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Summary record of the 1284th meeting

Topic:
Succession of States with respect to treaties

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many disputes as the attempt to draw a line between dissolution and separation.

42. Mr. QUENTIN-BAXTER said that in his opinion everything that had been said during the first reading of the draft had been completely sound. The broad approach adopted by the Commission on newly independent States had been that in the case of new States emerging from dependent status there would be a clean slate rule, while in other cases there would be a rule of continuity, under the principle, referred to by Mr. Yasseen, of *pacta sunt servanda*.

43. There was general agreement, however, that the price paid for that dichotomy was the need to recognize that there was still a case in which the rule of continuity could not be applied, even if the new international person had not just emerged from a state of dependency, as in the case of Bangladesh.

44. He did not find the difference between articles 27 and 28 at all artificial, since in one case there was an entity which was simply divided, while in the other case there was a part of an entity which had broken off from, and positively repudiated, the entity to which it had formerly belonged.

45. In his opinion, the Commission had been right in making a basic distinction between the clean slate principle and the principle of continuity as it applied in other cases. It was not necessary, however, to make an exception for a State which was not technically, and perhaps not really, emerging from dependency or subjection, but which still felt itself to be so emerging to the extent that it was unwilling to be considered the successor of the entity from which it had separated itself. The question then arose how much the Commission should be concerned about the fact that it was not possible to formulate a rule which would automatically put individual cases into their proper categories.

46. There would always be situations in which States would think of themselves as having rejected the thing to which they had previously belonged, and situations in which they would think of themselves as being a projection or a continuity of the thing to which they had previously belonged. There would always be cases, such as that of the former Austro-Hungarian Empire, in which the decisive judgement of the international community would depend on the way in which the new State chose to think of itself. For those reasons, he did not find anything unsatisfactory in the difference between articles 27 and 28. The practical conclusion seemed to be inescapable: the rule of continuity must apply, except in cases of emergence from dependency and in cases in which the new State rejected what might otherwise have been its heritage.

47. With regard to the drafting of article 27, the only distinction between sub-paragraphs (b) and (c) of paragraph 1 was that in one case the treaty was concluded by the predecessor State and in the other it was binding on the predecessor State.

48. Article 27 should be understood as having a much more general application than merely the dissolution of what, in fairly recent times, had usually been a union of States.

49. Mr. CALLE y CALLE said that the case of the dissolution of a State was qualitatively different from that of its disuniting, and he hoped that some mention could be made of those two possibilities. In his opinion, the principle of continuity was perfectly logical in the case of the dissolution of a State, which assumed the prior existence of that entity, but the case was slightly different when there was separation of a newly emerging State.

50. In paragraph 2, it might perhaps be advisable to make it clear that the States which might "otherwise agree" were the States parties to the treaty in question.

51. Mr. EL-ERIAN said he agreed with the Special Rapporteur that a clear distinction should be made between the case of a union of States and the case of a unitary State. What the Commission was dealing with was the case of a State which was a single international person, and in that case there could be no doubt that the old State disappeared and new States emerged; but since the Special Rapporteur had pointed out that it would in any event be necessary to provide for the continuity of treaties in respect of old States, it was obviously important to decide the theoretical question involved.

52. In some cases it was necessary to distinguish between dissolution and separation, but that should not present too many difficulties. All members would agree that the creation of the United Arab Republic in 1958 had been the creation of a new international person, which had been accepted as such by the United Nations. The two partners in that union had wished to merge their identities in a single person, but when the union had been dissolved, they had adopted a pragmatic approach and Syria had resumed its own national identity. In his opinion, therefore, article 27 should be considered as applying to a unitary State and not to a union of States, since it would be difficult to formulate a rule to cover all the possible forms of union that might arise in practice.

53. Mr. ŠAHOVIĆ said he doubted whether sub-paragraph (c) of paragraph 1 was justified and whether a distinction should be drawn between the situations contemplated in that sub-paragraph and in sub-paragraph (b). The two situations were really analogous: a particular part of the territory of the predecessor State was concerned and the same rule applied in both cases, since the treaty continued in force in respect of that part of the territory of the predecessor State only. Perhaps that point needed further consideration.

The meeting rose at 6 p.m.

1284th MEETING

Tuesday, 25 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangaso-

vina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, 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. 1-6; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 27 (Dissolution of a State) (continued)

1. The CHAIRMAN said that the Commission had not concluded its discussion of article 27, but seemed to think that article should be discussed together with article 28. He therefore invited the Special Rapporteur to introduce article 28, which read:

Article 28

Separation of part of a State

1. If part of the territory of a State separates from it and becomes an individual State, any treaty which at the date of the separation was in force in respect of that State continues to bind it in relation to its remaining territory, unless:

(a) it is otherwise agreed; or

(b) it appears from the treaty or from its object and purpose that the treaty was intended to relate only to the territory which has separated from that State or the effect of the separation is radically to transform the obligations and rights provided for in the treaty.

2. In such a case, the individual State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty.

2. Sir Francis VALLAT (Special Rapporteur) said that, in the light of the discussion which had taken place on article 27, it seemed desirable to raise the question of the relationship of article 28 to part III of the draft. Consideration should also be given to the definition of a newly independent State in article 2, paragraph 1(f), a point which had been raised by the Governments of France and the United Kingdom (A/CN.4/278/Add.5, paras. 406 and 407).

3. It had been suggested that the provisions of article 28 should be incorporated in part III, and a change in the definition of a newly independent State would make that technically possible; but, as he had pointed out in paragraph 413 of his report, he still believed that it would be better, in the present draft articles, to maintain article 28 as a separate provision, unless, in the course of the discussion, it should disappear into the matrix of article 27.

4. In the light of the previous discussion, he did not consider it necessary to add very much concerning article 28. He supported the suggestion made by the Netherlands Government (*Ibid.*, para. 414) that paragraph 1(b) should be amended, on the model of article 29 of the Vienna Convention, to read: "(b) a

different intention appears from the treaty or is otherwise established?"

5. Consideration should be given to the composite case in which, for example, three parts of three States separated and then joined together to form one State.

6. Mr. MARTÍNEZ MORENO said that the point which seemed to call for most attention in considering articles 27 and 28 was whether there was, in fact, a difference between dissolution and separation. On the basis of dictionary definitions alone, he believed that there was a substantial difference; but the really important point was how the successor State in each case was prepared to regard the treaty.

7. It was argued that in the case of dissolution of a State, its treaties should continue in force on the basis of *ipso jure* continuity, whereas in the case of separation, in accordance with the clean slate principle, they should not. That argument was based on the fact that in the case of dissolution, the State had participated in the treaty as a party, whereas in the case of separation, the newly independent State had presumably been a colony before the separation and, as such, had been unable to be a party to the treaty.

8. It seemed to him that there were sometimes two distinct cases involved in a dissolution: the Austro-Hungarian Empire provided an example. Austria had been the seat of the central government and sovereign power, and after the Empire's dissolution Austria had maintained its identity to the extent that it could say that it regarded certain treaties as continuing in force. Czechoslovakia, on the other hand, was composed of several former territories of the Empire, but it was not clear that any of them had ever participated in treaties. The case of Hungary was presumably similar.

9. In his opinion, the essential difference lay in the rights of the third party or parties to the treaty. In the case of the dissolution of a State, the obligation of the successor State could, as Mr. Yasseen had pointed out, be regarded as continuing in accordance with the principle *pacta sunt servanda*. In the case of separation, the situation was different, since the new State should begin its new life without any treaty obligations. Consequently, he considered it necessary to maintain the distinction between articles 27 and 28.

10. He noted that nearly all the examples in the commentary to article 27 (A/8710/Rev.1, chapter II, section C) related to "unions of States". It was necessary to be very careful in the use of that term. In his fifth report Sir Humphrey Waldock had defined it thus: "Union of States" means a federal or other union formed by the uniting of two or more States which thereafter constitute separate political divisions of the united State so formed, exercising within their respective territories the governmental powers prescribed by the constitution".¹

11. Many writers would not accept that definition, however. The question should be clarified in the commentary, since it was not clear in all cases that there could be a dissolution when there was a union of States.

¹ Article 1, para. 1(h), reproduced in *Yearbook ... 1972*, vol. II, p. 18.

He cited the example of the Confederation of Central America of 1823, formed from the old Captaincy-General of Guatemala, which in turn had consisted of many administrative sub-divisions. In 1838, that Confederation had been dissolved and its territory had been divided into five separate States.

12. Lastly, he endorsed the Netherlands suggestion that paragraph 1(b) of article 28 should be amended on the lines of article 29 of the Vienna Convention on the Law of Treaties.²

13. Mr. USHAKOV said he did not think that article 28 could be rendered unnecessary by changing the definition of a "newly independent State", as some speakers had suggested. In his opinion that would be impossible, because of the need to regulate the situation of the remaining territory of the original State, as was done in paragraph 1. It would also be necessary to cover the case in which a State was formed from three or more territories which had separated from another State and then joined to form a union.

14. It had been suggested that a State might, in certain circumstances, decide that there was no succession in respect of treaties, because of the very fact of the separation. Mr. El-Erian had said that the question whether there had been a separation or a dissolution might be decided by adopting a pragmatic approach. He himself thought that question must be considered from the point of view of the other party or parties to the treaty. If there was a dissolution, the treaty could be considered as being still in force on the principle of *ipso jure* continuity. If the new State claimed that there was not a dissolution but a separation, it could invoke the clean slate principle and maintain that it was not bound by any treaty obligation; in the case of a commercial treaty, that might have serious consequences for the other State party.

15. Who would decide whether there had been a dissolution or a separation? And if a State separated into two parts of approximately the same size, who would decide which part had separated from which? The difficulties caused by articles 27 and 28, particularly with respect to the definition of dissolution and separation, were almost insuperable. It seemed impossible to decide, from a purely legal point of view what had happened in a given situation, though the question could always be decided by practice, as in the case of Bangladesh.

16. He thought it would be better to merge articles 27 and 28 into a single article.

17. Mr. TSURUOKA said that the Commission should above all seek to maintain an equitable legal order for the international community. From that point of view, it had been right to adopt the principle of the continuity of treaties for normal cases of succession; for a new State ought to help maintain the existing legal order, in its own interest and in that of the whole international community. The Commission had also

been right to adopt the clean slate principle for certain particular cases, such as former colonies, protectorates and mandated territories, in order to preserve the equity without which the legal order would be valueless.

18. The important point, therefore, was to define what was meant by a "newly independent State". In his view, the definition should be based on two criteria: the newness of the State and the position held by the territory before it had become independent. Clearly, if the population of the territory had not played a sufficient part in the exercise of sovereignty, it would be right for the new State to benefit from the clean slate principle. Those two criteria—newness and the pre-existing situation—should therefore be taken into account in defining a "newly independent State".

19. Mr. CALLE Y CALLE said that although some might argue that it was rather academic to attempt to distinguish dissolution from separation, he himself believed that the two cases were different. In dissolution the predecessor State disappeared, although it might survive in a certain way in the entities which emerged from it. In separation, on the other hand, a new State emerged, but the State from which it had been separated still existed. He therefore believed that the two separate articles, 27 and 28, should be retained.

20. As he saw it, article 28 adopted two hypotheses. The first was that not only one new State, but more than one might result from a separation; the second was that a new State might be formed by parts separated from several other States. A typical case was that of Poland, which had been formed from territory under the sovereignty of three different States, namely, the Austro-Hungarian Empire, Russia and Germany. In such a case as that, the new State would inherit a vast number of treaties, and it was only logical to place it in the same position as a newly independent State and apply the clean slate principle.

21. Mr. REUTER said that the distinction between the situations contemplated in article 27 and article 28 was not purely academic. To be convinced of that, it was sufficient to consider an analogous case in internal law, such as a schism in a church or a split in a trade union. In the case of a trade union, if a minority broke away to form a separate entity, the old and the new entities would dispute not only the right to the name, but also possession of the union property. In the case of dissolution the property would have to be divided, but not in the case of secession.

22. He drew the Commission's attention to the gravity of the decision it was required to take—not, perhaps, in regard to the law of treaties proper, but in regard to the law of State succession, which the Commission had more or less arbitrarily divided into two topics. For in dealing with succession of States in respect of matters other than treaties, the distinction between dissolution and separation was essential.

23. In that connexion, he observed that there were questions of State succession relating to the First World War which had not yet been settled. The problem must not be merely denied, for it existed and it was an extremely difficult one. Could the Commission avoid

² 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. 293.

having to solve it within the framework of the law of treaties? It could do so if, after examining the problem, it concluded that, for the purposes of succession to treaties—and succession to treaties only—the situation was the same in both cases.

24. If the Commission decided that the same régime applied to both cases, it need not consider the problem or solve it. Even if it took that position, however, in order to avoid all ambiguity he would prefer the Commission to mention the two cases and say that the régime was the same for both, for the two cases did exist. If, on the other hand, the Commission concluded that the two cases called for different treatment, it would have to keep the two separate articles and should adopt a formula giving some idea, at least, of the principle governing the choice between the two solutions.

25. In view of the complexity of the question and the diversity of the situations which could arise in practice, he thought, like Mr. Ushakov, that the Commission was in a very embarrassing position. In his view, all it could affirm was that only the relevant circumstances of law and fact made it possible to determine whether a State was entitled to claim identity with the former State which had undergone the change. For the issue was, in fact, the maintenance of the identity of a State through certain alterations.

26. He therefore proposed that the Commission should first tackle the question whether the régime was the same in both two cases. If it was, there would be no problem to solve. If, on the other hand, the régime was not the same, the Commission would not only have to retain the two articles, but indicate that the question whether a State was identical with the predecessor State, so that the case was one of separation and not dissolution, must be judged from all the relevant circumstances of law and of fact.

27. Mr. RAMANGASOAVINA said he shared the views of Mr. Martínez Moreno on the question of dissolution. When the Commission had formulated the draft articles, it had had in mind a union of States and the possibility of its dissolution. Viewed from that angle, article 27 was justified; where only the dissolution of a union of two or more States was concerned, the situation was simple, because each component State of the union had had a separate international life. But dissolution was not only the voluntary separation of the component states of a union; it could also be the disintegration of a union as the result of a war in which the predecessor State had been destroyed following unconditional surrender, for example, and its institutions had disappeared.

28. The question thus arose to what extent the various components of the former State, which had become independent of each other, should succeed the predecessor State. In the case of the Kingdom of the Netherlands, which now consisted of the Netherlands proper, the Netherlands Antilles and Surinam, it was obvious that when the Netherlands Antilles and Surinam became independent they would not be former component states of a union which, as such, would succeed *ipso jure* to the treaties concluded by the predecessor

State. Similarly, in the case of Portugal which, by a legal fiction, had always considered its overseas provinces as an integral part of the Portuguese State, it was quite certain that, when those provinces became independent, they could not be regarded as former component states of a union. Thus the distinction was very difficult to make.

29. The case of Taiwan was particularly complicated in that respect, because under the treaties concluded at the end of the Second World War the island of Taiwan was an integral part of Chinese territory, although it had had an international life entirely separate from that of China. If Taiwan became independent, would it be a part which had separated from a whole to become a newly independent State, or would it be a former component of a union—which had never existed in international law?

30. Tanzania also raised a difficult problem, because it had been formed by the union of two States—Tanganyika and Zanzibar—which could not be said to have led separate international lives, since they had been independent for only a very short time when they had decided to unite. If those two countries separated, would it be the dissolution of a union or would one of them be regarded as a newly independent State? The problem was not always so easy to solve as in the case of the United Arab Republic, for when a union was formed there was often one country which acted as leader in relation to the others and which would accordingly continue the international life of the union after the separation of the other parts. Hence it was natural to apply the principle of the continuity of treaties to that country and to treat the other former components of the union as newly independent States.

31. Having examined the case of newly independent States, the Commission thus had to consider other States which could be born into international life without having been dependent countries in the strict sense of the term. He was not sure whether article 28 should be retained; it might be better to incorporate it in part III of the draft, though that would involve amending the definition of the expression “newly independent State”.

32. Mr. HAMBRO said he wished to go on record as saying that he considered it important to keep articles 27 and 28 separate, as had already been decided by the Commission at a previous session after thorough deliberation. The distinction made would also be of great importance when Mr. Bedjaoui's report came to be discussed.

33. Mr. KEARNEY said that, after listening to the discussion, it seemed to him that it would be necessary to retain the distinction between dissolution and separation in some way or other, regardless of whether the Commission decided to retain article 28, to combine it with article 27 or to eliminate it altogether. He therefore supported those who were in favour of maintaining the distinction, which was not merely an academic one, but could involve questions of substance for many countries. It should be borne in mind, however, that whatever distinction was made, arguments would inevitably arise as to whether it had been properly applied.

34. For that reason, he suggested that the Commission might consider the possibility of including some procedure for the settlement of disputes in the present draft.

35. Mr. BILGE said he thought there was a difference between dissolution and separation. Mr. Reuter had clearly pointed out the key to that difference by showing that, in separation, the successor State retained its essential identity, even if there was a change in its name or in the boundaries of its territory. But was the case of dismemberment, for example, covered by separation? He thought that, in its present form, article 28 did not cover dismemberment and that it might perhaps be necessary to amend the text. After all, dismemberment was really an extreme case of separation, since it involved the separation not only of one part, but of all the parts of a State, except the original State. Hence, if the Commission decided not to devote a separate article to the case of dismemberment, he thought it should at least expand article 28 to cover that case, since in dismemberment the original State retained its real identity, according to the essential criterion advanced by Mr. Reuter.

36. In his opinion the cases of dissolution and separation—dealt with in articles 27 and 28—called for different treatment. In the case contemplated in article 27, the States which had become independent had a kind of collective responsibility with respect to the treaties concluded before the dissolution. Hence the rule adopted in article 27 should be based on the principle of continuity. In the case of the State referred to in article 28, paragraph 2, on the other hand, it was open to question whether a distinction should be made according to whether the separated part had been a dependent or an independent territory. That was a difficult problem for there were not only colonial territories, but also semi-colonial territories.

37. Consequently, he did not think that aspect of the question could provide the Commission with the key to the rule to be adopted in paragraph 2. The important point was that by separating itself from the predecessor State, the new State expressed its wish for self-determination. In that case, therefore, the Commission could adopt a different rule from that in article 27, and consider that the State which emerged from the separation, even if it was not necessarily a newly independent State, was in a situation similar to that of a newly independent State and could accordingly be given a similar status. That point should be emphasized in the commentary.

38. Mr. USHAKOV stressed that it was sometimes difficult to distinguish in practice between cases of dissolution and cases of separation, for the purpose of deciding the fate of treaties. The Federal Republic of Germany and the German Democratic Republic had both claimed to succeed to the German State from which they had sprung, and perhaps each considered the other to be a part separated from that former State. It was extremely difficult to determine whether those countries had come into being through dissolution or separation. The same was true of the republics of the Soviet Union which had emerged after the October Revolution. In theory, they could be placed in either

category, but in practice, and where treaties were concerned, they had to be considered as resulting from the dissolution of czarist Russia, for they had all recognized the principle of succession.

39. The same difficulties arose with regard to succession to State property. Moreover, it might be in the interest of a State to be considered, for purposes of treaties, as having separated from the former State, and for purposes of succession to its property, as having issued from the dissolution of that State.

40. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment briefly on the question raised by Mr. Martínez Moreno regarding the different attitudes to succession in respect of treaties adopted after the First World War by Austria, Hungary and Czechoslovakia.

41. Until 1918, the Dual Monarchy of Austria-Hungary had been a union of States, which was considered a purely personal union of crowns by Hungary, but was regarded as a real union by Austria. After the dissolution of what had until then been an empire for Austria and a kingdom for Hungary, the latter country had lost two thirds of its territory. For the next two decades, feelings of irredentism had prevailed in Hungary, and the idea had been upheld that the Kingdom of Hungary had not disappeared. Hence the general tendency to maintain in force, for post-1919 Hungary, the treaties which had previously been binding on the old Kingdom of Hungary in the days of union with Austria.

42. The position of Austria after 1919 had been rather different. That country, too, had lost much of its territory, but it had not been animated by an irredentist spirit. The Austrian Government of the day had therefore adopted a cautious approach to the question of succession to treaties and had not made any general declaration of continuity. It had considered on its merits each treaty previously binding on the Austrian Empire, in order to decide whether it should continue to regard it as binding on the Republic of Austria.

43. As to Czechoslovakia, it had been formed in 1918, mainly from Bohemia-Moravia, formerly part of the Austrian Empire, and Slovakia, formerly a part of the Kingdom of Hungary. Czechoslovakia had regarded itself as a nation liberated from foreign oppression, and had declared that it was not bound by any of the old treaties of Austria-Hungary. In fact, it had placed itself in the position of a newly independent State under the present draft articles.

44. In considering articles 27 and 28, it was appropriate to remember the main guiding principle which governed succession of States in respect of treaties, namely, the principle that existing treaty relations should be maintained, provided they had come about in conformity with the established principles of international law. That general principle of continuity was, of course, qualified by the rule on fundamental change of circumstances in the general law of treaties, which was reflected in article 62 of the Vienna Convention on the Law of Treaties. The question of fundamental change of circumstances was especially relevant to the cases dealt with in articles 27 and 28 of the present draft.

45. The general principle of continuity was also, however, subject to a very large exception, which had been adopted in the draft for the benefit of newly independent States; under the clean slate rule, those States were left free to decide whether they would succeed to treaties concluded by a predecessor State.

46. The main reason for that special treatment of newly independent States was clearly stated in the Special Rapporteur's report (A/CN.4/278/Add.5, para. 401). In the event of the dissolution of a State, the normal rule of continuity applied because, as the Special Rapporteur had written, the treaty could "be presumed to have been made with the consent of the people of all parts of the State", which had acted through its constitutional organs. That presumption, he went on to say, was not applicable to the very different situation "of a dependent territory which, although it may be consulted about the extension of the treaty, does not normally play any part in the actual government of the State concerned, and cannot therefore be regarded as responsible for the conclusion of the treaty as such".

47. In the light of those considerations, the Commission had to decide how to deal with the cases contemplated in articles 27 and 28. It would be necessary to rely on logic since, as indicated in the commentaries to the articles, the existing precedents were not very conclusive. The first problem was whether a distinction should be made between the case of dissolution of a State and the case of separation of part of a State. He himself had no objection to a distinction being made, but felt very strongly that different régimes should not be established for the two cases. The situations contemplated in articles 27 and 28 were not very different. Moreover, the difference was not always recognizable in practice. He therefore advocated the adoption of a uniform rule for both cases.

48. As they stood, the articles established two different régimes. In article 28, the real rule of succession was not in paragraph 1, but in paragraph 2. That rule was based on the assumption that the part of the State which had separated regarded itself as having been released from ties unjustly imposed upon it in the past. It seemed to him that situations of that kind could also arise after the dissolution of a State. One or more separatist movements could bring about the dissolution of a State under conditions very similar to those associated with the secession of part of a State.

49. The approach to both cases should therefore be governed by the same general principle of continuity. The rule now stated in paragraph 2 of article 28 would then appear as an exception; it would only apply where there was sufficient proof that the part of the State which had separated or become independent following the dissolution, thus exercising the right of self-determination, had formerly been in a position similar to that of a dependent territory. That exception would cover cases in which the newly formed State could claim, as Czechoslovakia had done in 1918-19, that it had not had any voice in the conclusion of the old treaties and should not be regarded as bound by them. He believed that would be a better solution than any attempt to change the definition of a "newly independent State". It

was highly desirable to reserve that definition for cases of decolonization. The basis of his formula was that there should always be a very strong presumption of continuity of treaty relations, rebuttable only where there was conclusive evidence of dependence.

50. Mr. YASSEEN said he shared the Chairman's point of view. He had already expressed his opinion on article 28 when discussing the preceding article.³ Generally speaking, there was no difference in kind between dissolution and separation which would justify a different régime for those two cases.

51. The principle should not be absolute, however, and the exceptions provided for in article 27, paragraph 2(b), might be amplified. The phrase "the effect of the dissolution is radically to change the conditions for the operation of the treaty" might be replaced by a reference to the "circumstances of the separation", which would indicate that, by separating, the part of the territory in question had intended to escape from oppression or from a position of quasi-dependence. If the exceptions were properly formulated, the cases of dissolution and separation could be placed under a single régime.

52. Sir Francis VALLAT (Special Rapporteur) said it was very difficult to sum up the penetrating, subtle and complicated discussion which had taken place on articles 27 and 28.

53. The difference in principle between dissolution and separation of part of a State had been quite clearly acknowledged and accepted by a large majority of members. Many doubts had been expressed, however, on the question whether that distinction could usefully be applied in practice. That question raised the very difficult problems of the identity of the future State with the old State and the classification of particular cases.

54. At the present stage of history, he was inclined to follow the former Special Rapporteur, who had pointed out that the time was still too close to the events relating to the German Democratic Republic to try to draw conclusions from them.⁴ That example nevertheless illustrated the subtleties and difficulties involved. If one considered the total surrender of Germany in 1945 and the distribution of sovereign powers over its territory among the four Powers exercising authority there, the whole situation appeared much more complex than a dissolution or a separation of part of a State. It was no exaggeration to say that behind that situation there were 25 years of history and that it was not possible to deal with such a complex case on the basis of a simple classification. The lesson to be learned was clearly that it would be unwise to deal with every possible historical case. It was better to adopt a comparatively clear classification and leave it to practice to fill the gaps.

55. Another question was whether the distinction between dissolution and separation of part of a State should affect the solution to be adopted. Mr. Tammes had urged that dissolution should be treated more as a

³ See previous meeting, para. 24.

⁴ See *Yearbook ... 1972*, vol. I, p. 215, para. 51.

separation; Mr. Ushakov had advocated that separation should be treated as a dissolution and other speakers had expressed various intermediate views. The majority of members, however, were prepared to maintain the distinction and the separate treatment of the two cases in articles 27 and 28.

56. In the circumstances, the real problem seemed to be where and how to draw the line between the cases contemplated in those two articles. He thought the Commission was, on the whole, moving in the direction indicated by Mr. Ustor: more attention should be paid to the principle of continuity, with the proviso that a part of a State which separated could be entitled to special treatment by analogy with a newly independent State.

57. The adoption of that approach would involve the difficulty of finding a criterion for the application of the special treatment, and it had to be admitted that any criterion would be more difficult to apply than the distinction between separation and dissolution.

58. In all cases of that kind, it was essential not to lose sight of the facts. In many instances, a dependent territory had had self-government long before becoming independent, and no treaty had been applied to it without its consent. He could think of a great many formerly dependent territories which, during their period of dependence, had had a real say in the adoption of treaties extended to them, in a sense in which Wales for example, did not participate in the conclusion of treaties by the United Kingdom. If the Commission were to draft rules which failed to take account of such facts, there was a danger that those rules would later be ignored.

59. The CHAIRMAN suggested that articles 27 and 28 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

The meeting rose at 12.40 p.m.

⁵ For resumption of the discussion see 1296th meeting, para. 2.

1285th MEETING

Thursday, 27 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, 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. 1-6; A/CN.4/L.206; A/CN.4/L.209; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the title of part I of the draft articles and the titles and texts of articles 1, 3, 4, 5, 6, 6 *bis*, 7, 8 and 9 adopted by the Drafting Committee (A/CN.4/L.209).

2. In accordance with the Commission's usual practice, its decisions on the provisions submitted by the Drafting Committee would be without prejudice to the final "editing" of the draft articles as a whole, which the Drafting Committee would carry out in the last stage of its work.

ARTICLES 1, 3 and 4¹

3. Mr. HAMBRO (Chairman of the Drafting Committee) said that, before introducing articles 1, 3 and 4, he wished to explain the method he proposed to follow. The Commission was engaged on the second reading of the draft and all the articles before it had already been adopted in 1972. He therefore believed that it was unnecessary for him to make any comments on those articles which the Drafting Committee had adopted without change, though he would, of course, explain any recommendation made by the Committee concerning the commentary to an article.

4. That being said, he wished to draw attention to a drafting point which affected the draft as a whole. In 1972, the Commission, following the precedent of the Vienna Convention on the Law of Treaties, had decided that sub-paragraphs of an article which did not constitute a complete grammatical sentence should begin with a small, or lower case, letter. That decision of the Commission had been respected in the 1972 mimeographed text of the articles adopted. Unfortunately, however, in the printed text (A/8710/Rev. 1), the lower case letters at the beginning of sub-paragraphs had been replaced by capitals. The printers had simply followed certain general instructions from the United Nations Editorial and Official Records Service.

5. The Drafting Committee believed that the decision taken in 1972 was sound, and it had accordingly reinstated all the lower case letters. That action did not constitute a change, but rather a reversion to the 1972 style, so he would not mention the particular instances in which it had been taken.

6. The Drafting Committee had postponed consideration of two matters. The first was the title of the draft articles as a whole; the second was the text of article 2 (Use of terms) which, in accordance with the Commission's usual practice, would be taken up at a later stage, since it might be found necessary to define additional terms as the work progressed.

7. The titles and texts proposed by the Drafting Committee for articles 1, 3 and 4 read:

PART I

GENERAL PROVISIONS

Article 1

Scope of the present articles

The present articles apply to the effects of succession of States in respect of treaties between States.

¹ For previous discussion see 1264th meeting, para. 43 and 1266th meeting, paras. 1 and 11.