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Summary record of the 1285th meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
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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 4[1]

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 unneccessary 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.

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.

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.

The Drafting Committee had not made any changes in the titles or texts of those articles, or in the title of part I.

8. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the title of part I and the titles and texts of articles 1, 3 and 4 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 5[2]

9. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 5:

Article 5

Obligations imposed by international law independently of a treaty

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

10. The title of the article remained as adopted in 1972, but several changes had been made in the text. In the first line, the words "a treaty is not in force" had been replaced by the words "a treaty is not considered to be in force". The question whether a treaty was or was not in force belonged to the general law of treaties, which the Commission was not codifying at present. The question which belonged to the law of succession of States was whether, for purposes of succession, a treaty was or was not considered to be in force. The expression "considered to be in force", or some similar formula, appeared in other provisions of the draft, such as article 19, paragraph 1. The Drafting Committee would review all those expressions in the light of the draft as a whole at a later stage, and if it then adopted a different form of words it would recommend a change in the text of article 5.

11. In the next phrase, "in respect of a successor State", the Drafting Committee had deleted the word "successor". Under the law of succession and, in particular, under the rule stated in article 19, a treaty could be considered as not being in force, not only with respect to the successor State, but also with respect to other States. Following the deletion of the word "successor", the words "any State" had been replaced by the words "that State".

12. Lastly, the Drafting Committee had discussed the words "as a result", appearing in the 1972 text in the passage: "The fact that a treaty is not in force... as a result of the application of the present articles...". The Committee had noted that several articles, such as article 19, laid down the conditions under which a particular treaty or category of treaties was considered to be in force, but that it was only by implication that the draft articles determined the conditions under which a treaty must be considered as not being in force. The Committee had therefore found that the words "as a result" were too rigid, and had decided to replace them by the slightly more flexible expression "by virtue of". The words "*en raison de*", which appeared in the French version of the 1972 text, had been retained, because the Committee believed that they already contained the desired element of flexibility.

13. Thus the changes which the Drafting Committee had made in the text of article 5 were all minor drafting amendments.

14. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the title and text of article 5 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 6[3]

15. Mr. HAMBRO (Chairman of the Drafting Committee), said that the Drafting Committee had not made any change in article 6, which read:

Article 6

Cases of succession of States covered by the present articles

The present articles apply only to the effects of 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.

16. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the title and text of article 6 as proposed by the Drafting Committee.

It was so agreed.

[2] For previous discussion see 1266th meeting, para. 18.

[3] For previous discussion see 1266th meeting, para. 25.

ARTICLE 6 *bis*

17. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed a new article 6 *bis* which read:

Article 6 bis

Non-retroactivity of the present articles

Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the articles apply only to the effects of a succession of States which has occurred after the entry into force of these articles.

18. The article dealt with the non-retroactivity of the present articles: it had originated in a proposal submitted to the Commission by Mr. Ushakov (A/CN.4/L.206).

19. There were two main provisions on non-retroactivity in the Vienna Convention on the Law of Treaties.[4] The first was article 4, entitled "Non-retroactivity of the present Convention". The drafting Committee had used that title for the new article 6 *bis*, replacing the words "present Convention" by the words "present articles".

20. The other relevant provision in the Vienna Convention dealt with the non-retroactivity of treaties in general. It was article 28, which read:

Unless a different intention appears from the treaty or is otherwise established, its provisions do 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.

He had two comments to make on that text. First, it was clear that for the purposes of the present topic the "act or fact" referred to was the succession of States, that was to say "the replacement of one State by another in the responsibility for the international relations of territory". Secondly, the last phrase of the article referred not to the entry into force of the treaty as such, meaning the deposit of the required number of instruments of ratification or accession, but to its entry into force with respect to each party. Entry into force for an individual party could occur a considerable time after the entry into force of the treaty as such.

21. It followed that if the international instrument resulting from the present draft articles contained no provisions on retroactivity, article 28 of the Vienna Convention would be applicable to it. Accordingly, the whole of part III, concerning newly independent States, would be completely inoperative. A newly independent State could become a party to the instrument resulting from the draft articles only after the succession which gave birth to that State, since it had not existed before the succession.

22. The Drafting Committee had therefore submitted, in article 6 *bis*, a provision on non-retroactivity which related not to the entry into force of the future convention with respect to each party, but to the entry into force of that instrument as such. That result had been achieved by redrafting the provisions of article 4 of the Vienna Convention and, in particular, by omitting the concluding words "with regard to such States".

23. The Drafting Committee was fully aware that under article 6 *bis* the future convention would not be applicable to the effects of a succession of States which had occurred before its entry into force upon the deposit of the required number of instruments of ratification or accession. It could, however, be applicable to successions of States occurring after such entry into force—a result which would not be achieved, so far as newly independent States were concerned, if article 6 *bis* was not included in the draft. The purpose of the article was to exclude the total application of article 28 of the Vienna Convention.

24. Lastly, he wished to draw attention to the fact that article 6 *bis* did not deal with the question of the application of the draft articles to newly independent States. The Drafting Committee was still considering the possibility of formulating a separate draft instrument to deal with the acceptance by newly independent States of the rules laid down in the draft articles.

25. Mr. REUTER said he would like to know what legal principle would justify giving effect to a treaty with respect to a State which was a third party in relation to that treaty.

26. Mr. YASSEEN asked from what date the future convention would become applicable. If it was from the date of its entry into force *in abstracto*, it would then be in force only for the States which had ratified it, and that date could not be taken as the start of the convention's application to States which had not ratified it.

27. Mr. USHAKOV said that article 6 *bis* did not deal with succession of States, but with the effects of such succession. The rules laid down in the draft articles related only to successions of States occurring after the entry into force of the future convention and they could be applied by any State which—if necessary by a simplified procedure—became a party to that convention. The article thus concerned the non-retroactivity of the present articles with respect to pre-existing territorial situations. In the case of a newly independent State, retroactivity was only possible with respect to the effects of the succession, not with respect to the succession itself.

28. Mr. REUTER said that, if he had rightly understood Mr. Ushakov's explanations, article 6 *bis* did not constitute a derogation from the principle of the relative effect of treaties, since the consent of a successor State created after the entry into force of the convention would be required, whether it was given orally or in writing, collaterally or otherwise. That was a very important point, which should be emphasized in the commentary.

29. Mr. KEARNEY said that the question raised by Mr. Reuter went far beyond article 6 *bis*. It concerned the whole problem of the application to successor States of the instrument that would result from the draft articles. Some thought had been given to devising, for successor States, some simplified method of becoming a party to that future instrument. The method in question

[4] 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.

would be applicable whether the application of the instrument had or had not been extended, before succession, to the territory to which the succession of States related.

30. Mr. ELIAS said he was convinced that the provision in article 6 *bis* was unnecessary.

31. Reference had been made to States which would become independent in the future, that was to say after the entry into force of the instrument resulting from the present draft; he did not believe that there would be many new States in that position. The point had also been made that article 6 *bis* applied not to succession itself, but to the effects of succession. That was an extremely fine point and he, for one, thought it could be adequately dealt with in the commentary.

32. He urged that article 6 *bis* should be dropped and that any message it was intended to convey should be put in a commentary.

33. Mr. AGO said he had no fundamental objection to article 6 *bis*, but he was concerned about how it could apply and what its consequences would be. If he understood the article correctly, one of its objects was to establish the intertemporal relationship between custom and the future convention. Like Mr. Yasseen, however, he wondered what was meant by the expression "entry into force of these articles". Usually, in a convention of that kind, it was specified that the convention would enter into force on the date on which it had received a certain number of ratifications. So what would happen if, after the convention was already in force, the States concerned in a succession had not yet ratified it? The wording of the article—"after the entry into force of these articles"—suggested that a succession occurring after the entry into force of the convention and involving States which had not ratified it would nevertheless be subject to the provisions of the convention, because it was in force. Any ambiguity on that point would have to be removed.

34. His main concern, however, related to the case of successions occurring before the entry into force of the convention, and he noted that in that respect articles 5 and 6 *bis* were linked together. What would be the régime applicable during the long period of uncertainty that would precede the generalized entry into force of the convention? In the case of the Vienna Convention on the Law of Treaties, the Commission had reached the conclusion that the Convention reflected customary law. Would the same be true of the convention now being prepared? If so, the effect of article 5 and article 6 *bis* would be that the convention would apply as customary law to successions occurring before its entry into force and as conventional law to successions occurring after its entry into force. But he doubted whether a convention containing a substantial number of new rules could be said to represent existing customary law. In his opinion, the commentary should distinguish carefully between what was innovation and what constituted rules already established by custom. Otherwise there might be uncertainty about all successions which had occurred up to the present time and of which the effects might have to be determined. He would not like the Commission to be accused of having made light of that problem.

35. The CHAIRMAN, speaking as a member of the Commission, said it had been the Commission's practice, in its drafts, not to try to distinguish rules which constituted codification of existing customary international law from rules which constituted progressive development. Article 6 *bis* merely aimed to do, in the present draft, what was done by article 4 in the Vienna Convention on the Law of Treaties, though admittedly there was some difference between the Vienna Convention and the present draft, in that the proportion of rules which constituted codification was greater in the Vienna Convention.

36. It would be an extremely difficult, not to say impossible task to try to draw a distinction between the two types of rule in the draft articles, and he thought the Special Rapporteur should not be asked to shoulder such a burden. It would be an enormous undertaking to identify the existing rules of customary international law on succession of States, which would, of course, govern problems of succession of States in respect of treaties until the entry into force of the instrument resulting from the present draft articles.

37. The purpose of article 6 *bis* was to make it clear that the instrument resulting from the present draft would apply to a succession of States which occurred after its entry into force. One had to imagine a dissolution or separation affecting a State which was a party to the instrument and occurring after its entry into force. The instrument would also apply to a newly independent State which emerged after its entry into force, and that raised the question of the manner in which a new State could consent, after independence, to become bound by the future instrument. So far, the Commission had not considered any draft rules on that point.

38. Mr. YASSEEN said that, if he had understood Mr. Ushakov correctly, the purpose of article 6 *bis* was to emphasize that the future convention would never apply to successions which had taken place before its entry into force. There was some justification for establishing that point, for the principle of the non-retroactivity of rules of law was not *jus cogens*, either in internal law—excepting criminal law—or in international law; States were free to agree to give effect to a convention.

39. There were, however, two cases that worried him. The first was that of States which had not become parties to the convention after its entry into force and became the subject of a succession. Could the provisions of the convention be applied to the succession of those States? Article 6 *bis* seemed to indicate that they could, but that was incompatible with the principle of the relativity of conventional rules.

40. The second case was that in which a State was created by a succession: could the future convention be applied to that succession? That was a very difficult question, but he considered it less important than the first. If the phrase "after the entry into force of these articles" was compared with the words used in article 4 of the Vienna Convention, it must be concluded from

the omission of the words "with regard to such States" from article 6 *bis*, that the future convention could apply to successions relating to States which had not ratified it.

41. It must therefore be concluded that article 6 *bis* made the future convention applicable even to States that were not parties to it. He did not think that was the Commission's intention, so there appeared to be a drafting problem.

42. Sir Francis VALLAT (Special Rapporteur) said that when the text now under discussion had first been proposed, his reaction had been that it was unnecessary, because the rule of non-retroactivity contained in the Vienna Convention on the Law of Treaties was an expression of existing customary international law. He had also considered that it would be undesirable to include the proposed provision, because the Commission had always been at pains not to legislate on the general law of treaties in the present draft unless it was absolutely necessary. He had, however, been persuaded that article 6 *bis* was both desirable and necessary for the reasons given by the Chairman of the Drafting Committee in his introduction.

43. It was important to bear in mind all the aspects of article 28 of the Vienna Convention. That article contained the opening proviso "Unless a different intention appears from the treaty or is otherwise established". Those words clearly showed that it was always possible to depart from the residuary rule of non-retroactivity set out in article 28; that rule was not a rule of *jus cogens* and it could therefore be varied if, in the opinion of the parties, the needs of a particular treaty so required.

44. There was therefore nothing contrary to the Vienna Convention in making, in the present draft, some departure from the residuary rule in question. The words "act or fact" in article 28 of that Convention, which contained the residuary rule, would, in the present instance, refer to the fact of the replacement of one State by another in the responsibility for the international relations of the territory to which the succession related. Consequently, under the rule in article 28 of the Vienna Convention, the convention resulting from the present draft articles would apply only to a succession which took place after its entry into force.

45. The application of the provisions of article 28 of the Vienna Convention to a new State in relation to the future convention would thus produce a conundrum. The new State could not be a party until it came into existence, that was to say until the succession had taken place; but under the residuary rule in article 28 of the Vienna Convention, the rules in the future convention could not apply, because the fact of succession had occurred at a time when the new State was not a "party", and that article specified: "before the date of the entry into force of the treaty with respect to that party". It was necessary to clarify that situation by means of a specific rule included in the text of the draft articles. A commentary would not suffice. Nor would article 6 *bis* by itself be sufficient; consideration would have to be given to the introduction of some machinery for accession by new States to the instrument that would result from the draft articles.

46. Mr. TABIBI said that, as they had been explained, the provisions of article 6 *bis* were likely to have an unfavourable psychological effect on the General Assembly. It was worth remembering that the draft adopted in 1972 had been received not only with approval, but with much praise in the Sixth Committee, largely because it was held to favour the newly independent States, and to protect their interests. The proposition was now being put forward, in order to explain article 6 *bis*, that the draft articles would not apply to the independent States which had emerged in the past decade or two, mainly in Africa. If the application of the future convention was to be restricted to States which became independent after its entry into force, extremely few States would benefit from it. Even Angola and Mozambique, for example, would probably be independent States before the new instrument came into force.

47. It would be most unfortunate if the impression were given that the Commission had devoted a great deal of time to drafting an international instrument that would have little or no practical application.

48. Mr. AGO said that Mr. Yasseen had been right to stress the difference in wording between article 6*bis* of the draft and article 4 of the Vienna Convention, since the omission of the words "with regard to such States" would certainly be interpreted as significant. If the Commission wished the draft articles to adhere to the general principle that a convention applied only to the States parties to it, it would have to revert to wording that was in conformity with that of the Vienna Convention. But then the future convention would never be applied. The principle adopted in the Vienna Convention was perfectly logical, since that Convention dealt with treaties concluded between States which already existed and had therefore been able to become parties to it. But the future convention was intended to apply to new States, and unless a new State hastened to accede as soon as it became a State, the convention would not apply to its succession.

49. Two situations could arise: either the new State would not accede, in which case the convention would not apply at all; or the new State would accede, in which case the succession would begin under the régime of customary law and continue under that of conventional law. That raised a very serious problem, for the future convention was intended to apply to new States, that was to say States which, by definition, at the time of their birth when the problem of succession arose, could not be parties to it.

50. Mr. THIAM said he had already expressed reservations about article 6 *bis* in the Drafting Committee, and he noted that the problems he had then raised had come up again. He did not think it would be possible—at least not at the present stage—to work out a formula which would satisfy all the members of the Commission, and he feared that trying to be too specific might lead to difficult and ambiguous situations. He agreed with Mr. Tabibi that the General Assembly was unlikely to find much merit in a convention which it was known from the outset would hardly ever be applied—except, of course, to States formed by fusion or separation.

Where newly independent States were concerned, serious difficulties would arise, since those States would need to accede to the convention immediately and they would not necessarily do so. It might therefore be better to leave that problem aside and seek a solution later on the basis of practice.

51. Since the Vienna Convention treated non-retroactivity as a rule of customary law, it was self-evident that the present draft could not make that rule applicable to newly independent States; hence he saw no point in restating it in the draft. The only result of raising the problem would be to create insurmountable psychological difficulties when the draft came before the General Assembly.

52. As the Commission was divided on the question, he thought the best solution would be to drop article 6 *bis* for the time being; the necessary explanations should be given in the commentary, as Mr. Elias had suggested, not in an article that was too specific to take in the full complexity of the situation.

53. Mr. REUTER said that, if he had rightly understood the explanations given by the Special Rapporteur, article 6 *bis*, contrary to what he had first thought, benefited new States and provided for some degree of retroactivity. If that was so, the wording of the article, and particularly its title, should be amended. For supposing that the convention entered into force between certain States on 1 January 1975, and that a new State emerged and acceded to the convention on 1 January 1976, according to the general law of treaties the convention would only apply to the effects of the succession of States subsequent to 1 January 1976, not to the effects between 1 January 1975 and 1 January 1976. The purpose of article 6*bis*, however, was precisely to benefit new States by providing for some degree of retroactivity; but that retroactivity had been restricted by providing that it would operate only from the date of entry into force of the convention, that was to say from 1 January 1975 in the case suggested. If the purpose of the article was really to benefit the new State by providing for some degree of retroactivity, that should be made clear in the title, which should refer to partial retroactivity rather than non-retroactivity.

54. He unreservedly recommended that solution, which would benefit new States and respect the fundamental principle that treaties had no effects in regard to third parties, while at the same time allowing some degree of retroactivity as compared with the Vienna Convention.

55. Mr. MARTÍNEZ MORENO said that the problems arising from article 6 *bis* were largely due to the fact that the text had been submitted direct to the Drafting Committee, without being discussed in the full Commission. He had been absent from the meeting of the Drafting Committee at which the article had been examined and it was only as a result of the present discussion that he had begun to form an opinion on some of the very complex issues involved.

56. The reference to "rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles" raised the difficult question of the content of the rules of customary international law. As far as State succession was concerned, there were conflicting State practices. Continuity of treaty relations had been favoured in some cases, but there was also considerable State practice in favour of the clean slate principle. That point deserved careful consideration.

57. Another question which required more attention was that of successions of States occurring prior to the entry into force of the instrument that would result from the draft articles.

58. The lesson to be learnt from the discussion was that a full debate in the Commission was necessary on every article before the Drafting Committee set to work on it.

59. Mr. EL-ERIAN said that the discussion had shown the need to weigh carefully the many issues raised by article 6 *bis*.

60. In discussing its previous drafts, the Commission had tried to avoid taking a firm stand on the question which rules constituted codification and which constituted progressive development. On many occasions it had included, in the introductory part of a draft, a clause making it clear that it did not take any position on that question. The question had a bearing on the present discussion, for to the extent that the rules included in the draft constituted codification of general international law, the rule of non-retroactivity would not apply, since the source of the obligation would be general international law and not the future instrument.

61. Moreover, every treaty was binding upon the parties to it from the moment when those parties expressed their intention to be bound. So if a rule was included in the present draft to the effect that it did not apply to pre-existing facts, the question would arise whether that non-retroactivity rule would cover all the provisions of the draft. The Commission had included a whole series of articles concerning newly independent States, and since the process of decolonization was now coming to an end, the great majority of the resultant new States had already emerged and the operation of State succession had already taken place.

62. There would thus appear to be a contradiction between the adoption of the articles on newly independent States and the inclusion of article 6 *bis*, if the provisions of that article were taken as applying to the whole of the draft.

63. Mr. HAMBRO (Chairman of the Drafting Committee) said that the discussion had shown that article 6 *bis* was not only very important, but also very complicated. The article was necessary in the draft, as explained by the Special Rapporteur.

64. Following the interesting discussion which had taken place, he thought the best course for the Commission would be to refer article 6 *bis* back to the Drafting Committee. The Committee, however, should not submit the article to the Commission again until it had also formulated a provision on the accession of new States to the future convention. Such a provision was essential if that instrument was to be of any use to new States.

65. Mr. CALLE Y CALLE said that, in the discussions in the Drafting Committee he had been convinced of the necessity of article 6 *bis*.

66. It should be remembered that the Vienna Convention on the Law of Treaties contained two provisions on non-retroactivity. The first was that in article 4, which specified that the Vienna Convention applied only to treaties concluded by States after the entry into force of that Convention "with regard to such States". The second was the general rule of international law stated in article 28.

67. Problems of non-retroactivity would also arise with regard to the rules at present under discussion. The future convention containing those rules would come into force as an international convention on the deposit of a certain number of instruments of ratification or accession, and it would be out of the question to require a large number of ratifications or accessions. Indeed, he himself would suggest a very small number—three for example—as against the 35 required by article 84 of the Vienna Convention. In addition, the future convention would have to be ratified by the successor State and by the predecessor State if those States were to be bound by it. The rules in the draft, however, would also affect other States, and the question of the application of the rule of non-retroactivity to those States also arose. The provisions of article 6 *bis* would have to be carefully considered in that light.

68. He proposed that an additional clause should be introduced into article 6 *bis*, which might read: "unless the States concerned agree to apply the present articles among themselves". Such a proviso would be consistent with the terms of article 28 of the Vienna Convention, which made it possible to depart from the main rule stated in that article.

69. Lastly, he suggested that consideration be given to the drafting of a protocol providing for a simplified procedure by which the rules of the draft could be applied to the signatories to the protocol before the entry into force of the future convention. The rules laid down in the draft would then operate as a code, not as treaty provisions.

70. Mr. USHAKOV explained that it was the existence of article 6 which had prompted him to propose article 6 *bis*. Article 6 provided that the draft articles applied to the effects of a succession of States occurring in conformity with international law. That provision might be taken to mean that the future convention would apply to the effects of successions of States which had occurred long before its entry into force. That was how it had been interpreted by Mr. Tabibi, who believed that States which had attained independence in the past few decades would be able to become parties to the convention and seek its application to past situations. It seemed obvious, however, that the Commission could only legislate for future situations. Laws generally did not have retroactive effect and exceptions to that principle were very few. Article 6 *bis* accordingly stipulated that the future convention would apply only to the effects of a succession of States which had occurred after its entry into force.

71. Some members of the Commission considered that if the future convention would apply only to the effects of successions of States occurring after its entry into force, it could not be applied by new States, or by other States in their relations with new States. A new State could not become a party to a convention before its entry into force; it could only become a contracting State. In article 6 *bis* the term "succession of States" should be understood as applying to the birth of the new State: before the succession the new State did not exist. Article 6 *bis* stipulated that the convention would apply to the effects of a succession of States occurring after the entry into force of the convention, otherwise it would have to be concluded that the convention would apply to States not yet in existence.

72. The question whether articles should be drafted on the effects of succession for new States, which could not become parties to the future convention before they were born, had been considered by the Special Rapporteur in the introductory part of his report (A/CN.4/278), and the Commission had already discussed it. Several situations could be envisaged. The new State might be created before the convention came into force: so long as it did not accede to the convention, the convention would not be applicable to it; the succession would be governed by existing rules of international law as indicated in the first part of article 6 *bis*. As Mr. Ramangasoavina had pointed out, States which came into existence after the entry into force of the convention would have everything to gain by acceding to it as soon as possible. A great many questions could, of course, be raised, particularly about the significance of the convention for States bound to the new State by treaties, but not themselves parties to the convention, and such questions might lead to the conclusion that the Commission's work was in vain. Personally, in the light of the arguments put forward by the Special Rapporteur he was convinced that it was not.

73. It should also be borne in mind that with regard to the effects of a succession, the draft provided for retroactive effect to the date of the succession, in other words to the date of birth of the new State. But the draft applied only to successions of States occurring after its entry into force; it could not apply to situations already governed by international law. Thus article 6 *bis* complemented article 6, and only if article 6 were deleted could the clarification in article 6 *bis* be dispensed with. The rule stated in article 6 *bis* seemed so self-evident that he was surprised at the long discussion it had provoked.

74. Mr. RAMANGASOAVINA said he understood why the Drafting Committee had inserted article 6 *bis* in the draft, but it did raise certain difficulties. Two provisions in the Vienna Convention on the Law of Treaties were comparable with article 6 *bis*: article 4 on the non-retroactivity of that Convention, which was a kind of tribute paid to international law and a reminder of the applicability of its general principles; and article 28, which stated the general principle of the non-retroactivity of treaties. Whatever the links between the draft under discussion and the Vienna Convention might be, article 28 of that Convention seemed to be of sufficiently general application to cover the draft.

75. He was concerned about another aspect of that question. As the draft was being prepared at the height of decolonization, the Commission might be said to be legislating "hot". New States would no doubt be created by processes other than decolonization, but it was to be feared that the inclusion in the draft articles of a provision having the same effect as article 4 of the Vienna Convention might deprive the latter article of its force. The future convention would certainly not enter into force in the immediate future, and even if it did so as soon as 1 January 1976, a certain number of States would probably have attained independence in the meantime and would be subject to a different régime from those which became independent later. It would therefore be advisable to amend the principle of non-retroactivity, but without running the risk of calling past situations in question again.

76. As article 6 *bis* had been introduced because of the interpretation that might be placed on article 6, the deletion of both articles might perhaps be considered. Rather than take that easy way out, however, it would be better to make the rule in article 6 *bis* more flexible, so that newly-independent States could become subject to the future convention retroactively if they wished. Without that corrective, many of those mainly interested, that was to say the newly-independent States, might be prevented from benefiting under the convention when it came into force.

77. Mr. QUENTIN-BAXTER said he considered article 6 *bis* indispensable, although he shared the doubts expressed by some members about its drafting. The discussion had revealed two major legal points of concern to members of the Commission. Mr. Ushakov feared that unless some clear provision such as that in article 6 *bis* was included in the draft, article 6 might, in the application of the future convention lead to an infinite regression in time. Other speakers, however, had pointed out that the Commission was codifying a topic which would be relevant to most States only once in their lifetime, especially since the period of rapid State succession was drawing to a close. In their opinion, it should be sufficient to rely on the corresponding provisions of the Vienna Convention.

78. Mr. Ushakov had pointed out that the draft articles as a whole dealt with the effects of succession, but he would not like to have the timing of their application arranged with reference to those effects. For example, the question of exactly when a dispute arose was one which had sometimes troubled the International Court of Justice; in the present case, the time of succession would be known, but not the time when its effects made themselves felt. In those circumstances, the provisions of the Vienna Convention might not be enough.

79. He himself was clearly aware that if article 28 of the Vienna Convention, on the non-retroactivity of treaties, was left to operate by itself, it would only increase the misgivings of those who were concerned that the Commission should look to the future. There seemed, therefore, to be a certain advantage in adopting article 6 *bis*, especially as the Special Rapporteur did not think that would involve any departure from the spirit of the Vienna Convention. Moreover, article 6 *bis* would help to settle the point raised by Mr. Tammes, namely, that the draft articles would apply, in particular, to newly independent States, which could not be bound by them until they had ratified the future convention.

80. It should be borne in mind, however, that those participating in the drafting of a convention for the codification and progressive development of international law were concerned with something more than its operation with respect to the States parties to it. In their view, the main advantage of a convention was that by codifying a large part of existing law, it could serve as a signpost to the future, and in the fullness of time could become an authoritative statement of customary law.

81. Of course, there was always the problem of persuading States to become parties to multilateral conventions. Small States which lacked the necessary skilled personnel to deal with proposed conventions might take the view that the future convention did not apply to them and would not apply to any State for a long time, so that their signature and ratification were not urgent matters. It was precisely that tendency which article 6 *bis* was intended to prevent. A new State which became independent after the convention was in force could always arrange for it to be applicable to itself. It was necessary to consider not only the case of newly independent States, but the implications of article 28 of the Vienna Convention, which envisaged the possibility of new States that would not be bound by the rule of continuity.

82. Lastly, although he thought that the coverage of article 6 *bis* was more or less adequate, its presentation seemed anything but satisfactory. The question was not one which could be dealt with in the commentary only. He recalled Mr. Yasseen's concern lest the Commission should interfere with the fundamental rule of treaty law that a treaty did not apply to States which were not parties to it. Mr. Tabibi, Mr. Thiam and other members had also expressed certain reservations about the drafting of article 6 *bis*. He hoped, therefore, that the present discussions would help the Drafting Committee to prepare a text which would form a useful and necessary part of the draft articles.

83. Mr. AGO said he was in favour of retaining article 6 *bis*, because the matter it dealt with could not be passed over in silence. It was useful, if not indispensable, to specify that the convention would apply only to situations subsequent to its entry into force. It was also obvious that a rule of law could only apply to a new State from the moment when it came into existence.

84. When a new State was created, if its first concern was to accede to the convention, the succession could be governed by the convention, at least as far as the new State was concerned. It had been suggested that, where a new State delayed in acceding to the convention, it should be entitled to declare at the time of its accession, that it intended the effects of its succession to be governed by the convention. Such a declaration would, however, affect the rights and obligations of third States, and the Commission should consider whether it wished to go so far. That situation might retroactively engender cases of international responsibility for non-

application of a treaty by a State which was unaware that the treaty had been given retroactive effect. He was not radically opposed to offering States that possibility, but the questions it would raise must be duly settled in the draft.

85. It would also be advisable to define the meaning of the expression "entry into force", which could mean either entry into force for the parties concerned, or entry into force when the requisite number of ratifications had been obtained.

86. The discussion on article 6 *bis* had raised a number of problems which the Drafting Committee could examine, for it was important for the Commission to take a definite position on each of them.

The meeting rose at 1 p.m.

1286th MEETING

Friday, 28 June 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. Quentin-Baxter, Mr. Ramangasoavina, 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.205, L.206 and L.209; A/8710/Rev.1)

[Item 4 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 6 *bis* (Non-retroactivity of the present articles) *(continued)*

1. Mr. TSURUOKA said that at the previous meeting the Commission had almost agreed to refer article 6 *bis* back to the Drafting Committee, in view of the fundamental questions it raised. His remarks would therefore be addressed to the Drafting Committee.

2. The codification of the topic under consideration was governed by the principle of the continuity of treaties, subject to application of the principle of the sovereign equality of States, since strict observance of the continuity principle would be unjust to newly independent States which had not participated in the formulation of pre-existing rules of international law. That group of States should accordingly be given certain privileges, but those privileges should be clearly delimited, because of their exceptional nature. The notion of newly independent States had to be transposed from the political to the legal plane and carefully defined. The privileges accorded to newly independent States had to be justified, especially if they appeared to be contrary to the principle of the sovereign equality of States. The commentary should therefore stress the condition of dependence in which the territories of newly independent States must have been before their accession to independence. Unless the Commission made that clear, it might give the impression that it attached little importance to certain major principles of international law.

3. The deletion of article 6 *bis* might suggest that the Commission had ignored the fundamental principle of the sovereign equality of States. He was reluctant to delete the article, yet the contents of article 6 seemed sufficiently clear for the retention or deletion of article 6 *bis* to make little difference in practice.

4. Although the article formed a counterpart to article 6, he would not press for its retention. The reason why opinions differed about article 6 *bis* was that all States should be equal and the provision conferred privileges on some of them. That difficulty could be overcome if the Commission defined the expression "newly independent States" in a manner which took due account of two elements: the creation of a new State and the previous situation of dependence of its territory.

5. Mr. USHAKOV agreed that the majority of the Commission were in favour of referring article 6 *bis* back to the Drafting Committee. In view of the close links between articles 6 and 6 *bis*, the Committee should re-examine the two provisions simultaneously; article 6 *bis* might become unnecessary if article 6 was suitably amended.

6. With regard to the concern expressed by Mr. Ramangasoavina, it should be borne in mind that newly independent States emerging a few years before the entry into force of the future convention might well agree that it should apply to the effects of their succession; the draft articles provided that a newly independent State could make a notification of succession within a reasonable period, and it would then be regarded as a party to the future convention from the date when it came into being. That possibility was open to newly independent States in cases of separation, but it was doubtful whether the rule could apply to cases of uniting or dissolution, since the principle governing them was the continuity of treaties.

7. As to the position of third States bound by treaties to the predecessor State, which had caused Mr. Ago some concern, it might be settled by stipulating a fixed time-limit or "reasonable" period. That question was not related to either article 6 or article 6 *bis*. General retroactivity of the draft articles, which was absolutely impossible, should not be confused with retroactivity to the date of succession, as provided for in the draft itself.

8. Some of the rules laid down in the draft, such as those in articles 29 and 30, were existing rules of international law from which no derogation was possible and which applied independently of the entry into force of the future convention.

9. Mr. SETTE CÂMARA said that during the enlightening discussion on article 6 *bis*, Mr. Ushakov had emphasized the link between that article and article 6.