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Summary record of the 1181st meeting

Topic:
Succession of States with respect to treaties

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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.

States plus territories, or even of territories alone. There would always have to be a certain margin of appreciation, and the draft must be careful not to hamper the reasonable accommodations normally reached by States in dealing with questions of succession.

7. He attached importance to the reservation in paragraph 2 concerning the case where the object and purpose of the treaty were compatible only with the continued existence of the union of States. On the whole, he thought it would be better not to qualify that exception but to leave the actual application of the principles to be determined by the circumstances of each particular case and by discussions between the parties.

8. Sir Humphrey WALDOCK (Special Rapporteur) said that a majority of the Commission seemed to favour a solution based on the principle of *ipso jure* continuity contained in alternative A. As he had said before in connexion with article 19, that was undoubtedly the more difficult line to follow in codification, since then it became necessary to provide qualifications and safeguards which were not altogether easy to formulate.

9. He wished to emphasize that article 20 would not stand alone, since he proposed to submit an article 21 which would deal with forms of dismemberment other than the dissolution of unions of States. Article 20 was intended to deal only with the case of succession in the event of the ultimate dissolution of a union of States, there being some practice to support the view that the dissolution of such a union came into a different category from the dissolution of a mere combination of territories. Members were thus entitled to reserve their final opinion until article 21 had been discussed.

10. If the number of precedents for the cases dealt with in article 21 might be limited, such precedents as existed suggested that the "clean slate" rule as formulated in article 6 would apply and that a newly independent State would not be bound to consider treaties concluded by its predecessor as being still in force. Neither classical nor modern precedents provided support for the principle of *ipso jure* continuity in those cases.

11. He agreed with Mr. Quentin-Baxter that it was difficult to draw neat distinctions. Some writers had made a distinction based on the continued possession of a certain treaty-making capacity as indicative of the separate international identity of the units of a union. Basing itself presumably on the cases of the United Arab Republic and Tanzania, the International Law Association had, however, concluded that that point of distinction should not be retained as there were cases where that element was not present. He himself endorsed that view in the light of the practice, although that point of distinguishing the cases had its logic. Even so, he felt that there was a concept of a union of States for which it was possible to justify rules different from those applicable to the ordinary case of dismemberment of territory.

12. The case of Bangladesh, which he would mention in his commentary to article 21, appeared to be an example of the classical solution adopted in the past, one political entity, namely Pakistan, being treated as the continuance of the State, while the other entity was regarded as having broken away from it. The same solution had been adopted in the case of Pakistan and India: the entity which had broken away had been treated as a new State, and there had been no question of applying any principle of *ipso jure* continuity. He would not take the matter further at that stage; he merely wished to make it clear that he had given thought to the relationship between the dissolution of a union of States and the dismemberment of a State which was merely a composition of territories.

13. If the Commission accepted the principle of *ipso jure* continuity in article 20, he agreed with Mr. Ramangasoavina that it was necessary to include some qualifying clause,[2] such as that contained in paragraph 2 of alternative A for article 19.

14. The safeguard provided in paragraph 2 of alternative A for article 20 presented certain difficulties, particularly with respect to its concrete application. He agreed with Mr. Reuter that, if any differences of opinion should arise between the parties, the provisions of the Vienna Convention should apply and that it would be the duty of the new State to resolve such differences by way of negotiation.[3] Could it really be said, however, that in cases of State succession a duty devolved upon the new State to enter into negotiations in good faith to adapt itself to the new situation? To prescribe such a duty rather begged the question. Even if the principle of *ipso jure* continuity was accepted, the precise extent of any such duty might be difficult to formulate. For reasons of mere common sense, a new State and the other party would often be ready to enter into such negotiations, but the Commission should consider carefully whether it wished to formulate a specific provision along those lines.

15. He did not think that commercial treaties presented any particular difficulties in connexion with a dissolution of a union of States. Like other treaties, they might or might not be consistent with the situation which existed after the dissolution. In many cases, it could be expected that recourse would be had to mutual adaptations.

16. He too had been concerned by the question of the most-favoured-nation clause, which had been mentioned by Mr. Bartoš.[4] He felt, however, that that problem should best be left to the Special Rapporteur for that particular topic.

17. Mr. Ago had referred to the problem of succession in connexion with the European Economic Community.[5] He himself felt, however, that that problem should be omitted from the present draft, since EEC obviously came into the category of intergovernmental unions and not into the category which Mr. Ago had described as that of constitutional unions.

18. The CHAIRMAN suggested that it might be desirable to include in the commentary to the article a direct question to Governments concerning the obligation of States to negotiate in good faith on their difficulties.

19. Mr. USTOR said he thought that the commentary to the general articles should make it clear that whenever

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[2] *Ibid.*, para. 38.

[3] *Ibid.*, para. 51.

[4] *Ibid.*, para. 52.

[5] See 1179th meeting, para. 53.

there was a continuance of treaties, which would be mostly bilateral or restricted multilateral treaties, there should be a duty to enter into new negotiations concerning the respective interests of the parties.

20. Mr. TABIBI said that the demarcation line between the dissolution of a union of States, dealt with in article 20, and the separation or dismemberment of States, with which the Special Rapporteur proposed to deal in article 21, was not very clear.

21. He would take the example of Bangladesh, to which several members had already referred. The State of Pakistan had consisted of several component parts constituting separate entities: the North-West Frontier Province, Sind, Punjab and East Bengal. The imposition of martial law in 1955 had led to restlessness in all those areas and to the final recognition of East Bengal's separate identity, even before the elections of 1970, and to the establishment of the separate legislature and Government which had been in existence before the military intervention of March 1971. The members of the present Legislative Assembly of Bangladesh were the same as those of the Legislative Assembly of East Pakistan. In his view, the case was clearly therefore one of the dissolution of a union of States, covered by article 20, and not one of separation, to be covered by article 21.

22. Some members had argued that a union of States had to have a constitutional framework that was clear and complete. But problems might arise even where that was the case. For example, Iraq and Jordan had at one time formed a union based on a common monarchy under the Hashemite dynasty. After the 1959 revolution in Iraq, the representative of that union had actually been recognized by the United Nations as continuing to represent Iraq; soon, however, Members had one by one recognized the new Government.

23. For those reasons, he would find it difficult to support article 20 in its existing form.

24. In his opinion, the principle of *ipso jure* continuity would be very difficult to apply in the case of economic treaties. What would happen, for example, if one component of a union should secede from the union and declare its intention of becoming a non-aligned State, while the other components remained committed to either the East of the West? Obviously, the rule of continuity would have to be sufficiently flexible to take such cases into account.

25. If the Commission decided to adopt article 20, he would prefer alternative B for the reason that it preserved the rights of the component parts as well as the rights of third parties. Until the Commission had considered article 21, however, it would be impossible to say what kind of cases would be covered.

26. Mr. USHAKOV said he noted that the Special Rapporteur regarded the constituent political divisions dealt with in articles 19 and 20 as former independent States. That approach did not give rise to any difficulty so long as the boundaries of the political divisions remained the same as those of the former States. However, in the case of a union of States which lasted several decades, it was not unusual for the constituent political divisions to undergo substantial changes by comparison with the former independent States. He therefore suggested that the Special Rapporteur and the Drafting Committee should consider the case where the political divisions constituting a union of States no longer coincided with the former independent States. Situations of that kind occurred where a nation had availed itself of the right of self-determination, and in such cases paragraph 1 (*c*) of alternative A for article 20 might prove difficult to apply.

27. Mr. REUTER said he was grateful to the Special Rapporteur for his efforts to take account of all the comments made during the discussion. Once again, however, he had to reserve his position with regard to articles 19 and 20; the Commission would perhaps ultimately decide that the questions dealt with in those articles were too complex and not yet ripe for codification.

28. He wished to clarify his earlier suggestion that article 20 should include a provision requiring the renegotiation of certain treaties.[6] Although the Vienna Convention did not deal with State succession, it nevertheless contained certain rules, which were more or less complete and which had to be taken into account in the present instance. The questions now under discussion should be examined in the light of the rules laid down in article 62 of that Convention (Fundamental change of circumstances).[7] The political transformations mentioned in articles 19 and 20 of the draft were clearly such that they could be regarded as constituting a fundamental change of circumstances justifying the application of the "clean slate" doctrine.

29. It should, however, be noted that article 62 of the Vienna Convention dealt only with two extreme cases, namely, the occurrence of a fundamental change of circumstances, when the treaty could be terminated, and the absence of such a change, when the treaty remained in force. There was, however, a third possibility, namely, that of a change which was sufficiently important to require an adaptation of the treaty. That possibility had not been dealt with in the Vienna Convention because that would have made it necessary to introduce another concept, also absent from that Convention, namely, that of balance. By virtue of that concept, an unbalanced treaty was an "unequal treaty" which had to be adapted or in extreme cases voided. The only provision of the Vienna Convention which referred to that concept was paragraph 3 (*c*) of article 44 (Separability of treaty provisions).[8]

30. With regard to succession to treaties, the Special Rapporteur had included in both articles 19 and 20 a saving clause referring to the object and purpose of the treaty, which would rule out the application of the principle of continuity. For that reason, he was not unduly concerned about the fate of the important political treaties mentioned by Mr. Tabibi.

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[6] See 1180th meeting, para. 51.

[7] 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. 297.

[8] *Ibid.*, p. 295.

31. With regard to treaties not covered by that saving clause, the possibility might be considered, in the cases contemplated in articles 19 and 20, of a solution other than that of regarding them either as having been terminated by reason of a fundamental change of circumstances within the meaning of article 62 of the Vienna Convention, or as remaining in force because a change of that character had not occurred. A third approach was possible, namely, to regard the situations mentioned in articles 19 and 20 as constituting changes other than fundamental changes involving the termination of treaties, since the Vienna Convention itself provided an exception to the rule in article 62, where the change of circumstances was the result of an action by the party to the treaty invoking that change. Examination of the cases mentioned in articles 19 and 20 showed that they invariably resulted from an expression of will—either the will to unite of a number of States or the will to separate—of the constituent political divisions of a union of States. He therefore suggested introducing a provision imposing an obligation to renegotiate treaties in good faith so as to arrive at a new balance. That solution might, of course, lead to deadlock in the absence of a jurisdictional clause, but a well formulated rule did not necessarily require the provision of sanctions.

32. The CHAIRMAN, speaking as a member of the Commission, said that the views expressed by Mr. Reuter led him to reiterate that the present articles should be regarded as a second chapter of the Vienna Convention, since there appeared to be a continuing interplay between them.

33. Sir Humphrey WALDOCK (Special Rapporteur) said he shared that view but was not sure how far article 62 of the Vienna Convention was relevant in the present case. To say that the provisions of article 62 should apply would be an over-simplification, since draft article 20 involved an additional element which was not present in article 62 of the Convention, namely, a succession of States.

34. The CHAIRMAN, speaking as a member of the Commission, asked whether the Special Rapporteur agreed that some effort should be made to adjust a treaty in the light of new circumstances.

35. Sir Humphrey WALDOCK (Special Rapporteur) replied that the circumstances of the different cases of succession necessarily varied and the question was whether a new State formed after the dissolution of a union should be under a particular obligation to negotiate. Mr. Reuter had suggested that there should be an obligation on such States to negotiate in good faith concerning the continuance of treaties; he himself, however, felt that it might be going too far to impose such an obligation.

36. Mr. REUTER said he should explain that he had not requested the application of article 62 of the Vienna Convention; he had merely suggested that the Commission should draw inspiration from the ideas contained in that article.

37. Sir Humphrey WALDOCK (Special Rapporteur) observed that the notion of adaptation to the new situation had been deliberately omitted from article 62 of the Vienna Convention. The idea had rather been that a party to a treaty might be able to use that article as a lever to persuade the other State to negotiate along more rational lines. It might therefore be going too far to say that the new State would be obliged to adapt itself to the altered circumstances.

38. Mr. AGO said there was a great difference between a fundamental change of circumstances affecting a treaty the parties to which had not changed, and the case dealt with in the articles under consideration. As he saw it, it was necessary first of all to determine whether or not the new State was bound by the treaty. If it was, third States should be given an opportunity to release themselves from their obligations by invoking a change of circumstances. He therefore favoured the idea of introducing a provision requiring renegotiation of the treaty. It was, however, first necessary to settle the question to which he had drawn attention.

39. Mr REUTER said that even if the treaty was no longer in force, an obligation might subsist to negotiate a new treaty which would maintain between the new State and the other party to the treaty balanced relations on the subject-matter of the old treaty. Obviously, however, it was not possible to introduce a provision imposing an obligation to renegotiate the treaty and at the same time to consider that the treaty continued in full force. His suggestion was intended merely to mitigate the consequences of the solutions put forward by the Special Rapporteur in both alternative texts of the article under discussion.

40. The principle of continuity underlying alternative A would be watered down if a provision was introduced requiring the renegotiation in good faith of treaties where the balance had been upset, for any violation of that obligation could then lead to the termination of the treaty.

41. Mr. USHAKOV said he still preferred alternative A, which should be taken as the starting point, though certain special circumstances had to be taken into consideration and might require the inclusion of saving clauses.

42. Mr. TSURUOKA said he thought it would be more appropriate to specify in the commentary that treaties normally remained in force but that a change of circumstances might give rise to new negotiations for the purpose of restoring the balance of the respective rights and obligations of the parties.

43. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer article 20 to the Drafting Committee.

It was so agreed.[9]

Draft articles proposed by the Drafting Committee

ARTICLE 2 (*second reading*)[10]

44. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 2:

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[9] For resumption of the discussion, see 1196th meeting, para. 49.

[10] For previous discussion, see 1176th meeting, paras. 74-104, and 1177th meeting, paras. 18-51.

Article 2
Transfer of territory

1. When territory under sovereignty or administration of a State becomes part of another State:

(*a*) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession; and

(*b*) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

2. Paragraph 1 is without prejudice to the provisions of article 22 [Territorial treaties]. (A/CN.4/L.185)

45. No substantial changes had been made in the article, except for the shortening of the title. The Drafting Committee had, however, included a footnote to the effect that it had proposed the present text on the understanding that the draft articles would include a saving clause concerning cases of military occupation, a point which had been raised by the Chairman of the Commission.[11]

46. The CHAIRMAN, speaking as a member of the Commission and referring to the Drafting Committee's footnote, said that he was still concerned about the use of the word "administration" in the introductory clause of paragraph 1, which he regarded as much too vague a term in that context.

47. Mr. ALCÍVAR said that he could accept the Drafting Committee's text provisionally until the Commission was able to reach agreement on a formula which would meet the concern of some of its members about the lawfulness of the transfer.

48. The CHAIRMAN suggested that the Commission approve article 2 provisionally.

It was so agreed.[12]

ARTICLE 4 [13]

49. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 4:

Article 4
Successor State's unilateral declaration regarding its predecessor State's treaties

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 or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the 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. (A/CN.4/L.183/Add.1)

50. The Drafting Committee had taken the view that paragraphs 2 and 3 of the Special Rapporteur's original text concerning provisional application should be placed somewhat later in the draft articles. The new article 4 retained only the substance of paragraph 1 of that text, since the Drafting Committee had thought it appropriate to model the paragraph on article 3, which involved the application of the same principle.

51. The Drafting Committee was aware that the words "the continuance in force of the treaties in respect of its territory" at the end of paragraph 1 might be open to criticism; they were, however, in common use and it had considered it advisable to include them. The suggestion that a unilateral declaration would necessarily lead to a new treaty might raise parliamentary difficulties with respect to ratification in certain countries.

52. Mr. BILGE asked what was the purpose of adding the words "regarding its predecessor State's treaties" in the title.

53. Mr. USTOR, Chairman of the Drafting Committee, replied that the Drafting Committee had regarded the new title as clearer and more complete.

54. The CHAIRMAN suggested that the Commission approve article 4 provisionally.

It was so agreed.[14]

ARTICLE 5 [15]

55. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 5:

Article 5
Treaties providing for the participation of a successor State

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party thereto, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present articles.

2. If a treaty provides that, on the occurrence of a succession of States, the successor State shall be considered as a party, such a provision takes effect only if the successor State expressly accepts in writing to be so considered.

3. In cases falling under paragraphs 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed. (A/CN.4/L.183/Add.1)

56. The Committee had considered that the article was necessary in order to deal with the case of participation by a successor State in a treaty by virtue of a clause included in the treaty itself, as distinct from the case where the right of participation arose from the law of succession.

57. Paragraph 1 dealt with the more frequent case where the successor State had an option under the treaty to consider itself as a party to the treaty. Paragraph 2 concerned the special case where the treaty provided that, in case of succession, the successor State "shall be con-

[11] See 1177th meeting, para. 39.

[12] For resumption of the discussion, see 1197th meeting, para. 11.

[13] For previous discussion, see 1160th meeting, paras. 64-88; 1161st meeting, paras. 1-76; and 1162nd meeting, paras. 1-19.

[14] Article 4 was adopted without change at the 1197th meeting.

[15] For previous discussion, see 1162nd meeting, paras. 20-53 and 1163rd meeting, paras. 1-10.

sidered as a party". Under that paragraph, the successor State would, in such a case, be considered as being under no obligation to become a party to its predecessor's treaty and would become bound by it only if it expressly so agreed in writing. Paragraph 3 was intended to ensure continuity of application of the treaty by providing that, as a general rule, the successor State, if it consented to be considered as a party, would be so considered from the date of succession. That rule was qualified by the concluding proviso which safeguarded the freedom of the parties.

Article 5 (A/CN.4/L.183/Add.1) was approved.[16]

ARTICLE 6[17]

58. Mr. USTOR, Chairman of the Drafting Committee, said the Committee proposed the following title and text for article 6:

Article 6

Position in respect of the predecessor State's treaties

Subject to the provisions of the present articles, a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States relates. (A/CN.4/L.183/Add.1)

59. As the Commission would recall, the Drafting Committee had proposed that the whole draft should begin with a part I entitled "General Provisions" and consisting of articles 0, 1, 1 *(bis)*, 1 *(ter)*, 1 *(quater)*, 3, 4 and 5, and that article 2 should form part II, which would be entitled "Transfer of territory from one State to another".[18] Article 6 would be the first article of part III, provisionally entitled "Newly independent States".

60. The Committee had taken the view that the expression "New States", which had originally been proposed by the Special Rapporteur in his third report and which could cover cases other than those envisaged in part III, should be replaced by the expression "Newly independent States", which was less equivocal.

61. It was clear from the opening clause of article 6 that the article sought only to establish a general rule and reserved the question whether there were categories of treaties which did not come under that rule; that question would be dealt with elsewhere in the draft. In the interests of brevity and simplicity, the Drafting Committee had combined the two sentences of the text originally submitted to the Commission by the Special Rapporteur.[19]

62. In the French version, the expression "Newly independent States" had been rendered by the formula "*Etats nouvellement indépendants*" instead of by "*Etats qui accèdent à l'indépendance*".

63. Lastly, the title of the article had been amended.

64. Mr. ALCÍVAR said that it was proving difficult to find a suitable Spanish rendering for the expression "newly independent States" and he would be grateful to the Special Rapporteur for an explanation of the intended meaning, since that would facilitate translation.

65. Sir Humphrey WALDOCK (Special Rapporteur) said that the phrase "newly independent" was intended in English to mean a State which has just become independent. It covered any State in the period of its becoming independent and immediately afterwards.

66. Mr. ALCÍVAR said that the Special Rapporteur's very useful explanation would be of assistance in the search for a suitable Spanish expression.

67. Mr. NAGENDRA SINGH said that he found the provisions of article 6 most gratifying. The principle which it embodied would be very welcome to the decolonized States.

68. If the expression "newly independent States" were finally adopted, he would be willing to accept it, but he hoped the definition would make it clear that it referred to decolonized States, since at first sight it would also seem to cover cases of secession.

69. Mr. USTOR, Chairman of the Drafting Committee, said that the wording of the initial proviso "Subject to the provisions of the present articles", was provisional. It might be altered later so as to refer only to certain specified articles.

70. Mr. USHAKOV said that the scope of the expression "newly independent States" would depend on the definition to be adopted later. For the time being, it covered States which had become independent either as a result of decolonization or of separation, like Bangladesh.

Article 6 (A/CN.4/L.183/Add.1) was approved.[20]

ARTICLE 7 (Participation in multilateral treaties in force)[21] and ARTICLE 8 (Participation in multilateral treaties not yet in force)[22]

71. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following texts for articles 7 and 8:

Article 7

Participation in multilateral treaties in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession made in conformity with article 11, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the successor State may establish its status as a party to the treaty only with such consent.

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[16] Article 5 was adopted without change at the 1197th meeting.

[17] For previous discussion, see 1163rd meeting, paras. 11-61, and 1164th meeting, paras. 1-41.

[18] See 1176th meeting, para. 18.

[19] See *Yearbook of the International Law Commission 1970*, vol. II, p. 31.

[20] Article 6 was adopted without change at the 1197th meeting.

[21] For previous discussion, see 1164th meeting, paras. 42-74, 1165th meeting and 1166th meeting, paras. 1-8.

[22] For previous discussion, see 1166th meeting, paras. 9-83.

Article 8

Participation in multilateral treaties not yet in force

1. A newly independent State may, by a notification of succession made in conformity with article 11, establish its status as a contracting State to a multilateral treaty which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates, if before that date the predecessor State had become a contracting State.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the contracting States, the successor State may establish its status as a contracting State to the treaty only with such consent.

4. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision. (A/CN.4/L.183/Add.2)

72. He was introducing articles 7 and 8 together because they were closely connected. He wished to begin by drawing attention to a correction which had been made in the text of article 8, paragraph 1 of which should begin with the words: "Subject to paragraphs 2 and 3, a newly independent State...", in the same way as the corresponding paragraph of article 7.

73. The Drafting Committee had simplified the title of article 7 by substituting the words "Participation in" for the words "Right to notify its succession in respect of". It had not considered it necessary to insert the words "of newly independent States" after "Participation", because article 7 belonged to part III, which was entitled "Newly independent States". Lastly, it had taken the view that, since the article dealt with multilateral treaties in force, it was better to make that clear in the title, particularly as the following article dealt with multilateral treaties not yet in force.

74. The Committee had rearranged the wording of the original text submitted by the Special Rapporteur,[23] so that the general rule was laid down in paragraph 1 and the exceptions in paragraphs 2 and 3. The Drafting Committee had decided to eliminate the exception concerning constituent instruments of international organizations in the original sub-paragraph (*b*) because that question was now dealt with in article 1 *(ter)* as already approved by the Commission.[24] The original wording of paragraph 1 had been criticized because it merely provided that a State was entitled to notify that it considered itself a party without indicating what the legal effect of such a notification would be. The Committee had therefore used the expression "establish its status as a party". Paragraph 2 contained the exception provided for in sub-paragraph (*a*) of the Special Rapporteur's text. Paragraph 3 corresponded to sub-paragraph (*c*) of that text. The language used was based on article 20, paragraph 2, of the Vienna Convention.[25]

75. With regard to article 8, the Drafting Committee had thought it desirable to bring out the parallelism between the rules in articles 7 and 8, the former dealing with multilateral treaties in force and the latter with multilateral treaties not yet in force. The wording of article 8 and its title had therefore been modelled on article 7.

76. The Drafting Committee had taken the view that, although the case envisaged in paragraph 1 (*b*) of the original text had become of marginal importance, since a procedure was now provided for new accessions to the League of Nations closed treaties, it was nevertheless worth providing for in the draft articles. It had noted, 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. It had therefore agreed that sub-paragraph (*b*) should be removed from article 8 and a new article 8 *(bis)*, dealing with both multilateral treaties in force and multilateral treaties not yet in force, should be included in the draft.

77. Throughout article 8, the Drafting Committee had used the expression "contracting State" which, under the Vienna Convention on the Law of Treaties, was the appropriate term in the case of a treaty not yet in force.

78. Mr. AGO said he noted that, in paragraph 3 of article 7, it was indirectly deduced from two factors—the limited number of the negotiating States and the object and purpose of the treaty—that participation in the treaty by any other State required consent of all the parties. It seemed to him that consideration should also be given to the case where that requirement was specifically laid down in the treaty itself.

79. Sir Humphrey WALDOCK (Special Rapporteur) said that although it was not usual to include such a provision in a treaty, the point made by Mr. Ago was a valid one. If the treaty itself expressly indicated that participation in it required the consent of all the parties, the position would be the same as in the case envisaged in paragraph 3.

80. Mr. USTOR, Chairman of the Drafting Committee, said that, as he read it, the present text of paragraph 3 would cover the case mentioned by Mr. Ago. If the treaty expressly stated that the consent of all the parties would be required for the participation of a successor State, then the provisions of paragraph 3 as they now stood would apply; there would be a limited number of negotiating States, and the object and purpose of the treaty would clearly make it a restricted multilateral treaty.

81. Mr. AGO said that the case which he had mentioned did not relate to compatibility with the object and purpose of the treaty. Nor was he thinking of a clause restricting participation by way of succession. The case which he had in mind was that of a treaty containing a clause which specifically required the consent of all the parties for participation by any other State, successor or otherwise.

[23] See *Yearbook of the International Law Commission 1970*, vol. II, p. 37.

[24] See 1176th meeting, para. 65.

[25] *Loc. cit.*, p. 291.

82. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ago's point could be covered by amending the opening words of paragraph 3 to read: "When, under the terms of the treaty or by reason of the limited number of the negotiating States...".

83. It should be noted, however, that in article 20 of the Vienna Convention on the Law of Treaties (Acceptance of and objection to reservations), paragraph 2, which dealt with restricted multilateral treaties, made no allowance for the possibility of the treaty containing a specific clause to the effect that a reservation would require the consent of all the parties. He wished to place it on record that the proposal he had just made did not imply any uncertainty with regard to the interpretation of that provision of the Vienna Convention. There could be no doubt that if a restrictive clause of that type on the subject of reservations were included in any treaty, it would preclude reservations which were not accepted by all the parties.

84. Mr. USHAKOV said that he had no objection to the Special Rapporteur's proposal, but questioned whether it could not be interpreted as an endorsement of the so-called "Vienna clause", which restricted not the number of parties, but the categories of States which could become parties to the treaty.

85. Mr. AGO said he did not think that interpretation was possible. The purpose was simply to deal with the case where, as in the Treaty of Rome constituting the EEC, the treaty itself contained a specific clause on the subject.

86. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 7, with the amendment suggested by the Special Rapporteur.

It was so agreed.

Article 7, as amended, was approved.[26]

87. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 3 of article 8 in the same manner as paragraph 3 of article 7.

It was so agreed.

Article 8, as amended, was approved.[27]

The meeting rose at 1 p.m.

[26] and [27] For subsequent abridgment of title, see 1187th meeting, para. 25, and for deletion of the phrase "made in conformity with article 11", in the second line, see 1187th meeting, para. 28. Articles 7 and 8, as thus amended, were adopted at the 1197th meeting.

1182nd MEETING

Tuesday, 20 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

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

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 5; A/CN.4/L.182 and L.186)

[Item 5 of the agenda]

(resumed from the 1164th meeting)

REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited Mr. Tsuruoka, Chairman of the Working Group established by the Commission at its 1150th meeting, to introduce the Working Group's report (A/CN.4/L.186).

2. Mr. TSURUOKA (Chairman of the Working Group) said that the Commission had been requested by the General Assembly, in operative paragraph 2 of part III of resolution 2780 (XXVI) to study the question which formed the subject of item 5 of the Commission's agenda, "with a view to preparing a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission considers appropriate." [1] The Commission had taken up the item at the very beginning of the present session and had set up a Working Group to review the problems involved and prepare a set of proposals for submission to the Commission. Between 24 May and 17 June the Working Group had held seven meetings, which had been attended by all its members except Mr. Thiam, who had been absent from Geneva during that period. In accordance with the Commission's decision, those meetings had also been attended by its Chairman, who had prepared the working paper containing draft articles circulated as document A/CN.4/L.182.

3. Apart from that document, the Working Group had considered the written observations submitted by Member States (A/CN.4/253 and Add.1 to 5), the text of a draft convention submitted by Uruguay to the General Assembly at its twenty-sixth session (A/C.6/L.822) and the draft convention which the Government of Denmark had attached to its written observations (A/CN.4/253/Add.2). Other documents had been made available to the Working Group by the Secretariat, including the "Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance" of the Organization of American States (OAS) of 2 February 1971,[2] and the two conventions concluded under the auspices of the International Civil Aviation Organization (ICAO), namely, the Convention for the Suppression of Unlawful

[1] See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 29*, p. 137.

[2] See *International Legal Materials*, vol. X, p. 255.