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A/CN.4/SR.1266

Summary record of the 1266th meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
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world. On the present solemn occasion, one had the feeling that notwithstanding all that had been achieved, the ever growing needs of the international community were making new demands upon the ingenuity of thinkers and upon the skill of practical politicians and governments. It was to be hoped that the world would once more move towards a climate of understanding and co-operation in which international law would constitute not only a body of doctrine, but also a useful means of attaining peace, justice and the welfare of mankind.

73. In that context, the law-making procedure, in which the Commission played an important part, was destined to improve even further. International law would increasingly consist of rules intended to guarantee general peace and to promote and secure economic stability and growth, human rights and fundamental freedoms, social justice and the dedication of science and technology to the common good. It would then become the law of a true community, sustained by, and itself sustaining, each successive stage in the development of the international community.

74. Despite their different creeds and colours, different legal systems and different political persuasions, men were bound to live together on a shrinking earth, and that they could only do by constantly maintaining and developing the legal order, which would enable them to live in peace, freedom and justice. The tasks before the international law-making machinery were endless. He hoped that the Commission would continue to work effectively for the accomplishment of those noble tasks in the tradition of the past twenty-five years, thanks to the selfless dedication of its past and present members.

The meeting rose at 5.35 p.m.

1266th MEETING

Tuesday, 28 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-3; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1264th meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 3

1. The CHAIRMAN invited the Special Rapporteur to introduce article 3, which read:

Article 3

Cases not within the scope of the present articles

The fact that the present articles do not apply to the effects of succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(*a*) the application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(*b*) the application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties.

2. Sir Francis VALLAT (Special Rapporteur) said that article 3, which corresponded to article 3 of the Vienna Convention on the Law of Treaties,[1] was a saving clause referring to cases outside the scope of the present articles. The Swedish Government, the only one to comment on the article, considered that the principles embodied in it were self-evident and need not be expressly stated in the articles (A/CN.4/275). He did not share that view. Self-evident principles sometimes needed to be stated in order to provide the foundation or framework for the rules which followed. The Swedish Government's contention that the title of article 3 should be changed because the provisions of the draft articles were in fact applicable to the cases mentioned was mistaken. Sub-paragraph (*a*) referred to the applicability, not of the provisions of the articles, but of the rules of international law which existed independently of the articles and happened to coincide with their provisions. Article 3 did in fact deal with cases outside the scope of the articles, by stating that customary international law continued to apply in those cases. He would therefore prefer to retain article 3 with its present title.

3. Mr. EL-ERIAN said he agreed with the Special Rapporteur that it was sometimes necessary to state the obvious, in order to establish the basis of certain legal obligations. Article 3 should be retained to make the provisions as complete as possible.

4. Mr. HAMBRO said he hoped that, during the second reading of draft articles, silence on the part of members would be interpreted as agreement with the Special Rapporteur.

5. The CHAIRMAN assured him that it would.

6. Mr. ŠAHOVIĆ said that he supported the Special Rapporteur's approach to the topic of succession of States in respect of treaties and approved of the draft articles in general. The Special Rapporteur's report (A/CN.4/278 and Add.1-2) raised some new questions which should be considered thoroughly. As to the

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[1] 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. 289.

Swedish comment on article 3, he agreed with the Special Rapporteur that article 3 defined the scope of the draft and supplemented article 1.

7. Mr. SETTE CÂMARA said he had no objection to the Special Rapporteur's proposal that article 3 should be retained as drafted, but he appreciated the Swedish Government's doubts about the title, which gave the impression that the function of the article was to exclude certain cases from the scope of the draft. The intention of the article was in fact the opposite. The Drafting Committee might try to find a more felicitous title, perhaps something like "Application in cases not within the scope of the present articles".

8. Mr. BEDJAOUI said that he had read the Special Rapporteur's report on succession of States in respect of treaties with keen interest, not only as a member of the Commission, but also as Special Rapporteur for the topic of succession of States in respect of matters other than treaties. The report, which summarized the comments of Governments, should facilitate examination of the draft articles on second reading. He noted that the draft had given rise to few written comments and that the oral comments made did not fundamentally affect the structure of the articles. He hoped, therefore, that the Commission would proceed as quickly as possible with the second reading of the draft and endorsed the suggestion made by Mr. Hambro.

9. He agreed with what the Special Rapporteur had said about article 3, which defined the general scope of the codification of the law of State succession, despite the limitation stipulated in article 1. He also agreed with the Special Rapporteur that it was by virtue of international law, and independently of the draft, that its provisions applied to the cases in question. Article 3 had not given rise to any comments by Governments other than those of Sweden. It could be referred to the Drafting Committee.

10. The CHAIRMAN said that if there were no further comments, he would take it that article 3 could be referred to the Drafting Committee for further consideration. The Drafting Committee might wish to reconsider the title, especially as it was used for similar provisions in other drafts, for example, the draft articles on the most-favoured-nation clause.

It was so agreed.[2]

11. ARTICLE 4

Article 4

Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to the effects of succession of States in respect of:

(*a*) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(*b*) any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

12. Sir Francis VALLAT (Special Rapporteur) said that in the Sixth Committee the only speakers who had dealt with article 4 had expressed support for it.

13. Mr. EL-ERIAN said he had some doubts about the reference to "Treaties constituting international organizations" in the title of the article, which might be misinterpreted. He suggested that the phrase should be amended to read "Constituent instruments of international organizations".

14. Mr. CALLE Y CALLE said that he, too, had doubts about the title. Article 4 was concerned, not so much with constituent instruments, as with the problems which might arise from succession, in situations governed by such instruments, because of the nature of the membership or of the rights and obligations inherited from the predecessor State by virtue of that membership. The drafting Committee might try to work out a more appropriate title reflecting that aspect of the matter.

15. Mr. USHAKOV said he fully shared the Special Rapporteur's views on article 4. He pointed out, however, that the Russian translation of the article as it appeared in the Commission's report (A/8710/Rev.1) did not correspond to the Russian text which he had himself prepared in the Drafting Committee. In particular, subparagraph (*a*) had been changed in such a way that its meaning was completely distorted. He asked that in future Russian texts he had drafted himself should not be altered by the Secretariat without his permission.

16. Mr. ŠAHOVIĆ said that too much importance should not be attached to titles. In part I of the draft, containing the general provisions, the titles could be modelled on those of the Vienna Convention on the Law of Treaties. He agreed with the suggestion made by Mr. Calle y Calle, however, and thought that the Drafting Committee might be asked to reconsider the title of article 4, taking account of the subject it dealt with.

17. The CHAIRMAN suggested that article 4 should be referred to the Drafting Committee for further consideration in the light of the comments made.

It was so agreed.[3]

18. ARTICLE 5

Article 5

Obligations imposed by international law independently of a treaty

The fact that a treaty is not in force in respect of a successor State as a result of the application of the present articles shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

19. Sir Francis VALLAT (Special Rapporteur) said article 5 established a general rule which was specific in its scope and modelled on article 43 of the Vienna Convention on the Law of Treaties. The Swedish Government had suggested that the rule should be omitted from the draft articles and the underlying principle dealt with in the commentary, for the reasons it had given in

[2] For resumption of the discussion see 1285th meeting, para. 3.

[3] For resumption of the discussion see 1285th meeting, para. 3.

the case of article 3. He believed that article 5 should be retained. He might subsequently ask the Commission to consider including in the draft a general provision to the effect that the Law of Treaties would apply in cases where the present articles were not applicable. That was a broad issue, however, which would need separate consideration.

20. Mr. YASSEEN agreed with the Special Rapporteur.

21. Mr. MARTÍNEZ MORENO said he was prepared to accept article 5, but he thought that its scope might perhaps be widened to include not only obligations imposed by international law independently of a treaty, but also any rights that might belong to a successor State. For example, a predecessor State might not be a member of an international organization because it did not satisfy the requirements for membership laid down in the constituent instrument of the organization; if the successor State satisfied those requirements, there was no reason why the application of the present articles should restrict its rights. That case might possibly be covered by other provisions of the draft. Nevertheless, it might be advisable to add to article 5 a clause providing that the fact that a treaty was not in force in respect of a successor State as a result of the application of the present articles did not restrict its rights as a successor State.

22. Sir Francis VALLAT (Special Rapporteur) said he agreed with that idea, but thought it could more appropriately be taken up when the Commission considered supplementary provisions at a later stage. It would be best to confine article 5 to the specific purpose for which it was intended.

23. Mr. USHAKOV considered that article 5 was indispensable, since it was important to stress that the obligations imposed by international law subsisted independently of treaties. Consequently he did not agree with the Special Rapporteur's remark in paragraph 169 of his report (A/CN.4/278/Add.2) that the article might not be necessary.

24. The CHAIRMAN agreed with the Special Rapporteur that Mr. Martínez Moreno's suggestion should be taken up at a later stage, either in the Drafting Committee or in the Commission. He suggested that article 5 should be referred to the Drafting Committee for further consideration.

It was so agreed.[4]

25. ARTICLE 6

Article 6

Cases of succession of States covered by the present articles

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

26. Sir Francis VALLAT (Special Rapporteur) said that opposite views had been expressed about article 6, which was considered essential by some and superfluous by others. Governments had been asked to submit their comments, but there had been little response. Although the article might overlap to some extent with article 31, which covered special cases in a special way, it did not deal with quite the same circumstances. The substance of article 31 did not, in his opinion, obviate the need for article 6, which excluded from the application of the articles cases in which succession was not in conformity with the principles of international law enbodied in the Charter of the United Nations.

27. He was inclined to agree with the United States Government that the use of the word "normally" in the first sentence of paragraph (1) of the commentary was going too far (A/CN.4/275). The articles clearly could not be drafted on the assumption that the world was perfect, and some amendment along the lines indicated by the United States might be appropriate. As he had indicated in paragraph 177 of his report (A/CN.4/278/Add.2), it would be possible to redraft article 6 so as to ensure that the rights conferred by the draft articles could only be exercised by a successor State if the succession had occurred in conformity with international law, as suggested by the United States Government. It was a tempting solution, but might not be found to be the best one if article 6 was viewed in the context of the articles as a whole. Like many of the articles, article 6 was not concerned with specific rights or obligations as such, but dealt with the treaty relations which might result from succession. It was not essential to the purpose of the articles to draw a distinction between rights and obligations in them, and it would indeed be difficult to do so.

28. Mr. EL-ERIAN said he had carefully considered the United States Government's comments and thought that a distinction should be made in the case of situations involving a violation of international law. The purpose of international law was to regulate such illegal situations. In drafting rules on State succession, however, the Commission wished to ensure that legitimate situations would continue notwithstanding the fact of succession, and naturally expected such situations to conform to international law. The article was therefore of basic importance and its acceptance by a large majority of Members of the United Nations would allay the fears of many States. A similar provision was included in the draft articles on succession of States in respect of matters other than treaties. The substance of the two articles should be retained; the points raised by those who did not approve of them could perhaps be met by amendments to the articles or by additions to the commentaries.

29. Mr. KEARNEY agreed that it was desirable to include such a provision as article 6. He was concerned, however, that as the result of its inclusion a State which had acquired territory illegally, for example, by force, should not be in a better position than one which had acquired territory legally. He doubted whether article 6 or, for that matter, the suggestions of the United States Government and the Special Rapporteur, would be adequate to solve that problem. It would be difficult to draft a satisfactory text. The purpose of article 6 was

[4] For resumption of the discussion see 1285th meeting, para. 9.

different from that of articles 29 and 30, which were concerned with the difficulties arising out of rights and obligations in regard to territories. It might be advisable to consider the problem in the context of particular articles dealing with fundamental aspects of succession, which might be applied to the detriment of States unlawfully deprived of their territory.

30. Mr. USHAKOV pointed out that article 6 had been adopted after a long discussion, in the course of which several members of the Commission had emphasized that the draft should apply only to lawful territorial situations. Article 6 did not deal with the effects of succession of States, but with succession of States itself—hence the reference to international law and, in particular, to the principles of the United Nations Charter. In his opinion, the formula proposed by the Special Rapporteur in paragraph 177 of his report departed from the original meaning of the article.

31. The members of the Commission had wished to limit the scope of the draft articles to contemporary situations, subsequent to the establishment of the United Nations. That idea of non-retroactivity had been introduced indirectly into the draft by the formula "in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations", which indicated that only new situations relating to State succession were covered. That point had to be made clear, for otherwise it might be thought that the draft applied to situations several centuries old. In his observations, the Special Rapporteur did not mention the need to limit the application of the articles to recent situations which had arisen since the establishment of the United Nations, yet that had been the Commission's intention.

32. Mr. RAMANGASOAVINA said he thought the purpose of article 6 was similar to that of article 5: to confirm, in connexion with the draft articles, certain principles that were already established by virtue of international law and the Charter. Article 5 was a reminder that, because a State was not a party to a treaty, it was not relieved of the obligations imposed by international law; article 6 specified that the draft articles applied only to cases of succession of States occurring in conformity with the principles of international law embodied in the Charter. In his opinion, those articles were perfectly appropriate even though they were only reminders of established principles already laid down in the Vienna Convention on the Law of Treaties. He was fully satisfied with the formulation of the principle stated in article 6.

33. Mr. ELIAS said he supported the present text of article 6, mainly for the reasons given by the Special Rapporteur in his introduction. Article 6 stated what the Commission had concluded was necessary: that the articles should apply only to cases of succession occurring in conformity with international law and, in particular, with the Charter of the United Nations. The effects of succession had been rightly stressed in the draft articles and there was little chance that the Commission's intention would be mistaken.

34. The Polish Government had rightly insisted that article 6 should apply only to cases of succession which arose in conformity with the principles of international law (A/CN.4/275). The apprehensions of the United States Government were also valid, but the Commission should deal with them in the commentary, without changing the substance of the article. Although it was desirable to emphasize that cases of unlawful succession should be excluded from the application of the draft, the introduction of too many refinements might defeat the purpose of the article. So far only two Governments had definitely opposed article 6, while Nigeria, Pakistan, Poland, the United States and the USSR had broadly supported it. The Drafting Committee might therefore be asked to reconsider the article and decide whether it should be made to exclude application of the articles *in toto* in the cases in question, or merely to exclude enjoyment of the benefits of their application. He was sure that the Drafting Committee would not radically depart from the present text, which he thought the Commission would do well to retain.

35. Mr. PINTO said that, in his view, the title of article 6 was unsatisfactory, since it seemed to suggest that the article dealt with certain specific cases of succession of States, which was not so. It really dealt with the scope of the present draft articles. The title "Scope of the present articles" was, however, already used for article 1, which showed the close relationship between the subject matter of the two articles. He therefore suggested that the contents of article 6 should be moved to article 1. The resultant combined article would give the reader a better understanding of the provisions that followed.

36. Mr. TSURUOKA said he supported the principle stated in article 6. To prevent difficulties in application from restricting the scope of the draft, it would be sufficient to give very detailed explanations in the commentary. The term "succession of States", as defined in article 2, paragraph 1(*b*), normally referred to lawful succession. In other than normal situations, the lawful or unlawful nature of a fact could not be determined without a value judgment by the States concerned. It was in order to ensure that those committing unlawful acts did not benefit from the rules applicable to normal situations that detailed explanations would have to be given in the commentary.

37. Mr. ŠAHOVIĆ said that he considered article 6 essential and found its wording satisfactory. In his own conclusions, the Special Rapporteur had expressed the opinion that it would be preferable to retain the article as it stood.

38. The commentary to the article in its present form was not, however, sufficiently detailed; many relevant questions, some of which had been raised again during the present discussion, were not mentioned in it. The commentary was silent on points which were of great importance for the interpretation of article 6 and, in particular, on the phrase "the principles of international law embodied in the Charter of the United Nations". Some reference should certainly be made, either in a separate provision or in the commentary, to the question of retroactivity, since it might have significant consequences for States.

39. Mr. BEDJAOUI said that article 6 was most important, and pointed out that it had cost the Commission considerable effort to reach agreement on its wording. The provision had been reproduced in the same terms in the draft articles on succession of States in respect of matters other than treaties.[5] As the Special Rapporteur for that topic, he appealed to the other members of the Commission to retain both the principle and the wording of the article.

40. Article 6 merely stipulated that the draft applied only to lawful successions, to the exclusion of any form of unlawful succession. There was, therefore, no question of the possible rights and obligations of a successor State which had effected a territorial change to its own advantage in breach of international law and, more especially, of the United Nations Charter. The irregularity of the acquisition of a territory would be in no way effaced if the successor State applied the provisions of the draft. Hence it was not a matter of denying rights or obligations to such a State, but of treating it as a non-successor State. Article 6 should therefore be retained, and no reference should be made to any rights a non-successor State might have, since it could have none.

41. Mr. YASSEEN said he had not been much in favour of article 6 when the Commission had examined it on first reading, not because he had disagreed with the idea it expressed, but because it had seemed to him too self-evident to need expression in a special provision. In the light of the controversy to which the article had given rise, he now thought it was certainly useful.

42. On the other hand, he was not convinced by the criticisms some Governments had made of article 6. A convention on succession of States in respect of treaties could only apply to lawful situations and it was preferable to re-state that fact. The wording of article 6 was satisfactory, but he would have no objection to its being referred to the Drafting Committee.

43. With regard to the comment by the Government of the United States, it should not be forgotten that there were principles of law which would be applicable and would make it possible to remedy the situation that Government had in mind. It would be better to retain article 6 as it stood than to try to establish subtle distinctions between rights and obligations.

44. Mr. BILGE said that he supported article 6 as it stood. That provision made it clear that the draft was concerned solely with cases of lawful succession, a fact which was self-evident, but which should nevertheless be stated. The Commission had held a long debate on the article on first reading and had then decided, by a large majority, to include it in the draft. On the whole, Governments seemed to recognize that the provision was useful.

45. The Special Rapporteur, in paragraph 177 of his report, had proposed new wording to take account of the United States suggestion. For the reasons already given by Mr. Bedjaoui, he himself was not in favour of changing the text of article 6. Moreover, the draft did not merely confer rights; it also imposed obligations.

46. Mr. Pinto's suggestion that articles 1 and 6 should be combined was certainly interesting, but it would involve the Commission in an unnecessary departure from the arrangement it traditionally followed.

47. Mr. TABIBI said that article 6 was a very important provision. He fully supported the text adopted by the Commission in 1972, which specified that the draft articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, in conformity with the principles of international law embodied in the Charter of the United Nations. Any departure from that principle would remove a very important safeguard from the draft.

48. It was well known that the majority of old treaties, especially those relating to boundaries, were unequal treaties. Such instruments were illegal, and hence invalid, because they were contrary to principles of *jus cogens* embodied in the United Nations Charter. In the circumstances, the provisions of article 6 provided an important safeguard and it was essential to retain those provisions as they stood.

49. Mr. QUENTIN-BAXTER said that he fully agreed on the need to make it clear that there could be no question of encouraging or countenancing the replacement of one sovereignty by another contrary to the rules of international law and the principles of the United Nations Charter. Since all members agreed on that aim and since the conceptual problems involved in article 6 were so baffling, he had been tempted to refrain from commenting on that article. He was, however, still troubled by its formulation and by the concepts behind it.

50. The difficulties mentioned by several members during the present discussion, and by various Governments, confirmed his view that the drafting of article 6 needed very careful examination. For example, Mr. Ushakov had raised the problem of retroactivitiy with regard to events which had occurred before the establishment of the United Nations. Such comments made him doubt whether the formulation of the article was adequate from a conceptual point of view. The same applied to the comments of the United States Government, which had understandably suggested that the text of article 6 might be going too far by simply removing the whole effect of the draft articles in relation to a régime brought about contrary to international law.

51. The Special Rapporteur had pointed out in his report that article 6 had to be considered in the context of the draft articles as a whole, and particularly of article 2, paragraph 1 (*b*), and articles 10 and 31 (A/CN.4/278/Add.2, para. 174). He had added that the commentary to article 2, paragraph 1 (*b*), stressed that the term "succession of States" was used as referring exclusively to "the fact of the replacement" of one State by another, without any indication whether that fact occurred lawfully or unlawfully. The Special Rapporteur had envisaged amending the definition of "succession of States" so that it would refer to "the lawful replacement" of one State by another, but had thought that such an amendment would cloud the simplicity of the definition. That passage of his report showed,

[5] See document A/CN.4/267, article 2.

however, that the formulation of article 6 was somewhat unsatisfactory.

52. There had been few comments on article 6, because Governments endorsed the aims of that article, but were not sure how to dispel the anxieties generally felt regarding its wording. In his view, the suggestion that the concept of "lawful replacement" should be introduced into the definition came very close to the heart of the problem. The conceptual difficulties faced by the Commission concerned the borderland between law and fact. The Commission had very properly referred to the fact of succession and that was the foundation on which the whole edifice of the draft was constructed. He could think, for example, of a situation in which the States Members of the United Nations did not acknowledge the presence of a State among them because it had attempted to succeed illegally. In that case, the States in question did not merely refuse to accept the State succession as lawful; they maintained that there was no State succession. They denied the very fact of succession of States because it had been brought about illegally.

53. In the circumstances, it was important to make it clear that there was no intention of giving any encouragement to the notion of an attempt at illegal succession. Bearing in mind the doctrines of recognition, he doubted whether the draft should specifically contemplate an illegal replacement of one State by another. The defect in law also related to the fact. He suggested that the Drafting Committee should consider carefully how to avoid those problems.

54. Mr. HAMBRO said that the importance of article 6 should not be exaggerated. The article did not say what would happen in a case of unlawful succession. Its purpose was merely to provide an escape clause; it simply specified that the draft articles did not apply in that kind of situation. He did not see how article 6 could be interpreted in any way as an invitation to illegal State succession.

55. His own feeling had originally been that article 6 was not really necessary because its contents went without saying. But since the majority of the Commission had thought it wiser to include an article dealing with the problem and since article 6 had been adopted after a long debate on first reading, it seemed to him that it was better not to reopen the discussion on second reading.

56. Mr. USHAKOV said he noted that some members had referred to treaties establishing frontiers, and he wondered whether it was possible to apply the principles of international law embodied in the Charter of the United Nations in determining whether a situation that had arisen in the eighteenth or nineteenth centuries, or at the beginning of the twentieth century, had been lawful or unlawful. Obviously, the principles of contemporary international law were valid only for comparatively recent situations, and it would be absurd to apply the principle of non-aggression, for example, to situations of long ago. He wished to emphasize once again that the purpose of article 6 was not only to specify that the situations to which the draft applied were lawful situations consonant with contemporary international law and the Charter of the United Nations, but also to limit the scope of its application in time.

57. The CHAIRMAN said that the Commission was faced with both a substantive question and a drafting question. On the substantive question, there was wide agreement that the article should specify that the provisions of the draft did not extend beyond lawful succession—an approach which raised the question whether unlawful succession was really succession at all.

58. With regard to the drafting of the article, many members wished to retain the text as it stood; one member had suggested that the article should be combined with article 1; and another suggestion was that the Drafting Committee might consider the possibility of introducing the concept of "lawful replacement". Lastly, it had also been suggested that separate provision might be made in the draft to deal with the important time factor mentioned by Mr. Ushakov.

59. He thought the Commission could agree that article 6 was ready for consideration by the Drafting Committee.

60. Sir Francis VALLAT (Special Rapporteur) said the discussion had shown that the Commission as a whole supported the principle of article 6 and, broadly speaking, accepted its formulation. With regard to the drafting formulas included in his report, he wished to make it clear that they had been put forward merely as an indication of what might be possible; they had not been intended as proposals or even as suggestions.

61. He noted from Mr. Kearney's remarks that he appeared to have slightly misunderstood the suggestion made by the United States Government. The ideas expressed by Mr. Kearney would be much easier to incorporate in the commentary, which could make it plain that a State should not be the gainer from a succession that had occurred otherwise than in accordance with international law. He did not favour the introduction of a separate paragraph on the subject because it would detract from the simplicity of the article and might even have the effect of slightly distorting the sense of the provisions embodied in it.

62. On the point raised by Mr. Ushakov, he himself had no doubts regarding the non-retroactive effect of the draft articles. He would take it that, in accordance with article 28 (Non-retroactivity of treaties) of the Vienna Convention on the Law of Treaties, the provisions of a treaty did not bind a party "in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party". If the Vienna Convention had been universally accepted, no problem would have arisen. But since, unfortunately, that was not yet the case, the point would have to be clarified, and his own suggestion was that it should be done in the commentary. He did not favour amending the title of the article, since that method would not provide an adequate solution for a problem of substance.

63. The suggestion made by Mr. Pinto, that article 6 should be combined with article 1, raised some

difficulties. It was true that article 6 was clearly related to article 1, but in a sense all the first six articles were interconnected. It was, of course, possible to rearrange them, but his own feeling was that the article on the use of terms should be as near the beginning of the draft as possible. He therefore saw no advantage in moving article 6 from its present place. That was, of course, essentially a matter for the Drafting Committee.

64. All members shared the concern about certain conceptual points expressed by Mr. Quentin-Baxter, but viewing the matter realistically, he did not see how article 6 could be improved unless a specific proposal was put forward.

65. He hoped that general agreement would be reached on the need to keep article 6 in its present form, possibly with minor drafting improvements.

66. Mr. KEARNEY proposed, as a drafting improvement, the insertion at the beginning of the article of the proviso: "Without prejudice to articles 29 and 30...".

67. Sir Francis VALLAT (Special Rapporteur) said that that proposal would be considered by the Drafting Committee.

68. Mr. TABIBI said he opposed Mr. Kearney's proposal. The majority of members, both in 1972 and during the present discussion, had supported article 6 in its present form.

69. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 6 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[6]

The meeting rose at 12.55 p.m.

[6] For resumption of the discussion see 1285th meeting, para. 15.

1267th MEETING

Wednesday, 29 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-3; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 7

1. The CHAIRMAN invited the Special Rapporteur to introduce article 7, which read:

Article 7

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

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

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

2. Sir Francis VALLAT (Special Rapporteur) said that article 7, on devolution agreements, and article 8, on unilateral declarations, (A/8710/Rev.1, chapter II, section C) had some common features, and many of the considerations that applied to the one also applied to the other. When discussing article 7, it was therefore desirable to bear in mind also the contents of article 8.

3. Government comments on article 7 fell into two groups. The first, which included the observations by Kenya and Zambia (A/CN.4/278/Add.2, para. 180), related to the assessment of the value of a devolution agreement, compared with a unilateral declaration. It was, of course, quite understandable that, from the political point of view, a unilateral declaration should be a more acceptable instrument to a newly independent State, but the only way of dealing with that point was to discuss it in the commentary. It was difficult to see how any allowance could be made for such a preference in the text of the articles.

4. The second group of comments related partly to the drafting of article 7 and partly to the effect of its provisions. The United States Government (A/CN.4/275, section B) had proposed that paragraphs 1 and 2 of the article should be combined and, in doing so, had raised the question of the relationship between article 7 and the provisions of part III, section 4 (Treaties and third States) of the Vienna Convention on the Law of Treaties,[1] which comprised articles 34 to 38.

5. In its written comments (A/CN.4/275/Add.1), the Netherlands Government had accepted as correct the negative rule formulated in article 7, which was also embodied in article 34 of the Vienna Convention, but had criticized the failure to include any rules on the lines of articles 35 and 36 of the Vienna Convention, recognizing the positive aspect of devolution agreements. On that point, there was a link between the Netherlands and United States comments.

[1] 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. 294.