 (*b*) of alternative A for article 19 had been omitted in article 20, where the only exception provided for was that of the compatibility of the object and purpose of the treaty only with the continued existence of the union of States. Did the Special Rapporteur mean that the union of States and the third States parties to the treaties would have no right to agree otherwise?

63. Sir Humphrey WALDOCK (Special Rapporteur) said that the omission was purely an oversight on his part.

64. Mr. CASTAÑEDA said that he could see a certain logic in the argument that a treaty which had been in force for a union of States should continue in force for the separate States formed after its dissolution. In such cases, there could be no legal objection to the principle of continuity, but he had some doubts as to how it could be applied in a political context. He could easily imagine cases in which the application of quasi-automatic continuity would not be desirable. For example, if a union of States had assumed certain obligations as a great Power, such as the protection of other States, those obligations would have little meaning for the small, separate States formed after its dissolution.

65. He was inclined to question, therefore, whether it was possible to accept the principle of continuity in any categorical form in article 20. Perhaps the Commission should consider the suggestion put forward by Mr. Reuter and introduce in article 20 the idea that an obligation did exist for the separate States after a dissolution, to negotiate in good faith an adjustment of the treaties in order that they might continue in force.[12]

66. Mr. NAGENDRA SINGH said that if the definition of "union of States" in the preamble to article 19 also applied to article 20, it was obvious that alternative A was to be preferred. In that case, there would be two separate sovereign States that had united in a union which was now dissolving.

67. But if that definition did not apply to article 20 and article 20 was allowed to exist independently of article 19, article 20 would seem to apply also to a federal unit which seceded from a union of States. It the Special Rapporteur proposed to deal with that situation in his new article 21 on the separation and splitting-up of States, alternative A for article 20 would seem the best solution; he would then have to revise the statement he had made earlier in the meeting.[13]

68. He would like, however, to see the Special Rapporteur's draft for article 21 before taking a final decision on article 20, since if the problem of the secession or splitting-up of States was to be left to article 20, that might well spell confusion in such cases as that of Bangladesh.

69. The CHAIRMAN, speaking as a member of the Commission, suggested that in paragraph 1 (*a*) of alterna-

[10] See para. 57 above.

[11] *Ibid.*

[12] See para. 51 above.

[13] See paras. 29 and 30 above.

tive A for article 20, the present wording be replaced by the words: "A treaty that applies to the union as a whole continues in force in respect of each such State".

70. In paragraph 1 (*b*), it might be necessary to deal with the problem of a possible plurality of the particular political divisions in question, since more than one might leave the union. In that event, the words "... continues in force only in respect of that State", would have to be amended.

71. In paragraph 3, he thought that the emphasis ought not to be placed on the dissolution of the union, since the situation was one in which the union was not, in fact, dissolved, and he accordingly suggested the wording: "The rules in paragraphs 1 or 2 apply if one of the constituent political elements withdraws from the union of States".

72. Lastly, a final paragraph might perhaps be necessary to cover the situation in which a member of a dissolved union either joined another union of States or became part of another State. For that purpose, he would suggest some such wording as: "Any of the constituent political divisions of a dissolved union which becomes part of another State or a union of States shall be governed by article...".

The meeting rose at 1 p.m.

1181st MEETING

Friday, 16 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, 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 and Add.1 and 2; A/CN.4/L.184; A/CN.4/L.285)

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

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 20 (Dissolution of a union of States) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 20 of the Special Rapporteur's draft (A/CN.4/256/Add.2).

2. Mr. SETTE CÂMARA said he could understand that, for reasons of consistency, those members who had supported alternative A for article 19, which embodied the principle of *ipso jure* continuity, would also favour alternative A for article 20. That alternative would present no difficulty in the normal case of the dissolution of a union of originally independent States. Incidentally, a minor drafting point arose in connexion with paragraph 3, since it was possible that more than one of the constituent political divisions of a union of States might decide to become a separate State.

3. The Drafting Committee should, however, bear in mind the complications which might arise in the event of the secession of a political division of a union of States, especially if that political division had formerly existed as an independent State and had subsequently joined a federation. It would also have to consider the case of a union which was composed not of independent States but of territories and which might subsequently be dissolved or dismembered. That might require something along the lines of excursus A (A/CN.4/256/Add.1). Another problem it would have to deal with was the possibility of secession from a union of non-independent States, of which the short-lived Republic of Biafra was an example.

4. Mr. QUENTIN-BAXTER said he too could understand why members who had favoured alternative A for article 19 would feel impelled to adopt the same position in connexion with article 20. He himself, however, did not think that there could be any completely cut-and-dried solution to the sort of problems the Commission was considering, and the Special Rapporteur himself had expressed a doubt as to whether the definition of a union of States which applied to article 19 was equally applicable to article 20.

5. At the previous meeting a member had very properly expressed concern as to where a case such as that of Bangladesh might fall in relation to article 20 and had argued that it plainly could not fall under article 20 because the State of Pakistan as it previously existed had not been formed of two existing States.[1] However, it seemed to him that that was not necessarily the operative reason; that surely was connected with the circumstances of the dissolution rather than with the terms under which the union had been formed. In much of the learned writing on the subject, emphasis was placed not only on the tracing of personality, but also on the degree of disruption entailed by the secession of part of the State. That was a consideration that, he felt, could not be eliminated from the draft. Assuming, for example, that the State of Pakistan, East and West, had continued to exist in the old shape for a very long time, maintaining its unity by a process of devolution, by balancing the interests of the two parts, and had then, in the changed circumstances of the twenty-first century, decided that the remaining ties must be dissolved, could it fairly be said that the law governing that dissolution of the union should be determined almost solely by the situation which had existed before the formation of the union? It should be possible to place more emphasis on the kind of State that existed and on the length of time it had existed.

6. He had some sympathy with the International Law Association's conclusion that it was not desirable to make a sharp distinction on the simple ground that a State had originally been composed of sovereign States, or of

[1] See 1180th meeting, paras. 66-68.