Document:-
A/CN.4/SR.1501

Summary record of the 1501st meeting

Topic:
Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-
1978, vol. I

so, at least jointly if not alone. He had no precise wording to suggest, but thought that the article should be recast in more positive terms; subparagraph (*b*) might then be amended to refer not to the unitary State but to the kind of federal or confederal State that left the debts to the constituent parts, although it was questionable whether any genuine confederations still existed.

43. Mr. NJENGA said that, although the intent of article W was to cover a specific and limited case of uniting of States, it was cast in such a way that it seemed to extend to a far wider spectrum of relations. That caused him some concern, particularly bearing in mind paragraph 1 of article 14, which provided that, when two or more States united and thus formed a successor State "the State property of the predecessor States shall... pass to the successor State". If State property passed, then debts must also pass. His concern was partially dispelled, however, by paragraph 2 of article 14, which provided that the allocation of the State property "to its component parts shall be governed by the internal law of the successor State".

44. It would be seen, from some recent examples of uniting of States, that there was no problem in that connexion as far as Malaysia was concerned. The United Arab Republic, too, had formed a fully integrated union and, although that union was now dissolved, article W would have operated to transfer State debts as well as State property to the successor State. In the case of the United Republic of Tanzania, however, union was still not complete. Under its interim constitution, responsibility for certain matters, such as external relations and defence, was vested in the United Republic, but not responsibility or other important issues. In Zanzibar, for instance, questions relating to the ownership of State and private property and the administration of justice remained the sole responsibility of the Government of Zanzibar under the leadership of its President, who was also Vice-President of the United Republic of Tanzania. Consequently, if a rule were adopted whereby the United Republic of Tanzania succeeded to the debts of the predecessor State, Zanzibar would pay nothing and yet retain all its assets.

45. A rule drafted in such wide terms would therefore be undesirable, and he thought that article W should be recast to provide in positive terms for cases where the uniting of States gave rise to a unitary State, with a proviso that broader kinds of relationship would be governed either by agreement or by the constitution, depending on the type of arrangement arrived at.

46. Mr. ŠAHOVIĆ thought that the Drafting Committee could find a solution to all the questions that had been raised. In particular, the Drafting Committee should try to establish a parallel between articles 14 and W. It should be noted, too, that the introductory phrase of article W was applicable only to States that federated, and it was therefore difficult to link it to subparagraph (*b*), which concerned a uniting of States giving rise to a unitary State.

47. He hoped that the Drafting Committee would reconcile the wording of articles 14 and W; article 14 used the expression "component parts", the corresponding words for which in article W were "constituent States", and "predecessor States" were mentioned in article 14 but not in article W.

The meeting rose at 1 p.m.

1501st MEETING

Thursday, 15 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1,[1] A/CN.4/313)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE W (Treatment of State debts in cases of uniting of States)[2] (*concluded*)

1. Mr. REUTER said that he could accept article W subject to any necessary drafting changes. The article dealt with a specific case: that of a State that was independent, from the international point of view, uniting with one or more States, also independent, to form a new State, so that it ceased to be a State at the international level. All other cases, including those of succession between States and other entities such as international or supranational organizations, were outside the scope of the draft. If other such cases were to be brought within the scope of the draft, the definitions in article 3[3] would have to be amended, in particular the definition of the term "succession of States".

2. That definition was particularly important for the distinctin that had to be made between the topic of succession of States and that of State responsibility. If a local authority under public law failed to discharge its debts, it could be determined, in accordance with the draft articles on State responsibility,[4]

[1] *Yearbook... 1977*, vol. II (Part One), p. 45.

[2] For text, see 500th meeting, para. 21.

[3] See 1500th meeting, foot-note 8.

[4] *Yearbook... 1977*, vol. II (Part Two), pp. 9 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.

whether there had been a wrongful act in international law; if so, that act was attributable to the State to which the local authority belonged. Article W dealt with the case in which an entity that had formerly been a State ceased to be a State and became an entity under public law, such as a province or *département*. Such an entity kept its debts, and only if it failed to discharge them did the situation contemplated in the draft articles on State responsibility arise. The Special Rapporteur had provided, however, for an exception in cases where the predecessor State lost its legal identity under the internal law of the successor State, responsibility for the debt then falling on the latter. Otherwise, the successor State was responsible for the debt only in the event of an internationally wrongful act on the part of the predecessor State that had become a constituent State. That approach was in conformity not only with the other articles of the draft but also with the articles prepared by the Commission on other topics.

3. Mr. EL-ERIAN shared the view that article W should be recast in positive terms, first laying down the basic rule that the successor State formed on the uniting of two or more States succeeded to the debts of the constituent State, then providing for exceptions to that rule. The main point to be borne in mind was that, under internatonal law, a united State formed from a union of States was generally regarded as a single legal entity, even though matters such as the powers of the federal State and of its constituent elements had to be settled by constitutional law.

4. With regard to the uniting of Egypt and Syria as the United Arab Republic in 1958, he agreed with the conclusions drawn by the Special Rapporteur (A/CN.4/301 and Add.1, para. 448). He noted, in particular, the statements that the Provisional Constitution had made no mention of succession to property or debts and that there might be grounds for agreeing with Professor O'Connell that "the UAR would seem to have been the only entity competent to service the debt of the two regions". In that connexion, he informed the Commission that the then Foreign Minister of the United Arab Republic had stated, in a carefully drafted letter addressed to the former Secretary-General of the United Nations, the late Dag Hammarskjold, that the United Arab Republic would be bound by all the obligations contracted by the two constituent States, not only by those deriving from treaties. Further, as stated in the comments submitted by UNESCO referring to the uniting and dissolution of the United Arab Republic,[5] the arrears of contributions due to that organization from Egypt and Syria before their union had come into being had been treated as a liability of the United Arab Republic. Upon Syria's resumption of its membership of the organization as a separate State in 1961, the contribution attributable to the United Arab Republic for the unexpired portion of the 1961-1962 biennium had been divided in the ratio of five sixths for Egypt and one sixth for Syria. Comments on the same lines had been submitted by IMF.[6] The Special Rapporteur might wish to consider including a reference to that material in the commentary.

5. Lastly, he wished to commend the Codification Division on the excellence of the United Nations legislative series. He suggested that a list of all the volumes available in that series be included in a later edition of *The Work of the International Law Commission*,[7] for the benefit of students and lawyers, particularly in countries where such material was not readily available.

6. Mr. QUENTIN-BAXTER agreed on the need for a greater degree of conformity in the draft articles, but also considered it necessary to recognize the differences between them. Article 14 appeared in square brackets because the Commission had not been of one mind as to its place in the draft as a whole. Since that article dealt with the passing of property in cases where the uniting of States had given rise to only one State, members were inclined to ask what international law had to do with the way in which a single united State disposed of such matters. But there was a parallel tendency to recognize that it was not unknown in international law for constituent States to retain part of their personality and some element of responsibility. As had already been noted, much of State practice concerned cases in which the new State was rather loosely constructed and retained certain composite aspects.

7. Article W was to be distinguished from article 14 primarily by the fact that, where debts rather than property were concerned, there was another party to consider, namely, the creditor. Whereas it could be argued in the case of property rights that the question was of no concern to the Commission, that could not be said in the case of debts. Many of the difficulties with which the Special Rapporteur had had to contend stemmed from that consideration.

8. A second, but closely allied difference between the two articles was that, in dealing with property rights, the Commission was concerned with rights arising under the internal law of the predecessor State. Consequently, the main problem in dealing with article W and with article 25 (Dissolution of a State) (A/CN.4/313, para. 77) was that the obligations which, it was provided, would not pass to the successor State, would in fact be extinguished. His own conception of the proper function of the law of succession was that international law always involved an "intersection" with internal law and could not properly be construed without the latter. If the Commission divorced the subject from internal law, it would be left with a legal vacuum. The problem was therefore partly artificial, since the Commission, concerned as it was with the triangular relationship, had tended to divorce its thinking from that primary

[5] *Materials on succession of States in respect of matters other than treaties* (United Nations publication, Sales No. E/F.77.V.9), p. 545.

[6] *Ibid.*, p. 550.

[7] United Nations publication, Sales No. E.72.I.17.

point of reference. The very first principle of State succession, after all, was that internal law continued until changed, and that the rights and obligations created under that law persisted. That principle of continuity applied even in the case of the uniting or dissolution of a State. The reasons for the Special Rapporteur's text seemed compelling. It did not endeavour to deal in broad terms with the transfer of debts from one State to another, but concentrated on the position under internal law and the international manifestations of that law. It was for that reason, and partly because the definition of State debt did not altogether correspond to that of State property, that the Commission was now faced with a problem. That was perhaps not the right time to resolve it, but the problem would have to be dealt with when the Commission reverted to the question of definitions.

9. Mr. JAGOTA agreed that a distinction could perhaps be made between State property and State debts as far as the interests of creditors were concerned, but did not think it was germane to the Commission's consideration of article W. Moreover, there was a distinct correlation between those two concepts, in that State debts bore a relationship to State property as defined in article 5, namely, property, rights and interests owned by the State. That nexus was recognized in a number of articles of the draft, in particular, article 24 (Separation of a part or parts of the territory of a State) (*ibid.*, para. 26).

10. He suggested that the Drafting Committee should consider articles W and 14 together, with a view to harmonizing their texts and, as far as possible, using the same wording to convey similar ideas. Generally speaking, legal instruments were either silent on succession to State property and State debts, or dealt with both matters. Very rarely did they refer to one and remain silent on the other. The question of the internal law governing the passing of State property as between the predecessor and successor States should therefore be dealt with in article W in the same spirit as in article 14.

11. The Special Rapporteur and the Drafting Committee might also wish to consider whether the reference in article W to a unitary State should be retained. In his view, it was a vague term that might give rise to controversy as to what did or did not constitute such a State. The Special Rapporteur had in fact recognized the point, both in the definitions and in the sections of his report dealing with the case of Tanzania (A/CN.4/301 and Add.1, para. 450), and with the lessons to be learnt with respect to State debts (*ibid.*, para. 455). In that respect, too, article W should be brought into line with article 14, which did not refer specifically to the nature of the successor State, but merely indicated that the passing of State property should be governed by the internal law of that State, which meant internal law under its constitution. He also noted that article 14 made no mention of an agreement among the constituent States forming the successor State. That point could perhaps be considered when the two articles were brought into harmony.

12. An important point was the residual nature of the rule governing the passing of State debts. The effect of article W was that a debtor State that united with another State normally remained liable for its debt. Only in the case of a unitary State, or where a single State assumed all State property and State debts and the personality of the constituent State was extinguished, was the debt assumed by the successor State. The problem with article W as it stood was the following: if the successor State were defined as the State that replaced the former State, and no mention of the passing of debts were made, either in the agreement among the constituent States or in the constitution, the debtor State could claim that, since it had lost its personality and formed a successor State, its debt had been extinguished. That would lead to endless controversy and the question could not be settled simply by recourse to internal law. Difficulties might also arise in regard to State responsibility, for under the rule as drafted it would not be easy to claim that responsibility none the less passed to the successor State. Consequently, although State practice supported the general theory that a new State, unless it was a unitary State, need not assume the debts of a constituent State, he thought it would help to avoid controversy if, on that point, the wording of article W followed that of paragraph 1 of article 14.

13. Sir Francis VALLAT fully endorsed Mr. El-Erian's suggestion that a list of the volumes published in the United Nations *Legislative Series* should be included in the new edition of *The Work of the International Law Commission*. That would be in keeping with article 24 of the Commission's Statute.

14. Although he agreed in essence with the underlying thoughts of the Special Rapporteur as expressed in article W, he had two points of concern. In the first place, the text perhaps gave the impression of going beyond the scope of the articles as defined in article 1 (Scope of the present articles) and in paragraphs (*a*) and (*c*) of article 3 (Use of terms). Of course, the definitions could always be altered, but he doubted the wisdom of so doing because, if the Commission went outside the sphere of the creation ofthe successor State in the international sense, that would give rise to a series of issues that would only increase the difficulties in an already complex matter. He was therefore inclined to consider that the Commission was dealing with a case in which a successor State meant a State that had replaced another State, in other words, a State in international law, regardless of its internal constitution. In general, a federal State was assumed to be a State for the purposes of succession of States and that, in a sense, should be the end of the matter.

15. A second point of concern was the placing in square brackets of the word "international" in the expression "any international financial obligation", in article 18 (State debt). That left a large area of doubt on a matter that was highly relevant to the topic under consideration. If the word "international" were retained, it could means that the Commis-

sion was virtually operating in the sphere of treaty law and was not the Commission was virtually operating in the sphere of treaty law and was not really dealing with debts in the ordinry sense. If, on the other hand, that word were deleted, as he believed it should be, then the Commision would be dealing with financial obligations that did not necessarily, in themselves, consitute obligations under international law. He was thinking, for example, of bonded debts, where the State borrowed money on the international market and secured the loan by the issue of bonds, mainly to private persons or corporations. Such debts were debts not in international law, but in internal or private law. That, in his view, was partly where the Commission's difficulty lay. In the case of succession by a uniting of States, debts were inevitably affected by the internal law of the emergent State and internal responsibility for them might be left to the constituent unit or be passed to the federal government. In dealing with State debts, it seemed that the Commission was endeavouring to provide, first, that the new State would be responsible for the debt and, secondly, that the new State would have international responsibility for ensuring that the debt was honoured, even it the burden of payment fell on a component part, which was not quite the same thing. To meet that situation, the article would have to be couched in positive terms, but that would raise the question of the internal legal constitutional position. Consequently, the Commission really had no alternative but to include a safeguard clause providing that the fact that the new government would become responsible for the debt was not intended to prejudice the effect of the internal law of the State after succession had taken place.

16. Lastly, he agreed that article W should be brought into line with article 14 which, in his view, showed the right approach.

17. Mr. CASTAÑEDA fully agreed with the conclusions reached by the Special Rapporteur in his valuable study of the historical precedents and his excellent presentation of the relevant arguments. All members seemed to agree that the rule stated in article W was correct. With regard to the drafting, although the net effect in legal and practical terms would be the same, it might none the less be preferable to formulate the rule in positive form, so that it would read:

"On the uniting of two or more States in one State, the successor State thus formed shall succeed to the debts of the constituent States unless..."

18. A more difficult problem was raised by the use of the vague term "unitary State", which had no precise meaning in political science and could be used to describe both federal and non-federal States. Moreover, as rightly pointed out at the previous meeting, confederations of States were things of the past and were essentially of academic interest. The examples cited in the report of uniting of States in Central America could be regarded as curiosities of history, since entities in which the constituent States retained all the attributes of sovereignty in internal affairs could not function effectively in the modern world. Admittedly, it might be asserted that the Commission was begging the question if it followed the solution adopted in article 14, which referred to a "successor State" without mentioning a "unitary State". Nevertheless, in order to overcome the difficulties raised by the term "unitary State", the Drafting Committee might well take article 14 as a model, rather than enumerate in article W the particular types of State covered.

19. Mr. FRANCIS said it was clear from the 1897 Treaty relating to the Republic of Central America, referred to in paragraph 440 of the ninth report of the Special Rapporteur, that there were instances of unions of States in which the constituent members retained responsibility for their debts and exercised full sovereignty in their internal affairs. Certain problems might arise in modern times in the case of such unions. For example, if two States formed a union for the purpose of external representation and the pursuit of their foreign policy in the United Nations, a new entity would come into being, but what would happen in regard to the obligations of the constituent members to make their financial contributions to the United Nations?

20. It could be seen from paragraph 8 of the tenth report (A/CN.4/313) that the Special Rapporteur had had good grounds for broadening the title and the first part of the article in order to make it clear that the rule stated applied to unions of States in which the constituent members formed separate entities. If that course were followed, subparagraph (*b*) of the article would be confined to the case of a uniting of States in the proper sense, that was to say, the formation of a single unified State.

21. Mr. BEDJAOUI (Special Rapporteur) noted that there was virtually no difference of opinion among members of the Commission on the questions of substance raised by article W. The problem, therefore, was merely one of finding wording that would preclude the possibility of certain interpretations to which several members had referred.

22. It was a fact that article W raised a drafting problem concerning the definition of uniting of States that could call in question the definition of succession of States adopted by the Commission. Some members of the Commission, including Mr. Ushakov (1500th meeting) and Sir Francis Vallat, had expressed concern that an attempt might be made to extend the scope of article W to associations or confederations of States united by very loose ties, which fell outside the ambit of succession of States as defined in article 3. That article stipulated that the term "succession of States" meant "the replacement of one State by another in the responsibility for the international relations of territory".

23. He wished to assure members that it was not his intention to depart from the definition of succession of States adopted by the Commission or to call in question the definition of uniting of States given in article 14 in regard to State property. Article W

dealt with the uniting of several States into one State, referred to as the "successor State thus formed". Thus there was no difference between article 14 and article W as far as the definition of a unitig of States was concerned, since the only case contemplated was that of the formation of a successor State.

24. It was clear that the somewhat vague political and economic institutions established in Europe during the previous 30 years did not come within the framework of succession of States, inasmuch as they had not produced a single successor State. For example, it was not possible to speak of the "United States of Europe". Similarly, a confederation that did not have responsibility for the international relations of its component States, or did not have international personality, or whose component States retained their internal and external sovereignty, did not fall within the scope of article W, since it did not entail the existence of a successor State.

25. The application of article W must therefore be strictly limited to cases where there was a succession of States as defined in article 3 (*a*). To obviate any mistakes in interpretation on that point and to establish a parallelism between State property and State debts, he hoped the Drafting Committee would reflect in article W the definition of uniting of States given in article 14, in accordance with the wishes expressed by most of the members of the Commission. The Drafting Committee might also, as suggested by Mr. Šahović (1500 th meeting), standardize the terminology of the two articles, article 14 referring to predecessor States where article W referred to constituent States.

26. The first question to be settled, therefore, was whether there was a successor State. The constitutional form of such a State was irrelevant; it sufficed that it was a subject of public international law. He did not think it necessary to limit the scope of the principle stated in article W to unions of States, in the sense suggested by Mr. Francis. There were wide differences in the legal ties uniting the component parts of a federation or a confederation of States and in the legal status of those parts, depending on whether the reference were, for example, to the United States of America or the United States of Brazil, or again to the Swiss cantons, the Canadian provinces or the Soviet Socialist Republics.

27. He thought the Commission should leave aside complex and hybrid cases such as that of the United Arab Republic, mentioned by Mr. El-Erian, whose component parts, although forming a single State, had nevertheless retained a certain identity at the international level after their union. Sometimes, too, the composite State and its component States carried out international responsibilities at the same time; that was true of the Byelorussian and Ukrainian Soviet Socialist Republics, each of which had international personality, since they were Members of the United Nations side by side with the USSR. The latter, consequently, could not be said to be entirely responsible for their international relations.

28. Instead of confining himself, in article W, to stating the principle of the passing of State debts, as he had for the passing of State property in article 14, he had sought to go further and to determine whether it was the composite State or the component State that should assume those debts. He had probably been wrong to do so, because he had thus come up against the problem of the constitutional form of the State, in other words, its internal law.

29. In the matter of debts there was a very great difference, in regard to the risks run by creditors, between cases of uniting of States and cases of separation or dissolution of a State. It was obvious that, in the case of a uniting of States, the component States did not unite in order to evade their debts, which were not likely to be extinguished as in the case of separation or dissolution of a State; the debts would in any event be taken over, either by the successor State or by the component States. The only question that arose was to what extent the debts of the predecessor States passed to the successor State, but that question was of no importance from the creditors' point of view. Hence there was no need to try to determine who should in fact assume the debts.

30. He recognized that Mr. Jagota's preference for a closer parallel between articles 14 and W was justified, but pointed out that article 14 was still in square brackets, because it remained controversial. However, if the Commission wished to establish a parallel between the two articles, he was prepared to draft article W in positive form.

31. He proposed that the article be referred to the Drafting Committee for consideration in the light of the suggestions made by the members of the Commission.

32. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article W to the Drafting Committee.

It was so agreed.[8]

ARTICLE 24 (Separation of a part or parts of the territory of a State)

33. The CHAIRMAN invited the Special Rapporteur to introduce article 24 (A/CN.4/313, para. 26), which read:

Article 24. Separation of a part or parts of the territory of a State

1. If a part or parts of the territory of a State should separate from that State and form a State, then, unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

2. The provisions of paragraph 1 shall apply in the case where a part of the territory of a State separates from that State and unites with another State.

[8] For consideration of the text proposed by the Drafting Committee, see 1514th meeting, and 1515th meeting, paras. 1-54.

34. Mr. BEDJAOUI (Special Rapporteur) said that article 24 dealt with the passing of State debts in the event of the separation of a part or parts of the territory of a State. For the sake of parallelism, clarity and internal consistency, the type of State succession to which the article referred had been defined in the same way as in article 15, concerning the passing of State property; the situation contemplated was that in which one or more parts of the territory of a State separated from it to form another State, the predecessor State surviving the separation.

35. He had given examples of State practice in that situation in his tenth report. In the case of the Irish Free State, he had noted that the Treaty of 6 December 1921 between Great Britain and Ireland, by which that State had been created, had apportioned debts between the predecessor State and the successor State on the basis of the principle of equity.[9]

36. In the case of the secession of Singapore, he had found a remarkable symmetry between the adherence of Singapore to the Federation of Malaya in 1963 and its withdrawal from the Federation in 1965, which had been characterized by a return to the *status quo ante*. When the Federation of Malaya had been set up, provision had been made for the passage to it, unless otherwise agreed between the federal government and the government of the State concerned, of "all rights, liabilities and obligations" of its constituent States, including Singapore. Singapore's withdrawal from the Federation in 1965 had brought the return to that State of the "rights, liabilities and obligations" it had transferred to the Federation.[10] That symmetry had been made possible by the circumstances of the case; for it was probable that, on the one hand, the federal or confederal nature of the grouping, which had tended to preserve the identity of the components, and, on the other hand, the short lifespan (two years) of the union, which had prevented a higher degree of integration, had contributed to the nearly total and virtually automatic return to the *status quo ante* in regard to rights, liabilities and obligations, particularly State property and State debts. But it was clear that cases of that kind were not typical.

37. With regard to the secession of Bangladesh, the problem of the apportionment of State debts between Bangladesh and Pakistan was still pending, for the negotiations begun in June 1974 had ended in failure. Bangladesh seemed to have been rather reluctant to assume a share of the debts, although it had claimed 56 per cent of the common property.[11]

38. The paucity of the examples he had cited showed that State practice in the matter under discussion was not very abundant. But that did not mean that State succession of the type in question would have no part to play in the future. On the contrary, it might occur much more often and acquire considerable importance, since many groups of human beings were now seeking their identity by virtue of the right of peoples to self-determination. That right had been invoked in various forms in the course of history. After the principle of nationalities, upheld by Napoleon III and then, after the First World War, by President Wilson, which had led to the establishment of numerous independent States and changed the map of Europe, and after the decolonization movement following the Second World War, which had enabled numerous peoples of the third world to free themselves from the yoke of colonialism and had profoundly disrupted international relations, some writers now saw a new phase in the invocation of the rght to self-determination which, as was shown by the current problems of Africa, spared neither the older States nor the newly independent States. The reason was that certain peoples or ethnic groups had at various times been enclosed within artificial frontiers, so that there were now poly-ethnic States, or States comprising several races, and polynational races, or races dispersed among several States. It could thus be seen that the problem of State succession, as it might arise in cases of secession, was not an academic but a real problem that might assume considerable importance in the future and must not be overlooked.

39. He should the rule governing that type of succession be constructed? In his view, it must be decided how much weight was to be given, on the one hand to agreement between the parties and, on the other hand, to what was equitable and reasonable. It was clear that agreement between the parties took precedence over everything else. But in the absence of agreement—and it was to be feared that in cases of secession, which often took place with violence, there would be no agreement—recourse must once again be had to equity, which then reasserted its full claim.

40. If it followed that principle, however, the Commission would produce an article 24 on the same lines as article 21, which concerned succession to State debts in the event of transfer of part of the territory of a State. But that type of succession was different from the case of separation dealt with in article 24. Indeed, as he had pointed out in paragraph 20 of his report, the Commission had distinguished very clearly between those two cases. The first case involved the transfer, generally by peaceful means and by agreement between the ceding State and the beneficiary State, of a relatively small and unimportant area of territory, and that did not entail the creation of a new State. The second case involved the secession, generally by violent means and without prior agreement, of a large area of territory, resulting in the creation of a new State.

41. It would thus be unrealistic to adopt the same solution in article 24 as in article 21, since in the case of separation there was often no prior agreement. Recourse must therefore he had once again to the principle of equity, as it had been applied in the other articles. That principle must be seen as an essential ele-

[9] See A/CN.4/313, paras. 11 and 12.

[10] *Ibid.*, paras. 13 and 15.

[11] *Ibid.*, para. 17.

ment of settlement between two protagonists which, given the separation and the conditions in which it occurred, would tend to show very little flexibility towards each other.

42. However, if the Commission invoked the principle of equity, it would have to establish some parallelism between the rule on State debts set out in article 24 and the rule on State property set out in article 15 to cover the same case of the separation of a part or parts of the territory of a State. There would have to be some correlation between the "property, rights and interests" that passed to the successor State and the State debts relating thereto. It was also necessary to take account of any just and equitable claim, so as to achieve the essential balance in the apportionment of debts between the predecessor State and the successor State. Consequently, paragraph 1 of article 24 stressed the principle of equity, while giving due place to the element of agreement.

43. It would be remembered that in article 15, paragraph 2, the Commission had assimilated to the case where a part or parts of the territory of a State separated from it to form a new State the different case of a part of the territory of a State separating from it and uniting with another, pre-existing State. The latter case was not the one contemplated in article 12, which related to the transfer of part of the territory of a State. Article 12 referred to the case of a small area of territory being transferred by one State to another, whereas article 15, paragraph 2, referred to a case where a large area of territory voluntarily separated from one State and united with another. The wording of article 24, paragraph 2, which was similar to that of article 15, paragraph 2, met the need for parallelism between the provisions relating to State property and those relating to State debts.

44. Mr. VEROSTA thought the Drafting Committee would be able to adopt article 24 without change, for it was a clear and well-worded provision covering most of the problems that were likely to arise.

The meeting rose at 12.50 p.m.

1502nd MEETING

Friday, 16 June 1978, at 10.40 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Organization of work (*continued*)*

1. The CHAIRMAN said that the Enlarged Bureau had recommended at its latest meeting that, in response to an invitation contained in a note dated 6 March 1978 from the Secretary-General, the Commission should be represented as an observer at the World Conference to Combat Racism and Racial Discrimination, to be held in Geneva from 14 to 26 August 1978. The Enlarged Bureau had authorized him to enter into consultations with members to determine who should represent the Commission at the Conference.

2. If he heard no objection, he would take it that the Commission approved the recommendation.

It was so agreed.

3. The CHAIRMAN said that the Enlarged Bureau had also recommended that a letter be addressed to the European Committee on Legal Co-operation explaining that the Commission would be unable to send a representative to the forthcoming session of the Committee because it would be in session itself during the period in question.

4. If he heard no objection, he would take it that the Commission approved that recommendation.

It was so agreed.

5. The CHAIRMAN informed the Commission that the Enlarged Bureau had recommended the establishment of a working group on international liability for injurious consequences arising out of acts not prohibited by international law, consisting of Mr. Quentin-Baxter (chairman), Mr. Ago, Mr. Castañeda and Mr. Njenga, and of a working group on jurisdictional immunities of States and their property, consisting of Mr. Sucharitkul (chairman), Mr. El-Erian, Mr. Francis and Mr. Riphagen.

6. If he heard no objection, he would take it that the Commission approved those recommendations.

It was so agreed.

7. The CHAIRMAN informed the Commission that the Enlarged Bureau had proposed that the review of State practice, international jurisprudence and doctrine relating to *"force majeure"* and "fortuitous event" as circumstances precluding wrongfulness (ST/LEG/13), prepared by the Codification Division of the Office of Legal Affairs, should be published in the Commission's *Yearbook* for 1978. In an exchange of views with the Office of Legal Affairs, the Department of Conference Services had expressed some hesitation and had sought to apply a criterion under which the length of certain documents was limited to a maximum of 32 pages. Such a criterion should obviously not apply in the case of important documents of scientific value.

8. The Commission might therefore decide to include the aforementioned study in its 1978 *Yearbook*

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* Resumed from the 1486th meeting.