Document:-

A/CN.4/L.209 and Add.1, Add.2 and Corr.1 and Add.3-5

Draft articles on succession of Sates in respect of treaties: texts adopted by the Drafting Committee - titles of parts I, II, III (sects. 1-5), IV, and VI, and arts. 1-6, 6 bis, 7-26, 26 bis, 26 ter, 27, 28, 28 bis, 28 ter, 29, 30 30 bis, 31, 31 bis and 31 ter - in A/CN.4/SR.1285 - SR.1296

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.

Article 6 stated the principle that the Commission's draft applied only to a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. In other words, the Commission was not establishing rules for application to abnormal cases of succession of States, such as succession resulting from war and military occupation.

10. Article 6*bis* contained two elements. The first was a saving clause providing that principles of international law to which the effects of a succession would have been subject independently of the draft articles would always apply; the second was the statement that the articles applied only to the effects of a succession which had occurred after their entry into force. The obvious purpose of the second element was to exclude the retroactive application of the articles to successions that had occurred in the past.

11. Several speakers had questioned the need for article 6*bis*, because articles 4 and 28 of the Vienna Convention on the Law of Treaties[1] established in clear-cut terms the non-retroactivity of international treaties, unless the parties expressly agreed otherwise. But the present wording of article 6*bis* raised certain doubts. First, what was to be understood by the "entry into force" of the articles? Mr. Ago had rightly pointed out that there was an important nuance in that wording. Was the "entry into force of the treaty" the moment at which the treaty, having received the required number of ratifications, came into force for the international community as a whole? Or was it the moment at which, as a result of the deposit of the necessary individual instrument of ratification, it came into force for a State party to the convention?

12. That distinction was very important, since ratification by a newly independent State might occur when the treaty had already been in force for some time. In that case, its retroactive effect for that State would cover the period during which it had already been in force for other States. But was that the result which the Commission was seeking? Would that be in the interest of the newly independent State or in the interests of third States? The answers might vary from case to case, and he was not sure whether it was wise to include a provision which would give retroactive effect to the present articles.

13. Intertemporal law raised extremely complex and delicate problems which the Commission had been careful to avoid in many instances. He did not think it was the Commission's task to restrict the application of the articles in time; provisions of that kind would be proposed at the future diplomatic conference adopting the convention or during its discussion in the Sixth Committee, if Governments considered them necessary.

14. Furthermore, if the number of ratifications necessary for the entry into force of the future convention was much lower than the thirty-five required for the Vienna Convention on the Law of Treaties, the former instrument would come into force before the latter. In that case, the rule stated in article 6*bis*, which, as it stood, admitted a form of retroactivity, would prevail over the general rules in articles 4 to 28 of the Vienna Convention.

15. In the light of the discussion, he was inclined to share the doubts of Mr. Elias, Mr. Yasseen and Mr. Ramangasoavina regarding the need for article 6*bis*. Moreover, if, as Mr. Ushakov had contended, the price of avoiding the complicated problems of intertemporal law involved in the application of the draft articles was to abandon article 6 as well, he thought the Commission could go that far. The principle stated in article 6 was in accordance with international reality and, if he was not mistaken, the Commission had in the past considered it unnecessary to include in its draft conventions a provision specifically excluding from their application situations contrary to international law and to the principles embodied in the Charter of the United Nations.

16. Mr. ŠAHOVIĆ said he too thought that article 6*bis* should be referred back to the Drafting Committee, but with precise instructions. The Commission should first try to clarify the situation. The discussion on retroactivity had begun during the consideration of article 6, as a result of remarks made by Mr. Ushakov.[2] He (Mr. Šahović) had then suggested that explanations might be given in the commentary.[3] Instead, the Commission now had before it a new draft article which, although he did not oppose it, had raised many points on which the Commission should make its position clear, since the article could be interpreted in several ways. The rules relating to the non-retroactivity of treaties had been codified, in particular in articles 4 and 28 of the Vienna Convention, and it was obvious that they had to be applied in the present case. That did not appear to be denied by anyone, but some members questioned the need to restate those rules in the draft articles.

17. What was most important was to clarify the relationship between article 6 and article 6*bis* and determine how far the latter provision should be interpreted in the light of the former. The purpose of article 6 was to draw attention to the lawfulness of the situations to which the future convention related; that of article 6*bis* was to settle the question whether the convention would apply to old situations and whether the present criterion of lawfulness would be valid for situations governed by a body of international law that differed from the present law. Those questions could be settled in the commentary to article 6 without going into the general question of the retroactivity of the draft, which was already governed by the Vienna Convention. If the Commission wished to include an article 6*bis*, it should be worded on the lines of article 4 of the Vienna Convention. The cases of certain territorial régimes, such as those dealt with in articles 29 and 30, should be regulated separate-

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 290 and 293.

[2] See 1266th meeting, para. 31.

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

ly, in accordance with the principle of *uti possidetis* and the practice of States.

18. Mr. KEARNEY said he regretted that he did not share the view of the last two speakers that article 28 of the Vienna Convention was a clear article. On the contrary, he thought it was evident from the discussion that that article was not easy either to understand or to apply.

19. The conclusion to be drawn from article 6*bis* was that the present articles applied to a succession of States occurring after their entry into force. But article 28 of the Vienna Convention dealt with two possibilities, the first being an act or fact which had taken place before the entry into force of the treaty, and the second, a situation which had ceased to exist before that entry into force. It was therefore necessary to consider whether the Commission was dealing with an act or fact, or with a situation. If succession was viewed as a situation, it was obvious that that situation would not cease to exist before the draft articles entered into force, unless one succession was succeeded by another. There was no doubt that the act of the replacement of one State by another in responsibility for the foreign relations of territory was an act completed on the date of the succession, but did that necessarily mean that the succession of the State was completely terminated in all its implications and ramifications?

20. Assuming, for example, that succession took place before the entry into force of the draft articles and that the new State made a declaration of provisional application with respect to a group of treaties, that declaration would be an act which took place before the entry into force of the draft articles, so that they would not affect the declaration whatever the purposes it was designed to achieve. But if, after the entry into force of the draft articles, the new State decided to change from provisional to full application, would the Commission's rules apply in the case of reservations which had originally been provisionally applied? To his mind, the situation of the successor State would not be clear under article 28 of the Vienna Convention, and for that reason he would suggest that article 6*bis* should be referred back to the Drafting Committee.

21. Lastly, he thought that definite limits had to be placed on retroactivity; he questioned the wisdom of adopting a provision which would permit retroactivity in cases of State succession to extend back beyond the entry into force of the present articles. In any case, what the Commission decided in the case of article 6*bis* need not affect article 6 or articles 29 and 30, which constituted separate units with their own separate rules.

22. Mr. USHAKOV said some members of the Commission had observed that article 6 raised the question of the lawfulness of successions, that was to say the replacement of one State by another. In his view, the present wording of the article did not limit that lawfulness in time. If the territorial changes that had taken place in previous centuries were considered in regard to their lawfulness under contemporary international law, it would be concluded that most of them were unlawful. It was because some States tried to apply the principles of present-day international law to very old situations and thus met with great difficulties, that he had proposed article 6*bis*, to limit the scope of the preceding article. Article 6*bis* would become unnecessary, however, if the Drafting Committee could find adequate wording for article 6. For example, in the French text the Committee might replace the words *"une succession d'Etats se produisant conformément au droit international"* by the words *"une succession d'Etats qui se produira conformément au droit international"*.

23. Mr. YASSEEN said that although he appreciated Mr. Ushakov's concern, he thought article 6 determined the field of application of the draft without calling in question the lawfulness of successions of States in regard to time. There was no indissoluble link between articles 6 and 6*bis*, and article 6 did not seem to prejudge the question of the retroactivity of the future convention.

24. The CHAIRMAN, speaking as a member of the Commission, said that most members seemed to agree that the articles the Commission adopted would be subject to the general rule of treaty law on non-retroactivity, as laid down in article 28 of the Vienna Convention. But in view of the uncertain meaning of that article, to which Mr. Kearney had drawn attention, and of the fears expressed by Mr. Ushakov that article 6 might have the effect of excluding non-retroactivity, it would be useful to include a provision which clearly stated that the general rule of non-retroactivity would apply throughout the draft. All members seemed to think that article 6*bis* should be returned to the Drafting Committee for further consideration, and Mr. Ushakov had proposed that article 6 should also be referred back to that Committee. It would be necessary to draft detailed commentaries making the situation clear to the General Assembly.

25. Mr. AGO said he agreed with the Chairman. In view of the concern that had been expressed, it would be better to refer articles 6 and 6*bis* back to the Drafting Committee with very broad instructions, so that it could either amend article 6 or draft one or two additional provisions.

26. The CHAIRMAN suggested that articles 6 and 6*bis* should be referred back to the Drafting Committee.

It was so agreed.[4]

ARTICLE 7[5]

27.

Article 7

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

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

[4] For resumption of the discussion see 1296th meeting, para. 63.

[5] For previous discussion see 1267th meeting, para. 1.

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

28. Mr. HAMBRO (Chairman of the Drafting Committee) said that the only changes made by the Drafting Committee in the title and text of article 7 were of a stylistic nature and related only to the English version. In the title, the Committee had replaced the expression "from a predecessor to a successor State" by "from a predecessor State to a successor State"; article 2 defined two distinct terms, "predecessor State" and "successor State", and all the provisions of the draft should be consistent with the definitions in that article. For the same reason, the Committee had replaced the words "the predecessor and successor States", in paragraph 1, by the words "the predecessor State and the successor State". No corresponding change had been required in the French and Spanish versions. The possessive form "State's" had appeared in the first line of paragraph 1 of the English text, and since that was somewhat unusual in English legal drafting, the Committee had amended the opening phrase to read: "The obligations or rights of a predecessor State . . .".

29. Mr. AGO suggested that in paragraph 1 of the article the words "relating to that territory" should perhaps be added after the words "treaties in force in respect of a territory at the date of a succession of States", as the present wording was too vague.

30. The CHAIRMAN pointed out that the term "date of the succession of States" was defined in article 2, paragraph 1 (*e*), as "the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

31. Sir Francis VALLAT (Special Rapporteur) said that the answer to Mr. Ago's point was to be found in the link between the definitions of "predecessor State", "successor State" and "date of the succession of States".

32. The CHAIRMAN suggested that the Commission should approve article 7.

It was so agreed.

ARTICLE 8[6]

33.

Article 8

Unilateral declaration by a successor State regarding treaties of the predecessor State

1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the succession of States on treaties which at the date of that succession of States were in force in respect of the territory in question are governed by the present articles.

34. Mr. HAMBRO (Chairman of the Drafting Committee) said that the only change made in article 8 related to the English version of the title, which had formerly read: "Successor State's unilateral declaration . . .".

35. The CHAIRMAN suggested that the Commission should approve article 8.

It was so agreed.

ARTICLE 9[7]

36.

Article 9

Treaties providing for the participation of a successor State

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

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

3. In cases falling under paragraphs 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed.

37. Mr. HAMBRO (Chairman of the Drafting Committee) said that only minor changes had been made in article 9; they related to the Spanish version only and were intended to bring it into closer conformity with the English and French versions. In the title of the article, the words *"que estipulan"* had been replaced by *"en que se prevé"*. In the first lines of paragraphs 1 and 2, the words *"a raíz de"* had been replaced by *"en caso de"*.

38. Members would recall that doubts had been expressed about the latter part of paragraph 1 of the article reading: "or, failing any such provisions, in conformity with the provisions of the present articles". In the Committee's view, that phrase referred to treaties which, like some commodity agreements, provided for the option mentioned in the first part of the paragraph, but contained no provision indicating the procedure by which it should be exercised. In such cases recourse to the draft articles might be necessary. The Committee wished, however, to reserve the possibility of reviewing that question in the light of the draft articles as a whole. For the time being, therefore, it did not propose any change.

39. Mr. AGO said that paragraph 2 of the article caused him some concern in regard to the situation of third States pending the expression by a newly independent State of its consent to be bound by a treaty. Rights and obligations certainly could not be attributed to a State before it existed, but the position of third States should also be safeguarded. In order to protect the interests of both the successor State and third States, it might perhaps be possible to amend the last part of paragraph 2 to read: "such a provision does not take

[6] For previous discussion see 1267th meeting; article 8 was discussed in conjunction with article 7 (see para. 67).

[7] For previous discussion see 1268th meeting, para. 1.

effect if the successor State expressly declines to be so considered". Article 9 raised the problem of a time-limit, which also arose in regard to other articles, and should therefore be considered later in connexion with all the provisions concerned.

40. The CHAIRMAN, speaking as a member of the Commission, said that article 9 formed part of the general provisions and would therefore seem to apply both to newly independent States and to the other types of succession, regarding which continuity of treaties was the prevailing rule. It was not clear to him, however, whether paragraph 2 applied to forms of succession such as the uniting and separation of States or whether it constituted an exception to the continuity principle.

41. Sir Francis VALLAT (Special Rapporteur) said he had assumed that the Commission had intended paragraph 2 to be a general exception in the special case in which a treaty provided that the successor State should be considered as a party. Having regard to the historical background of such treaties, it might be desirable for a newly independent State to express its acceptance in writing rather than to be considered a party by virtue of its conduct or by some other means.

42. The CHAIRMAN, speaking as a member of the Commission, said that, on the dissolution of a State, a treaty which did not include a special provision concerning succession would be automatically binding on the States created by the dissolution. He did not see, therefore, why the situation should be different in the case of a treaty which contained an express provision to the effect that it would be binding on a successor State, regardless of the type of succession.

43. Sir Francis VALLAT (Special Rapporteur) said that history suggested there was always a risk that a treaty providing that a successor State should be considered as a party might be imposed on such a State; for that reason, he believed that the exception provided for in paragraph 2 was necessary.

44. Mr. USHAKOV said that no answer had yet been given to the question raised by Mr. Ago about a possible time-limit. It might therefore be better to refer article 9 back to the Drafting Committee. He himself found the article perfectly clear as it stood, since it provided that a treaty could only apply to a successor State with its express consent.

45. The CHAIRMAN, speaking as a member of the Commission, said that he withdrew his objections to paragraph 2.

46. After a brief discussion, in which Mr. HAMBRO, Mr. YASSEEN, Mr. AGO and Sir Francis VALLAT took part, Mr. ELIAS proposed that the Commission should approve article 9 provisionally, subject to further consideration by the Drafting Committee in the light of the other provisions of the draft articles.

It was so agreed.[8]

[8] There was no further discussion of this article in the Commission; it was adopted without change at the 1301st meeting (para. 23).

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLES 29 AND 30

47. The CHAIRMAN invited the Special Rapporteur to introduce articles 29 and 30, which read:

Article 29

Boundary régimes

A succession of States shall not as such affect:

(*a*) a boundary established by a treaty; or

(*b*) obligations and rights established by a treaty and relating to the régime of a boundary.

Article 30

Other territorial régimes

1. A succession of States shall not as such affect:

(*a*) obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a particular territory of a foreign State and considered as attaching to the territories in question;

(*b*) rights established by a treaty specifically for the benefit of a particular territory and relating to the use, or to restrictions upon the use of a particular territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

(*a*) obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a group of States or of all States and considered as attaching to that territory;

(*b*) rights established by a treaty specifically for the benefit of a group of States or of all States and relating to the use of a particular territory, or to restrictions upon its use, and considered as attaching to that territory.

48. Sir Francis VALLAT (Special Rapporteur) said it would be convenient to deal with articles 29 and 30 together, since they had a joint commentary in the Commission's 1972 report (A/8710/Rev.1). The underlying principles were substantially the same in both cases, although the nature of the obligations and rights dealt with in article 30 made its drafting more difficult than that of article 29.

49. The history of the two articles went back to the former Special Rapporteur's first report, in which he had proposed a draft article 4 on boundaries resulting from treaties.[9] Although that article related only to boundaries, the question of so-called "dispositive" or "localized" treaties was discussed in paragraph (3) of the then Special Rapporteur's commentary, so it could be said that the subject-matter of articles 29 and 30 had been before the Commission for a very considerable time and that the provisions of those articles were the result of fairly mature consideration.

50. The articles had received a very broad measure of support at the 1972 General Assembly, from delegations representing a variety of viewpoints. To judge by the debates in the Sixth Committee, if they had been submitted to a conference of plenipotentiaries at that time,

[9] See *Yearbook ... 1968*, vol. II, p. 92.

they would in all probability have been adopted by a large majority.

51. Difficult and controversial as the articles might be, they could therefore be approached with confidence. The criticisms made of them were, in his view, largely due to a misconception of the purpose they were intended to achieve. The two articles in fact constituted saving clauses of a limited character, and no more. Their inclusion in the draft was necessary because, as a result of the operation of one or other of the draft articles, a treaty as such might cease to be in force in the relations between the successor State and another State. Since boundary treaties were usually bilateral, it was necessary to ensure that the rights and obligations arising from a boundary régime were not destroyed by the fact of a treaty ceasing to be in force through the operation of the draft articles. Similar considerations applied to other territorial régimes.

52. It was important to remember that the scope of articles 29 and 30 was limited to the effects of succession *qua* succession. They did not touch upon questions pertaining to the international law of treaties; that was made absolutely clear by the negative form in which the articles were cast.

53. The articles were concerned with the results of certain treaties and not with the treaties themselves. In that connexion, it should be borne in mind that the words "established by a treaty" could only mean "validly established by a valid treaty". The obvious intention was to refer to situations lawfully and validly created. Moreover, there was nothing in the articles which in any way precluded adjustment by self-determination, negotiation, arbitration or any other method acceptable to the parties concerned.

54. Abundant comments, both oral and written, had been made by Governments; they were summarized in his report (A/CN.4/278/Add.6). In addition, a letter (A/CN.4/L.205) had been received from the permanent mission of Ethiopia to the United Nations, stating the views of the Ethiopian Government on the grazing provisions of the 1897 Anglo-Ethiopian Agreement relating to the boundary between Ethiopia and the former British Somaliland Protectorate. He thought the questions raised in that letter could more appropriately be discussed in the commentary than in connexion with the principles involved in articles 29 and 30.

55. Government comments were largely favourable to articles 29 and 30; only three Governments had taken a totally negative view. Legal writing, State practice and judicial precedents provided support for the view that there were certain rights and obligations with regard to boundaries and territorial régimes that could be regarded as "running with the land", to use an expression familiar to English lawyers. That view underlay several of the decisions of the Permanent Court of International Justice and the International Court of Justice mentioned in the Commission's 1972 commentary to the two articles (A/8710/Rev.1, chapter II, section C).

56. Considerations derived from the general principles of law and the need to maintain peace and stability also supported the underlying doctrine of articles 29 and 30. Acceptance of the idea that a bilateral boundary treaty could be swept aside by a succession of States would result in chaos. It was unthinkable that it should become necessary to renegotiate a boundary whenever a succession of States occurred.

57. The inclusion of articles 29 and 30 had been criticized on the ground that the question of boundary and territorial régimes was not germane to succession of States in respect of treaties or even to State succession at all. He could not accept that view because the draft articles would affect the operation of boundary treaties; some reference to the subject-matter of articles 29 and 30 was therefore inescapable.

58. Another argument advanced against articles 29 and 30 had been that a boundary established by a treaty which was in itself not lawful could have no permanency. The Commission had accepted that principle, although perhaps not quite in that form, but that did not affect the articles. Clearly, if there were grounds for impeaching the treaty itself, the boundary would lose the basis on which it rested, but nothing in articles 29 and 30 affected the position in that respect. He believed that the point was made reasonably clear in the commentary to the two articles, but he would be prepared to deal with it more fully, if that was considered necessary.

59. Where the question of self-determination was concerned, he wished to stress that there were always two points of view on a boundary dispute. If the people on one side of the border had the right of self-determination, so had those on the other side. If there was room for self-determination, articles 29 and 30, which merely maintained the *status quo*, would not prevent the exercise of that right.

60. The Commission had been criticized for relying on article 62, paragraph 2(*a*), of the Vienna Convention on the Law of Treaties. In fact, all that the Commission had done was to take note of the fact that, when the Vienna Conference had adopted article 62, on fundamental change of circumstances, it had made an exception for boundary régimes. In view of the large majority of States which had supported that exception at the Conference, it was not unreasonable to take the same view for the purposes of the present draft articles 29 and 30.

61. His own general conclusion was that articles 29 and 30 should be maintained substantially as they stood. He appreciated the anxiety of certain Governments concerning their own specific problems, but wished to draw attention to the Commission's long-standing belief that, in the process of codification, it was not part of its task, or of that of the conference of plenipotentiaries, to try to settle individual disputes. The Commission and the codification conferences concentrated on the task of laying down principles for general application. In doing so they took State practice fully into account, but were not unduly affected by individual disputes.

62. Where the commentary was concerned, he would take the utmost care—again in accordance with the Commission's long-standing tradition—accurately to reflect the views of individual States.

63. An interesting point had been raised in the Sixth Committee by the Egyptian delegation, which had asked how, in legal theory, the rights and obligations of parties under a treaty could be separated from the international instrument which had created those rights and obligations (A/CN.4/278/Add.6, para. 417). He wished to stress that the provisions of articles 29 and 30 did not deal with the question of the existence of a treaty. Nevertheless, rights and obligations could clearly exist only in the context of the treaty from which they derived. If the treaty disappeared, the rights and obligations would also disappear. He believed that it was precisely the merit of articles 29 and 30 that they referred to rights and obligations deriving from treaties, but not to the treaties themselves.

64. A number of other questions had been raised by Governments with which, in his opinion, it would be inappropriate to deal in the present context. One was the suggestion by the delegation of Morocco that provision should be made for arbitration in certain circumstances (*ibid.*, para. 447). Another was the comment by the delegation of Kenya that article 30 should not be placed on the same footing as article 29 (*ibid.*, paras. 450 and 451). For the reasons given in his report (*ibid.*, para. 453), the comments made on the subject of "unequal treaties" likewise did not, in his view, call for any change in articles 29 and 30.

65. As a matter of drafting, it had been suggested that the provisions of article 30 should be simplified by combining sub-paragraphs (*a*) and (*b*) in each of the two paragraphs. The Drafting Committee should consider that suggestion and act on it if it was possible to do so without disturbing the meaning or detracting from the clarity of the text.

66. The United States Government had made the more specific comment that it might not be advisable to provide, as was done in paragraph 1 of article 30, that the rights and obligations had to attach to a particular territory in the State obligated and to a particular territory in the State benefited (*ibid.*, para. 418). The language used in the article might be construed as excluding, for example, the case in which transit rights accrued to a landlocked State, for the right in that case was not attached to a particular territory in the landlocked State which benefited from the treaty. The point thus raised was essentially one of drafting and should be given careful consideration.

67. The United Kingdom Government had suggested that the term "territory" should be defined (*ibid.*, paras. 418 and 460). That question had already been discussed by the Commission, which had decided not to adopt a definition.[10] For his part, he did not recommend that the discussion on that point should be reopened.

68. The Netherlands Government had suggested that the system embodied in article 30 should also be adopted for certain treaties which guaranteed fundamental rights and freedoms to the population of the territory to which a succession of States related (*ibid.*, para. 418). That suggestion was a very interesting one but the Commission had so far refrained from creating special categories of treaties. Moreover, it was difficult to see how the case mentioned by the Netherlands Government could be covered in a section which dealt with rights and obligations arising from boundary and other territorial treaties, that was to say rights and obligations running with the land. Clearly, the matter should be dealt with in the context of other articles of the draft.

69. In conclusion, he recommended that articles 29 and 30 should be retained substantially as they stood and that the greatest care should be taken to make the commentary as full and as accurate as possible.

The meeting rose at 1 p.m.

1287th MEETING

Monday, 1 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. 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; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of articles 29 and 30.

2. Mr. SETTE CÂMARA said that, during the Commission's long discussion on those articles in 1972[1] a consensus had emerged that the so-called "dispositive treaties", "treaties of a territorial character", "real treaties" or "localized treaties" could not be considered as governed by either the clean slate rule of article 11 or the moving treaty-frontiers rule of article 10. Since the time when the distinction between "real" and "personal" treaties had been recognized, the former had been regarded as transmissible and the latter as not transmissible. The legal basis for that treatment had been traced by some writers to the old Roman Law

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[10] See *Yearbook ... 1972*, vol. I, p. 247, article 22 *bis* and p. 275, para. 7.

[1] See *Yearbook ... 1972*, vol. I, pp. 247-249, 250-254, 258-266 and 275-276.

maxims *nemo plus juris transferre potest quam ipse habet* and *res transit cum suo onere*. The real rights created by a treaty impressed the territory with a status which was intended to have a certain degree of permanence.

3. The Commission had been right to deal separately with the case of boundary treaties and that of other treaties of a territorial character. There was some difference between the two categories, since boundary treaties were executed instantly, whereas the other treaties entailed repeated acts of continuous execution. There could be little doubt that boundary settlements constituted an exception to the clean slate rule; legal writings and State practice were virtually unanimous in upholding their continuity. During the whole course of the decolonization process, there had been no trace of any claim for invalidation of a boundary treaty on the basis of the clean slate principle. Even Tanzania, one of the strongest defenders of that principle, had proclaimed that boundaries established by a treaty remained in force. In 1964, the Organization of African Unity had adopted a resolution solemnly pledging all its member States to respect "the borders existing on their achievement of national independence".

4. The principle of continuity did not, of course, mean that boundary treaties were sacred and untouchable. They were inherited, together with any related disputes and controversies, and could therefore be challenged, but on grounds other than the clean slate rule.

5. The decision by the Vienna Conference to exclude boundary treaties from the operation of article 62, on fundamental change of circumstances, of the Vienna Convention on the Law of Treaties,[2] showed that those treaties were of an exceptional character and were accorded a special status in the interests of the international community.

6. In 1972, the Commission had made a decisive choice by adopting the solution embodied in articles 29 and 30, namely, that it was not the treaties themselves that constituted a special category, but the situations resulting from their implementation. The Commission had taken that decision in full awareness of the problem that could arise from severance of the dispositive from the non-dispositive provisions of a treaty. Even though it was not the treaty which was inherited but the régime emanating from it, he believed that the problem was still one of succession in respect of treaties and not one of succession in respect of matters other than treaties, as had been suggested by the Egyptian Government in its comments (A/CN.4/278/Add.6, para. 417).

7. The Special Rapporteur's able analysis of government comments (ibid., para. 419 *et seq*) showed that a large majority of States supported articles 29 and 30. The few reservations based on defence of the principle of self-determination were not convincing; if every newly independent State could unilaterally repudiate the boundaries that constituted the material basis of its existence, the world would be plunged into chaos.

8. It was important to remember that no State was bound to accept the inheritance of injustice. It was always free to dispute the legality of boundary provisions by the means established by the United Nations Charter for the settlement of international disputes.

9. Besides boundaries, articles 29 and 30 touched on matters of great international moment, such as rights of transit, the use of international waterways and de-militarized or neutralized territories, on which States were extremely sensitive. The present formulation was cautious and well balanced. He would therefore hesitate to embark on the discussion of any major changes, such as that suggested by the Netherlands Government (A/CN.4/275/Add.1, para. 19).

10. Although he was in general agreement with the present wording of the articles, he would be prepared to consider any specific suggestions for simplification of the wording of article 30.

11. Mr. TABIBI said that the law of State succession in respect of treaties was extremely complex and the régime very pragmatic, so that it was not uncommon for the same State, and even the same international tribunal, to take diametrically opposed positions in different cases. And the most complex area of that law was the law of State succession in respect of boundary régimes or territorial régimes established by a treaty. Sir Gerald Fitzmaurice, a former Special Rapporteur of the Commission on the law of treaties, had written in 1948: "...it is necessary to look very carefully at the convention concerned in order to see whether it is one affecting the international *status* of the ceded territory or of any river, canal, etc., within it, or whether it is merely one creating *personal* obligations for a given country in *respect* of that territory or things in it".[3] Mr. Castrén, a former member of the Commission, had expressed strong doubts as to how far treaties of territorial nature constituted a true case of succession by operation of law and how far their continued observance by the successor State was a matter of political expediency.[4] M.G. Marcoff, in his well-known work on accession to independence, had stated his belief that the transmissibility of such treaties was governed by the principles of the equality of States and self-determination.[5]

12. It was indeed the people and their right of self-determination which were the most important considerations in contemporary international law. That law would be made workable only by the support of the people everywhere, not by concepts accepted by a small number of continental jurists.

13. Despite the arguments advanced by the Special Rapporteur, he remained unconvinced of the usefulness of articles 29 and 30. The cases mentioned in the commentary (A/8710/Rev.1, chapter II, section C) did not suffice for the establishment of rules. The present draft of the two articles was politically oriented and, for

[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. 297.

[3] See *Yearbook ... 1972*, vol. II, p. 45, para. 3.

[4] *Académie de droit international, Recueil des cours*, 1951-I, vol. 78, pp. 436-437.

[5] Marco G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, (Fribourg, 1969), pp. 205 *et seq*.

that reason, had attracted the political support of a number of nations, including the big Powers. In fact, it was undeniable that those articles, like article 62 of the Vienna Convention on the Law of Treaties, did no more than reflect the practice of the United Kingdom as a boundary-maker in the eighteenth and nineteenth centuries.

14. The main precedents mentioned in the 1972 commentary to articles 29 and 30 were the *Case of the Free Zones of Upper Savoy and the District of Gex* (paras. (3) and (4)), which had been decided by the Permanent Court of International Justice, and the *Åland Islands* dispute (para. (5)), which had come before the Council of the League of Nations. Both those cases were of a limited character and the commentary itself drew attention to their weaknesses; they did not constitute sufficient grounds for establishing a general rule in a complex area of law.

15. Much of the commentary to articles 29 and 30 was based on an article written by O'Connell in 1962. That article, however, contained the statement: "Critics of the dispositive category have correctly pointed out that the advocates of servitudes established their case by calling all transmissible territorial treaties 'servitude', while the writers on State succession purportedly delimited the category of transmissible territorial treaties by classifying them as servitudes, so that a *petitio principii* was involved in the argument".[6]

16. On the question of severability of treaties, articles 29 and 30 clearly reflected the well-known United Kingdom practice. In that connexion, however, it should be noted that Lauterpacht had written in 1949: "It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty once signed and ratified is more than the expression of the intention of the parties".[7] Clearly, therefore, the treaty as a unit should be looked at as a complete whole. O'Connell had suggested caution in utilizing intention as the touchstone of severability, and every boundary or territorial treaty should be examined as a separate case to determine the real intention of the parties.

17. The crux of the commentary was that the articles dealt not with the treaty itself, but with the situation and régime created by the treaty (para. (35)). He did not believe that it would be legitimate to use the two or three cases cited in the commentary to establish rules to cover all the complex political and legal cases of boundary and territorial régimes established by treaty. It would not be acceptable to the newly independent States to abandon the clean slate rule in favour of a situation or régime created by unequal treaties going back to the colonial era of the eighteenth and nineteenth centuries. Those settlements had taken no account of ethnic, linguistic or cultural affinities and should not be preserved in defiance of the principle of self-determination.

18. The main reason for the inclusion of articles 29 and 30 in the present draft was the existence of paragraph 2 (*a*) of article 62 of the Vienna Convention on the Law of Treaties. It should be remembered, however, that the international scene had greatly changed since 1969; the cold war had been replaced by *détente*, the rights of the People's Republic of China had been restored and both the Federal Republic of Germany and the German Democratic Republic were now Members of the United Nations. Moreover, article 62, paragraph 2 of the Vienna Convention was qualified by other articles of that Convention, such as article 46 on competence to conclude treaties, article 47 on restrictions on authority to express consent, article 48 on error, article 51 on coercion and, above all, article 53 on *jus cogens*. Thus article 62 of the Vienna Convention could not serve to legalize unequal treaties. In that connexion, the expert consultant at the Vienna Conference had given assurances that the establishment of a boundary by a treaty left untouched any legal grounds that might exist for challenging that boundary, such as the principle of self-determination or invalidity of the treaty.[8] It was subject to those assurances that the exception embodied in paragraph 2 (*a*) of article 62 had been adopted.

19. It was his considered opinion that the inclusion of articles 29 and 30 would constitute an unwarranted exception to the clean slate rule, which was the cardinal principle of the present draft, and would create doubts as to the application of article 53 of the Vienna Convention on the Law of Treaties.

20. A cursory examination of the examples given in the commentary showed that they failed to support the rules embodied in articles 29 and 30. Thus Tanzania had refused to recognize the lease at a nominal rent granted to Zaire, Rwanda and Burundi under the so-called Belbases Agreements of 1921 and 1951 (paras. (22) and (23)), on the grounds of the limited competence of Belgium as the former administering Power. Similarly, the Nile Waters Agreement of 1929 (para. (26)) had been rejected by the Sudan and Tanganyika with the result that Egypt had made a new arrangement with those countries. Israel, too, had denied, in the Security Council, the validity in law and in fact of the 1923 and 1926 Agreements on water rights over the Jordan river (para. 27). Somalia had rejected colonial arrangements made in the past. The United States had considered the military arrangements relating to the West Indies as of only limited duration (para. (24)).

21. In his view, all those examples of State practice contradicted the rules embodied in articles 29 and 30, which purported to confer permanency on boundary régimes and territorial arrangements. The argument advanced in support of those articles, namely, the maintenance of peace, was unconvincing. Peace would not be achieved by maintaining a boundary illegally established under an unequal or colonial treaty; it had to be sought

[6] D.P. O'Connell, "Independence and succession to treaties", in *The British Yearbook of International Law, 1962*, at p. 150.

[7] H. Lauterpacht, "Restrictive interpretation and the principle of effectiveness in the interpretation of treaties", in *The British Yearbook of International Law, 1949*, at p. 76.

[8] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records* (United Nations publication, Sales No. E.68.V.7), p. 381, para. 31.

mainly on the basis of the agreement of the country concerned.

22. He was equally unconvinced by the argument derived from article III, paragraph 3, of the Charter of the Organization of African Unity.[9] That provision admittedly upheld respect for the sovereignty and territorial integrity of States, which was also upheld by the Charter of the United Nations. There were, however, many African States, such as Somalia, which were not satisfied with boundary and territorial arrangements that were a legacy from the colonial era. Most modern writers stressed the fact that colonial frontiers had been shaped more by strategic or economic needs than by the sentiments and aspirations of the populations concerned. It was for that reason that many Asian and African boundaries failed to follow clear ethnic or cultural divisions.

23. That being said, he wished to comment on the Treaty of Kabul,[10] mentioned in paragraph (14) of the commentary. That Treaty had not, in fact, been a boundary treaty, but a treaty of friendship concluded in 1921 after the third Anglo-Afghan war. It had been terminated by giving one year's notice under its article 14. There was, moreover, nothing in that Treaty which pointed to permanency of any of its provisions. The United Kingdom had given its own one-sided interpretation of the matter, which conflicted not only with article 14 of the Treaty itself, but even with the provisions of the Indian Independence Act and with various written and unwritten promises made to Afghanistan before the sub-continent had become independent. The frontier to which the United Kingdom note, quoted in paragraph (14) of the commentary, referred, had not been a demarcation line, but a political boundary drawn for the purpose of protecting British India from possible invasion from the North. Both the North-West Frontier Province, with its population of three million at the time, and the Free Tribal Area had been administered separately from India.

24. There were two other documents which should be mentioned in paragraph (14) of the commentary in order to make it more balanced. The first was a letter of 1921 from Sir Henry Dobbs, the head of the British Mission, to the Afghan Minister for Foreign Affairs, which had been attached to the Treaty of Kabul; that letter recognized the interest of Afghanistan in the frontiers of India beyond the Durand Line and the fact that the members of the frontier tribes were not citizens of India. The second was the United Kingdom declaration of 3 June 1947, which dealt with the special case of the North West Frontier Province and the Free Tribal area. Both those documents had been included in the Secretariat publication *Materials on Succession of States.*[11]

25. He disagreed with the Special Rapporteur's conclusion that Governments supported articles 29 and 30: out of over 130 Members of the United Nations, only 23 were mentioned in paragraph 425 of his report (A/CN.4/278/Add.6) as having expressed such support in writing or orally, and in many cases that support was stated to be "by implication". In fact, articles 29 and 30 were favoured only by certain big Powers and a small number of countries which benefited from the boundaries inherited from the colonial era. For political reasons, a great many countries had not expressed their views at all: one example was Japan, which had not submitted any comments, but which was actively negotiating on the subject of territorial treaty provisions. There was also the significant silence of the People's Republic of China.

26. In the circumstances, it was most unrealistic to imagine that burning political issues could be disposed of by treating the provisions of articles 29 and 30 as though they constituted settled rules of international law. The only possible course was to seek, by peaceful and direct negotiation, settlement of those territorial disputes which endangered the peace of the world.

27. He had already commented on the limited reliance which could be placed on the few judicial precedents mentioned in the commentary. He would only add that, as far as the International Court of Justice was concerned, its present composition did not inspire confidence in the majority of the countries of Asia and Africa.

28. In conclusion, he urged that articles 29 and 30 should be deleted from the draft.

29. Mr. TAMMES said that the Special Rapporteur had given convincing answers to the more fundamental objections raised to articles 29 and 30. His report demonstrated that the many inequities of history could not be corrected simply by means of a convention on succession in respect of treaties; but at the same time it stressed that the draft articles would leave untouched any other grounds for claiming the revision or setting aside of boundary settlements (A/CN.4/278/Add.6, para. 440).

30. His own comments would be largely concerned with drafting, although not devoid of substantive implications. It seemed to him that the final phrase of article 29, "régime of a boundary", needed to be clarified, especially as the commentary, paragraph (18) of which explained the matter, would not remain when the draft articles became a convention. That phrase appeared to have been used mainly in order to determine that treaty provisions for the completion of a boundary settlement, by demarcation or otherwise, were inherited by the successor State with the boundary situation already executed. That extension of devolution, however, was one of the most controversial issues that arose with respect to boundary régimes. It had been an issue between the parties in the *Case concerning the Temple of Preah Vihear*,[12] but the International Court of Justice had not decided whether such treaty provisions were transmissible upon succession. The same controversial issue had arisen in connexion with the Treaty of Kabul and in boundary disputes between African States.

[9] United Nations, *Treaty Series*, vol. 479, p. 74.

[10] League of Nations, *Treaty Series*, vol. XIV, p. 67.

[11] ST/LEG/SER.B/14, (United Nations publication, Sales No. E/F.68.V.5), pp. 5 and 6.

[12] *I.C.J. Reports 1962*, p. 6.

31. Since those various controversies had not been settled, the meaning of paragraph (18) of the commentary was not clear in so far as it referred to "ancillary provisions" of a boundary treaty which were "intended to form a continuing part of the boundary régime". The question arose, for example, whether such provisions would include a clause providing for compulsory jurisdiction of the International Court of Justice.

32. One method of clarifying article 29 would be to introduce a reference to the means of completion of the boundary after succession—demarcation, the holding of a plebiscite, or provision for the exercise of an option by the inhabitants concerned. Another method would be to introduce the language of paragraph (18) of the commentary, where it referred to "ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the termination of which on a succession of States would materially change the boundary settlement established by the treaty". Yet another solution would be to apply the criterion in paragraph 3 (*b*) of article 44 (Separability of treaty provisions) of the Vienna Convention on the Law of Treaties. The reference would then be to provisions of a boundary settlement which were an "essential basis of the consent" given by the parties to be bound by the treaty as a whole. It was not possible, however, to rely merely on the expression "boundary régime", which was insufficient to define the precarious rights and obligations it was intended, according to the commentary, to make transmissible under sub-paragraph (*b*) of article 29.

33. It had been stressed by the Special Rapporteur at the outset of the general discussion, and subsequently by other speakers, that there was much in the draft articles which affected the well-being of people; it was that human element which was lacking in paragraph 1 of article 30. There were many boundary situations in which the population of the border region was a more important factor than succession to the territory. Paragraph (12) of the commentary referred to the customary grazing rights of Somali nomadic shepherds in territory which had been divided in the nineteenth century. As a matter of international law, the case had remained unsettled: the United Kingdom considered the rights to be unaffected by the succession of States, but Ethiopia considered them automatically invalid.

34. Consequently, without attempting to settle specific disputes, it was necessary to provide a general rule for the future sufficiently comprehensive to cover human situations that were far from rare. To give an example, Norway regarded itself as a successor State bound by the Swedish-Russian treaty of 1826, which regulated the boundary and was the basis of a régime governing Lapp migrations. There were many treaty provisions which guaranteed—beyond all vicissitudes of territorial sovereignty—the free access of people to monuments, religious shrines and wells. It was those simple but important human needs that the Netherlands Government had had in mind in its comments (A/CN.4/275/Add.1), rather than a whole system of human rights and fundamental freedoms.

35. The gap to which he had drawn attention could largely be filled in article 30 by inserting the words "or its inhabitants" after the phrase "for the benefit of a particular territory" in sub-paragraphs (*a*) and (*b*) of paragraph 1. The Commission could also amend the commentary to indicate that the rights referred to in sub-paragraph (*b*) of article 29 were more extensive than was indicated by the present text of the commentary.

36. Lastly, with regard to paragraph 2 of article 30, he thought it might be necessary to make a distinction between the different kinds of benefits granted to a group of States, in order to determine whether they were transmissible or personal. Any benefits which were one-sidedly military or political should not be transmissible; paragraph 2 (*a*) of article 30 was not clear on that point and should be amended.

37. Mr. THIAM said he thought the problem raised by articles 29 and 30 was essentially a practical one, namely, what the practical effect of their provisions would be. In the case of Africa, for example, it was a fact that the Charter of the Organization of African Unity had laid down a number of principles, one of which was that established frontiers were no longer open to question. But it was also a fact that since that principle had been laid down, the countries of Africa had been faced with problems relating to territorial claims every year, and not once had they seen fit, on the basis of the principles established by the OAU Charter, to refer such a claim to the Organization's Commission of Mediation, Conciliation and Arbitration. The only dispute referred to a Commission—that between Algeria and Morocco—had not been referred to the Commission of Mediation, Conciliation and Arbitration provided for in the OAU Charter, but to an *ad hoc* commission whose role had never been precisely defined, and the dispute had finally been settled by direct negotiation.

38. As far as the international community was concerned, assuming that the draft articles were adopted and became a convention providing for reference to the International Court of Justice, he did not think that the States directly concerned would go to the Court. The reason was that articles 29 and 30 directly concerned only two classes of States: those which benefited by a previous treaty and those which considered themselves injured by a previous treaty and wished to call it in question. So, assuming that the articles were adopted by the Commission and the General Assembly, would those States which considered themselves injured consent to be bound by a convention some of whose articles they could not accept? If they did not regard themselves as bound by the convention, what would be the practical effect of the articles in question?

39. He thus shared Mr. Tabibi's view that, if it was not possible to find a formula satisfactory to the countries concerned, it would be better to drop article 29. In his opinion, the Commission should reconsider the article and see whether, apart from the principle it laid down, it would have any real practical effect and could help to settle territorial disputes.

40. Mr. MARTÍNEZ MORENO said that draft articles 29 and 30 had the merits of prudence and objectivity; he congratulated the Special Rapporteur on having

maintained a careful balance. He himself, like the majority of speakers, was in favour of retaining articles 29 and 30 because he believed that application of the principle of continuity was vitally necessary for the maintenance of world peace and security. For the purposes of the commentary, however, he considered it indispensable that the Commission should avoid endorsing any principle that might imply a partisan approach to some actual boundary dispute then in progress.

41. Mr. Tabibi had pointed out that, during the nineteenth century, a number of metropolitan States had concluded treaties with former colonial territories concerning their boundaries. It was possible, of course, that if a metropolitan State found it could no longer refuse independence to a territory, it might first conclude a treaty that would prejudice that territory's future boundaries. Obviously, what was needed was some principle similar to the principle of Roman law which prevented the property of a widow from passing into the hands of the creditors of her deceased husband.

42. Mr. Thiam had said that the inclusion of articles 29 and 30 was undesirable for practical reasons. He himself, however, thought that it would be equally impractical to insist on maintaining the clean slate principle, in spite of the many cases in which that principle applied. As the Special Rapporteur had made clear in his text and commentary, the clean slate principle should not prevail against any specific treaty concerning boundary régimes.

43. Mention had been made of the Latin American application of the principle of *uti possidetis*, but he did not think that that practice was very consistent in the Latin American countries. Some States had, for example, taken the view that they could retain their colonial titles to land, while others, such as Brazil, had applied the principle of *uti possidetis* as establishing fundamental title. Much care should therefore be exercised in drafting the commentary concerning practice in Latin America.

44. The question had also been raised whether boundary disputes could not be settled peacefully, or, in other words, by arbitration. The Latin American States had always maintained that arbitration was the best possible solution and had in some cases even accepted the idea of compulsory arbitration. There had, however, been some important cases in which arbitration had not been accepted by the parties, such as the case of the boundary dispute between Colombia and Costa Rica which had been supposed to be settled by the decision of the President of France.[13] He therefore believed that articles 29 and 30 should also leave some room for settlement by direct negotiation between the parties, though settlement by other means should also be possible.

45. With regard to the problem of local populations, which had been mentioned by Mr. Tammes and Mr. Sette Câmara, he considered that, as a matter of human rights and *jus cogens*, it was absolutely necessary to take full account of the situation of minority populations. He was therefore in favour of extending the principle of continuity of treaties to cover problems affecting the populations of border territories.

46. Mr. USHAKOV said that, like the Special Rapporteur, he considered that the arguments for retaining articles 29 and 30 were practically irrefutable but that their form and drafting should be reviewed, together with the commentary, so as to ensure that they were not prejudicial to any State or territorial régime. He did not question the principle laid down in the articles, but wished to make a few remarks with a view to clarifying the commentary.

47. It was unnecessary to stress the relationship between the articles under consideration and the clean slate principle. For the principle stated in articles 29 and 30 was a general principle which applied to all cases of succession of States, not merely to the emergence of newly independent States. No matter whether a State was created by fusion, dissolution or separation, boundaries previously established by treaty were in no way affected. It should therefore be made quite clear in the commentary that the principle stated in articles 29 and 30 applied to all kinds of succession of States and even to transfers of territory. If a transferred territory had a boundary with a third State, that boundary, as established by the predecessor State by treaty, was binding on the successor State.

48. The commentary should also point out that the Commission was not making any innovation in the draft articles. It was merely confirming a principle of customary law which had existed for centuries and was accepted by contemporary international law. International law had long recognized the principle that a boundary established by treaty was not affected by a succession of States, whatever its nature. Early international law had even recognized that a territory of one State might be absorbed by another State by *debellatio* and that such a conquest was effective within the limits of the territory absorbed.

49. For the purposes of the draft articles, the term "succession of States" meant the replacement of one State by another in the responsibility for the international relations of territory, that was to say, in general, the replacement of one State by another in the exercise of responsibility for the territory. That change could not affect boundary régimes as such. No matter whether a new State had emerged from a fusion, a dissolution, a separation or the decolonization process, its emergence could not affect the territorial régimes to which it had been previously subject. There was tôo often a tendency to visualize the emergence of a newly independent State in the abstract, as if it had no boundaries. If that were so, not only would the newly independent State not be obliged to recognize the boundaries previously established by treaty, but adjacent States would be free not to recognize them and to encroach on its territory. In reality, it was not by the birth of a State that boundaries could be altered, but by other means recognized by international law.

[13] *British and Foreign State Papers*, vol. XCII, p. 1038.

50. When a new State was born with a disputed boundary, it might continue the dispute begun by the predecessor State. That was so because territorial régimes were in no way affected by a succession of States.

51. It did not seem correct to say, as the Special Rapporteur had done, that "By speaking of the boundaries or the obligations and rights established by a treaty, the way is clearly left open to an attack on the validity of the treaty if there should be grounds for it" (A/CN.4/278/Add.6, para. 444). For the validity of a treaty, especially a treaty establishing boundaries, did not in any way derive from a succession of States; its validity could be challenged, not by invoking a succession of States, but by relying, for example, on the Vienna Convention on the Law of Treaties. Furthermore, a treaty establishing boundaries might be lawful, but the boundaries might have been changed by agreement between the States concerned, just as the treaty might be unlawful in the eyes of international law, but lawful boundaries might have been established by agreement.

52. It did not seem possible to state that "articles 29 and 30 in their present form seem to fit well with article 6, which excludes the application of the articles to a so-called succession which may occur unlawfully" (*ibid.*, para. 446), since articles 29 and 30 applied to any case of State succession, whether lawful or not. No succession of States of any kind could affect a territorial régime. For instance, if a State occupied part of the territory of another State by military force, thus creating an unlawful situation, the boundary between that territory and a third State would not be changed in any way. Thus even in unlawful cases the rule in articles 29 and 30 applied, and there was no need to establish any relationship between those provisions and article 6.

53. As to unequal treaties, the possibly unequal character of a treaty had nothing to do with a succession of States. That was a question to be settled by reference to other branches of international law.

54. As to provision for possible arbitration if the rules laid down in articles 29 and 30 conflicted with the principle of self-determination of the populations concerned or were contested by a State declaring itself not bound by a treaty considered to be unequal, the Special Rapporteur had said, in paragraph 448 of his report, that that question might be considered subsequently in connexion with the general question of the settlement of disputes. His own view was that there was no need to provide for arbitration when the draft articles stipulated that successions of States must take place in conformity with contemporary international law and that they did not affect territorial régimes. Arbitration was recommended only in order to reopen old situations; but the rules of contemporary international law could not be applied retroactively. It should be made quite clear in connexion with article 6 that the future convention would apply only to successions of States which occurred in the future. It was quite evident that if the successions of States which had occurred in previous centuries were judged today in the light of modern international law, most of them would be found to be unlawful.

55. He found articles 29 and 30 acceptable, subject to drafting changes, but hoped that they would be further explained in the commentary.

The meeting rose at 6 p.m.

1288th MEETING

Tuesday, 2 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Statement by the Secretary-General of the United Nations

1. The CHAIRMAN welcomed the Secretary-General of the United Nations and the Director-General of the United Nations Office at Geneva. He invited the Secretary-General to address the Commission.

2. The SECRETARY-GENERAL said that, the Commission having recently commemorated the twenty-fifth anniversary of its first session, he was glad to have an opportunity of extending his whole hearted congratulations and best wishes to its distinguished members. During the twenty-five years of its existence, the Commission had made an admirable contribution to the codification and progressive development of international law, and thus to the fostering of friendly relations and co-operation among States and the strengthening of international peace and security.

3. The codification and progressive development of international law was a continuing process whose importance and difficulties were illustrated by the items placed on the agenda for the present session of the Commission in accordance with the recommendations of the General Assembly.

4. One of those items was State responsibility. There was no need to stress the importance of that topic. The Commission had brought out and developed with admirable clarity the rule that every State was responsible for its wrongful acts, which was the governing principle of the whole matter. It had succeeded in finding a basic approach to that very difficult topic by undertaking the codification of general rules governing international responsibility, including rules on the legal consequences of violations of norms on the maintenance of international peace and security.

5. At the same time, the Commission was putting the final touches to the draft articles on succession of States in respect of treaties and was engaged in a study of succession of States in respect of matters other than treaties—in particular, economic and financial matters.

Succession of States had always been one of the most difficult topics of international law and had acquired special importance during the process of decolonization. It was therefore very fortunate that in the course of the present month the Commission would adopt a final draft on succession of States in respect of treaties, which he was sure would be of great value to statesmen and lawyers alike. He was fully aware that, in preparing that draft, the Commission had constantly had in mind the principles of self-determination and the sovereign equality of States embodied in the Charter of the United Nations, as well as the need to preserve stability in international treaty relations.

6. The importance which economic and trade matters had acquired at the present time, especially in the relations between countries with different systems or levels of development, both in the social and in the economic sphere added a special interest to the Commission's codification and progressive development of the rules governing the most-favoured-nation clause. There again, the Commission was faced with a mass of conflicting precedents and practices, from which it would have to derive a coherent and logical body of legal rules of universal validity, which would foster the development of economic and trade relations on a non-discriminatory basis.

7. The Commission was also dealing with the question of treaties concluded by international organizations, which was of particular interest to the United Nations, its specialized agencies and other intergovernmental organizations. The articles it was now preparing would be of practical value to the international organizations concerned in carrying out activities which required the conclusion of agreements.

8. The Commission's work on all those topics, and on the items on its programme of future work, would be a substantial contribution towards strengthening the legal basis of world-wide co-operation, which was especially important at a time when the trend towards international *détente* was dominant in international relations.

9. The CHAIRMAN, after thanking the Secretary-General for his statement, observed that it was the second occasion on which he had found time to address the Commission during his relatively short time in office. That in itself was a sign of his appreciation, but after hearing his statement the Commission had no need of indirect evidence of his interest in its work.

10. The Commission was, indeed, highly gratified by the Secretary-General's praise. Although Latin was not an official language of the United Nations, it was sometimes used in the Commission, and on the present occasion he would like to quote the old Latin adage *Principibus placuisse viris non ultima laus est*, which, translated into plain English, meant "It is pleasant to be liked by eminent men"; and the chief administrative officer of the United Nations was certainly an eminent man. He hoped that the Secretary-General, for his part, would find a certain satisfaction in the high esteem in which he was held by the members of the Commission—many of whom were also *principes viri* in the field of law—because of his achievements before taking his present office and his success in discharging his new responsibilities. The Commission was proud that it was a trained jurist who now held the high office of Secretary-General of the United Nations.

11. The Commission had listened with great interest to the Secretary-General's statement and was glad that he shared its views on the importance of the codification and progressive development of international law, and the close connexion of that work with the maintenance of peace, co-operation and justice in a world which was so much in need of them.

12. The Commission considered itself fortunate that in the person of the Secretary-General it had a friend on whose comprehension and help it could count when the problems confronting it were dealt with by him or by bodies in which he played a decisive part. By way of example, he referred to paragraph 176 of the Commission's report for 1973, in which it had informed the General Assembly that in view of the increased demands of its work, it needed more assistance for research projects and studies, which could hardly be achieved without increasing the staff of the Codification Division of the Office of Legal Affairs, as the Commission had already recommended in 1968.

13. In conclusion, speaking on behalf of the Commission, he thanked the Secretary-General for his visit and assured him that in his absence he was always most ably represented by the Commission's Secretary and his efficient staff.

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; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (*continued*)

14. The CHAIRMAN invited the Commission to continue consideration of articles 29 and 30.

15. Mr. AGO said that, in his view, the articles under discussion were essential and the arguments in favour of their retention irrefutable. If those articles were deleted, it might be asked whether other provisions, in particular article 11, were necessary.

16. The Special Rapporteur's report and his oral introduction of the two articles both gave the impression that he was not entirely satisfied with their wording. In their present form, the articles seemed to go further than would be desirable in regard to the maintenance of the *status quo*. That was why the Special Rapporteur had stated in paragraphs 439 and 440 of his report (A/CN.4/278/Add.6) that their form and drafting might require further consideration and that special care should be taken with the commentary. The real purpose of article 29 was to stipulate that a boundary did not cease to be a boundary simply because of a succession

of States relating to a particular territory. The wording "A succession of States shall not as such affect a boundary established by a treaty", with which article 29 began, might be misinterpreted because it was rather too categorical.

17. The articles under discussion quite clearly covered all cases of succession of States, not only those resulting in the creation of newly independent States, though they excluded successions of governments. The various cases differed widely.

18. In Latin America, most of the States which had attained independence about the middle of the nineteenth century had previously been part of the Spanish Empire. The Spanish administration, which had had no reason to mark the boundaries of its Latin American provinces in one way more than another, had adopted mountain ranges and rivers as lines of demarcation. Although those boundaries had not always been very precise, they had never been arbitrary, and the new States of Latin America, following the principle of *uti possidetis juris*, had wisely decided to maintain the boundaries established by the Spanish monarchy. But in spite of that, the period following their independence had been characterized by boundary disputes.

19. Moreover, not all the boundaries of those new States had formerly delimited provinces of the Spanish Empire; some of them had separated a province from the territory of another colonial empire. Where a boundary had delimited the territories of two colonial empires, one of the colonial Powers concerned might have taken advantage of the conclusion of a treaty to expand its territory at the expense of the other. When a territory thus detached attained independence, assuming, of course, that the treaty was valid, the question would arise whether the succession of States affected or did not affect the boundary established by the treaty. Although the principle of international law according to which the boundary existed at the time of the succession of States was indisputable, it should be borne in mind that the two colonial Powers had had no reason to contest the boundary, whereas the new State had very specific reasons for wishing to change it.

20. History provided a more recent example of colonies which had attained independence after belonging to a single empire—the French colonial empire. Since, at one time, France had hoped to retain some territories more than others, it might have tried to extend unduly the boundaries of the possessions it wished to retain, to the detriment of the countries which were to attain independence earlier.

21. Generally speaking, it should be noted that in Africa, the boundaries separating territories belonging to different colonial empires had often been established arbitrarily. Some populations had been divided or united arbitrarily. To avoid chaos, the newly independent States of Africa had preferred to adhere to the established boundaries for the time being, though some of them had suffered more than others from the dissemination of their population among different States. It was conceivable that a colonial Power, knowing that a territory under its adminsitration would soon become independent and wishing to develop its relations with another already independent State bordering on that territory, might transfer to that State sovereignty over part of the territory which was about to become independent. The validity of such an agreement between a colonial Power and an independent State was undeniable, but what of the State which would then attain independence after being improperly stripped of part of its territory? In those circumstances one would hesitate to say that the succession of States could not affect the boundary thus established. Article 29 should be worded in such a way that it could not be construed in a manner prejudicial to the interests of certain countries.

22. Consequently, while he was in favour of retaining articles 29 and 30 and reaffirming the fundamental principle of international law on which they were based, he hoped that they would not be open to a political interpretation of which the Commission would surely not approve.

23. Mr. HAMBRO said that many of the oral and written arguments which had been advanced concerning articles 29 and 30 had given him the impression of being special pleading directed at special cases. In the practice of States, of course, all cases were special, but it was important that the Commission should not deal with special cases, but should rather lay down general rules for the future. After all, the Commission did not function as a tribunal, nor did it attempt to decide controversial cases of State succession which had already taken place.

24. It should also be made clear that article 29 did not state or imply that boundary treaties were sacrosanct and would last forever; it simply stated that succession of States as such would not affect those treaties. If a treaty was invalid or grossly inequitable before succession, it would continue to be equally invalid or inequitable thereafter. It should also be made clear that the Commission was not remotely interested in abolishing any instruments for the peaceful settlement of disputes, which should certainly always be available to a successor State if it found that a boundary treaty was inequitable.

25. Some speakers had suggested that article 29 might conflict with the principle of self-determination, but he could not share that view. The principle of self-determination could not and should not be invoked for the purpose of destroying all stability in international relations.

26. It had also been said that the Commission should take into consideration not only the territory affected by a treaty, but also the human beings whose lives might be affected by it. It was undoubtedly true that more importance was now attached to individuals than in the past, but it must be borne in mind that treaties were concluded between States and not between persons. In fact, the importance of State sovereignty was so often emphasized today that it would be absurd to denounce a treaty because it did not attach sufficient importance to individuals.

27. It had also been asked what would happen if article 29 was not included in the draft. In his opinion, probably no great harm would be done, since its provi-

sions were an expression of customary international law. But that was no reason for omitting them, since to do so would attack the very concept of codification. It had been argued that it might be better to omit the article, because it could conceivably lead to controversy. But that argument was also invalid, since it would mean the abandonment of all attempts at codification. After all, States would always be able to ratify the future convention subject to certain reservations.

28. He also favoured the adoption of article 29 because it might prove to be particularly important in relation to article 11, which had already been adopted by the Commission.

29. Lastly, with regard to article 30, he considered it to be a correct expression of customary law, though he was not as convinced of its usefulness as he was of that of article 29.

30. Mr. BEDJAOUI commended the Special Rapporteur for the part of his report dealing with the concluding articles of the draft. Articles 29 and 30 applied to all kinds of treaties, both general and restricted multilateral treaties and bilateral treaties, and to all types of succession of States, not merely those connected with the creation of a newly independent State.

31. As Special Rapporteur for the topic of succession of States in respect of matters other than treaties, he was in a difficult position. While basically in agreement with the rule laid down in articles 29 and 30, he was rather unhappy, if not about their inclusion in the draft articles, at least about their present wording and titles. The Commission had decided to consider succession of States in respect of treaties separately from succession of States in respect of matters other than treaties because it had wished to deal with treaties as subject-matter of succession, not as intruments of succession. In the case of articles 29 and 30, however, a subtle distinction had been drawn between the treaty itself, which would be "consummated" and, having produced all its effects, become merely an evidential instrument serving as a title of validity, and the territorial or boundary régime established by the treaty and valid *erga omnes*. That represented a shift from succession of States in respect of treaties towards succession of States in respect of matters other than treaties, so that articles 29 and 30 should not normally be included in the draft under consideration. Moreover, territorial régimes could derive from sources other than treaties, such as custom; they were then rightly regarded as subject-matter of succession independent of the treaties or custom which had established them.

32. The fact that the matter had been dealt with by the Special Rapporteurs for succession of States in respect of treaties would not dispense him from studying it as part of the topic for which he was Special Rapporteur. He would, however, deal with boundary and territorial régimes independently of the instrument which had established them, whereas in the present case only régimes established by treaty were considered. For the purposes of the draft articles under discussion the emphasis must be on the treaty, not on the régime it established, otherwise the articles might go beyond the bounds of succession in respect of treaties.

33. The United Nations Conference on the Law of Treaties had been more skilful. Article 62, paragraph 2(*a*), of the Vienna Convention[1] was formulated simply in terms of objective rights, which, being a matter of status rather than of treaty law, did not come under that Convention. The articles under discussion, on the other hand not only indicated that boundary and territorial régimes were outside the scope of the draft, they stated a substantive rule—albeit an indisputable one—which took the Commission outside the subject it was considering. If the Commission wished to lay down a substantive rule of positive law, it must refer to treaties, both in the titles and in the text of the articles. It must not refer to boundary régimes or territorial régimes, but to the fate of the treaties establishing such régimes. The attachment of the subject of boundary and territorial régimes to that of treaties was thus quite artificial. To avoid such an artifice, either the Commission must deal with the fate of the treaties, or articles 29 and 30 must be transferred to the topic for which he was responsible.

34. Most frontiers on the African continent had been established by European Powers without regard to the pertinent technical, linguistic or other considerations. A document distributed to the Commission showed that the Somali people had been divided between British Somaliland, the former Italian Somaliland, the French Somali Coast, the northern part of Kenya and certain Ethiopian territories (A/CN.4/L.205). The African States had accepted the principle that boundaries, whether established by treaty or by custom, were inviolate. That position had been confirmed by several provisions of the Charter of the Organization of African Unity.[2] It might be said that the African States, in the interests of peace, had agreed to ratify anew the General Act of the Berlin Conference of 1885,[3] which had divided Africa into zones of colonization or influence. That position had been reiterated at several summit meetings of the non-aligned countries. As to the dispute between Algeria and Morocco referred to by Mr. Thiam, it had been settled in June 1972, on the basis of the inviolability of frontiers, by two treaties between Algeria and Morocco, solemnly signed in the presence of African Heads of State at a summit meeting at Rabat.

35. As he, personally, interpreted articles 29 and 30, the fact that they dealt only with boundary and territorial régimes established by treaty did not mean that régimes established in other ways did not enjoy continuity or that they were precarious or had lapsed. That was one of the drawbacks of dealing with those régimes solely within the framework of treaties; the only remedy would be an appropriate commentary.

36. Régimes imposed by force or in circumstances of inequality, and régimes incompatible with *jus cogens*, were void. Nothing in the text of the articles or in the

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 297.

[2] United Nations, *Treaty Series*, vol. 479, p. 70.

[3] *British and Foreign State Papers*, vol. LXXVI, p. 4.

commentary should leave any doubt that the right of self-determination was to be respected. The process of succession of States could not, in itself, either consolidate or validate situations that were contrary to the principles of contemporary international law. Thus territorial régimes of a political nature, such as those of military bases, could not be guaranteed continuity. The same was true of agreements concluded by a colonial Power at the expense of a territory it had administered.

37. The present versions of articles 29 and 30 dealt much more satisfactorily with those various points than the corresponding articles discussed in 1972.[4]

38. Mr. ELIAS said that articles 29 and 30 represented a very important stage in the Commission's efforts at codification. He congratulated the Special Rapporteur on his incisive analysis and on his moderation and sense of balance. In his opinion, the arguments in favour of maintaining the two articles were overwhelming, though he was not entirely satisfied with their wording.

39. He agreed with Mr. Hambro that if article 11 was included in the draft, articles 29 and 30 should be included as well, since they underlined the customary rule that territorial treaties constituted an exception to the clean slate principle.

40. Articles 29 and 30 were also important because of the implications of the Charter of the Organization of African Unity; article XIX of that Charter provided for the establishment of a Commission of Mediation, Conciliation and Arbitration, the sole purpose of which would be to deal with boundary disputes. Since almost all newly independent States were likely to find themselves involved in boundary disputes of one kind or another, it was essential to have some rule in the Commission's draft which would cover the matter, though in that respect the present wording of article 29 was not entirely satisfactory.

41. Moreover, the principles laid down in articles 29 and 30 were in line with the very careful formulation of article 62, paragraph 2 of the Vienna Convention, which stated that "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary". In drafting articles on succession of States in respect of treaties, the Commission could not logically take a position opposite to that which it had taken in regard to the law of treaties.

42. He agreed with Mr. Ushakov that article 29 was not confined in its scope and effect to newly independent States, but could also apply to long-established States and frontiers. He had, however, found it difficult to accept the idea that an unlawful treaty could establish a valid boundary. In its anxiety to limit the application of the present articles to existing and future problems, the Commission should not give the impression that it believed that boundary régimes should always be considered valid once they had been established. It would be very dangerous to recognize purely *de facto* situations, since that might mean a recognition of territories which had been occupied by military force.

43. He subscribed to the view expressed by the Special Rapporteur in paragraph 440 of his report (A/CN.4/278/Add.6) that the fact of succession as such should not affect boundaries, but should leave open the question of the validity or invalidity of the boundary treaty itself. The Special Rapporteur had, in fact, stressed two things in that paragraph: first that the Commission should do its best to avoid giving the appearance of making decisions which might be regarded as influencing the settlement of a particular dispute, and secondly, that special care should be taken to ensure accuracy in the final version of the commentary. Those were points to which the Drafting Committee should give particular attention in its final formulation, for if legal experts like Mr. Ushakov and the Special Rapporteur could hold such different views on the meaning of articles 29 and 30, the need for stating the rules they laid down as carefully and clearly as possible could not be over-emphasized.

44. There seemed to be general agreement that rules stated in articles 29 and 30 should not be interpreted as in any way discouraging negotiations or arbitration for the peaceful settlement of disputes. The possibility of such a misinterpretation might be avoided by prefacing the articles with some such opening phrase as "Without prejudice to the rights of either party to invoke the validity of the treaty...".

45. Mr. RAMANGASOAVINA said that he endorsed the principle stated in articles 29 and 30. A succession of States should not serve as a pretext for challenging an established situation or for unilaterally denouncing a territorial treaty: such a possibility would militate against the maintenance of peace and international security. The Commission's purpose was not, however, to maintain the stability and continuity of boundary régimes at all costs. It must also avoid the maintenance of a measure of discontent or unrest caused by the stability it was seeking to maintain. It should therefore give the most careful consideration to the principle it was trying to preserve concerning the continuity of boundary treaties and present that principle with numerous precautions, so as to avoid wounding certain susceptibilities. In stating the principle, it should not close the door to all possibility of friendly settlements between neighbouring States, and it must therefore make it quite clear that the rule laid down could not be invoked as a ground for the rejection of any territorial claim based on legitimate rights, such as the right to self-determination. It should not exclude all possibility of arbitration, for arbitration was always desirable with a view to establishing a more equitable situation that was more in keeping with the real territorial, ethnic or sociological facts of the area concerned.

46. Articles 29 and 30 applied to all successions of States—not only to successions resulting from the union or separation of former States, but also to successions involving newly independent States. But very few of the cases cited by the Special Rapporteur in his commentary (A/8710/Rev.1, chapter II, section C), which were drawn both from international practice and from international jurisprudence, related to newly independent States. Most of them related to former European States

[4] See *Yearbook ... 1972*, vol. I, p. 247.

and to treaties negotiated by independent States enjoying full sovereignty. For instance, in the *Case of the Free Zones of Upper Savoy and the District of Gex*, France had succeeded to a treaty between the Kingdom of Sardinia and Switzerland, and in the *Case concerning the Temple of Preah Vihear* it had not been Cambodia, as successor of France, which had disputed the boundary treaty, but Thailand, an independent State, which had been a party to the treaty.

47. He himself came from a State that had no boundary problems, but was situated in a geographical area in which boundary disputes were very acute and many territorial problems remained to be solved. The United Nations had certainly done well to organize a plebiscite in Togo and Cameroon, but there were other problems in Africa which had not yet been settled. For example, it could not be said that the situation in Tanzania, Zaire, Rwanda and Burundi was now stabilized and that those States—Tanzania in particular—had accepted the situation they had inherited from the predecessor States, that was to say the colonial Powers. The situation could only be described as one of tolerance which depended on the understanding between those States, and to which Tanzania might put an end at any time by denying transit through its territory to the nationals of the neighbouring States.

48. He therefore believed that the present wording of articles 29 and 30 might give rise to a misunderstanding that would be hard to dispel. Of course, some Governments accepted those articles, because they had every interest in the stabilization of a situation which was to their advantage. Other Governments, on the other hand, saw the articles as consolidating a situation they considered unjust or unlawful. The present boundaries in Africa, for instance, were the result of administrative decisions imposed by the colonial Powers in the nineteenth century under such instruments as the General Act of the Berlin Conference of 1885. Such boundaries had often been imposed without regard to the interest of the population of the territories concerned. Somalia, for instance, had been divided into several parts, some of which had been attached to neighbouring States. It would take a long time to reach a final settlement of those problems, and it was to be hoped that an acceptable solution could be found by arbitration.

49. While recognizing the need to maintain the principles embodied in articles 29 and 30, he thought their wording should be carefully reconsidered. As Mr. Bedjaoui had said, article 29 seemed to place the main emphasis on boundaries. Important though that question was, the Commission should not forget that it was dealing with succession of States in respect of treaties. It would therefore be better for article 29 to say that a succession of States "shall not as such affect a treaty establishing a boundary" rather than "a boundary established by a treaty".

50. With regard to article 30, Mr. Tammes had made a very wise suggestion in introducing human considerations into the draft articles. The Commission should not concern itself solely with territories, but should place greater emphasis on the interests of the inhabitants of those territories, who were often split up between several neighbouring States, as in the case of the Somali pastoral nomads who had been deprived of their grazing grounds.

51. As Mr. Elias had said, the introduction to article 29 should stress that the principle that a succession of States did not as such affect a treaty establishing a boundary, left untouched any dispute that might exist regarding a particular territorial treaty; for in the case of many newly independent States, the treaties in question had been concluded by colonial Powers without consulting the populations concerned. It should therefore be emphasized that the possibility of arbitration remained open whenever a treaty was seriously contested and whenever the principle laid down in articles 29 and 30 conflicted with the principle of self-determination.

52. Thus, although the principles embodied in articles 29 and 30 could be accepted as a whole, their presentation would have to be completely recast in order to allay any possible fears about their application. The Special Rapporteur had said that the great majority of governments were in favour of the two articles; but in view of the importance of the future convention, he thought every effort should be made to obtain a consensus, for as long as any doubt remained about the application of the articles, some States would not ratify the convention and that would seriously restrict its scope and effectiveness.

53. Mr. TSURUOKA said he believed, like most of the speakers before him, that a succession of States as such was a separate matter and did not affect a boundary established by a treaty or rights and obligations established by a treaty and relating to the boundary régime. The principle stated in article 29 was therefore justified in the interests of stability of frontiers—which often gave rise to international disputes—and consequently in the interests of the maintenance of peace.

54. Nevertheless, he also shared the concern of some members of the Commission because, as Mr. Bedjaoui had observed, articles 29 and 30 applied to all forms of succession of States, including successions resulting in newly independent countries. He therefore agreed with most members of the Commission that the principle stated in the two articles was a good one, but that the drafting needed improvement. Successions of States which brought independent countries into being enabled such new countries to aspire to more legitimate boundaries better suited to their interests. In recasting articles 29 and 30, care should therefore be taken not to exclude all possibility of recourse to peaceful means of settling boundary questions, such as negotiation and judicial procedure. Every recourse to peaceful means of settlement should be permitted, not only to newly independent countries, but to other countries as well. He was sure that the Drafting Committee would find more satisfactory wording to cover that point.

55. He also had some doubts about the interpretation and application of the two articles. He was not sure exactly what was meant by the terms "boundaries" and "boundary régime". Did they refer only to the line of demarcation, or to the limit within which a State exercised its sovereignty? If the latter interpretation were

adopted, the scope of the two articles would be much too wide. For instance, in the case of the law of the sea, those terms would embrace not only land boundaries, but also the limits of territorial waters and the contiguous zone. That point would have to be clarified in the article or, failing that, in the commentary. He himself understood a boundary to mean the boundary line, not the limit of the area within which the sovereignty of a State was exercised, for he thought the latter interpretation would go beyond what the Commission intended. He would, however, be glad if the Special Rapporteur would explain that point.

56. He hoped that the Drafting Committee would find better wording, which would make the meaning of the terms "boundary" and "boundary régimes" clear and allay the anxiety of newly independent countries which feared they would no longer be able to challenge boundaries imposed by an unjust treaty, in the negotiation of which they had taken little part.

57. Mr. ŠAHOVIĆ said that, in his commentary and oral introduction, the Special Rapporteur had succeeded in answering most of the arguments advanced against articles 29 and 30. In drawing up rules on succession of States in respect of treaties the Commission could not have left aside the question of boundary régimes and other territorial régimes, and in dealing with that question it had been right to adhere to the traditional rules of international law. Those rules were indisputable and their validity had not been contested even by those who had expressed doubts about the advisability of including articles 29 and 30 in the draft.

58. Nevertheless, the discussion and the present state of international law showed that there were a number of problems relating to those traditional rules which made it necessary to reconsider them from a new standpoint and to try to adapt them to international law at its present stage of development. In doing so it could be seen that the real problems arose mainly in connexion with successions resulting from the decolonization process. In view of the fundamental principles of contemporary international law upon which that process was based, it had been found necessary to pose the problem of the relationship between the traditional rule of the continuity of treaties, confirmed by the Commission, and the principle of self-determination.

59. In his opinion, the rules involved should be more thoroughly examined in regard to their merits and actual content, with a view to delimiting their field of application. In doing so, special importance should be attached to the present practice of States established during the process of decolonization. On the whole, those States had shown that they were prepared, in their own interest, to observe the traditional rule of the stability of boundaries. The African countries, for instance, had decided to respect the boundaries imposed on them by the colonial Powers, even though they were conscious of the injustice done to them in the past by the imperialist countries. Thus, if international law was viewed as a whole, it must be concluded that the principle of self-determination and the principle of the inviolability of the territorial integrity of States were not conflicting, but interdependent principles, which should both be equally respected, having regard to all the means available to States under contemporary international law for the settlement of their boundary problems. The traditional rule of the continuity of treaties must therefore be respected in regard to boundary régimes and other territorial régimes, but without denying States the possibility of settling boundary questions by applying the other lawful procedures open to them under international law.

60. He agreed that the wording of articles 29 and 30 should be reconsidered. The principles stated in those articles should not be omitted, but be better adapted to the subject-matter of the draft.

61. In his opinion, moreover, the statement that unequal treaties always remained unequal treaties should be qualified. For treaties such as the Act of Berlin, under which Africa had been partitioned by the imperialist Powers, were not unequal treaties from the standpoint of the States which had concluded them, but from that of the African nations which had been under colonial oppression when those treaties had been concluded. And those African nations were now independent States which had decided to respect the boundaries imposed on them by the treaties. Hence it was dangerous to maintain in categorical terms that unequal treaties would always remain unequal treaties.

62. He considered that articles 29 and 30 should be retained, but that their wording should be reconsidered in the light of all the suggestions made, particularly those by Mr. Tammes concerning article 30.[5]

63. Mr. KEARNEY said that he was essentially in agreement with those who considered that articles 29 and 30 were necessary in the draft. He believed, however, that those articles involved problems of presentation.

64. It was not possible to adjust the language so as to allay all the misgivings that had been expressed. That was particularly true of the concern of Mr. Bedjaoui, as Special Rapporteur for the topic of succession of States in respect of matters other than treaties. It was extremely difficult to draw the dividing line between Mr. Bedjaoui's part of the topic of State succession and the part relating to treaties, and it was possible that the Commission might have slightly overstepped that line in articles 29 and 30. At the present stage, however, the Commission could not very well draw back from the position it had taken in 1972.

65. On the question of presentation, Mr. Elias had made an excellent proposal, namely, that it should be made clear that the provisions of articles 29 and 30 did not affect differences regarding the validity of the treaties to which those articles referred. One possibility would be to introduce a separate article which would apply that principle to articles 29 and 30. The new article, which would become either the first or the last in part V, might be worded on the following lines: "Nothing in article 29 or in article 30 shall be considered as prejudicing in any respect a question relating to the validity of a treaty." Although that point had already been made quite clear in the commentary, it

[5] See previous meeting, paras. 33-36.

would be psychologically more effective if it was included in the text of the draft.

66. The Commission could not, of course, rectify boundary situations which, in the opinion of some, were not fair. That was certainly not the purpose of the draft articles. The Commission was not at present engaged in writing frontier law, but only succession law. It could not go beyond the formulation of provisions on succession of States.

67. That being said, he wished to deal with some drafting points. The first related to the phrase "régime of a boundary" in sub-paragraph (*b*) of article 29. That formula had been criticized as being too vague, but it would be very difficult to make it any more precise without going into excessive detail. In fact, the formula was in fairly common use and was usually taken to mean a set of attributes which accompanied a boundary. One example was that of means established for the delimitation and determination of the actual boundary line; a set of agreed technical rules for the purpose of determining the exact site of the boundary would constitute part of the régime of the boundary.

68. The United States Government, in its comments, had suggested the elimination from paragraph 1 of article 30 of the requirement that rights and obligations had to attach to a particular territory in the State concerned (A/CN.4/275). As he saw it, the purpose of that suggestion was to reduce possible argument on the question whether the rights related to a particular territory or to the State as a whole. If one took the example of a land-locked State which had certain rights of transit or the right to use a seaport in another State, those rights clearly benefited the entire land-locked State. Cases of that kind should be covered by the draft articles.

69. He accordingly urged that the Drafting Committee should give careful consideration to that suggestion which, if accepted, would make the application of article 30 clearer, simpler and less productive of disputes.

The meeting rose at 1.05 p.m.

1289th MEETING

Wednesday, 3 July 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. 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; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of articles 29 and 30.

2. Mr. EL-ERIAN said that the Commission had decided in 1972 to include articles 29 and 30 in the draft in order to cover certain categories of treaties, or rather certain situations which had their origin in treaties of a "territorial" character, known also as "dispositive" or "localized" treaties. The Commission had taken that decision in full awareness of the complexity of the undertaking; it had recognized in paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C) that the question of territorial treaties was "at once important, complex and controversial".

3. It had been asked whether the subject-matter of articles 29 and 30 really belonged to succession of States in respect of treaties or to the other part of the topic of State succession, for which Mr. Bedjaoui was Special Rapporteur. That question had been raised in the Sixth Committee by the Egyptian delegation, whose comments were summarized in the Special Rapporteur's report (A/CN.4/278/Add.6, para. 417). During the present discussion, the majority of members had seemed to consider it desirable to include the two articles in the draft. If the Commission decided to retain them, it would be necessary to find a formulation that would allay the misgivings and prevent the misinterpretations to which the present text of the articles had given rise.

4. For those reasons, it was essential to make it abundantly clear what the articles were intended to cover, what their provisions actually meant and, particularly, what they did not mean. In the latter connexion, he drew attention to the statement in the Special Rapporteur's report that "the draft articles should deal only with matters relating to the effects of a succession of States and should not attempt to reiterate rules such as those relating to the validity of treaties". The Special Rapporteur had then gone on to stress the need to make it "absolutely clear that article 30 does not prejudice any grounds that there may be fore invalidating or terminating a treaty" (A/CN.4/278/Add.6, para. 453). There was general agreement that the Commission did not intend articles 29 and 30 to prejudice the question of the validity of the treaties concerned. Article 6 of the draft was particularly relevant to that matter, since it stipulated that the present articles applied only to "the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations", and the provisions of articles 29 and 30 were obviously subordinated to those of article 6.

5. He accordingly supported the suggestion made by Mr. Elias and Mr. Kearney that the position should be made absolutely clear in that respect,[1] primarily for

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[1] See previous meeting, paras. 44 and 65.

psychological reasons, in order to remove the misapprehensions to which the present text of the articles had given rise. He endorsed the idea of including a provision to the effect that articles 29 and 30 did not prejudice in any way the question whether a treaty was or was not valid.

6. Mr. YASSEEN drew the Commission's attention to a question of methodology connected with the alternative texts suggested by the Special Rapporteur during the first reading of the draft articles,[2] namely, the question whether article 29, as now worded, concerned a succession in respect of treaties or a succession in respect of matters other than treaties. The wording of the article appeared to indicate that it referred not to the treaty itself, but to the boundary established by the treaty. Thus the question dealt with in article 29 did not relate solely either to treaties or to boundaries: it was a mixed question, pertaining to both succession of States in respect of treaties and succession of States in respect of matters other than treaties. There could therefore be some slight overlap between the two subjects. He believed, however, that the Commission had already gone too far to reverse its course and that in spite of what Mr. Bedjaoui had said, it would be preferable to retain articles 29 and 30.

7. He supported the principle underlying the two articles, which was generally accepted, for he considered that the stability inherent in the notion of a boundary should be preserved in the interests of the international community. He therefore understood the reasons which had led the Commission to adopt draft articles 29 and 30 on first reading; but he also understood the objections which certain governments and some members of the Commission had made to those articles. In his view, however, the Commission could not abandon its starting point and depart from the fundamental principle of the stability of boundaries.

8. It was necessary to stress, however, that it was a succession of States "as such" which did not affect a boundary established by a treaty. The succession could not, indeed, have any effect on the treaty itself. It could not, for example, remedy the defects of a treaty, because the treaty remained as it had been before the succession. A succession could neither validate a treaty that was invalid, nor invalidate a treaty that was valid. There could, of course, be more or less convincing reasons in favour of a boundary change. Article 29 did not prohibit the States concerned from seeking such a change, but they could do so only by the lawful means available to them under international law. Some members of the Commission feared, however, that it might be deduced from article 29 that a succession did not allow States to dispute a boundary even if they had good grounds for doing so. The Drafting Committee should therefore amend the wording of the article so as to make its meaning clear and dispel any misunderstanding.

9. Mr. CALLE Y CALLE said that he had not been present during the 1972 discussion, but he gathered from the summary records that the principle embodied in articles 29 and 30 had received strong support.

[2] See *Yearbook ... 1972*, vol. I, p. 247.

10. Acceptance of the clean slate principle involved, as a logical consequence, the exceptions set forth in articles 29 and 30. Treaties which established the boundaries of the territory of a successor State, thereby defining the territorial content of the succession, should have the character of permanency. It had originally been proposed that the exceptions should be formulated in negative terms. In his first report, the former Special Rapporteur had proposed an article 4 (Boundaries resulting from treaties)[3] which read:

> Nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succession.

A somewhat different formulation had been put forward in 1972 by the then Special Rapporteur in articles 22 and 22*bis* (alternative A) in his fifth report.[4] That formulation also specified, but in positive terms, that the "continuance in force" of a boundary treaty or a territorial treaty was not affected by the occurrence of a succession of States; it thus referred to the status of the treaties in question, and the matter fell strictly within the limits of the topic of succession of States in respect of treaties. Following the 1972 discussion, however, the Commission had reached agreement on the more flexible text now under consideration.

11. There could be no doubt that the fact of succession, that was to say the replacement of one State by another in the responsibility for the international relations of territory, constituted a change of circumstances and that that change was fundamental in character. Unless, therefore, an exception was made, the successor State might argue that the boundary or territorial treaty was no longer operative. The exception would have the same effect as that embodied in article 62, paragraph 2(*a*), of the Vienna Convention on the Law of Treaties,[5] which had been adopted by the Vienna Conference by an overwhelming majority. That being said, he fully agreed that articles 29 and 30 should not be construed as purporting in any way to validate a boundary or territorial treaty that was invalid or, conversely, to invalidate such a treaty that was valid.

12. Lastly, he urged that the commentary should be as full and as balanced as possible. In particular, it should cover the State practice which was not at present mentioned, that was to say the numerous cases in which there had been no dispute between the States concerned, because the continuity of boundary treaties had been accepted as a natural process.

13. Mr. USHAKOV, replying to an observation by Mr. Elias, said that what mattered was not the validity or invalidity of the treaty, but the territorial situation it created; for territorial changes could be justified by an intolerable situation created by a perfectly valid treaty. For instance, in the case of Somalia, it was the situation of a people divided among several States which could

[3] See *Yearbook ... 1968*, vol. II, p. 92.

[4] See *Yearbook ... 1972*, vol. II, p. 44.

[5] See *Official Records of the United Nations Conference on the Law of Treaties. Documents of the Conference* (United Nations Publication, Sales No. E.70.V.5), p. 297.

justify a boundary change, irrespective of the validity of the treaty which had created that situation. Sometimes, on the other hand, a treaty could be invalid—for example, because of an error made when it was concluded—whereas the situation created by it was perfectly acceptable and did not call for any change of boundary. The situation could then be confirmed by a new and valid treaty. The point at issue, therefore, was not whether the treaty was valid or invalid, but whether the situation it had created was acceptable or not.

14. He thought the expression "succession of States" might give rise to misunderstanding, for in speaking of a "succession of States", one did not generally have in mind the succession as such, but the effects of that succession. It would therefore be preferable, in his view, not to use that expression in article 29, but to say instead that "Replacement of one State by another in the responsibility for the international relations of territory shall not as such affect...". That wording would avoid all misunderstanding.

15. He also considered that it would be better not to use the word "treaty" in sub-paragraph (*a*) of article 29, since in fact it was not a treaty, but a boundary which was in question. He therefore proposed that the phrase "a boundary established by a treaty" should be replaced by the words "a boundary existing between two States", which seemed to him clearer. In that connexion, he pointed out that the Special Rapporteur for the topic of succession of States in respect of matters other than treaties would not deal with the effects of succession on territories, because a territory and its population were not subject-matter of succession and hence were not within the scope of the general topic of succession of States.

16. The question of the validity or invalidity of treaties did not arise in connexion with articles 29 and 30, any more than it did in connexion with the other articles of the draft. Hence articles 29 and 30 did not affect the validity or otherwise of the treaties in question, and did not in any way affect the possibility of settling territorial disputes between States by peaceful means.

17. In that connexion, he stressed that article 29 did not perpetuate established boundaries. It was obvious that a treaty establishing a boundary could, like the other treaties mentioned elsewhere in the draft, be denounced or invalidated in accordance with the law of treaties. States could always agree among themselves to alter boundaries by peaceful means. Hence articles 29 and 30 did not perpetuate any particular state of affairs any more than the other articles of the draft.

18. Mr. BILGE said he could agree to the two exceptions provided for in articles 29 and 30, but wished to make it clear that he accepted them only as exceptions, since he was opposed to any widening of the scope of those two articles. He recognized the exception stated in article 29 as a necessity. The Special Rapporteur had decided, after long hesitation, to retain that article, because he had considered it necessary to give every successor State a preliminary base for the exercise of its authority. He (Mr. Bilge) was in favour of retaining the article, but thought its retention would raise a number of important questions and affect the vital interests of States which had frontier problems. He understood the concern of those States, but thought that, as the Special Rapporteur had explained it in his report, article 29 did not impair their rights. No doubt the explanations given by the Special Rapporteur did not satisfy the States which had frontier problems, but the members of the Commission seemed to be in agreement in recognizing, first, that article 29 did not impair the rights of those States and did not purport to impose the *status quo* on them, and secondly, that it was necessary to allay the concern of those States by dispelling all possible misunderstanding. He thought the point should be made clear either in a reservation to article 29 or, as Mr. Elias had proposed, in a separate article. Failing that, the position taken by the Commission should be clearly explained in the commentary.

19. On the question whether article 29 should refer to boundary régimes or to treaties establishing boundaries, he reminded the Commission that Sir Humphrey Waldock had justified his decision to refer to boundary régimes by invoking the modern trend in legal writing.[6] The new Special Rapporteur, Sir Francis Vallat, had justified that choice by practical considerations and had drawn the Commission's attention to peace treaties, which might contain not only boundary provisions, but also financial, commercial and other provisions that had no connexion with boundary problems (A/CN.4/278/Add.6, para. 444). He (Mr. Bilge) had difficulty in following that reasoning. The notion of a frontier had evolved in the course of history. The frontier, which had first been an uninhabited area, a sort of belt between States, had become a disputed area; then, with the formation of modern States, it had become a line delimiting the area over which the States in question could exercise their authority. Hence he thought it would be better to refer to treaties establishing boundaries than to boundary régimes.

20. Since he was anxious that articles 29 and 30 should remain exceptions, he would be most reluctant to agree to the scope of article 30 being widened, as Mr. Tammes had suggested,[7] to cover treaties relating to minorities and to the protection of human rights in general; in his view, the law governing those treaties was very different from the law governing territorial treaties. There was, indeed, a new trend in treaties relating to human rights: an attempt was now being made to extend those treaties to the whole world, for it was no longer a question of protecting the rights of a minority in a given territory, but of securing universal protection of human rights. Thus the Covenants on Human Rights were intended for universal application. To include treaties relating to human rights in the exceptions set out in article 30 would go against that trend, and he thought it would be difficult to extend the article in that direction.

21. The CHAIRMAN, speaking as a member of the Commission, said that the doubts which had been expressed about articles 29 and 30, both in the Commis-

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[6] See commentary to articles 22 and 22*bis* in *Yearbook ... 1972*, vol. II, p. 44 *et seq.*

[7] See 1287th meeting, paras. 33-35.

sion and outside it, had been largely dispelled by the present discussion.

22. The main problem lay in article 29. As he saw it, however, the validity of the rule embodied in that article was inherent in the very concept of succession of States. In paragraph 1(*b*) of article 2 (Use of terms), the expression "succession of States" was defined as "the replacement of one State by another in the responsibility for the international relations of territory". The term "territory" implied delimitation in space; when the successor State took over the territory, it did so within the limits, or boundaries, of that territory. It was also absolutely clear that other matters, such as the unsatisfactory character of certain boundary situations, were completely distinct from succession of States. When a succession took place, the successor State was placed in the same position as the predecessor State; it would inherit all the rights accruing to that State from the treaty. In particular, it could avail itself of any grounds for the invalidation, termination or suspension of the operation of the treaty that were available to it, either under the terms of the treaty itself or under the general law of treaties. In all respects, moreover, the successor State could behave as a sovereign State within its own boundaries from the date of succession. For those reasons, the idea of dropping articles 29 and 30 was completely unacceptable. Their absence would leave a gap in the draft, which would make for very great difficulties.

23. It had been suggested during the discussion that it should be specifically stated that the successor State succeeded to all the rights conferred by the treaty upon the predecessor State. That point belonged to the general question of the relationship between the present draft and the Vienna Convention on the Law of Treaties.

24. A convincing case had been made for the proposition that the rule embodied in article 29 applied to any boundary or frontier, whether established by treaty or otherwise. That idea was acceptable to him, but he believed that if article 29 were redrafted in general terms it would go beyond the strict confines of the topic of succession of States in respect of treaties.

25. The discussion had clearly shown the importance of the commentary. The ideas compressed into the short provisions of the articles needed to be explained in detail and as lucidly as possible. For example, it was necessary to explain the difference between the wording of articles 29 and 30 and that of other articles of the draft. The notion of continuity had been mentioned in earlier sections of the draft, but the language used in articles 29 and 30 was different. The reasons for that difference were to some extent explained in paragraphs (18) and (19) of the commentary, but that explanation needed some amplification. Lastly, the commentary should stress the fact that the stability of frontiers was closely bound up with the maintenance of peace and security.

26. Mr. TABIBI said that, as a citizen of a small country, he fully recognized the necessity of maintaining the stability and permanence of boundaries. The question he had raised in his previous statement[8] was the altogether different one of disputed frontiers. It was essential to rectify boundary situations established contrary to the wishes of the people concerned, by colonial or unequal treaties. Those boundary treaties were invalid because they violated established principles of international law, such as the right to self-determination and the principles embodied in the Charter of the United Nations. While it was true that the Commission was not called upon to act as a tribunal for individual cases, it was nevertheless engaged in drafting an international instrument on the basis of actual cases, and in that legislative work it should study all aspects of existing disputes throughout the world.

27. It had been suggested during the discussion that the Commission should be concerned only with States and not with peoples. He could not accept that approach. Times had changed since a sovereign could disregard the people and Louis XIV could say: "*L'Etat c'est moi*". Those who negotiated and signed treaties nowadays received their authority from the people. The rights of peoples, and not merely those of States, were enshrined in the Charter of the United Nations, and those rights should not be ignored.

28. He could not accept the propositon that a succession of States could not affect a boundary situation. The replacement of a predecessor metropolitan Power by a successor State did in fact affect the boundary situation in certain cases. He had in mind cases in which a boundary took the form of what used to be called a "zone of influence", intended for the protection of a colonial possession. A treaty concluded for the purpose of maintaining such a zone of influence around a colony would not be inherited by that colony when it became an independent State.

29. He could not agree that an illegal treaty could be validated because the factual situation created by it was claimed to be satisfactory. There could be no question of validating an invalid or unequal treaty; all that could happen was that the States concerned might conclude a new treaty confirming the situation.

30. During the discussion, some speakers had used the term "frontier" instead of the term "boundary". He would welcome some clarification of that point by the Special Rapporteur, bearing in mind in particular the confusion created by the "zones of influence" to which he had referred. Examples of such zones were the so-called "free tribal areas" and the settlement area of the former North-West Frontier Province, both of which were mentioned in the Treaty of Kabul[9] of 22 November 1921, which had been validly terminated by a notification dated 21 November 1953.

31. Where the right of self-determination was concerned, he fully agreed with the Special Rapporteur that that right existed for the peoples on both sides of a boundary. It was precisely for that reason that, for example, a metropolitan Power could not, on the attainment of independence of a former colony, dispose of the fate of the inhabitants of an area in dispute with a neighbouring State. To take another example, the

[8] *Ibid.*, paras. 11-28.

[9] League of Nations, *Treaty Series*, vol. XIV, p. 67.

Somali people, which had been divided under arrangements made by former colonial Powers, was claiming self-determination for the inhabitants of the area in dispute with Ethiopia, but the right of self-determination of the Ethiopian people could not stand in the way of that legitimate claim.

32. In conclusion, he urged that, if the Commission decided to retain articles 29 and 30 in any form, it should also adopt a saving clause, in the form either of a separate article or of provisos in the two articles. The purpose of the saving clause would be to safeguard the right to challenge a boundary or territorial treaty.

33. Mr. AGO said that, like the Chairman, he thought the question under discussion was connected with definitions. While it was true that under article 2, paragraph 1(*b*), a succession of States meant the replacement of one State by another in the responsibility for the international relations of a given territory, that replacement could only take place in the actual territory formerly held by the predecessor State. It was that particular, unremarkable in itself, which was the main feature of articles 29 and 30. However, those provisions also had the purpose of stating an exception to article 11, which established the application of the clean slate principle to newly independent States.

34. That exception was illustrated by the treaty concluded in 1935 between Italy and France[10] with a view to settling a question dating back to 1915, the year when Italy had entered the First World War. It had then been provided that in the event of a common victory giving France and Great Britain advantages in their colonial territories, compensation would be accorded to Italy, especially in the form of a rectification of frontiers.[11] The effect of the 1935 treaty had been to readjust the frontier between Libya, which had been an Italian colony at that time, and the French dependent territories of Tunisia and Algeria. The articles under consideration did not only mean that when Libya, Algeria and Tunisia had acceded to independence, their territories had been limited by the frontiers thus established, the articles also meant that those States could not have availed themselves of the possibility of setting the treaties aside provided by article 11.

35. Moreover, it should be noted that treaties like the Franco-Italian agreement generally also provided for a frontier régime which might be of great importance for the movement of caravans and tribes. The Commission would certainly not wish to make it possible for newly independent States to repudiate such provisions completely, by invoking article 11, and to claim that they were not bound by any obligation.

36. Thus articles 29 and 30 were not confined to recognizing the fact of the replacement of one State by another in the responsibility for the international relations of a certain territory; they stated an exception to article 11.

37. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on articles 29 and 30, thanked those who had congratulated him and said that the discussion had been conducted on a very high level. He also wished to congratulate Mr. Tabibi, who had defended with great skill a view which had not been accepted by the majority.

38. Mr. Tabibi had favoured the omission of articles 29 and 30, but the majority of members had taken the view that the Commission should act in accordance with the principle of the continuity and stability of boundaries, as well as of allied obligations and rights, in all cases of succession. In that connexion, he wished to emphasize that the essential basis of his proposal was to be found in long-established customary law. The case-law on the subject was not very extensive because, in case after case of State succession, it had been taken for granted that territorial boundaries would remain unaffected. As Mr. Ushakov had pointed out, that had always been the normal case in the practice of States.

39. If that was so, it might be asked why it was necessary to express the idea in the draft articles. It was necessary to do so because otherwise cases might arise in which the draft articles would be relied on as a ground for disturbing the existence of treaty obligations and thereby indirectly disturbing the existence of boundaries.

40. Mr. Bedjaoui had raised the question whether it would not be better for articles 29 and 30 to be included in his own draft articles on succession of States in respect of matters other than treaties. He agreed that when the Commission came to consider Mr. Bedjaoui's draft, it might find it necessary to include similar provisions to articles 29 and 30, but in his opinion that was not a reason for omitting them from the present draft.

41. It had also been suggested that the Commission should reverse its approach and concentrate on the treaty aspects of boundary régimes rather than on boundary régimes themselves. Mr. Yasseen had pointed out, however, that that would mean reversing a position which the Commission had already adopted, and he himself thought it would be unwise to modify a decision which the Commission had taken on the basis of alternatives proposed by Sir Humphrey Waldock.

42. There were certain points he thought it necessary to stress in the light of the discussion. First, the Commission was dealing only with the effects of succession as such. Secondly, it was dealing only with situations established by treaty and not with situations created by usage or by other means. Thirdly, articles 29 and 30 were not intended to affect the question of the validity or invalidity of the treaty itself. That point, however, might need further elucidation in order to make it completely clear.

43. While many members thought that articles 29 and 30 were sufficiently clear in their present form, several had expressed a desire for some modification of the language used. As Special Rapporteur, he would remind the Commission that it should always aim at a consensus; on articles having a potential political impact, in particular, it was important that the Commission should be solidly united when presenting its final text. It would be the duty of the Special Rapporteur and the Drafting

[10] See *British and Foreign State Papers*, vol. CXXXIX, p. 948.

[11] *Op. cit.*, vol. CXII, p. 973.

Committee to make satisfactory adjustments in the language of the articles, especially article 29. That might be done by the addition of some neutralizing formula, such as had been suggested by Mr. Elias and Mr. Kearney,[12] but that was primarily a question of presentation, not of substance.

44. With regard to article 29, Mr. Tsuruoka and Mr. Tabibi had raised a question of the use of terms, namely, the distinction between the words "frontier" and "boundary". To his mind, the word "frontier" had a much looser meaning than the word "boundary", which implied an actual line of demarcation. The term "boundary régime" in article 29, therefore, would not seem to apply to a "frontier area". By way of illustration, he referred to the 1958 Convention on the Continental Shelf,[13] which provided that a State had rights over the area of the continental shelf adjacent to its coast; the Convention did not define the actual boundaries of the continental shelf, but left that to be decided by the coastal State and its neighbours. As he interpreted the situation, once a treaty defining the boundaries had been concluded, it would come under article 29.

45. Doubts had also been expressed about the word "régime", but that term had been carefully chosen by the Commission in 1972 and he would be surprised if a better one could be found. It might, however, be further clarified in the commentary.

46. Article 30 had given rise to less controversy than article 29, both in the General Assembly and in the Commission. The reasons for that were obviously political, though the drafting of article 30 presented greater difficulties, because of the problem of defining the exact types of rights, obligations and régimes that the article was intended to cover. He thought that the Drafting Committee should give careful consideration to the comment by the United States Government (A/CN.4/275) calling for the deletion of the words "specifically for the benefit of a particular territory of a foreign State" in paragraph 1(*a*). Serious consideration should also be given to Mr. Tammes's suggestion that the Commission should make it clear that the obligations and rights referred to in the article should be understood as relating not only to territory but also to people, as in the case of grazing rights.

47. Mr. USHAKOV stressed the fact that the clean slate principle did not apply solely to newly independent States. Under the terms of article 19, a bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States related, was considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when both States had expressly so agreed or, by reason of their conduct, were to be considered as having so agreed. It followed from that provision that not only the newly independent State, but also the other State party to the bilateral treaty could refuse to recognize the boundaries established by such a treaty. The purpose of article 29, therefore, was to protect both the newly independent State and the other State party.

48. Mr. BILGE said that, in spite of the Special Rapporteur's explanations, he still thought that if the word "régime" was used in its broad sense, it might cause some overlapping between articles 29 and 30.

49. The CHAIRMAN said that was a point which could be dealt with by the Drafting Committee, to which he suggested that the Commission should refer articles 29 and 30.

It was so agreed.[14]

The meeting rose at 12.45 p.m.

[12] See previous meeting, paras. 44 and 65.

[13] United Nations, *Treaty Series*, vol. 499, p. 312.

[14] For resumption of the discussion see 1296th meeting, para. 30.

1290th MEETING

Friday, 5 July 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. 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.209/Add.1; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 31

1. The CHAIRMAN invited the Special Rapporteur to introduce article 31, which read:

Article 31

Cases of military occupation, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudge any question that may arise in regard to a treaty from the military occupation of a territory or from the international responsibility of a State or from the outbreak of hostilities between States.

2. Sir Francis VALLAT (Special Rapporteur) said that article 31 corresponded to article 73 of the Vienna Convention on the Law of Treaties.[1] It had been sug-

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

gested, in particular by the Czechoslovak Government in its written comments (A/CN.4/275), that the reference to cases of military occupation was out of place and should be deleted; it had, indeed, been maintained, with some justification, that that case had nothing in common with succession of States. In his opinion, however, that was in itself a very good reason why the Commission should make it clear that it was not dealing with that kind of situation in the present draft articles.

3. Mr. HAMBRO said he very much regretted that he could not agree to the inclusion of article 31. In his opinion, cases of military occupation came into the category of what he would call the pathology of international relations; he would much prefer that such cases should be referred to, if at all, in article 6.

4. Mr. TABIBI said that, like Mr. Hambro, he considered the question of military occupation to be outside the context of the present draft articles. To include a reference to that question would be to go further than the Vienna Convention and it could in any case be covered by article 6.

5. Mr. AGO said that in his opinion any relationship between draft article 31 and article 73 of the Vienna Convention on the Law of Treaties was far more apparent than real. The latter article—although its drafting was rather vague and confused—was understandable in the context of the Vienna Convention, for the Commission had wished to exclude expressly from the scope of that Convention the questions of succession of States in respect of treaties, State responsibility and the effects of war on treaties. But obviously article 31 could not contain a reservation concerning succession of States, since that was precisely the subject of the draft articles.

6. Article 31 lumped together references to military occupation, international responsibility and the outbreak of hostilities. The last two questions probably had little to do with the case of a succession of States in respect of treaties; in any case one should speak of succession, not just of treaties when referring to them. The question which, on the other hand, would properly have a place in a clause of that kind was that of military occupation, since the occupation of a territory raised problems that had some connexion with succession of States: the occupier might be required to respect certain treaties of the State under military occupation.

7. Article 31 would be justified if it were confined to stating that the draft articles did not prejudge the effects of a military occupation on the treaties of the occupied State.

8. Mr. KEARNEY said he had been impressed by Mr. Ago's view that there was no substantial reason for excluding the question of State responsibility from that of State succession. The Commission had perhaps been unnecessarily influenced by the Vienna Convention in that respect. He was, however, less sure that the same applied to outbreak of hostilities, as he could imagine circumstances in which an outbreak of hostilities might involve questions of succession.

9. It was the provision for an exception for cases of military occupation which seemed to arouse the strongest objections by members of the Commission. He thought that attitude was a reflexion more of the nobility of their intentions than of the keenness of their analysis, since it seemed to him that it would be very difficult to exclude such a provision. What was involved was the responsibility of a State for the foreign affairs of a territory which was under its military occupation. During the military occupation of Germany, for example, many treaties had been entered into by the military governments concerned on behalf of Germany and that had been considered a legitimate exercise of their authority. Such cases did not fall under the normal rules of succession, since the occupying Power was not exercising its own national authority, but rather that of the occupied State.

10. On the whole, therefore, he thought it would be better to have an article specifically excluding cases of military occupation from the application of the draft, though he fully realized the difficulty of establishing whether a given military occupation was illegal under present international law or not. There certainly were a number of possible exceptions, particularly in connexion with cases of aggression and the reaction to aggression. But in his opinion, the present state of international law was not sufficiently firm to justify the possibility of a military occupation being disregarded, and it seemed to him that prudence dictated the inclusion of a reference to that possibility in the draft articles.

11. Mr. USHAKOV said that, in regard to the international responsibility of a State and the outbreak of hostilities between States, article 31 reproduced article 73 of the Vienna Convention word for word. It also referred to the case of military occupation, which had not been provided for by the Vienna Convention. Military occupation was, undoubtedly, prohibited by contemporary international law, but unfortunately it continued to occur. It was therefore necessary to add the case of military occupation to the other two cases, for although it was not a case of State succession, it was closely connected with the question of treaties. He was therefore in favour of retaining article 13.

12. Mr. YASSEEN said that if the articles of the Vienna Convention, the general principles of international law and article 31 were correctly interpreted, it must be concluded that that article was unnecessary. As Mr. Ago had observed, article 31 had little connexion with succession of States. It might prove useful, however, in so far as the interpretation of certain articles or of certain principles could give rise to differences of opinion. Military occupation was prohibited by the principles of contemporary international law, as Mr. Ushakov had pointed out, but the modern world was familiar with cases of prolonged military occupation, to which it was impossible to shut one's eyes. Prolonged military occupation might, indeed, incite certain States to transform a *de facto* situation into a *de jure* situation. He therefore considered it prudent to retain article 31 and not to delete the reference to military occupation.

13. Mr. MARTÍNEZ MORENO said that arguments had been put forward during the discussion for both the retention and the deletion of article 31. It was his own considered opinion that if the article was retained, a

clear distinction should be made between cases of unlawful military occupation and cases in which such occupation was supported by international law. If the article was deleted, however, the Commission should, in the commentary, remove all doubt on the question whether it had prejudged cases of military occupation. He would like to hear further arguments for the retention of article 31; but what he regarded as of greater importance was that the Commission should take its earlier discussion of article 29 into account and make it clear that the draft articles did not prejudge any question relating to the validity or otherwise of a boundary treaty.

14. Mr. TSURUOKA said he would like to know what were the links between military occupation and the outbreak of hostilities between States. Did military occupation include the occupation of a territory by United Nations forces? Did it result from the defeat of a State in a war? He shared the concern expressed by Mr. Martínez Moreno and thought that if the Commission wished to retain the reference to military occupation in article 31, it should explain in the commentary what it meant by that expression.

15. Mr. AGO said he must repeat that article 31 lumped together entirely separate questions and that the only question which really arose in regard to effects on treaties was that of military occupation, since it raised problems regarding the observance of treaties which might resemble certain problems of State succession, even though there was no succession. That point could be illustrated by reference to Germany, which had occupied the city of Rome during the Second World War and had been required to respect the treaties concluded by the Italian State with the Vatican City State. That was a case which, though not one of State succession in the strict sense, was nevertheless related to State succession in some ways, for since there had been replacement, not of one sovereignty by another, but of one authority by another over a territory, there could be an obligation to respect existing treaties.

16. Where the two other cases were concerned, on the other hand, there was no justification for reproducing the terms of the Vienna Convention, since the present reference should not be to treaties, but to succession of States in respect of treaties. There was in fact no need to refer to State responsibility or the outbreak of hostilities. If the Commission nevertheless wished to mention those two questions, it should rather say that "The provisions of the present articles shall not prejudge any question that may arise in regard to a succession of States in respect of a treaty from the military occupation of a territory or from the international responsibility of a State or from the outbreak of hostilities between States". Otherwise, the Commission would be reproducing a rule in the Vienna Convention without indicating that in the present draft it did not refer to treaties, but to succession of States in respect of treaties.

17. Another point was that military occupation was not always illegal, for it might be occupation of the territory of an aggressor State by United Nations forces, ordered as a sanction by the Security Council. But even where military occupation was unlawful under international law, the occupying State had to fulfil certain international obligations. In his opinion, the Commission should emphasize that point and should not concern itself with the lawful or unlawful nature of the military occupation.

18. Mr. SETTE CÂMARA said he had no objection to the retention of article 31; but agreed with Mr. Ago that some changes were needed in its wording. As Mr. Ago had shown, the cases of State responsibility and the outbreak of hostilities had no place in the article and the Drafting Committee should try to reduce it to the bare essentials of the saving clause which had been decided on in 1972.

19. Mr. ELIAS said that, in his opinion, article 31 should be retained in some form or other, if only to make the draft complete. The article could be reworded on the lines suggested by Mr. Ago, but he thought its substance should be retained in order to keep it in line with article 73 of the Vienna Convention, as suggested by the Special Rapporteur. If the Commission wished to clarify further the question of international responsibility it was, of course, free to do so; but in any case he considered article 31 necessary and important.

20. Mr. USHAKOV said he thought the formula: "The provisions of the present articles shall not prejudge any question that may arise in regard to a treaty..." was broad enough to cover questions which might arise in regard to the effects of a succession of States in respect of treaties. In his view, it was less dangerous to reproduce the terms of the Vienna Convention than to modify them.

21. Mr. KEARNEY said that the reference to the "outbreak of hostilities" in article 73 of the Vienna Convention had been included only because of the possible effect of such an outbreak on the breach or suspension of a treaty. In the case of State succession, however, that situation could arise only if there was an outbreak of hostilities between the predecessor State and a third State party to the treaty. He did not think that such an outbreak of hostilities should in any way affect the right of the successor State to notify the fact of its succession.

22. Sir Francis VALLAT (Special Rapporteur), summing up the discussion, said it seemed clear that a majority of the Commission considered it necessary to include an article to provide for cases of military occupation, and that there was no substantial majority in favour of deleting article 31. Serious consideration should, of course, be given to the proposal made by Mr. Ago.

23. Referring to the question asked by Mr. Tsuruoka, he said that there were situations in which a military occupation might be distinct from an outbreak of hostilities; for as Mr. Kearney had pointed out, the military occupation might be related to the cessation of hostilities, or, conceivably, a State might not wish to offer any resistance to a military occupation. The theoretical margin between the outbreak of hostilities and military occupation might therefore be rather difficult to define.

24. The CHAIRMAN suggested that article 31 should be referred to the Drafting Committee.

It was so agreed.[2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

25. The CHAIRMAN invited the Commission to consider the title of part II of the draft articles, the title and text of article 10, the titles of part III and section 1, the title and text of article 11, the title of section 2 and the titles and texts of articles 12 to 14, as proposed by the Drafting Committee (A/CN.4/L.209/Add.1).

ARTICLE 10[3]

26. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for part II and article 10:

PART II

SUCCESSION IN RESPECT OF PART OF TERRITORY

Article 10

Succession in respect of part of territory

When a part of the territory of a State or any other territory for the international relations of which a State is responsible becomes part of the territory of another State:

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

(*b*) treaties of the successor State are in force in respect of the territory in question from the same date, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose [or would radically change the conditions for the operation of the treaty].

27. The Drafting Committee had made a number of small changes in the text of article 10, which was the only article in part II. In doing so, it had taken into account the criticisms made of the opening phrase of the 1972 text: "When territory under the sovereignty or administration of a State becomes part of another State:".

28. The first of those criticisms was based on a statement in the commentary (A/8710/Rev.1, chapter II, section C), which correctly pointed out that article 10 did not apply to the case of what was somewhat inadequately termed "total absorption". It had been argued that that point was not made sufficiently clear in the opening phrase of the article. The second criticism was that the words "territory under the ... administration of a State" were ambiguous and should be replaced by an expression based squarely on the definition of succession of States given in article 2. In order to take those criticisms into account, the Drafting Committee had amended the opening phrase to read: "When a part of the territory of a State or any other territory for the international relations of which a State is responsible becomes part of the territory of another State:".

29. That amendment involved consequential changes in the titles of part II and of article 10 itself. Those titles would now both read "Succession in respect of part of territory" instead of "Transfer of territory". Another consequential change was the substitution of the words "the territory in question" for the words "that territory" in both sub-paragraphs.

30. The Drafting Committee had also replaced the words "the succession" in sub-paragraph (*a*) by the expression "the succession of States", which was defined in article 2 and used throughout the draft. No other changes had been made in that sub-paragraph.

31. Sub-paragraph (*b*) laid down a rule and an exception to that rule. The exception, set out in the clause beginning with the word "unless", was generally known as the "compatibility test". The Drafting Committee had observed, however, that in article 25, sub-paragraph (*a*), and in article 26, paragraph 1(*b*), the compatibility test was coupled with a second exception based on the concept of radical change, which was similar to that of fundamental change of circumstances in article 62 of the Vienna Convention on the Law of Treaties. In order to eliminate that apparent discrepancy, the Drafting Committee had added the words "or would radically change the conditions for the operation of the treaty" to sub-paragraph (*b*) of article 10. It had, however, placed those words between square brackets, since it would be necessary to review the matter in the light of the draft articles as a whole and, in particular, of the provisions which the Commission might adopt for article 25, sub-paragraph (*a*).

32. The Drafting Committee had also deleted the word "particular" before the word "treaty" in sub-paragraph (*b*) of article 10 as being unnecessary.

33. Mr. TAMMES said that the Drafting Committee had largely reverted to the formula proposed by the former Special Rapporteur in his second report as article 2 (Area of territory passing from one State to another).[4] That formula excluded the case in which one of the two States involved in the transfer of territory disappeared. The wording now proposed would thus exclude from the scope of the article a case which had been discussed at length by the Commission, namely, that of the peaceful and voluntary incorporation of one State in another. That case was not covered by article 26 (Uniting of States) either, as it now stood. For that reason, he had to reserve his position on article 10 until he knew what provision would be made for cases of "total succession".

34. The CHAIRMAN said that the Drafting Committee would deal with that point in connexion with the uniting of States.

35. Mr. CALLE Y CALLE drew attention to the need to explain in the commentary that article 10 related to cases in which a part of the territory of an existing State became part of the territory of another existing State. It did not deal with cases of union, fusion or emergence of a new State, but solely with the transfer of a portion of territory from one existing State to another.

36. He also suggested that the Spanish version of the phrase in square brackets in sub-paragraph (*b*) should

[2] For resumption of the discussion see 1296th meeting, para. 36.

[3] For previous discussion see 1268th meeting, para. 29.

[4] See *Yearbook ... 1969*, vol. II, p. 52.

be altered to read "*o hubieran cambiado radicalmente las condiciones para su aplicación*". A corresponding change would appear to be necessary in the French version. Both the Spanish and the French texts as they now stood stated that the "application of the treaty" to the territory in question would radically change the conditions for the "application of the treaty".

37. The CHAIRMAN said that the first point would be noted for purposes of the commentary. The second point would be taken into consideration when the Drafting Committee took a final decision on the phrase in square brackets.

38. In addition to explaining the reasons for the changes made in the 1972 text, the commentary would make it clear that the rule embodied in sub-paragraph (*a*) of article 10 was qualified by the rule set out in articles 29 and 30, which made an exception for the case of boundary and territorial treaties. He noted that the Drafting Committee had wisely decided to delete from article 11 the proviso which appeared in the 1972 text regarding other provisions of the present articles; consequently, no specific reference to articles 29 and 30 was necessary in article 10, but the commentary would point out that the rule set out in sub-paragraph (*a*) was qualified by the provisions on boundary régimes and other territorial régimes contained in those two articles.

39. Mr. KEARNEY proposed that the word "when" should be inserted before the words "any other territory" in the opening sentence of article 10.

40. Sir Francis VALLAT (Special Rapporteur) supported that proposal.

41. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the title of part II and the title and text of article 10 as proposed by the Drafting Committee, with the amendment proposed by Mr. Kearney and subject to the decision to be taken later on the words in square brackets at the end of sub-paragraph (*b*).

It was so agreed.

ARTICLE 11[5]

42. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for part III, section 1 and article 11:

PART III

NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

Article 11

Position in respect of the treaties of the predecessor State

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

43. Article 11 constituted section 1 of part III. It laid down a general rule concerning the position of newly independent States in respect of the treaties of the predecessor State. The Committee had made no change in the titles of part III or section 1. In accordance with its earlier decision, however, it had replaced the words "the predecessor State's treaties" by the words "the treaties of the predecessor State" in the English version of the title.[6] In the English version of the article, the Drafting Committee had decided to delete the commas before and after the phrase "at the date of the succession of States".

44. The only other change made by the Drafting Committee related to the opening clause: "Subject to the provisions of the present articles". During the Commission's discussion, several members had expressed the view that that proviso was unnecessary, because it reflected a general rule of interpretation of treaties, and that if it were retained in article 11, it would have to be added to other articles as well. The Drafting Committee had accepted that view and had deleted the clause.

45. The CHAIRMAN said that if there were no comments, he would take it that the Commission approved the titles of part II and section 1 and the title and text of article 11, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 12[7]

46. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 2 and article 12:

SECTION 2. MULTILATERAL TREATIES

Article 12

Participation in treaties in force at the date of the succession of States

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession [made within a reasonable period from the date of the succession of States], establish its status as a party to any multilateral treaty which [at that date] was in force in respect of the territory to which the succession of States relates.

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

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

47. The Drafting Committee had made no change in the title of section 2 of part III. In the title of article 12 it had added the words "at the date of the succession of States" in order to bring that title into line with the text of paragraph 1. It had similarly amended the title of article 13 to read "Participation in treaties not in force at the date of the succession of States", in order to avoid any possible misunderstanding about the relationship between the two articles.

48. The main question discussed by the Drafting Committee in connexion with article 12 had arisen from the

[5] For previous discussion see 1269th meeting, para. 1.

[6] See 1286th meeting, para. 28.

[7] For previous discussion see 1269th meeting, para. 32.

fact that the 1972 text imposed no time-limit on the exercise by a newly independent State of its right to make a notification of succession to a multilateral treaty, but under article 18 of the draft, when a newly independent State made such a notification, the treaty was considered, under certain conditions, as being in force in respect of that State from the date of the succession of States.

49. The notification of succession could thus have retroactive effect. Several members of the Commission believed that that would create difficulties for other States parties and had suggested that article 12 should set a time-limit for the exercise by a newly independent State of its right to make a notification of succession. The Drafting Committee agreed with that view, but had considered it impossible to lay down a firm time-limit that would cover the great variety of particular situations arising in State succession. It had therefore inserted the words "made within a reasonable period from the date of the succession of States" after the words "a notification of succession" in paragraph 1 and, in consequence, had replaced the words "at the date of the succession of States" by the words "at that date". The Drafting Committee considered, however, that it would be necessary to review the whole matter when article 18 was examined and in order to emphasize the provisional character of the changes made, it had placed the proposed additional words in square brackets.

50. The Committee had also noted that while paragraph 1 of article 12 used the expression "newly independent State", the following two paragraphs referred to the "successor State", although the same State was meant in each case. In order to remove any possible doubt, the Drafting Committee had replaced the expression "successor State" in paragraphs 2 and 3 by the expression "newly independent State".

51. Lastly, the Drafting Committee had discussed certain questions relating to multilateral treaties and had decided to deal in the commentary with the particular cases of the ILO conventions and the Geneva humanitarian (Red Cross) conventions, but to make no further change in the article itself.

52. Mr. USHAKOV said that, at his request, the Drafting Committee had considered the possibility of supplementing the draft, later, with a few articles on treaties of a universal character, which constitute a corollary to article 12.

53. Mr. SETTE CÂMARA said that the words in square brackets would not have the effect of laying down any specific time-limit and would not solve any problems. They would, moreover, raise the problem of determining what was meant by a "reasonable period", and if they were retained it would be necessary to include an explanation in the commentary.

54. The CHAIRMAN, speaking as a member of the Commission, said that if the passage in square brackets were retained, it would also be necessary to explain the consequences of a notification of succession made after the "reasonable period" had expired.

55. Mr. YASSEEN said that the Commission had already considered that question and had concluded that the absence of a time-limit might cause practical complications. The idea of a "reasonable period" had been proposed as a compromise. Unlike Mr. Sette Câmara, he believed that the stipulation of a "reasonable period" would have some effect on the behaviour of States; they would feel called upon to decide for or against participation in the treaties which had been in force in respect of the territory to which the succession of States related. True, that provision did not solve the problem mathematically, but it would at least obviate the difficulties which would be caused by clearly overdue notifications.

56. The CHAIRMAN, speaking as a member of the Commission, said that the provision would be taken as having an exhortatory effect; it would serve to urge newly independent States not to delay making a notification of succession.

57. Mr. ELIAS suggested that the discussion on the words in square brackets should be adjourned until a decision had been taken on article 18.

58. Mr. BILGE said that he had already expressed his opposition to the inclusion of the phrase in square brackets and had not changed his opinion. The idea of a "reasonable period" added nothing to the article. Moreover, it was not specified whether it was the successor State or the other States parties which would decide whether the period was reasonable.

59. Sir Francis VALLAT (Special Rapporteur) said that, in using the word "reasonable", it had clearly been the Drafting Committee's intention to provide for an objective test. The position was similar to that resulting from a number of provisions in the Vienna Convention on the Law of Treaties, which required the application of an objective test. He therefore wished to make it clear that, although nothing was said on the question of adjudication, the question of what constituted a "reasonable period" was not left to the unilateral decision of either the successor State or the predecessor State.

60. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 12, subject to a later decision on the passages in square brackets.[8]

It was so agreed.

ARTICLES 13[9]

61. The CHAIRMAN said that since the Chairman of the Drafting Committee had been unable to attend the meeting, of that Committee at which articles 13 and 14 had been drafted, he would invite Mr. Elias to introduce those two articles on behalf of the Committee.

62. Mr. ELIAS said that the Drafting Committee proposed the following title and text for article 13:

Article 13

Participation in treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting

[8] See 1294th meeting, para. 32.

[9] For previous discussion see 1270th meeting, para. 51.

State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession [made within a reasonable period from the date of the entry into force of the treaty], establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if [at the latter date] the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

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

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

5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a contracting State for the purpose of that provision.

63. The Chairman of the Drafting Committee had already explained the reasons for the change in the title of article 13.

64. With regard to the text of the article, the Drafting Committee had decided to split the first paragraph into two new paragraphs, and the remaining three paragraphs had been renumbered accordingly. The purpose of that change was to deal separately with the two categories of contracting States. The first consisted of contracting States which had expressed their consent to be bound at a time when the treaty was not yet in force. The second consisted of contracting States which had expressed their consent to be bound at a time when the treaty was already in force. The Drafting Committee had decided to use the term "party" to denote States in the second category, in accordance with the definition of the term "party" in paragraph 1 (l) of article 2 (Use of terms).

65. A clause, placed in square brackets, had been included in the new paragraph 2, specifying that notification had to be made "within a reasonable period from the date of the entry into force of the treaty". No similar clause had been included in paragraph 1 because that paragraph contained a built-in time-limit, namely, the date of entry into force of the treaty. Paragraphs 3, 4 and 5 of the new text of article 13 reproduced the wording of the former paragraphs 2, 3 and 4 with some terminological changes consequent on the use of the term "party" in the new paragraph 2.

66. In addition to those changes, the Drafting Committee, for the same reasons as in article 12, had replaced the expression "successor State", throughout the text, by the expression "newly independent State". It had also replaced the word "parties" in the phrase "a specified number of parties shall be necessary for its entry into force" at the beginning of the former paragraph 4, by the expression "contracting States", since before the entry into force of a treaty there were clearly no parties to it, but only contracting States.

67. Sir Francis VALLAT (Special Rapporteur) proposed that in the new paragraph 3, the opening words "Paragraph 1 does not apply" should be replaced by the words "Paragraphs 1 and 2 do not apply". That change was rendered necessary by the sub-division of the former paragraph 1 into two separate paragraphs.

68. Mr. SETTE CÂMARA said he doubted whether the new text was an improvement. When a treaty required a given number of participating States for its entry into force, it clearly stipulated the need for a specific number of ratifications, accessions or acceptances. It was therefore inappropriate to refer to the States concerned as "contracting" States as was done in paragraph 5 of the new text. States which ratified, accepted or acceded to a treaty were "parties" to it, not "contracting States".

69. Sir Francis VALLAT (Special Rapporteur) said that that point had been considered at length by the Drafting Committee. Ideally, both paragraphs 1 and 2 should refer to States which had "consented to be bound" by the treaty. It would, however, be intolerably cumbersome to replace the words "contracting State" and "party" by the full text of the definitions in paragraphs 1(*k*) and 1(*l*) of article 2. The term "contracting State" was used in the phrase "a specified number of contracting States" in paragraph 5, with the meaning given to that term in paragraph 1(*k*) of article 2. It would not be appropriate to use the word "parties" instead of "contracting States" in that context, because the reference to "parties" would imply that the treaty was already in force.

70. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 13 with the amendment to paragraph 3 proposed by the Special Rapporteur, and subject to a later decision on the passages in square brackets.[10]

It was so agreed.

ARTICLE 14[11]

71. Mr. ELIAS, speaking on behalf of the Drafting Committee, said that the Committee proposed the following title and text for article 14:

Article 14

Participation in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 3 and 4, if before the date of the succession of States the predecessor State signed a multilateral treaty subject to ratification, acceptance or approval and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the newly independent State may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. For the purpose of paragraph 1, unless a different intention appears from the treaty or is otherwise established, the signature by the predecessor State of a treaty is considered to express the intention

[10] See 1294th meeting, para.32.

[11] For previous discussion see 1271st meeting, para. 39.

that the treaty should extend to the entire territory for the international relations of which the predecessor State was responsible.

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

4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may become a party or a contracting State to the treaty only with such consent.

72. Article 14 applied to treaties in respect of which the predecessor State had not expressed its consent to be bound, but which it had signed subject to ratification, acceptance or approval. The Drafting Committee had changed the title of the article in order to align it with the titles of articles 12 and 13 as just approved. All three titles now began with the words "Participation in treaties".

73. During the Commission's discussion of article 14 in 1972[12] and at the present session, several members had taken the position that a newly independent State should not have the right to inherit the signature of a predecessor State to a treaty, and had suggested that the article should be deleted. The majority of the Commission, however , appeared to be opposed to that suggestion, and the Drafting Committee had decided to recommend that article 14 should be retained.

74. The Committee had, however, found several imperfections in the 1972 text of the article. Paragraph 1, which dealt exclusively with the ratification of a treaty by the successor State, contained cross-references to five other provisions of the draft articles and could be understood only after a careful reading of those provisions. Paragraph 2 contained a somewhat obscure reference to paragraph 1 in the phrase "under conditions similar to those which apply to ratification". In order to remedy those imperfections, the Drafting Committee had recast the whole article and now submitted a new text which it believed to be clearer than the 1972 version. The changes which had been made did not affect either the sense of the article or the principle underlying it.

75. Mr. KEARNEY said that although he had no basic objection to paragraph 2 of the article, he noted that that paragraph made use of a legal fiction. As a matter of practice, there was always considerable doubt as to whether the signature of the predecessor State really expressed the intention to extend the treaty to the entire territory for the international relations of which it was responsible.

76. The CHAIRMAN said that the purpose of paragraph 2 appeared to be to establish a presumption. Unless the predecessor State had signified that its signature applied to a certain part of its territory, it could be presumed to wish to bind the whole of the territory under its jurisdiction.

[12] Then article 8*bis*; see *Yearbook ... 1972*, vol. I, p. 212 *et seq.*

77. If there were no further comments, he would take it that the Commission approved article 14 as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 12.30 p.m.

1291st MEETING

Tuesday, 9 July 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. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Question of treaties concluded between States and international organizations or between two or more international organizations.

(A/CN.4/277; A/CN.4/279; A/CN.4/L.210)

[Item 7 of the agenda]

(resumed from the 1279th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the title of the draft articles and of part I, the titles and texts of articles 1, 2, 3 and 4, the titles of part II and section 1, and the titles and text of article 6 adopted by the Drafting Committee (A/CN.4/L.210).

TITLE OF THE DRAFT ARTICLES AND OF PART I

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that, in the title of the draft articles, the Drafting Committee proposed that the words "Question of" should be replaced by the words "Draft articles on". It also proposed that the words "or between two or more international organizations" should be replaced by the shorter and possibly clearer wording "or between international organizations". The new title would thus read: "Draft articles on treaties concluded between States and international organizations or between international organizations".

3. For part I, the Drafting Committee proposed that the Commission should retain the title "Introduction", used by the Special Rapporteur in his third report (A/CN.4/279), and in the Vienna Convention on the Law of Treaties,[1] on which the present draft articles were modelled.

ARTICLE 1[2]

4. For article 1, the Drafting Committee proposed the following title and text:

[1] See *Official Records of the United Nations Conference on the Law of Treaties. Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[2] For previous discussion see 1274th meeting, para. 8.

Article 1

Scope of the present articles

The present articles apply to:

(*a*) treaties concluded between one or more States and one or more international organizations;

(*b*) treaties concluded between international organizations.

5. Article 1 dealt with the scope of the draft articles and covered two categories of treaties. The first consisted of treaties concluded between one or more States on the one hand, and one or more international organizations on the other; the second consisted of treaties concluded by international organizations *inter se*. In the interests of clarity, the Drafting Committee had divided the article into two sub-paragraphs, each referring to one of those two categories—an arrangement which would facilitate cross-references.

6. During the discussion in the Commission, it had been suggested that the commentary to article 1 should emphasize that the application of the draft articles was subjected to the rules of *jus cogens*. The Drafting Committee had, however, taken the view that that matter should be dealt with as a specific provision of the draft and not merely in the commentary; the Special Rapporteur would submit an article on the subject later.

7. Mr. ELIAS, supported by Mr. KEARNEY, proposed the addition of the word "and" at the end of sub-paragraph (*a*).

8. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved the title of the draft articles, the title of part I, and the title and text of article 1, with the change proposed by Mr. Elias.

It was so agreed.

ARTICLE 2,[3] PARAGRAPH 1 (*a*)

9. Mr. HAMBRO (Chairman of the Drafting Committee) said that article 2 contained the usual provisions on the use of terms. The Drafting Committee proposed the following text for article 2, paragraph 1(*a*):

Article 2

Use of terms

1. For the purposes of the present articles:

(*a*) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations, or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

10. It would be recalled that the Commission had discussed at some length the question whether paragraph 1(*a*) of the present draft, which corresponded to article 2, paragraph 1(*a*) of the Vienna Convention on the Law of Treaties, should likewise define the term "treaty" or should, instead, define the expression "treaty concluded between States and international organizations or between international organizations". The majority of the Commission, and also the Special Rapporteur in his concluding statement at the 1279th meeting, had favoured the simpler of those two solutions. The text now proposed by the Drafting Committee therefore defined the term "treaty" in the context of the present draft articles. That text was divided into two sub-paragraphs in order to reflect the distinction now made in article 1 between the two categories of treaty to which the draft applied.

11. In the text of paragraph 1(*a*) submitted by the Special Rapporteur in his third report (A/CN.4/279), the expression "governed by international law" had been qualified by the adverb "principally" and the adjective "general", neither of which appeared in the corresponding provision of the Vienna Convention. The Special Rapporteur himself had suggested in his concluding statement that those two words should be deleted, since they were not indispensable and might even be considered not quite correct. They had accordingly been omitted from the text now proposed by the Drafting Committee.

12. The CHAIRMAN, speaking as a member of the Commission, asked whether, in the present draft articles, the term "treaty" would never have the same meaning as in the Vienna Convention on the Law of Treaties. It seemed to him possible that it might prove necessary somewhere in the draft to use the term "treaty" to denote a treaty between States, which was the meaning given to that term in the Vienna Convention.

13. Mr. REUTER (Special Rapporteur) confirmed that view and said that the definition of the word "treaty" given in sub-paragraph (*a*) could raise a drafting problem later; the Commission might indeed have to refer in other articles to treaties as defined in the Vienna Convention. It would then have to explain the term "treaty" by saying "treaty between States" or "treaty within the meaning of the Vienna Convention".

14. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved paragraph 1(*a*) of article 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPH 1(*d*)

15. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 2, paragraph 1(*d*):

(*d*) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

16. That text was modelled on the corresponding provision of the Vienna Convention on the Law of Treaties, except in one respect. Article 2, paragraph 1(*d*) of the Vienna Convention used the words "when signing, ratifying, accepting, approving or acceding to a treaty".

[3] For previous discussion see 1275th meeting, para. 25.

Since it was not yet known what means would be specified in the present draft articles for the expression of consent to be bound by a treaty, the Commission had replaced those words by the more neutral phrase: "when signing or consenting [by any agreed means] to be bound by a treaty". The words "by any agreed means" were intended to emphasize that it was not within the discretion of a participant in a treaty to choose the means of expressing consent to be bound by the treaty. Those words had, however, been placed in square brackets in order to indicate that the Commission would have to review the whole matter at a later stage, when it completed its study of the means of expressing consent to be bound by a treaty.

17. Mr. YASSEEN said he was afraid that the expression "agreed means" might suggest that the means had to be the subject of an agreement. For if a custom or a consistent practice of international organizations was involved, one could hardly speak of "agreed means" without straining the meaning of practice or custom. He would therefore prefer the expression "by any other recognized means".

18. Mr. REUTER (Special Rapporteur) reminded the Commission that as the result of an amendment submitted by Poland and the United States, article 11 of the Vienna Convention had been substantially amended by the addition of the expression "or by any other means if so agreed" to the enumeration of the different traditional means of expressing consent to be bound by a treaty.[4] On reading that article, it might be wondered whether the expression in question was not intended to include and summarize the various means previously mentioned, namely, signature, exchange of instruments constituting a treaty, ratification, acceptance, approval and accession. If that was so, the wording of the article could have been simplified by deleting the reference to those various means of expressing consent to be bound by a treaty, since they were agreed means. He recognized that in French the word "*convenu*" might suggest an agreement, whereas the English term "agreed" was more flexible and denoted any process whereby consent was given. Nevertheless, he recommended that paragraph 1(*d*) be approved as it stood, since the Commission would have to revert to the matter later. If it then took the view that international organizations had formal procedures analogous to those generally recognized—ratification, approval, accession, and so on—it would have to define those procedures and mention them in the text of the article. The replies from international organizations did, indeed, show that, just like States, they each had their own practice. He therefore thought it preferable provisionally to approve paragraph 1(*d*) as proposed by the Drafting Committee.

19. Mr. YASSEEN said he saw no objection to retaining the present wording of paragraph 1(*d*) until the draft was reviewed as a whole.

20. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved paragraph 1(*d*) of article 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPHS 1(*e*) AND 1(*f*)

21. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1(*e*) and 1(*f*):

(*e*) "negotiating State" and "negotiating organization" mean respectively:

(i) a State,

(ii) an international organization

which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

(i) a State,

(ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

22. With very minor drafting changes, the text of those paragraphs was modelled on that of the corresponding provisions of the Vienna Convention on the Law of Treaties.

23. Mr. USHAKOV said that the translation of paragraphs 1(*e*) and 1(*f*) into Russian presented a grammatical problem, owing to the joint treatment of the separate subjects "a State" and "an international organization"; he hoped that type of construction could be avoided in future.

24. The CHAIRMAN said that the point made by Mr. Ushakov had been noted. If there were no further comments, he would take it that the Commission approved paragraphs 1(*e*) and 1(*f*), as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPH 1(*i*)

25. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for paragraph 1(*i*):

(i) "international organization" means an intergovernmental organization;

26. That paragraph was identical with the corresponding provision of the Vienna Convention on the Law of Treaties.

27. The CHAIRMAN said that if there were no comments he would take it that the Commission approved paragraph 1(*i*), as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPH 2

28. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 2, paragraph 2:

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State or by the rules of any international organization.

[4] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records* (United Nations publication, Sales No. E.68.V.7), p. 83, para. 42 *et seq.*

29. That paragraph reproduced the wording of article 2, paragraph 2, of the Vienna Convention on the Law of Treaties with the addition of the words: "or by the rules of any international organization". That addition, which corresponded to the reference to the internal law of any State, was necessary, because the draft dealt not only with treaties concluded by States, but also with treaties concluded by international organizations. The words "rules of the organization" had been taken from the passage reading "without prejudice to any relevant rules of the organization", in article 5 of the Vienna Convention. The use of the word "relevant" before "rules" was appropriate in that article because it dealt with specific matters, namely, treaties constituting international organizations and treaties adopted within an international organization. It was equally appropriate in article 6 of the present draft, which also dealt with a specific matter—the capacity of international organizations to conclude treaties. The word "relevant" would, however, have been out of place in paragraph 2 of draft article 2, which related to the whole body of rules of an international organization.

30. The CHAIRMAN said that if there were no comments he would take it that the Commission approved paragraph 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 3[5]

31. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 3:

Article 3

International agreements not within the scope of the present articles

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations

shall not affect:

(*a*) the legal force of such agreements;

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

(*c*) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

32. Article 3 of the Vienna Convention on the Law of Treaties was a saving clause applying to all the international agreements not covered by that Convention. It was, of course, theoretically possible to include in the present draft a corresponding clause safeguarding all the international agreements not covered by the draft, but such a clause would apply, in particular, to international agreements in written form concluded between States. In the Drafting Committee's view, that would be undesirable, since such agreements needed no safeguarding in draft articles which were the offspring of the Vienna Convention. The Committee had therefore come to the conclusion that article 3 of the present draft should apply to only some of the agreements not covered by the draft. That conclusion required that the categories of the agreements safeguarded by the article should be clearly specified. The text now proposed therefore contained a list of those categories, divided into three sub-paragraphs. It did not include either international agreements between States or international agreements between entities other than States or international organizations, which were both rare and varied, so that no rules on them could yet be formulated.

33. The word "entities" had been used in sub-paragraphs (i) and (ii) instead of the term "subjects of international law" used in article 3 of the Vienna Convention, in order not to prejudge the question whether all international organizations, whatever their nature, were subjects of international law. The Commission would no doubt wish to avoid prejudging that question in a draft which did not deal with the status of international organizations.

34. The term "parties", appearing in sub-paragraphs (i), (ii) and (*c*), had been placed in square brackets in order to indicate that, for the time being, the draft contained no definition of that term. The use of the term would be reviewed by the Drafting Committee and by the Commission itself when a definition had been agreed upon.

35. Mr. CALLE Y CALLE suggested that, in the Spanish text of sub-paragraph (iii), the words "*no escritos*" should be replaced by the language used in the corresponding provision of the 1969 Vienna Convention: "*no celebrados por escrito*".

36. Mr. REUTER (Special Rapporteur) said that agreements in written form should be distinguished from agreements of which there was merely evidence in writing; for there might be agreements concluded by oral exchanges whose existence was recorded in writing in the records of a conference or of an international organization. Such agreements were evidence in writing, but were not in written form.

37. It would not suffice, in sub-paragraph (iii), to refer to "oral" agreements, since that would exclude another category of agreements—those which might be concluded by conduct. For in addition to agreements in written form, agreements evidenced in writing and oral agreements, there was, perhaps, a fourth category: agreements resulting from conduct, which was neither written nor oral. It would therefore be preferable to keep to the negative and non-committal expression "not in written form".

38. Mr. ELIAS proposed the deletion of the word "or" at the beginning of sub-paragraphs (ii) and (iii) and its insertion at the end of sub-paragraph (ii).

[5] For previous discussion see 1275th meeting, para. 25.

39. The CHAIRMAN said that the commentary should perhaps explain that the agreements mentioned in sub-paragraphs (i) and (ii) could be in written form or not.

40. If there were no further comments, he would take it that the Commission approved article 3 as proposed by the Drafting Committee, subject to final decisions on the change in the Spanish text proposed by Mr. Calle y Calle and the changes in the English text proposed by Mr. Elias.

It was so agreed.

ARTICLE 4[6]

41. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 4:

Article 4

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after their entry into force as regards those States and those international organizations.

42. The article was modelled, with the necessary changes, on the corresponding provision of the Vienna Convention on the Law of Treaties.

43. Mr. USHAKOV observed that the words "their entry into force" presupposed the participation of all international organizations in the future convention—a matter which the Commission had not yet considered. He doubted whether that assumption was justified at the present stage.

44. Mr. REUTER (Special Rapporteur) said that the present text did, indeed, presuppose the machinery of a convention and, as Mr. Ushakov had pointed out, the Commission had not yet taken up that problem. It would therefore be necessary to adopt a different formulation and say, for example, "after they have become invocable against those States and those international organizations". For States could conceivably conclude a treaty whose final provisions stipulated that the present articles could be invoked only against organizations which so agreed; that would not make those organizations parties to the convention, but it would enable them to recognize, by an independent juridical act, the rules laid down in the present articles. As to the future of the draft articles there were, in fact, three possibilities: a general convention to which States and organizations would be parties and which would remain within the general régime of treaties—the situation which seemed to follow from the present text; a resolution of the General Assembly recommending the application of the rules laid down in the draft articles; and a convention between States, with machinery enabling international organizations to recognize those rules without being parties to the convention.

45. Mr. HAMBRO (Chairman of the Drafting Committee) said he appreciated the problem raised by Mr. Ushakov, but thought that to make any change in the text might prejudice later decisions by the Commission. He would prefer to retain the text as it stood, while making it clear in the commentary that the Commission did not intend to deal with the question how international organizations would become bound by the instrument that would emerge from the present draft articles.

46. Mr. REUTER (Special Rapporteur) proposed that the words "their entry into force" should be placed in square brackets and that it should be explained in the commentary that the Commission was not taking any position on how the rules laid down in the draft articles could enter into force for international organizations.

47. Mr. AGO observed that, coming after the word "treaties", the word "their" was ambiguous. It might be preferable to say: "after the entry into force of the present articles".

48. Mr. KEARNEY said that the question of participation by international organizations in the instrument which would result from the present draft was a fundamental one. The matter should be dealt with fully in the commentary, so as to elicit government comments.

49. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved article 4, as proposed by the Drafting Committee, subject to the words "their entry into force" being placed in square brackets as proposed by the Special Rapporteur, and on the understanding that the commentary would explain very fully the reasons for that decision.

It was so agreed.

TITLES OF PART II AND SECTION 1

50. Mr. HAMBRO (Chairman of the Drafting Committee) said that the titles proposed by the Drafting Committee for part II and section 1 had been taken from the Vienna Convention on the Law of Treaties. They read:

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

51. The CHAIRMAN said that if there were no comments he would take it that the Commission approved the titles of part II and section 1, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 6[7]

52. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 6:

Article 6

Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

[6] For previous discussion see 1275th meeting, para. 25.

[7] For previous discussion see 1275th meeting, para. 25.

53. That text was the result of a compromise which, like the use of the word "entity" in article 3, was based on the obvious fact that the draft was not concerned with the status of international organizations. The Drafting Committee believed that, for the limited purposes of the draft, article 6 said all that needed to be said on the matter and did so briefly and clearly.

54. He had already explained the origin of the expression "the relevant rules of that organization", when introducing paragraph 2 of article 2. The commentary would, of course, explain what the Commission meant by that expression. The matter had been fully discussed in the Commission and he need not add anything to what had already been said, particularly by the Special Rapporteur and by Mr. El-Erian.

55. Mr. TAMMES said that, in spite of its commendable efforts, the Drafting Committee had not been able to produce a really satisfactory text on the question of the capacity of international organizations to conclude treaties. As the Special Rapporteur had pointed out in paragraph 50 of his second report,[8] to say that the capacity of each organization was determined individually by the terms of its own statutes was tantamount to admitting that there was no general rule; a provision of that kind would be of little use.

56. Although article 6 might be said to state an obvious fact, it could still be dangerous in view of the prominent place it occupied in the draft: it could have a confusing effect on subsequent articles. That point could be illustrated by considering the consequences that would have ensued if article 6 of the Vienna Convention on the Law of Treaties had been worded to state that the capacity of a State to conclude treaties was governed by the internal law of that State—a formula which would correspond to the "relevant rules" principle embodied in the draft articles under consideration. An article of that kind would clearly have conflicted with the provisions of article 27 (Internal law and observance of treaties) and article 47 (Specific restrictions on authority to express the consent of a State) of the Vienna Convention. It would have made it possible, for example, to invoke internal law to argue that a treaty had been concluded *ultra vires*, which was precisely the possibility excluded by the rule in article 27 of the Vienna Convention.

57. Mr. YASSEEN said that, in his view, the Drafting Committee had succeeded in finding the appropriate wording, since the formulation of the article was neutral and did not prejudge the different doctrines concerning the basis of the capacity of international organizations to conclude treaties. Article 6 presupposed that, under international law, those who established an international organization had the power to confer a certain treaty-making capacity on it; but existing international law could not be held to contain rules on the capacity of the host of international organizations which might be created in the future. It was not for an international convention on treaties concluded between States and international organizations to grant an international organization treaty-making capacity. The possibility of conferring that capacity on an international organization lay in international law itself, and the international organizations availed themselves of it to draw up rules on the subject. It was therefore correct to say that the capacity of an international organization to conclude treaties was "governed by the relevant rules of that organization".

58. Mr. KEARNEY said article 6 was a reasonably successful attempt to reconcile the conflicting approaches to the nature of international organizations. Undoubtedly, as Mr. Tammes had pointed out, the Commission would in due course have to deal with the problem of the effect of the constitutional law of an international organization on the conclusion of treaties by it. Problems of that kind would certainly have to be faced, because many of the treaties signed by international organizations involved large sums of money—a fact which would inevitably lead to arguments on questions like capacity. It would therefore be wise to mention in the commentary that the Commission would deal with the matter later in the draft.

59. Mr. ELIAS said that there was no real analogy with article 6 of the Vienna Convention to justify the argument put forward by Mr. Tammes. The treaty-making capacity of States was determined by the principle of the sovereignty and equality of all members of the international community; draft article 6 simply stated that the capacity of an international organization to conclude treaties would be determined by the internal rules of that organization.

60. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*,[9] the International Court of Justice had based its finding that the United Nations had capacity to bring suit on a close examination of all the provisions of the United Nations Charter. What the Court had done had been, precisely, to refer to the "internal law" of the United Nations. The Commission could therefore do no more than adopt a similar formula for the purposes of draft article 6.

61. He therefore suggested that the Commission should approve article 6 as it stood, and revert to it if necessary in the light of the decisions taken with regard to later articles of the draft.

62. The CHAIRMAN, speaking as a member of the Commission, said that he found the terms of article 6 fully in conformity with the present stage of development of international law.

63. Mr. TAMMES said he would not oppose the approval of article 6, provided it was made clear in the commentary that the Commission might have to revert to it in the light of its later decisions on articles such as those corresponding to articles 27 and 47 of the Vienna Convention.

64. Mr. REUTER (Special Rapporteur) said it would be mentioned in the commentary that, in the opinion of some members of the Commission, the wording of

[8] Document A/CN.4/271, reproduced in *Yearbook ... 1973*, vol. II.

[9] I.C.J. Reports 1949, p. 174.

article 6 might have to be reconsidered in the light of subsequent articles.

65. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved article 6, as proposed by the Drafting Committee, on the understanding that the commentary would contain a passage on the lines indicated by the Special Rapporteur.

It was so agreed.

The meeting rose at 12 noon.

1292nd MEETING

Wednesday, 10 July 1974, at 12.10 p.m.

Chairman: Mr. Endre USTOR

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

Co-operation with other bodies
(A/CN.4/L.214)

[Item 10 of the agenda]
(resumed from the 1278th meeting)

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

1. The CHAIRMAN welcomed the observer for the European Committee on Legal Co-operation and invited him to address the Commission.

2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that it had been under the chairmanship of Mr. Bartoš that the Commission had decided, in 1966, to establish links of co-operation with the then recently established European Committee on Legal Co-operation. The passing of that great jurist, who had been wholeheartedly devoted to the cause of justice and peace in the world, was a loss not only to the Commission, but to the international community as a whole. He expressed his sympathy to the Commission and congratulated it on having elected Mr. Šahović to succeed Mr. Bartoš as a member.

3. He had been unable to attend the special meeting which the Commission had held on 27 May 1974 to celebrate its twenty-fifth anniversary, but he had already conveyed his Committee's sentiments of admiration in a message he had addressed to the General Assembly of the United Nations on the occasion of its celebration of that anniversary. In addition, the European Committee on Legal Co-operation had associated itself with that event by stressing, at its own tenth anniversary, the objectives which linked it with the Commission, namely, the codification and progressive development of international law. The European Committee would seek to ensure the widest possible application of the drafts on which the Commission was engaged; Mr. Tabibi, who had attended its recent meeting as observer for the Commission, had encouraged the Committee to follow that course.

4. The activities of the European Committee on Legal Co-operation related to a number of subjects, three of which deserved special mention: the protection of human rights, water pollution control and practice relating to the law of treaties. The international protection of human rights was, of course, one of the Committee's main activities. It took the form, first, of action based on the European Convention on Human Rights,[1] and, secondly, of connected measures which might even lead to the formulation of more highly specialized treaties to supplement that Convention. France had recently ratified both the Convention and its additional protocols, with the exception of the protocol which conferred a consultative jurisdiction, though of a very limited character, on the European Court of Human Rights. That ratification had been accompanied by reservations which were of considerable interest with regard to international treaty practice in the matter of reservations. In addition, the application of the Convention had been developed by the European Court of Human Rights in a judgment that had awarded monetary compensation to an injured person on the basis of provisions which were to be found, in an almost identical form, in human rights treaties of a universal character.

5. During the twenty-five years since its signature, the European Convention on Human Rights had naturally given rise to procedural problems with regard to its application, and studies had recently been undertaken with a view to simplifying and speeding up procedure. It should be noted that the Court of Justice of the European Communities had recently invoked the Convention as a reference text, that was to say, in an area not formally within its scope.

6. With regard to the protection of water resources and, particularly, of international watercourses against pollution, a draft convention had been prepared[2] which was now before the Committee of Ministers of the Council of Europe; only political difficulties could now prevent its finalization. That draft contained legal innovations of some importance. It took the form of a basic instrument which laid down the obligation of the future contracting parties to enter into negotiations with each other, with a view to concluding co-operation agreements between the riparian States of the same international watercourse. In its present form, that *pactum de contrahendo*, which was set forth in articles 12 and 13 of the draft, was without precedent.

7. The draft convention also imposed specific material obligations on contracting States to maintain the quality of the waters in accordance with minimum quality standards, and to enact regulations to prohibit or re-

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[1] United Nations, *Treaty Series*, vol. 213, p. 222.

[2] See *Legal problems relating to the non-navigational uses of international watercourses* (A/CN.4/274), part III, para. 377.

strict the discharge of certain dangerous or harmful substances into the waters. The obligations thus laid down raised the question of the international responsibility that would arise from their breach. A long discussion on that question had led to the formulation of article 21, which read: "The provisions of this Convention shall not affect the rules applicable under general international law to any liability of States for damage caused by water pollution". That provision left it to general international law to determine the consequences of the breach of an international obligation of the kind specified in the draft convention. On that point, the draft thus relied on the results of the work in progress in the Commission on the topic of State responsibility.

8. The system embodied in the draft for the settlement of disputes was more specific. It was based on the obligation to submit any dispute to an *ad hoc* arbitral tribunal to be set up for each individual case. Provision had had to be made for cases that were, perhaps, peculiar to problems of pollution of an international watercourse crossing the territory of several States—cases in which the dispute involved several States not having the same interests. It was difficult, when providing for *ad hoc* arbitration, to devise a system that would satisfy a diversity of interests. A tentative formula was embodied in an appendix to the draft, which made provision for the establishment of links between two or more arbitral tribunals seized of applications with identical or analogous subject-matters.

9. With regard to practice relating to the law of treaties, he drew attention to the increasing difficulties arising from the existence of several treaties covering more or less the same subject-matter or related subject-matters. Within the Council of Europe, for instance, there were successive agreements on criminal law which were applicable to different groups of States. That had led to an overlapping of international treaty obligations, because in the Council of Europe treaties were not binding on member States unless they individually expressed their consent to be bound. Studies were now in progress with a view to solving the problems of overlapping raised by the application of such treaties.

10. The position was complicated by the fact that, while the number of treaties was increasing, the structures of international society remained rudimentary, and were inadequate for the purpose of ensuring the harmonious development of international law. Perhaps there was no remedy for that state of affairs, but there were, at least, palliatives. For instance, in the matter of water pollution control it should be possible to coordinate closely the application of the draft European convention with the application of such other international instruments as the Oslo Convention[3] protecting the North Sea against dumping, the quite recent Paris Convention for the Prevention of Marine Pollution from Land-Based Sources[4] and the conventions protecting the Baltic Sea against pollution. The Council of Europe had taken care to establish links with the bodies set up under the Oslo and Paris Conventions to supervise their application.

11. The European Communities could, moreover, simply accede to those conventions as subjects of international law. Such accession would not be anything new, but the participation of an entity other than a State in a multilateral treaty between States was bound to create some problems. Those problems had been raised during the preparation of the Paris Convention, but no definitive solution had been found; in that Convention each contracting party was presumed to possess full capacity to perform treaty obligations. It was not clear, however, what would happen if the European Communities acceded to the Paris Convention at the same time as one or more of their member States. Would capacity be shared between the Communities and the State or States concerned? The question became further complicated where a convention contained clauses relating to the supervision of its application and to arbitration. Such problems were associated with the question of treaties concluded between States and international organizations, which was on the Commission's agenda.

12. The last point he wished to mention concerned the final stage of the codification of international law. He had doubts about the wisdom of adopting resolutions in the General Assembly of the United Nations instead of concluding international codification treaties negotiated at diplomatic conferences. The European Committee on Legal Co-operation was faced with a similar situation, a major factor in which was the political will of States. Both the Committee and the International Law Commission were in duty bound to seek, in their respective spheres, legal solutions which were conducive to the progressive development of international law and were acceptable to as many States as possible.

13. The CHAIRMAN, thanking the observer for the European Committee on Legal Co-operation, said it had been decided by the Commission that his address should be answered only by the Chairman. The reason for that decision was that the end of the session was near and the Commission was running out of time, so that it was desirable to avoid repetitive oratory. The Commission would adopt the same procedure when observers for other regional bodies addressed it, and the fact that the new procedure was being followed for the first time at the present meeting should not be construed in any way as discrimination against the European Committee for Legal Co-operation. The observer for that Committee would certainly appreciate the Commission's desire to organize its work and time as efficiently as possible.

14. On behalf of the Commission as a whole, he wished to congratulate the observer on his lucid statement and on his description of the work of the European Committee on Legal Co-operation. The Commission greatly appreciated the Committee's work, and its documents, like those of the other regional legal bodies, were studied by members with great interest.

15. That being said, he wished to make a few remarks expressing his own personal views, which were shared no doubt by some, but not necessarily by all the other

[3] See *International Legal Materials*, vol. XI (1972), p. 262.

[4] Op. cit., vol. XIII (1974), p. 352.

members of the Commission. The visit of the observer for the European Committee, like other similar visits by representatives of regional bodies, was an occasion for informal discussions among members of the Commission on the nature and importance of its co-operation with regional legal bodies. There was general appreciation of the fact that the regional bodies were taking due note of the Commission's work and that the Commission, in its turn, was being kept informed of their work. The question arose, however, whether arrangements for the mutual exchange of information could not be improved. The Commission's documents and the records of its proceedings were, of course, available in its *Yearbooks*, but those volumes were published with some delay.

16. Apart from that question of information, he wished to draw attention to an interesting point of difference between the European Committee and the Asian-African Legal Consultative Committee. The latter body had its own Statute, which specified that one of the Committee's purposes was to study the work of the International Law Commission and possibly comment on it. The Asian-African Committee had in fact submitted comments concerning the Commission's work on the law of treaties, but the possibilities of that provision of its Statute had not yet been fully exploited. He understood that no similar provision existed in the case of the European Committee on Legal Co-operation.

17. So far as co-operation between the Commission and the European Committee was concerned, some members of the Commission considered that the present arrangements were fully satisfactory. His own view, however, was that some thought should be given to the possibility of improving the arrangements for co-operation, not only with the European Committee, but also with the other regional legal bodies.

18. The Commission could certainly learn much from the experience of the regional bodies. Since the members of the European Committee came from highly developed countries, the Committee dealt with problems such as water pollution which, in time, would be of increasing interest in other parts of the world. The Committee's experience in that field could certainly be useful to the Commission, which was considering a recommendation concerning commencement of work on the law of non-navigational uses of international watercourses, under item 8(a) of its agenda. He had been particularly interested by the observer's remarks on the idea of a *pactum de contrahendo* whereby riparian States were placed under an obligation to conclude agreements on questions of water pollution control. That obligation was clearly derived from the general principle of the duty of States to co-operate with one another in accordance with the Charter of the United Nations, a duty solemnly proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[5]

19. He hoped that the time was not far off when co-operation in the legal sphere would extend beyond the present membership of the European Committee on Legal Co-operation and include the whole of Europe. He was aware that such a development would involve some sensitive political problems, but his personal view, which did not, of course, bind the other members of the Commission, took account of the fact that a conference dealing with both security and co-operation was now in session at Geneva, attended by representatives from all European States. At the previous session, on a similar occasion, he had drawn attention to the preparations then under way for the Conference on Security and Co-operation in Europe, "the purpose of which would be to lower the barriers between the two parts of the old continent and to unite their peoples in their common interest and for the benefit of mankind".[6]

20. On behalf of the Commission he thanked the observer for his kind words about the Commission's twenty-fifth anniversary and for the sympathy he had expressed regarding the loss suffered by the Commission through the death of Mr. Bartoš. He hoped that co-operation with the European Committee would continue to develop and wished the Committee and its observer every success.

21. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said he wished to assure the Chairman that he did not feel at all discriminated against by the adoption of the new procedure, which meant that the Commission spoke with one voice through its Chairman.

22. He hoped that European jurists like the Commission's Chairman would have fruitful meetings with the Europeans on the Committee he had the honour to represent, which covered only part of Europe. He trusted that principles would be worked out to strengthen the arrangements for co-operation and mutual exchange of information between the Commission and the European Committee.

The meeting rose at 12.55 p.m.

[5] General Assembly resolution 2625 (XXV), Annex.

[6] *Yearbook ... 1973*, vol. I, p. 177, para. 56.

1293rd MEETING

Friday, 12 July 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. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, 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.209/Add.2 and L.215; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1290th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider articles 15 to 18 as proposed by the Drafting Committee (A/CN.4/L.209/Add.2).

ARTICLE 15[1]

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 15:

Article 15

Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 12 or 13, it shall be considered as maintaining any reservation to that treaty which was applicable in respect of the territory in question at the date of the succession of States unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (*a*), (*b*) or (*c*) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 1 or 2, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

3. Article 15 dealt with the difficult matter of reservations. The 1972 text of the article[2] had been divided into three paragraphs, which he proposed to examine separately. Paragraph 1 of that text began with an introductory part laying down a general rule formulated as follows: "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States...". Sub-paragraphs (*a*) and (*b*) of paragraph 1—preceded by the word "unless" at the end of the introductory part—set out exceptions to that general rule.

4. One of the exceptions set out in sub-paragraph (*a*) was the formulation by a newly independent State of "a new reservation which relates to the same subject-matter and is incompatible with the said reservation", that was to say the reservation referred to in the introductory part of paragraph 1. The Drafting Committee had noted that the words "and is incompatible with" would necessitate the application of a difficult test which would be quite unnecessary in the present instance, since it could be assumed that the submission of a reservation on the same subject-matter as an existing reservation implied the intention to substitute the new reservation for the old. It had therefore decided that those words should be deleted.

5. Sub-paragraph (*b*) of the former paragraph 1 excepted from the rule laid down in the introductory part any reservation which "must be considered as applicable only in relation to the predecessor State". But it followed from the introductory part of paragraph 1 that the paragraph related only to a reservation which "was applicable in respect of the territory in question", and the effect of that clause was to exclude from the scope of the general rule laid down in paragraph 1 the type of reservation referred to in sub-paragraph (*b*). The Drafting Committee had decided that there was no need to exclude that type of reservation again and had deleted sub-paragraph (*b*) as an unnecessary repetition, which might be a source of perplexity.

6. The Committee had also made some drafting changes in paragraph 1. It had done away with the division into sub-paragraphs; it had inserted the words "under article 12 or 13" after the words "by notification of succession"; and it had deleted the adjective "new" in the phrase "formulates a new reservation", as being unnecessary. The adjective had presumably been used because it implied the existence of a prior reservation; that was true in the situation covered by paragraph 1, but not necessarily true in the situation covered by paragraphs 2 and 3. Having decided to delete the word "new" in the latter paragraphs, the Committee had also deleted it from paragraph 1.

7. Paragraph 2 of the 1972 text dealt with the formulation of reservations by newly independent States. It was rather long and complicated, because it reproduced the substance of several provisions appearing in the Vienna Convention on the Law of Treaties.[3] Since drafting by reference to the Vienna Convention had been found acceptable for paragraph 3, the Committee believed that it should also be accepted for paragraph 2. It was therefore submitting a new text for that paragraph which referred to the relevant provisions of the Vienna Convention without reproducing them.

8. Paragraph 3 of the 1972 text had been divided into two sub-paragraphs. Sub-paragraph (*a*) read: "When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply." As he had already said, the Committee had deleted the word "new" before the word "reservation". It had also substituted the words "in conformity with paragraph 1 or 2" for "in conformity with the preceding paragraph", since paragraph 1 also referred to the formulation of reservations by newly independent States. Finally, it had replaced the reference to article 23, paragraphs 1 and 4, of the Vienna Convention by a reference to the whole of that article.

9. Sub-paragraph (*b*) of the former paragraph 3 read: "However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the

[1] For previous discussion see 1272nd meeting, para. 2.

[2] *Ibid.*

[3] 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.

parties to the treaty". The Committee had taken the view that article 15 should be confined to the only new element introduced by the law of State succession into the whole field of reservations. That new element was the right to formulate a reservation when notifying a succession. Since sub-paragraph (*b*) dealt with a different matter, the Committee had decided that it should be deleted.

10. Mr. USHAKOV suggested that in paragraph 1 the words "applicable in respect of the territory in question" should be amended to read "applicable in respect of the territory to which the succession of States relates...", and that the word "at" in the phrase "at the date of the succession of States" should be replaced by the word "before" or "prior to".

11. Sir Francis VALLAT (Special Rapporteur) said that he accepted Mr. Ushakov's first suggestion. As to his second suggestion, however, he thought that the present wording was clearer.

12. He pointed out that in paragraph 3 of the Drafting Committee's text, the words "in conformity with paragraph 1 or 2" should be replaced by the words "in conformity with paragraphs 1 and 2".

13. Mr. AGO, referring to Mr. Ushakov's first suggestion, said that the French version of the phrase in question might be amended to read: "*il est réputé maintenir toute réserve au traité qui, à la date de la succession d'Etats, était applicable à l'égard du territoire auquel la succession d'Etats se rapporte,...*".

14. The CHAIRMAN suggested that the Commission should approve the title and text of article 15 proposed by the Drafting Committee, with the changes indicated by Sir Francis Vallat.

It was so agreed.

ARTICLE 16[4]

15. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 16:

Article 16

Consent to be bound by part of a treaty and choice between differing provisions

1. When making a notification of succession establishing its status as a party or contracting State to a multilateral treaty under article 12 or 13, a newly independent State may express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty.

2. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any consent or choice made by itself or made by the predecessor State in respect of the territory in question.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State it is considered as maintaining

(*a*) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory in question, by part of that treaty; or

(*b*) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory in question.

16. Article 16 dealt with the consent of a newly independent State to be bound by part of a treaty, and with the choice by that State between differing provisions of a treaty. The 1972 text[5] set out the general proposition last and the qualifications to that proposition first. The text submitted by the Drafting Committee reversed the order, in accordance with what the Committee believed to be sound legal drafting. It also contained some changes in wording. In the Drafting Committee's text the qualifying clause "in respect of the territory in question" had been added at the end of paragraph 2 (former paragraph 3) after the reference to the right of the newly independent State to withdraw or modify any consent or choice made by the predecessor State. The newly independent State was clearly not concerned with a consent or choice which did not affect the territory. The same qualifying clause was included in paragraph 3. For the sake of precision, the Committee had also inserted in paragraph 1 a cross-reference to articles 12 and 13.

17. Sir Francis VALLAT (Special Rapporteur) proposed that, in view of the Commission's decision to replace the words "territory in question" in paragraph 1 of article 15 by the words "territory to which the succession of States relates", the Drafting Committee should, in the process of final editing, consider whether to make the same change in article 16.

It was so agreed.

18. Mr. AGO said he would prefer the French version of the beginning of article 16 to read: "*Lorsqu'un Etat nouvellement indépendant établit, par une notification de succession, conformément à l'article 12 ou à l'article 13, sa qualité de partie à un traité multilatéral ou d'Etat contractant à l'égard d'un tel traité...*". The existing formulation might give the impression that the words "under article 12 or 13" related to the status of a party or contracting State.

19. Mr. REUTER suggested that the wording proposed by Mr. Ago should be simplified to read: "*Lorsqu'un Etat nouvellement indépendant établit, par une notification de succession, conformément à l'article 12 ou à l'article 13, à l'égard d'un traité multilatéral sa qualité de partie ou d'Etat contractant...*".

20. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to adopt that wording for the French version of article 16.

It was so agreed.

21. Mr. KEARNEY pointed out that the words "under the conditions laid down in the treaty" following the words "or make a choice between differing provisions" at the end of paragraph 1, differed from the original wording (former paragraph 2), which had read: "under the conditions laid down in the treaty for making any such choice". He would like to know whether there was a good reason for that change.

[4] For previous discussion see 1272nd meeting, para. 58.

[5] *Ibid.*

22. Sir Francis VALLAT (Special Rapporteur) said that Mr. Kearney's point was well taken and suggested that the words "for expressing such consent or making such choice" should be added after the words "under the conditions laid down in the treaty" at the end of paragraph 1.

23. After a brief exchange of views between Mr. REUTER and Mr. USHAKOV, the CHAIRMAN suggested that the Commission should agree to the addition suggested by the Special Rapporteur.

It was so agreed.

24. Mr. TSURUOKA suggested that, in the French version of paragraphs 2 and 3, the verb "*rétracter*" should be replaced by the verb "*retirer*", which was the one used to translate the verb "withdraw" in the Vienna Convention on the Law of Treaties, for example, in article 22.

It was so agreed.

Article 16, as amended, was approved.

ARTICLE 17[6]

25. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 17:

Article 17

Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 12 or 13 must be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(*a*) be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States;

(*b*) be considered to be made by the newly independent State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. (*a*) Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State.

(*b*) Subject to the provisions of the treaty, the notification of succession or such communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

26. The Drafting Committee had made no change in paragraph 1 of the article. In paragraph 2, it had inserted the words "of succession" after the word "notification", since article 2 defined the expression "notification of succession", not the term "notification".

27. Paragraph 3 of the 1972 text[7] reproduced, *mutatis mutandis*, the provisions of sub-paragraphs (*a*), (*b*) and (*c*) of article 78 of the Vienna Convention on the Law of Treaties. The Drafting Committee had thought, however, that some departures from that model would be appropriate.

28. Sub-paragraph (*a*) dealt with the transmission of the notification of succession by the newly independent State. The Committee had shortened the 1972 text of that sub-paragraph and had replaced the somewhat vague phrase "transmitted . . . to the States for which it is intended" by the words "transmitted . . . to the parties or the contracting States".

29. In the Committee's view, the purpose of sub-paragraph (*b*) was to determine the date of the notification. If there were no depositary, the notification would have to be considered as made by the newly independent State on the date on which it had been received by all the parties or, as the case might be, by all the contracting States. But if there was a depositary, by analogy with article 16 of the Vienna Convention on the Law of Treaties, the notification would have to be considered as made on the date on which it had been received by the depositary. The Committee had redrafted the sub-paragraph in order to bring out that purpose more clearly.

30. Sub-paragraph (*c*) of the former paragraph 3 concerned the transmission of the notification of succession by the depositary to the States for which it was intended or, to use the terminology proposed by the Drafting Committee, to the parties or the contracting States. The purpose of that sub-paragraph was to protect the interest of the States in question. It laid down the rule that the notification should "be considered as received by the State for which it was intended only when the latter State has been informed by the depositary". The Committee had taken the view that that rule was necessary, but that it should be broadened to cover not only notifications of succession, but also any communication made in connexion therewith by newly independent States. The broader rule should also specify that the preceding provisions of article 17 did not affect any duty the depositary might have to inform the parties. The Drafting Committee considered that, because of its subject-matter, the broader rule should constitute a separate paragraph. It had accordingly drafted the text of the present paragraph 4, which replaced the former sub-paragraph (*c*) of paragraph 3.

31. Mr. USHAKOV, referring to paragraph 4(*a*), suggested that the words "Paragraph 3 does not affect any duty" should be rendered in the French version by the words "*Le paragraph 3 n'affecte aucun des devoirs*" instead of "*Le paragraph 3 n'influe sur aucune des obligations*".

32. Mr. REUTER said he preferred the verb "*affecter*" to the verb "*influer*", which had a less precise and not necessarily legal meaning; but he preferred the term "*obligations*" to the term "*devoirs*". With regard to paragraph 3(*b*), he suggested that the French version should be brought exactly into line with the English, the words "*à la date de sa réception par toutes les parties*" being replaced by the words "*à la date à laquelle elle aura été reçue par toutes les parties*". It was not really reception by all the parties that was meant, for the date

[6] For previous discussion see 1273rd meeting, para. 1.

[7] *Ibid.*

of notification of succession was the date of receipt by the last party.

33. After a brief discussion in which Mr. SETTE CÂMARA, Mr. ELIAS, Sir Francis VALLAT and Mr. CALLE y CALLE took part, the CHAIRMAN suggested that article 17 should be approved, subject to possible changes by the Drafting Committee in the process of final editing.

It was so agreed.

ARTICLE 18[8]

34. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 18:

Article 18

Effects of a notification of succession

1. (*a*) Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 12 or paragraph 2 of article 13 shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

(*b*) However, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except so far as that treaty may be applied provisionally in accordance with article 22.

2. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under paragraph 1 of article 13 shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

35. Article 18 had given rise to a marked divergence of views. Some members had supported its provisions, while others had believed that there was a contradiction between paragraphs 1 and 2 of the 1972 text.[9] Paragraph 1 of that text laid down the general rule that a newly independent State which made a notification of succession should be considered a party or, as the case might be, a contracting State to the treaty on the receipt of the notification. But paragraph 2 provided that, subject to certain exceptions set out in that paragraph, when a newly independent State was considered a party to a treaty which was in force at the date of the succession of States, the treaty was considered as being in force in respect of that State from the date of the succession. How, it was asked, could a treaty which came into force in respect of a State at a certain date be considered to have been in force in respect of that State from an earlier date? It was also pointed out that the retroactive effects of paragraph 2 would place the other parties to the treaty—and possibly third States—in a most difficult situation and would create problems which might be almost insoluble.

36. The Drafting Committee had found that there was some merit in those criticisms and had redrafted article 18 on new lines. The problem was twofold. On the one hand, it was necessary, for the sake of continuity, to establish the existence of a nexus between the newly independent State and the treaty, from the date of succession or from the date of entry into force of the treaty if that was later. On the other hand, it was no less necessary to alleviate the retroactive effects following from that principle.

37. The 1972 text sought to solve the first part of the problem by providing that, while the newly independent State was a party to the treaty only from the date of the notification, the treaty was considered as being in force in respect of that State from the date of the succession. Taking a different view of the matter, the Drafting Committee had come to the conclusion that, in order to establish the nexus, the newly independent State must be considered a party to the treaty from the date of the succession or from the date of entry into force of the treaty, if that was later, and it had drafted paragraph 1(*a*) accordingly.

38. In order to alleviate the retroactive effects resulting from paragraph 1(*a*), however, the Committee had added paragraph 1(*b*), which provided that the operation of the treaty should be considered as suspended between the newly independent State and the other parties to the treaty until the date of making of the notification of succession, except so far as the treaty might be applied provisionally in accordance with article 22.

39. Paragraph 2 of the new text dealt with the case of a notification of succession made under paragraph 1 of article 13.

40. Mr. YASSEEN said he had found the previous version of article 18 unacceptable because of the difficulties its application would have raised as a result of retroactivity. The wording proposed by the Drafting Committee was satisfactory, and elegantly resolved all those difficulties.

41. Mr. USHAKOV said he had been unable to participate in the Drafting Committee's discussion of article 18 and express his disagreement with that provision. The Committee's text would make a notification of succession retroactive to the date of the succession of States or to the date of entry into force of the treaty. But that retroactivity was entirely artificial since, under paragraph 1(*b*) of the proposed article, the application of the treaty would be considered as suspended from the date of the succession until the date of the notification. It was contrary to the spirit and the letter of the Vienna Convention on the Law of Treaties that the operation of a treaty which had not entered into force should be considered as suspended.

42. The Drafting Committee had sought to eliminate the legal effects which might result from retroactivity between the date of succession and the date of notification; but it was obvious that a treaty whose application was suspended nevertheless had legal effects for all the parties to it. Although those effects might be acceptable to and even desired by the newly independent State, they would not be acceptable to the other parties to the treaty, for which the artificial suspension of the operation of the treaty could have grave legal consequences and entail international responsibility. There was no principle of international law which could justify such a

[8] For previous discussion see 1273rd meeting, para. 10.

[9] *Ibid.*

situation. He would therefore prefer article 18 to provide simply that the newly independent State should be considered a party to the treaty from the date of the succession of States.

43. As to drafting, the phrase "except so far as that treaty may be applied provisionally", in paragraph 1(*b*), was unsatisfactory, since in the case of provisional application the operation of the treaty would not be suspended between the dates of succession and notification. That sub-paragraph would suspend the operation of all treaties except those which were applied provisionally, so that they would be the only treaties not suspended. That could scarcely have been the result which the Drafting Committee had intended.

44. He asked that, if the Commission decided to approve article 18 in its present form, his dissent should be recorded in the commentary.

45. Mr. AGO said he thought the Drafting Committee had considerably improved the wording of article 18. In its previous form, the article had contained a contradiction between paragraphs 1 and 2: under paragraph 1, a multilateral treaty would have entered into force for the newly independent State at the time of notification, whereas under paragraph 2 it would have done so at the time of succession. That contradiction had been due to the conflict between the Commission's wish to safeguard the continuity of multilateral treaties and its fear of the dangers such continuity would entail. If a treaty was considered as continuing in force for a long time, and a newly independent State finally decided not to accept that situation, there might be serious consequences for third States, particularly in regard to international responsibility.

46. The new version of article 18 rested on a dual fiction: the treaty was considered to be in force from the date of the succession and at the same time its operation was considered to be suspended. That system was not entirely satisfactory, but it might be necessary to make do with it.

47. It should also be noted that article 18 was closely connected with the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215). That proposal was based on a different system, which distinguished between different kinds of treaty. In the case of some treaties there would be no retroactivity, whereas for others—treaties of a universal character—the principle of continuity would apply. It might be desirable to defer a decision on article 18 until the Commission had discussed article 12 *bis*. The Commission might opt for either system, or prefer to submit an alternative to the General Assembly.

48. The CHAIRMAN agreed that there was a connexion between the new article 12 *bis* proposed by Mr. Ushakov and article 18 and that it might be useful to discuss the two articles together. Mr. Ushakov had, however, maintained that article 18 was inherently defective, and that argument certainly deserved consideration.

49. Mr. USHAKOV observed that the two systems described by Mr. Ago differed on one point. Under his (Mr. Ushakov's) system, treaties of a universal character were considered as being in force until notice of termination was given; all the parties were aware of the legal consequences which could result from that situation. Under the system proposed by the Drafting Committee, on the other hand, the responsibility deriving from a treaty whose operation was suspended became retroactive upon notification of succession. That notion of retroactive responsibility was unacceptable.

50. Mr. AGO agreed that the idea of retroactive international responsibility was unacceptable, but maintained that no such responsibility was involved. He asked the Special Rapporteur to confirm that, under his system, third States were released from their obligation to observe the provisions of the treaty during the interim period and consequently could not be held responsible for failing to observe it.

51. Sir Francis VALLAT (Special Rapporteur) said that it was necessary to make article 18 relate to the practice recorded in the 1972 commentary to that article (A/8710/Rev.1, chapter II, section C) and, at the same time, to make it a realistic provision in the context of the draft articles. In his view, the article in its present form met both those requirements.

52. Paragraph 1 was directly based on practice, as set out in the 1972 commentary, which contained frequent references to the fact that a newly independent State which gave notification of succession was regarded as a party to a treaty from the date of independence. According to the definition in the present draft, a "party" meant a State "which has consented to be bound by the treaty and for which the treaty is in force". There was therefore no doubt that when a State was described as a party, that meant that the treaty was in force for it. From a practical standpoint, that would imply that third States had a responsibility which might be unknown for many years, but which might suddenly be made retroactive to the date of independence of a newly independent State. Such a situation appeared to be unacceptable to the majority of members of the Commission.

53. Paragraph 2 of article 18 was therefore a realistic provision, which recognized the importance of provisional application, but which ruled out the possibility of a State imposing a retroactive liability on another State. It did so by stipulating that a newly independent State should be regarded as a party from the date of independence, but that, subject to provisional application, the treaty should be regarded as suspended in operation. That provision was entirely in conformity with article 57 of the Vienna Convention, concerning the suspension of the operation of a treaty under its provisions or by consent of the parties. He agreed, however, that a fuller explanation of the juridical basis of article 18 might be needed in the commentary.

NEW ARTICLE 12 *bis*

54. The CHAIRMAN said that the discussion had shown a close connexion between draft article 18, as proposed by the Drafting Committee, and the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215), which read:

Article 12 bis

Multilateral treaties of universal character

1. Any multilateral treaty of universal character which at the date of a succession of States is in force in respect of the territory to which the succession of States relates shall remain in force between a newly independent State and the other States parties to the treaty until such time as the newly independent State gives notice of termination of the said treaty for that State.

2. Reservations to a treaty and objections to reservations made by the predecessor State with regard to any treaty referred to in paragraph 1 shall be in force for the newly independent State under the same conditions as for the predecessor State.

3. The consent of the predecessor State, under a treaty referred to in paragraph 1, to be bound by only a part of the treaty, or the choice by the predecessor State, under a treaty referred to in paragraph 1, of different provisions thereof, shall be in force for the newly independent State under the same conditions as for the predecessor State.

4. Notice of termination of a treaty referred to in paragraph 1 shall be given by the newly independent State in accordance with article 17.

5. A treaty referred to in paragraph 1 shall cease to be in force for the newly independent State three months after it has transmitted the notice referred to in paragraph 4.

New paragraph for inclusion in article 2:

(*x*) "multilateral treaty of universal character" means an international agreement which is by object and purpose of worldwide scale, open to participation by all States, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

55. He would therefore call on Mr. Ushakov to introduce the new article, which could then be discussed in conjunction with article 18.

56. Mr. USHAKOV said that if the treaty whose operation was suspended had no legal effect, as some speakers maintained, there was no reason to suspend its operation until the date of the notification of succession; it would be more logical simply to say that the treaty was in force from that date.

57. In his 1972 commentary to article 18 (A/8710/Rev.1, chapter II, section C), the previous Special Rapporteur, Sir Humphrey Waldock, had adduced existing practice in support of the principle of retroactivity. That practice was not conclusive, however, since it had no basis in any dispute, and if there had been any disputes concerning retroactivity, the practice would very probably have been different.

58. His proposed article 12*bis* was based on the principle that not every treaty could have retroactive effect, but that in the case of multilateral treaties of a universal character, such as humanitarian conventions, it was extremely important, not only for a newly independent State, but for all States, that the continuity of the treaty should not be broken. That principle did not conflict with the clean slate principle, for a newly independent State could terminate the application of a treaty to itself at any time. He had used the expression "multilateral treaty of universal character", but he would be prepared to accept any other adequate expression. He would also be prepared to accept another definition of that expression than the one he had suggested for inclusion in article 2.

59. The CHAIRMAN asked the Special Rapporteur whether it would be correct to say that the suspension provided for in paragraph 1(*b*) of the Drafting Committee's text of article 18, would have the same result as a provision on the non-retroactive effect of a notification of succession.

60. Sir Francis VALLAT (Special Rapporteur) said that, since, under paragraph 1(*a*) of article 18, the newly independent State was considered as a party to the treaty from the date of the succession, there would clearly be certain legal consequences. It was true that under paragraph 1(*b*) the operation of the treaty was considered to be suspended as between the newly independent State and the other parties to the treaty, so that no liability would arise in the event of a breach. At the same time, however, there would be an element of continuity. The newly independent State would, as a rule, be considered a party to the treaty from the date of the succession of States. The machinery provisions of the treaty would operate retroactively and the depositary would have to communicate to the newly independent State all notifications received throughout the interim period, that was to say the period between the date of succession or of entry into force, whichever was the later, and the date of making of the notification of succession.

61. The CHAIRMAN said that, under the system proposed by Mr. Ushakov, the multilateral treaties of a universal character covered by his proposed article 12*bis* would remain fully in force for the newly independent State under the same conditions as for the predecessor State. Where other multilateral treaties were concerned, the clean slate rule of article 12 would apply for all purposes and the depositary's duties in relation to the newly independent State would begin only with the notification of succession.

62. Mr. USHAKOV said that, in regard to multilateral treaties which were not of a universal character, it would be possible to consider the formula proposed by the Drafting Committee in article 18. If the Commission adopted his proposed article 12*bis* for multilateral treaties of a universal character, it would be necessary to amend article 12, which the Commission had approved at its 1290th meeting, by inserting an opening proviso such as "Subject to the provisions of article 12*bis*".

63. Mr. KEARNEY said that he found the position somewhat confusing. He had understood that Mr. Ushakov could not accept the actual concept of suspension embodied in paragraph 1(*b*) of draft article 18 as proposed by the Drafting Committee. There would appear to be no difference from that point of view between multilateral treaties of a so-called "universal" character and other multilateral treaties. If suspension as such was objectionable for one kind of multilateral treaty, it would be objectionable for all multilateral treaties.

64. Mr. AGO said he was grateful to the Special Rapporteur for having indicated that the system of suspension made it possible formally to consider a new State as a party to a treaty. He noted, however, that article 18 made no reference to a reasonable period of time and he wondered how long the operation of a treaty would remain suspended if a newly independent State delayed making a notification of succession.

65. Sir Francis VALLAT (Special Rapporteur) said that that was a subsidiary question which would have to be left to be decided by practice. The essence of the Drafting Committee's text for article 18 was that the newly independent State would be entitled to receive, on a retroactive basis, all notices relating to such matters as reservations, which were received by the depositary during the interim period. At the same time, there would be no retroactive application, as between the parties, of the substantive provisions of the treaty—the application to which objection had been raised.

66. Mr. USHAKOV, in reply to Mr. Ago's comment, said that, as provided in article 18, paragraph 1(*a*), only a State which made a notification of succession was to be considered a party to the treaty. If there was no notification of succession, the treaty was neither in force nor suspended; the slate was clean.

67. The CHAIRMAN replying to a question by Mr. Elias, said that, regardless of the expression chosen to describe the multilateral treaties in question and of the definition of that expression, the Commission should consider at the present stage whether it wished to accept the idea underlying Mr. Ushakov's proposal. That idea was that there were certain important multilateral treaties which remained in force for a newly independent State under the same conditions as for the predecessor State, unless the newly independent State gave notice of termination.

68. Mr. USHAKOV repeated that he was not wedded to the expression "multilateral treaties of universal character". He could accept any other wording that reflected the situation contemplated in article 12 *bis*, the essential purpose of which was to establish a presumption of continuity for the important multilateral treaties in question.

69. Mr. ŠAHOVIĆ said that Mr. Ushakov's proposal should be examined very carefully, since it called in question one of the basic principles of the draft prepared by the Commission two years previously. The Commission had decided to uphold the clean slate principle stated in article 12, as against the position taken by the International Law Association.[10] It had also decided to apply that principle to all treaties and not to distinguish between different categories. He himself was convinced that the solution adopted in article 12 was a good one, since it was consistent with the rest of the draft and was based on a correct interpretation of the clean slate principle. If Mr. Ushakov's proposal was adopted, that principle would have to be interpreted differently.

70. Mr. ELIAS said that the discussion on the proposed new article 12 *bis* amounted to a reopening of the decision the Commission had taken on article 12 at its 1290th meeting. If the Commission continued on that course, other members might wish to reopen the discussion on other articles of the draft. The Commission might then be unable to adopt the draft articles as a whole on second reading at the present session, which had only two weeks to run.

71. Mr. AGO observed that the rather strict system laid down in article 18 did, nevertheless, raise a problem: if a newly independent State made a notification of succession, the depositary was obliged to consider it a party to the treaty during the interim period between the date of the succession of States and the date of the notification of succession; but if the newly independent State did not make a notification, was it to be considered retrospectively a party to the treaty during that period? The treaty was considered to be in force during that period only as a matter of form. In fact it was not in force, since it did not give rise to obligations or rights. Hence it would be logical for it to be applicable only from the date of notification.

72. Although that system might be acceptable, it left one very serious question unanswered: to what conventions did it apply? Did it apply to essential humanitarian conventions, such as the Red Cross conventions or the Convention on Genocide? And if the Commission adopted Mr. Ushakov's proposal, it would have to find some procedure for settlement of the disputes that might arise. He did not think the Commission had sufficiently explored all the possibilities open to it—in particular the possibility of resorting to the conciliation procedure provided for in article 66 of the Vienna Convention, which formed part of the law of treaties. Whatever solution the Commission adopted, a conciliation procedure of that sort would be indispensable because of the many practical problems that would inevitably arise.

73. Mr. YASSEEN reminded the Commission that the consensus two years previously had been that law-making treaties were not binding on newly independent States and that those States remained entirely free to accept or not to accept such treaties. It had been suggested that newly independent States were perhaps under a moral obligation to recognize such treaties, but were legally free not to do so. The conventions mentioned by Mr. Ago, however, contained rules of customary law rooted in the conscience of the international community. He believed that those rules, as customary rules, demanded some degree of continuity, but the conventions as such could not be invoked against newly independent States.

74. Mr. USHAKOV said that his proposal was justified in as much as the Commission had deleted from article 18 the provision in paragraph 2 of the 1972 text.

75. Mr. YASSEEN replied that the Drafting Committee had indeed changed its position on article 18, because of the Commission's concern about giving retroactive effect to treaties. The Drafting Committee had overcome that difficulty, but he did not think the Commission had consequently changed its opinion on the principle of the continuity of treaties.

The meeting rose at 1.05 p.m.

[10] See The International Law Association, *Report of the Fifty-third Conference* (Buenos Aires) (1968), pp. xiii-xv and 589 *et seq.*

1294th MEETING

Monday, 15 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, 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.209/Add.2; A/CN.4/L.215; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 18 (Effects of a notification of succession) and new

ARTICLE 12 *bis* (Multilateral treaties of universal character) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 18 as proposed by the Drafting Committee (A/CN.4/L.209/Add.2), together with the new article 12*bis* proposed by Mr. Ushakov (A/CN.4/L.215).

2. Speaking as a member of the Commission, he pointed out that, whatever decision the Commission took on article 12 *bis*, it would still have to deal with article 18, because article 12 *bis* covered only a certain kind of multilateral treaty, whereas article 18 dealt with all multilateral treaties.

3. As he saw it, article 18 laid down that once the notification of succession had been made, the newly independent State became a full party to the treaty, which came into operation from that date as between the newly independent State and all the parties to the treaty. With regard to the past, however, the problem arose of the interim period between the date of the succession of States—or of entry into force of the treaty as the case might be—and the date of notification of succession. Article 18 provided that during that interim period the newly independent State became a party, but the operation of the treaty was considered as suspended between that State and the other parties to the treaty.

4. That rule was a rather bold one, in that it purported to suspend the operation of a treaty retroactively, and suspension was normally a process which related to the future. The rule was, however, subject to an obvious exception, which was stated in the concluding words of paragraph 1(*b*): "except so far as that treaty may be applied provisionally in accordance with article 22". The meaning of that exception was that if, prior to the notification of succession, a notification of provisional application had been made by the newly independent State and accepted by the other States parties, the operation of the treaty would commence accordingly.

5. In his view, however, there was another obvious exception to the rule: the case in which the newly independent State had not made any notification of provisional application, but had expressed its wish that the treaty should be considered as fully applicable on a retroactive basis between itself and the other parties. Should the other parties consent, the case would clearly be one of retroactive application of the treaty.

6. In the text now proposed by the Drafting Committee, article 18 protected the other States parties, but did not provide enough guidance to the newly independent State. He therefore proposed that the possibility to which he had referred should be specified in article 18. That possibility would, of course, exist in any event, but it was better to make express provision for it, as had been done in the case of the exception relating to provisional application under article 22.

7. Mr. KEARNEY asked whether, under that proposal relating to agreement on retroactive application, the matter would be one for bilateral determination, as in the case of provisional application under paragraph 1(*a*) of article 22, or whether the consent of all the parties to the treaty would be required to produce the effect the Chairman had in mind.

8. The CHAIRMAN, speaking as a member of the Commission, said that the system he proposed would be similar to that which operated in the case of provisional application.

9. Mr. USHAKOV said that the new system suggested by Mr. Ustor would be even more artificial than the one provided for in the Drafting Committee's text, since the date of entry into force of the multilateral treaty would vary according to the party concerned. The reason why he had proposed article 12 *bis* was to overcome the drawbacks of the system adopted in 1972, but he feared that the Commission did not have sufficient time to consider his proposal. He therefore suggested that consideration of article 12 *bis* should be deferred and that the attention of the General Assembly should be drawn to it by a statement in the report to the effect that the Commission had not had time to examine his proposal in detail.

10. The CHAIRMAN thanked Mr. Ushakov for his co-operative attitude. The Commission, however, still had to deal with article 18 and meet the valid criticisms made of the 1972 text of the article (A/8710/Rev.1, chapter II, section C), with particular reference to retroactivity. In that connexion he drew attention to the comments of the Government of Tonga on article 11 and those of the Government of Poland on article 12 (A/CN.4/278/Add.2, paras. 215 and 219).

11. Speaking as a member of the Commission, he said he fully agreed with Mr. Ushakov that the treaty should come into force as between the newly independent State and the other parties from the date of notification of succession only. Problems arose, however, such as the one to which the Government of Tonga had drawn attention, namely, the case of an aircraft crash which occurred after the date of independence, but before the notification of succession. A problem of that type would be readily solved if an "opting out" system had been adopted in the draft articles, because the Warsaw Con-

vention on International Carriage by Air would then have applied until the option was exercised. But the "opting out" system had not found much favour in the Sixth Committee, particularly among the newly independent States.

12. In the circumstances, the Commission had been led to adopt an "opting in" system, which would not solve problems of the type mentioned by the Government of Tonga. The proposal which he himself had now made would draw attention to the possibility open to the newly independent State of declaring its willingness to apply treaty provisions on a retroactive basis.

13. Mr. USHAKOV said that a treaty could be regarded as being in force from the date of the succession if all the parties to it so agreed, but if one of the parties rejected the offer of the newly independent State, there could be no retroactive application of the treaty provisions.

14. Mr. AGO said that the new system proposed in article 8 was far less ambitious than the one adopted in 1972, since the treaty would really enter into force at the time of the notification of succession. It was only in respect of certain minor matters that there could be retroactivity. Otherwise, article 18 neither conferred rights nor imposed obligations on the parties.

15. In his opinion, the system proposed by Mr. Ustor raised no problem with regard to the date of entry into force of the treaty. It was perfectly natural that a treaty should enter into force on different dates as between different parties. The real problem raised by Mr. Ustor's proposal was that of determining the will of the other parties to the treaty. If the will of the parties was expressly manifested, there was clearly no problem; but, as Mr. Ustor himself had said, States should be able to manifest their will tacitly by their conduct. How was such conduct to be interpreted in practice, and how much time must elapse before a conclusion could be drawn from it? Should there be some kind of presumption—for example, that the other parties consented if they did not expressly manifest their objection?

16. A further question was whether it was really necessary to defer the consideration of article 12*bis*, as Mr. Ushakov himself had suggested, and to state in the report that the had not had time to examine it. In his opinion, it would be preferable to incorporate Mr. Ushakov's proposal in the draft articles, by saying that treaties of a humanitarian character should be considered as being in force from the date of the succession—a proposition to which he fully subscribed. That suggestion obviously raised a difficulty, since it would be necessary to determine which treaties were humanitarian; but he thought the Commission might be able to solve that problem by specifying in a definition what it understood by that particular class of treaty.

17. If the Commission followed that course, it would also have to adopt a system for the settlement of disputes based on the Vienna Convention on the Law of Treaties,[1] to deal with all the practical problems that were bound to arise. It might even adopt the system provided for in the Vienna Convention, namely, recourse to the conciliation procedure laid down in the annex to that Convention. As that system would be in existence, there was no reason for not applying it to the settlement of disputes arising in a domain so closely connected with that of the Vienna Convention as succession of States in respect of treaties.

18. He thought the Commission should make an effort to settle those questions rather than merely say in its report that it had not had time to examine them.

19. Sir Francis VALLAT (Special Rapporteur) said it would be extremely difficult to introduce into article 18 an explicit provision setting out the possibility mentioned by Mr. Ustor. The same effect could be achieved in practice, however, by amending the opening clause of paragraph 1 of article 18, so that it would also be applicable to sub-paragraph (*b*). The new text would read:

> 1. Unless the treaty otherwise provides or it is otherwise agreed:
>
> (*a*) a newly independent State which makes a notification of succession under article 12 or paragraph 2 of article 13 shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date;
>
> (*b*) however, the operation of the treaty shall be considered as suspended...

20. The commentary would explain the effect of the proviso "Unless . . . it is otherwise agreed" on the provisions of paragraph 1(*b*). It would thus be made clear that the treaty could have a retroactive effect as a result of the agreement of the other parties to accept the offer of the newly independent State.

21. He had some misgivings about Mr. Ago's suggestion concerning humanitarian conventions. That question had been dealt with at length in paragraph (10) of the Commission's 1972 commentary to article 11 (A/8710/Rev. 1, chapter II, section C). After referring to the practice of the depositary of waiting for a specific manifestation of the successor State's will with respect to each convention, that paragraph of the commentary went on: "As to the practice of individual States, quite a number have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessor's ratifications. On the other hand, almost as large a number of new States have not acknowledged any obligation derived from their predecessors, and have become parties by depositing instruments of accession". That paragraph was one of the key paragraphs in a long and careful consideration of the question whether there was any customary rule of international law which would require a newly independent State to accept its predecessor's obligations under the humanitarian conventions. The commentary rightly concluded that State practice did not seem to indicate the existence of any such rule.

22. In view of the care with which that question had been dealt with under article 11, he was concerned at what appeared to be an attempt to reopen it.

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 298, article 66.

23. The CHAIRMAN, speaking as a member of the Commission, said that although he would have preferred the introduction of an explicit provision on the lines he had suggested earlier, he would be prepared to accept the rewording proposed by the Special Rapporteur, provided that the commentary made it clear that the change had been made in order to meet his point.

24. Mr. KEARNEY said that, as he understood the position, Mr. Ago had not advocated that the obligations of the humanitarian conventions should be imposed on newly independent States, but had merely suggested that the presumption of non-continuity should be reversed in the case of those conventions.

25. The CHAIRMAN said that he had also understood Mr. Ago to favour the inclusion of a clause based on the proposed article 12 *bis* to deal with the humanitarian conventions, together with a clause on the settlement of disputes based on article 66 of the Vienna Convention on the Law of Treaties and the Annex mentioned in that article.

26. Mr. USHAKOV said that no treaty could provide for retroactive suspension of its operation, yet the proposed application of the words "Unless the treaty otherwise provides" to sub-paragraph (*b*) would be tantamount to saying that it could. In his opinion, therefore, it would be better to leave article 18 as it was.

27. The CHAIRMAN, speaking as a member of the Commission, said that, like Mr. Ushakov, he found the idea of retroactive suspension of the operation of a treaty extremely artificial. But as that idea had been introduced into article 18, he had proposed that a specific reference should be made to the possibility of express agreement by the parties to retroactive application. The adoption of his proposal would obviate the disadvantages of the "opting in" system embodied in the draft articles. As pointed out by the Polish Government, that system created uncertainty for the other parties to the treaty, which could last a considerable time.

28. Sir Francis VALLAT (Special Rapporteur) said that the small change in drafting which he had suggested for paragraph 1 would achieve the result desired by the Chairman.

29. With regard to Mr. Ushakov's point concerning the application of the words "Unless the treaty otherwise provides" to sub-paragraph (*b*), the opening clause of paragraph 1 would read: "Unless the treaty otherwise provides or it is otherwise agreed". Since one of the two elements in that clause, namely, the one reflected in the words "otherwise agreed", unquestionably applied to sub-paragraph (*b*), the construction of the whole paragraph was perfectly correct.

30. Mr. USHAKOV said he wished to place on record that he abstained from participating in the decision on article 18.

31. The CHAIRMAN said that, if there were no further comments, he would take it that, subject to that abstention, the Commission approved article 18 as reworded by the Special Rapporteur, on the understanding that the commentary would explain the reason for that rewording, as well as the uneasiness of some members, including himself, about the notion of retroactive suspension of the operation of a treaty.

It was so agreed.

ARTICLE 12 (Participation in treaties in force at the date of the succession of States) and

ARTICLE 13 (Participation in treaties not in force at the date of the succession of States) *(resumed from the 1290th meeting)*

32. The CHAIRMAN reminded the Commission that when it had approved articles 12 and 13 at its 1290th meeting, it had left in square brackets certain words in paragraph 1 of article 12 and paragraph 2 of article 13, pending a decision on article 18. Following the decision just taken to approve article 18, he suggested that the Commission should now decide to delete the words in square brackets. The two paragraphs in question, with consequential amendments, as proposed by the Drafting Committee (A/CN.4/L.209/Add. 2, footnote 2), would then read:

Article 12, paragraph 1

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

Article 13, paragraph 2

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

33. If there were no comments, he would take it that the Commission agreed to approve those changes.

It was so agreed.

34. The CHAIRMAN suggested that the Commission should postpone taking a decision on the new article 12 *bis* proposed by Mr. Ushakov.

It was so agreed.[2]

ARTICLE 19[3]

35. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 3 and article 19:

SECTION 3. BILATERAL TREATIES

Article 19

Conditions under which a treaty is considered as being in force in the case of a succession of States

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:

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[2] See 1296th meeting, para. 77.

[3] For previous discussion see 1279th meeting, para. 1.

(*a*) they expressly so agree; or

(*b*) by reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

36. The only changes made in the 1972 text[4] were the addition of the words "in the case of succession of States" to the title and the replacement of the words "successor State" by "newly independent State" in paragraph 2.

The title of section 3 and the title and text of article 19 were approved.

ARTICLE 20[5]

37. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 20:

Article 20

The position as between the predecessor and the newly independent State

A treaty which under article 19 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as in force also in the relations between the predecessor and the newly independent State.

38. Some members of the Commission had been in favour of inserting the word "bilateral" before the word "treaty", but the Drafting Committee had considered that unnecessary. It should, however, be pointed out in the commentary that the article related exclusively to bilateral treaties.

39. Sir Francis VALLAT (Special Rapporteur) proposed that the word "State " should be inserted after the word "predecessor" in the last line; that would be in conformity with the practice followed in the previous articles.

40. Mr. RAMANGASOAVINA suggested that in the French version the words "*comme étant en vigueur aussi*" should be replaced by the words "*comme étant également en vigueur*".

41. The CHAIRMAN suggested that the Commission should approve article 20 with the changes suggested by the Special Rapporteur and Mr. Ramangasoavina.

It was so agreed.

ARTICLE 21[6]

42. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 21:

Article 21

Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 19 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

(*a*) does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party;

(*b*) is not suspended in operation in the relations between them by reason only of the fact that it has subsequently been suspended in operation in the relations between the predecessor State and the other State party;

(*c*) is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered as in force, or as the case may be, in operation between the newly independent State and the other State party if it is established in accordance with article 19 that they so agreed.

3. The fact that a treaty has been amended in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the newly independent State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

43. The only change the Drafting Committee had made in the 1972 text[7] was to replace the words "successor State" in paragraphs 2 and 3 by the words "newly independent State".

44. The CHAIRMAN suggested that the Commission should approve article 21 as proposed by the Drafting Committee.

It was so agreed.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.211)

Chapter IV

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

45. The CHAIRMAN invited the Commission to examine chapter IV of its draft report (A/CN.4/L.211).

A. INTRODUCTION

1. *Historical review of the work of the commission* (paragraphs 1-12)

Paragraphs 1-12 were approved without comment.

2. *General remarks concerning the draft articles* (paragraphs 1-10)

Paragraphs 1-5

Paragraphs 1-5 were approved without comment.

Paragraph 6

46. Mr. REUTER (Special Rapporteur) suggested that in the third sentence of the French version of paragraph 6, the words "*ce qui pourra éventuellement être le cas*" should be replaced by the words "*ce qui pourrait*

[4] *Ibid.*

[5] For previous discussion see 1279th meeting, para. 30.

[6] For previous discussion see 1280th meeting, para. 1.

[7] *Ibid.*

éventuellement être le cas". No change was needed in the English version.

Paragraphs 6 was approved with that amendment to the French text.

Paragraphs 7 and 8

Paragraphs 7 and 8 were approved without comment.

Paragraph 9

47. Mr. KEARNEY proposed that in the second sentence the words "or, in this particular case" should be amended to read "and, in this particular case". That change applied to the English text only.

Paragraph 9 was approved with that amendment to the English text.

Paragraph 10

48. The CHAIRMAN, speaking as a member of the Commission, said that the word "vital" in the last sentence of the English text was not a satisfactory translation of the French word "*essentiels*"; he suggested that it should be replaced by the word "fundamental".

It was so agreed.

Paragraph 10 was approved with that amendment to the English text.

B. DRAFT ARTICLES ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

PART I. INTRODUCTION

Text of article 1

(Scope of the present articles)

The texts of article 1 and of foot-note 3 were approved.

Commentary to article 1

Paragraph (1)

49. After an exchange of views between Mr. KEARNEY and Mr. REUTER concerning the English version of the third sentence of paragraph (1), the CHAIRMAN suggested that the English translation of that sentence should be revised by the Secretariat.

Paragraph (1) was approved, subject to revision of the English text.

Paragraph (2)

50. Mr. USHAKOV said he was not sure that paragraph (2) made it clear why the term "agreement" should be kept to denote conventional acts of an otherwise unspecified kind.

51. Mr. REUTER (Special Rapporteur) said that the term "agreement" was the most general of all the possible terms; it covered both written, oral and tacit acts and the acts of any international entity whatsoever. Several members of the Commission had said that they were in favour of using the term "treaty" rather than "agreement". He had meant to make it clear in the commentary that the word "agreement" should be kept for acts the nature of which was not identified by the parties to them or by any formal characteristic. The term "conventional acts" was completely general. To meet Mr. Ushakov's point, however, he suggested that the last phrase of the paragraph might be redrafted to read: "conventional acts, whatever the parties to them and whatever their form".

It was so agreed.

Paragraph (2), as amended, was approved.

Text of article 2

(Use of terms)

The text of article 2 was approved, subject to a slight rearrangement of the French text of paragraph 1(a).

Commentary to article 2

Paragraph (1)

Paragraph (1) was approved without comment.

Paragraph (2) and foot-note 6

52. Mr. KEARNEY asked the Special Rapporteur whether it might not be desirable to give an example of the type of organization to which paragraph 2 referred.

53. Mr. REUTER (Special Rapporteur) suggested that the words "such as the European Communities" should be inserted after the words "certain integrated organizations" in the second sentence.

It was so agreed.

Paragraph (2), as amended, and foot-note 6 were approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved without comment.

Paragraph (5)

54. Mr. KEARNEY asked the Special Rapporteur whether the words "by participating through their organs in the preparation, and in some cases even the adoption, of the text of certain treaties", in the last sentence, did not refer to a rather unusual case.

55. Mr. REUTER (Special Rapporteur) said that in so far as the question related to adoption, there were quite a number of international instruments which had been adopted by such organs as the Assembly of the League of Nations and the General Assembly of the United Nations, so he did not think the case could be regarded as very exceptional. He was, however, quite prepared to delete the phrase if the Commission thought it unnecessary.

56. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, when a convention was adopted in the General Assembly of the United Nations, the Organization was not participating as such in its adoption, but merely providing the necessary framework in the form of a conference; the convention was, in fact, adopted by the representatives of Governments. As he understood the phrase mentioned by Mr. Kearney, it would cover such instruments as international commodity agreements, in which the European Economic Community might perhaps be regarded as participating as a contracting party.

57. Mr. REUTER (Special Rapporteur) explained that the term "adoption" should be understood to mean deliberation by an organ as such, which established the substance of a text *ne varietur*. History provided many examples. From the doctrinal standpoint, however, it could be maintained that an assembly acting in that way was not really an assembly, but a meeting of the delegations of member States. The problem could perhaps be solved by a change in wording.

58. Mr. USHAKOV observed that the term "negotiating State" could apply only to a State which had taken part in both the drawing up and the adoption of a treaty and had adopted it on its own behalf. When the General Assembly of the United Nations took part in the drawing up and adoption of a treaty, it did not adopt the text on its own behalf and the definition in paragraph 1(*e*) of article 2 was therefore not applicable to it. It would, on the other hand, be applicable to the Council for Mutual Economic Assistance when it participated in the drawing up and adoption of a treaty concluded with an individual State.

59. Mr. YASSEEN said that practice existed in that matter and was far from being exceptional. Both the General Assembly of the United Nations and other organs of international organizations took part in drawing up and adopting international treaties. The question remained whether they were then acting as organs of the organization or as assemblies in which States could be represented. The second alternative seemed to be corroborated by the fact that States not members of the United Nations had participated to some extent in the work of the Sixth Committee of the General Assembly for the purpose of adopting certain conventions.

60. Mr. REUTER (Special Rapporteur) suggested that the term "adoption", which was defined in the Vienna Convention on the Law of Treaties, should be replaced by the less technical term "establishment".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6)-(9)

Paragraphs (6)-(9) were approved without comment.

Paragraph (10)

61. Mr. USHAKOV suggested that the wording of the last phrase of paragraph 10 should be toned down by adding the words "subject to the provisions of article 6" or "which have relevant rules".

62. After a brief exchange of views between Mr. KEARNEY and Mr. REUTER (Special Rapporteur), the CHAIRMAN, speaking as a member of the Commission, suggested that the best solution would be to delete the underlining from the word "all" in that phrase.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were approved without comment.

Paragraph (13)

63. Mr. REUTER (Special Rapporteur) observed that the first sentence of paragraph (13) should be amended in the same way as the last phrase of paragraph (10).

Paragraph (13) was approved with that amendment.

Paragraphs (14)-(16) and footnote 11

Paragraphs (14)-(16) and footnote 11 were approved without comment.

Commentary to article 3
(International agreements not within the scope of the present articles)

Paragraph (1)

Paragraph (1) was approved without comment.

Paragraph (2)

64. Mr. KEARNEY said he would hesitate to accept the statement that an agreement made by telex was not an agreement in writing. He therefore proposed that the words "particularly telex", in the third sentence, should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3)-(6)

Paragraphs (3)-(6) were approved without comment

Commentary to article 4
(Non-retroactivity of the present articles)

The commentary to article 4 was approved without comment.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

Section 1. Conclusion of treaties

Commentary to article 6
(Capacity of international organizations to conclude treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved without comment.

Paragraph (3)

65. In reply to a question by Mr. KEARNEY, the CHAIRMAN said that the translation of the French word "*physionomie*" in the second sentence would be revised by the Secretariat.

Paragraph (3) was approved, subject to that revision of the English text.

Paragraphs (4)-(6)

Paragraphs (4)-(6) were approved without comment.

Chapter IV as a whole was approved.

The meeting rose at 6.20 p.m.

1295th MEETING

Wednesday, 17 July 1974, at 10.15 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. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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.209/Add.3; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to resume consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.209/Add.3).

ARTICLE 22[1]

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 4 of part III and article 22:

SECTION 4. PROVISIONAL APPLICATION

Article 22

Multilateral treaties

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls under article 12, paragraph 3, or article 13, paragraphs 2 and 4, the consent of all the parties to such provisional application is required.

3. If, at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

4. Nevertheless, in the case of a treaty which falls under article 12, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. The Drafting Committee had made no change in the title of article 22 or in the title of section 4 (Provisional application).

4. The text of article 22[2] had consisted of two paragraphs, both of which related exclusively to multilateral treaties which, at the date of the succession of States, were in force in respect of the territory to which the succession related. The text now proposed by the Drafting Committee consisted of five pararagraphs, paragraphs 1 and 2 of which corresponded to the two paragraphs of the 1972 text, except for a few drafting changes.

5. One such change related to the words "the successor State notifies the parties or the depositary" appearing in paragraph 1 of the 1972 text. Many other articles of the draft specified that notification should be made to the depositary or to the States concerned. Some of those articles referred to "notification of succession", a term which was defined in article 2 and which was the subject-matter of article 17; others referred to notifications of another kind. To avoid all misunderstanding, the Committee proposed that the word "notification" should be used exclusively for notifications of succession, and that other notifications should be designated by the term "notice". A separate article would be devoted to the procedure by which such "notice" had to be given.[3] In paragraph 1, the Committee had accordingly replaced the words he had quoted by the words "the newly independent State gives notice". The French and Spanish translations of the words "gives notice" were only provisional and would be reviewed by the Drafting Committee at the final editing stage. The substitution of the words "newly independent State" for "successor State" was in line with the decision already taken in regard to other articles; that change would, of course, be made throughout the draft.

6. Paragraphs 3 and 4 of the new text extended the rules set out in paragraphs 1 and 2 to the case of a treaty which was not yet in force at the date of the succession of States, but which was being applied provisionally—a case that had not been covered by the 1972 text.

7. Paragraph 5 was a new provision, based on paragraph 2 of article 12 and on paragraph 3 of article 13, as approved by the Commission. A number of other articles contained similar provisions, with differences in wording for which there appeared to be no good reason. In the interests of consistency, the Drafting Committee had therefore adopted for all the provisions in question a single model based on paragraphs 2(*a*) and 3(*a*) of article 25. The wording of paragraph 5 of article 22 was the first instance of the use of that model.

8. Sir Francis VALLAT (Special Rapporteur) pointed out that the words "or article 13, paragraphs 2 and 4" had been included in paragraph 2 by mistake and should be deleted.

9. The words "which falls under article 12, paragraph 3", in the same paragraph, were not altogether

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[1] For previous discussion see 1280th meeting, para. 26.

[2] *Ibid.*

[3] See next meeting, para. 44.

appropriate and he suggested that they should be replaced by the words: "which falls within the category mentioned in article 12, paragraph 3".

10. Mr. USHAKOV proposed that the words "in respect of its territory" should be inserted after the words "should continue to be applied provisionally" in paragraph 3.

11. Sir Francis VALLAT (Special Rapporteur) accepted that change, which was in conformity with the language adopted throughout the draft. He proposed that the same words should also be inserted after the words "should be applied provisionally", in paragraph 1, so as to make the intention absolutely clear.

12. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the title of section 4 of part III and the title and text of article 22, as proposed by the Drafting Committee, with the changes proposed by Mr. Ushakov and the Special Rapporteur.

It was so agreed.

ARTICLE 23[4]

13. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 23:

Article 23

Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned if:

(*a*) they expressly so agree; or

(*b*) by reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

14. Article 23 dealt with the provisional application of bilateral treaties. Like article 22, article 23 of the 1972 draft[5] had related exclusively to treaties which were in force at the date of the succession. As in the case of article 22, the Drafting Committee proposed that the scope of article 23 should be enlarged to cover treaties which were provisionally applied at the date of the succession. It had also made some minor drafting changes in the text of the article.

15. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved the title and text of article 23, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 24[6]

16. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 24:

Article 24

Termination of provisional application

1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 22 may be terminated:

(*a*) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty, and the expiration of the notice; or

(*b*) in the case of a treaty which falls under article 12, paragraph 3, or under article 13, paragraph 4, by reasonable notice of termination given by the newly independent State or the parties or, as the case may be, the contracting States, and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 23 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned, and the expiration of the notice.

3. Unless the treaty otherwise provides or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

4. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 22 shall be terminated if the newly independent State gives notice of its intention not to become a party to the treaty.

17. Article 24 related to termination of the provisional application of treaties. The Drafting Committee had observed that some of the provisions of the 1972 text[7] belonged to the law of treaties rather than to the law of State succession. Paragraph 1(*a*), for instance, stipulated that the provisional application of a treaty terminated if the States provisionally applying it so agreed. A similar provision appeared in paragraph 2(*a*). The Committee had decided that such provisions had no place in article 24, which should deal only with the grounds for termination of provisional application that belonged to the law of State succession strictly speaking. It had accordingly reworded the opening clauses of paragraphs 1 and 2 to make it clear that those paragraphs did not attempt to give an exhaustive list of grounds for such termination.

18. Like paragraph 1 of the 1972 text, paragraph 1 of the Drafting Committee's text dealt with termination of the provisional application of multilateral treaties. It reproduced, with a number of drafting changes, the corresponding provisions of the 1972 text, but without subparagraph (*a*).

19. Paragraph 2 dealt with the termination of the provisional application of bilateral treaties and corresponded to paragraph 2 of the 1972 text, again without subparagraph (*a*). Paragraph 3 reproduced the corresponding provisions of the 1972 text in a simplified form.

20. Paragraph 4 was a new provision which was obviously necessary, since it would be unfair to propose the continuation of the provisional application of a treaty once the new independent State had given notice of its intention not to become a party to the treaty.

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[4] For previous discussion see 1280th meeting, para. 73.

[5] *Ibid.*

[6] For previous discussion see 1281st meeting, para. 1.

[7] *Ibid.*

21. Mr. RAMANGASOAVINA said that during the debate on article 24 he had pointed out that the newly independent State could decide to accede definitively to the treaty before the termination of provisional application.[8] He would have liked article 24 to contain a provision under which the newly independent State could accede definitively to the treaty by a notification of succession during the period of provisional application. Could he take it that that provision was implicit in the present text of the article?

22. Mr. USHAKOV proposed that following the decision taken regarding article 22, the words "or under article 13, paragraph 4" should be deleted from paragraph 1(*b*). The phrase "which falls under article 12, paragraph 3" in the same paragraph, should be replaced by the new wording suggested by the Special Rapporteur for article 22, paragraph 2.

23. Sir Francis VALLAT (Special Rapporteur) said he accepted those proposals. In reply to Mr. Ramangasoavina, he explained that the Drafting Committee had considered it unnecessary to add any provision to cover the case in which provisional application terminated as such because the treaty came fully into force. The reason was that article 24 had been recast so as not to give the impression of being exhaustive. The article did not contain a complete list of grounds of termination, and the one mentioned by Mr. Ramangasoavina was one of those not mentioned.

24. Mr. RAMANGASOAVINA observed that paragraph 4 provided that the provisional application of a multilateral treaty should be terminated if the newly independent State gave notice of its intention not to become a party to the treaty. He thought it might also have been indicated that the provisional application of the treaty terminated if the newly independent State made a notification of succession. He would not press that suggestion, but would like the commentary to make it clear that a notification of succession could terminate the provisional application of the treaty.

25. Mr. USHAKOV said that if the newly independent State made a notification of succession to the treaty, the application of the treaty did not terminate, but continued on a different basis, which was no longer provisional, but definitive, since the treaty then entered into force.

26. The CHAIRMAN said that the commentary would make that point clear. He assumed that it would also explain that the enumeration in article 24 was not exhaustive. He would like to know, however, how that point was made in the text of the article itself.

27. Sir Francis VALLAT (Special Rapporteur) said that article 24 was cast in a purely permissive form. Both paragraph 1 and paragraph 2 used the words "may be terminated", which made it plain that there could be other cases of termination.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 24, as proposed by the Drafting Committee, with the changes proposed by Mr. Ushakov.

It was so agreed.

ARTICLE 25[9]

29. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 5 and article 25:

SECTION 5. NEWLY INDEPENDENT STATES FORMED FROM TWO OR MORE TERRITORIES

Article 25

Newly independent States formed from two or more territories

1. Articles 12 to 24 apply in the case of a newly independent State formed from two or more territories.

2. When a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of articles 12, 13 or 19 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State unless:

(*a*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(*b*) in the case of a multilateral treaty not falling under article 12, paragraph 3, or under article 13, paragraph 4, the notification of succession is restricted to the territory in respect of which the treaty was in force at the date of the succession of States, or in respect of which consent to be bound by the treaty had been given prior to that date;

(*c*) in the case of a multilateral treaty falling under article 12, paragraph 3, or under article 13, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree; or

(*d*) in the case of a bilateral treaty, the newly independent State and the other State concerned otherwise agree.

3. When a newly independent State formed from two or more territories becomes a party to a multilateral treaty under article 14 and by the signature or signatures of the predecessor State or States it had been intended that the treaty should extend to one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State unless:

(*a*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(*b*) in the case of a multilateral treaty not falling under article 14, paragraph 4, the ratification, acceptance or approval of the treaty is restricted to the territory or territories to which it was intended that the treaty should extend; or

(*c*) in the case of a multilateral treaty falling under article 14, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree.

30. Article 25 was the only article in section 5. In the 1972 draft (A/8710/Rev.1, chapter II, section C), the section had been entitled "States formed from two or more territories", whereas the title of the article itself had been "Newly independent States formed from two or more territories". The Drafting Committee had

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

[9] For previous discussion see 1281st meeting, para. 20.

retained the title of the article and had inserted the words "Newly independent" before the words "States" in the title of the section, in order to emphasize that it belonged to part III of the draft.

31. The 1972 text of article 25 had consisted of a general rule, set out in an introductory clause, and of four exceptions to it, set out in sub-paragraphs (*a*), (*b*), (*c*) and (*d*). The Drafting Committee had observed that the general rule applied exclusively to treaties that were in force at the date of the succession. The rule was thus restricted to treaties to which the newly independent State became a party by virtue of article 12 or article 19. Under the provisions of sections 2 and 3 of part III, however, the right of a newly independent State to inherit a treaty was not limited to treaties that were in force at the date of the succession of States.

32. Thus, under article 13, paragraph 2, a newly independent State could establish its status as a party to a multilateral treaty which entered into force after the date of the succession of States if the predecessor State was a contracting State in respect of the territory to which the succession related; and under article 14, paragraph 1, a newly independent State could, under certain conditions, become a party to a multilateral treaty which the predecessor State had signed subject to ratification, acceptance or approval. The Drafting Committee had come to the conclusion that there was no valid reason to exclude from the scope of article 25 the situations covered in articles 13 and 14, and it had redrafted article 25 accordingly.

33. Paragraph 1 of the new text stated that articles 12 to 24 applied in the case of a newly independent State formed from two or more territories. That provision was required in order to make it clear that such a State had, *inter alia*, the right to become a party to a treaty under articles 13 and 14.

34. Paragraph 2 of the new text set out the provisions applicable to a treaty to which a newly independent State formed from two or more territories became a party by virtue of articles 12, 13 or 19. It reproduced, with some changes, the general rule and the exceptions to that rule contained in the 1972 text of article 25.

35. Paragraph 3 applied to a treaty to which a State became a party by virtue of article 14. Its provisions were an adaptation of the 1972 text to that particular situation.

36. Sir Francis VALLAT (Special Rapporteur) proposed that, at the end of the opening clause of paragraph 3, the words "the entire territory of that State" should be amended to read: "the entire territory of the newly independent State."

It was so agreed.

37. Mr. USHAKOV proposed that the references to article 13, paragraph 4, in paragraphs 2(*b*) and 2(*c*) should be deleted. In addition, the phrase "falling under article 12" should be replaced in each case by the new wording suggested by the Special Rapporteur for article 22, paragraph 2.

38. Sir Francis VALLAT (Special Rapporteur) suggested that those points should be left for the Drafting Committee to decide at the stage of final editing. There was a difference between article 25 and article 22, in that article 25 really referred to the substance of the previous articles and not merely to a certain category of treaties.

39. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the title of section 5 of part III and the title and text of article 25, as proposed by the Drafting Committee, with the amendment adopted to paragraph 3 and subject to final editing.

It was so agreed.

Title of part IV

40. Mr. HAMBRO (Chairman of the Drafting Committee) said that, in the 1972 draft (A/8710/Rev.1, chapter II, section C), part IV consisted of articles 26, 27 and 28 and was entitled "Uniting, dissolution and separation of States". The word "dissolution" had been included in that title in order to cover article 27, the title of which had been: "Dissolution of a State". The Drafting Committee, however, had amended the title of article 27 to read "Succession of States in cases of separation of parts of a State", and had accordingly deleted the word "dissolution" from the title of part IV.

41. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved the title proposed by the Drafting Committee for part IV, which read: "Uniting and separation of States".

It was so agreed.

ARTICLES 26,[10] 26 *bis* AND 26 *ter*

42. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and texts for article 26 and for two new articles numbered provisionally 26 *bis* and 26 *ter*:

Article 26

Effects of a uniting of States on treaties in force at the date of the succession of States

1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

(*a*) the successor State and the other State party or States parties otherwise agree; or

(*b*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:

(*a*) in the case of a multilateral treaty other than one falling within the category mentioned in article 12, paragraph 3, the successor State gives notice in writing to the depositary or, if there is no depositary, to the parties that the treaty shall apply in respect of its entire territory;

(*b*) in the case of a multilateral treaty falling within the category mentioned in article 12, paragraph 3, the successor State and all the parties otherwise agree; or

[10] For previous discussion see 1282nd meeting, para. 1.

(*c*) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

Article 26 bis

Effects of a uniting of States on treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a successor State falling within article 26 may, by giving notice in writing, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, any of the predecessor States, which have united, was a contracting State to the treaty.

2. Subject to paragraphs 3 and 4, a successor State falling within article 26 may, by giving notice in writing, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date any of the predecessor States, which have united, was contracting State to the treaty.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

5. Any treaty to which the successor State becomes a contracting State or a party in conformity with paragraph 1 or 2 shall apply only in respect of the part of the territory of the successor State in respect of which consent to be bound by the treaty had been given prior to the date of the succession of States unless:

(*a*) in the case of a multilateral treaty not falling within the category mentioned in article 12, paragraph 3, the successor State indicates in its notice given under paragraph 1 or 2 that the treaty shall apply in respect of its entire territory; or

(*b*) in the case of a multilateral treaty falling within the category mentioned in article 12, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

6. Sub-paragraph 5(*a*) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

Article 26 ter

Effects of a uniting of States in the case of treaties signed by a predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States one of the predecessor States had signed a multilateral treaty subject to ratification, acceptance or approval, a successor State falling within article 26 may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

4. Any treaty to which the successor State becomes a party or a contracting State in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was signed by one of the predecessor States unless:

(*a*) in the case of a multilateral treaty not falling within the category mentioned in article 12, paragraph 3, the successor State when ratifying, accepting or approving the treaty gives notice that the treaty shall apply in respect of its entire territory;

(*b*) in the case of a multilateral treaty falling within the category mentioned in article 12, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

5. Sub-paragraph 4(*a*) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

43. Article 26 of the 1972 text[11] had been entitled "Uniting of States" and had consisted of three paragraphs. Paragraph 1 laid down, in its introductory clause, the rule that, on the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties, continued in force between the successor State and such other States parties. There were two exceptions to that rule, set out in sub-paragraphs (*a*) and (*b*). The introductory clause of paragraph 2 laid down the rule that any treaty continuing in force in conformity with paragraph 1 was binding only in relation to the area of the territory of the successor State in respect of which the treaty had been in force at the date of the uniting of the States. Three exceptions to that rule were set out in sub-paragraphs (*a*), (*b*) and (*c*). Lastly, paragraph 3 specified that paragraphs 1 and 2 applied also when a successor State itself united with another State.

44. The Drafting Committee had decided to delete the provisions of paragraph 3, since they actually referred to two distinct and not simultaneous successions of States, each of which should be considered separately. It had reproduced the substance of paragraphs 1 and 2, with a number of drafting changes, in the new text of the article 26 it now proposed.

45. The Committee had amended the title of the article to read: "Effects of a uniting of States on treaties in force at the date of the succession of States", since article 26 related only to treaties which were in force at the date of the succession.

46. Because of that limitation of the scope of article 26, there was no provision in the draft articles that would enable a successor State which emerged from a uniting of States to become a party, or a contracting State, to a treaty which was not in force at the date of the succession, by procedures similar to those established by articles 13 and 14 for newly independent States. The Drafting Committee had come to the conclusion that there was no valid reason for such a difference in treatment between two categories of successor States, namely, the newly independent and those which emerged from a uniting of States. It had therefore prepared two new articles which it now proposed to the Commission.

47. The first article, provisionally numbered 26*bis*, was entitled: "Effects of a uniting of States on treaties not in

[11] *Ibid.*

force at the date of the succession of States". Its paragraphs 1, 2, 3 and 4 were based on the same paragraphs of article 13. Under conditions similar to those applying to newly independent States, those provisions enabled a successor State emerging from a uniting of States to establish, by giving notice in writing, its status as a party or as a contracting State to a multilateral treaty which had not been in force at the date of the succession.

48. Paragraph 5 of article 26*bis* reflected the provisions of paragraph 2 of article 26 as now proposed by the Drafting Committee. Paragraph 6 embodied the exception set out in paragraph 1(*b*) of article 26.

49. The second new article proposed by the Drafting Committee, provisionally numbered 26*ter*, was entitled: "Effects of a uniting of States in the case of treaties signed by a predecessor State subject to ratification, acceptance or approval". Paragraphs 1, 2 and 3 of that article were based on paragraphs 1, 3 and 4 of article 14, but it would be noted that paragraph 1 of article 26*ter* did not contain the proviso that the predecessor State intended by its signature "that the treaty should extend to the territory to which the succession of States relates". That proviso, which had its place in paragraph 1 of article 14, had clearly no relevance to a uniting of States. Since the provisions of paragraph 2 of article 14 related exclusively to that proviso, they had also been omitted from the text of article 26*ter* now proposed.

50. The provisions of paragraphs 4 and 5 of article 26*ter* were similar to those of paragraphs 5 and 6 of article 26*bis*.

51. Mr. USHAKOV proposed that the opening words of the titles of all three articles should be redrafted to read: "Effects of a uniting of States in respect of treaties...".

52. Sir Francis VALLAT (Special Rapporteur) supported that proposal which was in line with the language consistently used throughout the draft.

53. Mr. USHAKOV said that the expression "other State party" used in article 26, was not altogether suitable in the case of a uniting of States, because of the way in which that term was defined in paragraph 1(*m*) of article 2. The concluding words of the definition: "a treaty in force ... in respect of the territory to which that succession of States relates" made the term inappropriate.

54. He suggested that the Drafting Committee should solve that problem during the final editing, either by using different wording in article 26, or by amending the definition in paragraph 1(*m*) of article 2.

55. Sir Francis VALLAT (Special Rapporteur) said it would be very difficult to solve the problem by altering the passages containing references to the "other State party". It would be better to deal with the problem in article 2.

56. The CHAIRMAN suggested that, on the understanding that the Drafting Committee would deal with that point at the final editing stage, the Commission should approve articles 26, 26*bis* and 26*ter*, as proposed by the Drafting Committee, with the amendment to the titles proposed by Mr. Ushakov and accepted by the Special Rapporteur.

It was so agreed.

The meeting rose at 11.15 a.m.

1296th MEETING

Thursday, 18 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, 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.

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.209/Add.4 and 5; A/CN.4/L.212, L.215, L.221 and L.222; 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 articles 27 to 31*ter*, as proposed by the Drafting Committee (A/CN.4/L.209/Add.4). He then called on the Chairman of the Drafting Committee to introduce articles 27 and 28 together.

ARTICLES 27[1] AND 28[2]

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and texts for articles 27 and 28:

Article 27

Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(*a*) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(*b*) any treaty in force at the date of the succession of States in respect only of a part of the territory of the predecessor State that has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(*a*) the States concerned otherwise agree; or

(*b*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be

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[1] For previous discussion see 1283rd meeting, para. 17.

[2] For previous discussion see 1284th meeting, para. 1.

incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.

Article 28

Position if a State continues after separation of part of its territory

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

(*a*) it is otherwise agreed;

(*b*) it is established that the treaty related only to the territory which has separated from the predecessor State; or

(*c*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. With the adoption of articles 26, 26 *bis* and 26 *ter*, the Commission had completed the examination of questions arising out of a uniting of States. It now had to consider the reverse situation, namely, the separation from a State of a part or parts of its territory.

4. In the 1972 text, article 27[3] had been entitled "Dissolution of a State". It had been based on the assumption that parts of a State became individual States and that the original State ceased to exist. Paragraph 1 of the article had comprised three sub-paragraphs laying down rules which, by hypothesis, concerned only the successor States, that was to say the parts which had become individual States. Under sub-paragraph (*a*), any treaty concluded by the predecessor State in respect of its entire territory continued in force in respect of each successor State emerging from the dissolution. Under sub-paragraph (*b*), any treaty concluded by the predecessor State in respect only of a particular part of its territory which had become an individual State continued in force in respect of that State alone. Sub-paragraph (*c*) had dealt with the case of dissolution of a State previously constituted by the uniting of two or more States. It had referred, therefore, to two distinct and not simultaneous successions of State, which, in the Drafting Committee's view, should be considered separately. Accordingly, and in conformity with a decision it had taken in a similar case in regard to article 26,[4] the Committee had decided that the provisions of sub-paragraph (*c*) should be deleted.

5. Paragraph 2 of article 27 had listed two exceptions to the rules laid down in paragraph 1.

6. Article 28 of the 1972 draft[5] had been entitled "Separation of part of a State". It had been based on the assumption that the part which separated became an individual State, but—and that was the main difference between it and article 27—that the predecessor State continued to exist. Article 28 had laid down two rules. The first, set out in the introductory part of paragraph 1, concerned the predecessor State. It laid down that any treaty which was in force in respect of that State continued to bind it in relation to its remaining territory. Exceptions to that rule were listed in sub-paragraphs (*a*) and (*b*) of paragraph 1. The second rule, set out in paragraph 2, concerned the successor State and laid down that that State was to be considered as being in the same position as a newly independent State in relation to any treaty which, at the date of the separation, had been in force in respect of the territory now under its sovereignty.

7. The Drafting Committee had observed that most of the examples given in the commentary (A/8710/Rev.1, chapter II, section C) in support of the second rule in article 28 concerned the separation from a State of what would now be called a dependent territory. It had therefore decided that the scope of the rule should be limited to cases in which the separation occurred in circumstances that were essentially of the same character as those existing in the case of the formation of a newly independent State.

8. After taking the two decisions he had mentioned, the Drafting Committee had sought to present the provisions of articles 27 and 28 in a clearer and more systematic manner. It had come to the conclusion that they should be rearranged in two groups, the first containing the provisions concerning the successor State, and the second those concerning the predecessor State. With those considerations in mind, it had prepared the new texts it was now proposing to the Commission. Article 27, as proposed by the Committee, contained the provisions concerning the successor State, while article 28 contained those concerning the predecessor State.

9. The new article 27 was entitled "Succession of States in cases of separation of parts of a State". As stated in the opening clause, the article dealt with the case in which a part or parts of the territory of a State separated to form one or more States, whether or not the predecessor State continued to exist—in other words, whether or not it had been dissolved, to use the terminology of the 1972 draft. Thus the new article 27 covered both the situation dealt with in the former article 27 and the situation dealt with in the former article 28, but did so exclusively from the standpoint of the successor State.

10. Sub-paragraphs (*a*) and (*b*) of paragraph 1 reproduced, with some drafting changes, the rules set out in the corresponding sub-paragraphs of the former article 27. Paragraph 2 reproduced, again with drafting changes, the exceptions to those rules set out in paragraph 2 of the former article 27.

11. Paragraph 3 provided for a further exception to paragraph 1. That exception concerned successor States which separated from the predecessor State in circumstances essentially of the same character as those existing in the case of the formation of a newly independent State. It reflected paragraph 2 of the former article 28,

[3] See 1283rd meeting, para. 17.

[4] See 1295th meeting, para. 44.

[5] See 1284th meeting, para. 1.

with the limitation in scope which he had already mentioned.

12. The new text of article 28 submitted by the Drafting Committee was entitled "Position if a State continues after separation of part of its territory". As stated in the opening clause, the new text—like the former article 28—dealt with the case in which, after the separation of any part of the territory of a State, the predecessor State continued to exist; but it dealt with that case exclusively from the standpoint of the predecessor State.

13. The introductory part of the new text of article 28 reproduced, with several drafting changes, the rule laid down in the introductory part of paragraph 1 of the 1972 text; sub-paragraphs (*a*), (*b*) and (*c*) listed three exceptions to that rule. Sub-paragraph (*a*) corresponded to paragraph 1(*a*) of the 1972 text, sub-paragraph (*b*) to the first clause of paragraph 1(*b*) of that text and sub-paragraph (*c*) to the second clause of paragraph 1(*b*).

14. Mr. TAMMES said that the new texts of articles 27 and 28 had solved a number of problems; the precarious distinction between dissolution and separation had disappeared and a uniform régime of continuity had been established for both cases, with the exception referred to in paragraph 3 of article 27. He congratulated the Drafting Committee on having taken that courageous step in the progressive development of international law.

15. He thought, however, that the criterion for the application of the clean slate rule in paragraph 3 of article 27 would continue to present serious practical difficulties which could not easily be resolved by any method for the settlement of disputes. That criterion was the existence of circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. Reference to the 1972 commentary to article 28 (A/8710/Rev.1, chapter II, section C) showed, however, that such circumstances differed essentially from case to case. Moreover, no use could be made of the definition of newly independent State given in article 2, paragraph 1(*f*), since article 27 referred to the way in which such a State was formed. And it appeared from paragraph (6) of the 1972 commentary to article 2—which he hoped was still open to revision—that the term "newly independent State" was used there, precisely, to exclude cases of separation and dissolution, whereas in article 27, paragraph 3, the term was used for the purpose of an analogy.

16. It was to be feared that, as the Special Rapporteur had predicted when summing up the discussion, article 27 would not be applied in practice.[6] After all, the separated State would not be automatically bound by the future convention, which meant that it could choose to be governed either by the customary rule applicable to secession, that was to say by the clean slate principle, or by the progressive rule of *ipso jure* continuity, according to whether it considered itself as emerging from a revolutionary or an evolutionary secession. It seemed to him, therefore, that the commentary to article 27 might usefully refer to the possibility of an evolutionary separation after which the new State or newly independent State, which might not be fully responsible for all its international relations, nevertheless was constitutionally entitled to express its consent to be bound by a treaty. The inclusion of such an explanation in the commentary might be of great assistance in the otherwise difficult application of article 27.

17. Sir Francis VALLAT (Special Rapporteur) said that any suggestions Mr. Tammes could make for inclusion in the commentary would be welcome; he was fully aware of the difficulty of providing a clear-cut and workable test for the case referred to in paragraph 3 of article 27.

18. Mr. KEARNEY said there was much merit in what Mr. Tammes had said, since the test specified in paragraph 3 presented problems that would be difficult to solve in practice. He did not think, however, that their solution would be more difficult than that of the problems which would have been encountered in making the distinction between separation and dissolution provided for in the 1972 draft. One of the reasons why he had again submitted a proposal concerning the settlement of disputes (A/CN.4/L.221) had been, precisely, to meet the kind of difficulty to which Mr. Tammes had drawn attention and which seemed to be a serious potential source of disputes.

19. Mr. USHAKOV observed that in view of the diversity of cases covered by paragraph 3 of article 27, there were no objective criteria for determining what circumstances were essentially of the same character as those existing in the case of the formation of a newly independent State. Some of those cases would be easily settled in practice, while others would raise insurmountable difficulties. Hence, due consideration should be given to the question raised by Mr. Tammes.

20. With regard to the drafting of article 27, he hoped that the Drafting Committee would review the French translations of the word "concerned" in paragraph 2(*a*) and the word "character" in paragraph 3.

21. Mr. REUTER said that the comments made by Mr. Tammes on paragraph 3 were due to the fact that there was no legal criterion applicable to decolonization and that the Commission was not afraid of adopting articles containing purely protestative clauses.

22. The CHAIRMAN suggested that the Commission should approve articles 27 and 28, as proposed by the Drafting Committee, and that the comments made by members should be reflected in the commentary.

It was so agreed.

ARTICLES 28 *bis* AND 28 *ter*

23. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the new articles 28 *bis* and 28 *ter*, which read:

Article 28 bis

Participation in treaties not in force at the date of the succession of States in cases of separation of parts of a State

1. Subject to paragraphs 3 and 4, a successor State falling within article 27, paragraph 1, may by giving notice, establish its status as a

[6] See 1284th meeting, para. 53.

contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, the predecessor State was a contracting State to the treaty and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates.

2. Subject to paragraphs 3 and 4, a successor State falling within article 27, paragraph 1, may by giving notice, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State to the treaty and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

Article 28 ter

Participation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States the predecessor State had signed a multilateral treaty subject to ratification, acceptance or approval and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates, a successor State falling within article 27, paragraph 1, may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

24. Mr. HAMBRO (Chairman of the Drafting Committee) said that article 27, both in the 1972 text and in the new version, related exclusively to treaties which were in force at the date of the succession of States. Consequently, in the case of separation of parts of a State, the successor State would not be able to inherit a treaty which had not been in force at that date, by procedures similar to those provided by articles 13 and 14 for newly independent States. In articles 26*bis* and 26*ter* the Drafting Committee had extended those procedures to successor States emerging from a uniting of States.

25. In that case, too, the Committee had come to the conclusion that there could be no valid reason for a radical difference in treatment between two categories of successor States: on the one hand, newly independent States and those emerging from a uniting of States, and on the other, successor States in cases of separation of parts of a State. It had accordingly prepared two new articles which it had numbered provisionally 28*bis* and 28*ter*

26. Article 28*bis* adapted the provisions of article 13 to the case of a successor State falling within article 27, paragraph 1, that was to say a successor State emerging from a separation of parts of a State. Article 28*ter* adapted the provisions of article 14 to the case of such a successor State. Since members were now familiar with that drafting technique, the two articles should require no further comment.

27. Mr. USHAKOV, referring to paragraph 1 of article 28*bis*, said he doubted the advisability of using the conditional mood in the phrase "if it had been in force at that date, would have applied in respect of the territory", since in the case covered by that provision it seemed that the predecessor State had clearly intended the treaty to apply in respect of the territory in question.

28. Mr. HAMBRO (Chairman of the Drafting Committee) said he agreed with Mr. Ushakov. The grammatical point he had raised had, however, been exhaustively discussed in the Drafting Committee.

29. Mr. ELIAS proposed that the Commission should approve articles 28*bis* and 28*ter*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLES 29, 30[7] AND 30*bis*

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 29, 30 and 30*bis*, which read:

Article 29

Boundary régimes

A succession of States does not as such affect:

(*a*) a boundary established by a treaty; or

(*b*) obligations and rights established by a treaty and relating to the régime of a boundary.

Article 30

Other territorial régimes

1. A succession of States does not as such affect:

(*a*) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

(*b*) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

(*a*) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(*b*) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

Article 30 bis

Questions relating to the validity of a treaty

Nothing in the present articles shall be considered as prejudicing in any respect a question relating to the validity of a treaty.

[7] For previous discussion see 1286th meeting, para. 47.

31. Mr. HAMBRO (Chairman of the Drafting Committee) said that part V of the 1972 draft (A/8710/Rev.1, chapter II, section C), entitled "Boundary régimes or other territorial régimes established by a treaty" had consisted of articles 29 and 30, which had given rise to long and difficult debates. Several members had suggested the addition of a new article stating that nothing in article 29 or 30 should be considered as prejudicing in any respect a question relating to the validity of a treaty. Others had objected to the wording of the proposed new article, which, in their view, would imply that any article other than 29 or 30 could prejudice questions relating to the validity of treaties. Finally, thanks to the goodwill of all concerned, a compromise had been reached in the Drafting Committee, whereby the additional article would contain no reference to any specific provision of the draft and would be worded in general terms. The commentary, however, would explain the history of the article and would point out its relevance to articles 29 and 30. The additional article—numbered provisionally 30*bis*—and articles 29 and 30 would be transferred to part I of the draft, entitled "General provisions".

32. The only change made by the Drafting Committee in article 29 had been to replace the word "shall", in the first line of the English text, by the word "does". The object of that change was to emphasize that the article was in the nature of what the French called *une constatation de fait*. The Committee had also considered replacing the words "relating to", in sub-paragraph (*b*) by the words "forming an integral part of". It had finally decided against that change because it would be very difficult in practice to determine what did or did not form an integral part of the régime of a boundary.

33. As in the case of article 29, and for the same reasons, the Drafting Committee had replaced the word "shall", in article 30, by the word "does". In paragraph 1(*a*) of article 30 it had deleted the adverb "specifically", which added nothing to the text and might give rise to discussion, and had replaced the words "a particular territory" by "any territory". The phrase "rights established ... specifically for the benefit of a particular territory" used in the 1972 text, could be interpreted as excluding transit rights. Similar changes had been made in paragraph 1(*b*) and in paragraph 2.

34. The Committee had considered the possibility of inserting the words "or of its inhabitants" after the words "for the benefit of any territory of a foreign State" in paragraph 1(*a*), but had decided against doing so because, in the last analysis, rights and obligations were always established for the benefit of the inhabitants of a territory. Furthermore, any qualification of the expression used in the 1972 text might limit the scope of that expression.

35. The CHAIRMAN suggested that the Commission should approve articles 29, 30 and 30*bis* as proposed by the Drafting Committee, and their transfer to part I of the draft.

It was so agreed.

ARTICLES 31[8] AND 31 *bis*

36. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 31 and 31*bis*, in part VI, which read:

PART VI

MISCELLANEOUS PROVISIONS

Article 31

Cases of State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States.

*Article 31*bis

Cases of military occupation

The provisions of the present articles do not prejudge any question that may arise in regard to a treaty from the military occupation of a territory.

37. Mr. HAMBRO (Chairman of the Drafting Committee) said that in the text proposed by the Drafting Committee, part VI, the title of which remained unchanged, consisted of three articles, provisionally numbered 31, 31*bis* and 31*ter*.

38. Article 31 in the 1972 text[9] had excluded three specific matters from the scope of the draft articles. Two of those matters—State responsibility and the outbreak of hostilities—were excluded by article 73 of the Vienna Convention on the Law of Treaties[10] from the scope of that Convention. As had been pointed out in the 1972 commentary (A/8710/Rev.1, chapter II, section C), both those matters might have an impact on the law of succession of States in respect of treaties, and it was therefore necessary to exclude them from the scope of the draft articles. The third matter—military occupation—was of a different kind and it was difficult to see what impact it might have on the law of succession of States in respect of treaties.

39. Strictly speaking, no exclusion of military occupation from the scope of the draft articles was required. But although military occupation was not a succession of States, it might raise analogous problems and that might induce an occupying power to attempt to apply, by analogy, some of the rules in the draft articles. A formal exclusion of military occupation from the scope of the draft articles might serve as a warning against such attempts. In order to underline the special nature of such an exclusion, the Drafting Committee had decided that it should form a separate article.

40. The Committee was accordingly submitting two articles, numbered 31 and 31*bis*, in place of article 31 of the 1972 draft. Article 31 reproduced, with minor drafting changes, the provisions excluding State responsibility and the outbreak of hostilities. Article 31*bis* repro-

[8] For previous discussion see 1290th meeting, para. 1.

[9] *Ibid.*

[10] 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. 299.

duced, with one drafting change, the provision excluding military occupation; that change consisted in the substitution of the words "do not prejudge" for "shall not prejudge". The purpose of that substitution was to underline that article 31*bis* was in the nature of a *constatation de fait*. Members would observe that the Committee had retained the expression "shall not prejudge" in article 31.

41. Sir Francis VALLAT (Special Rapporteur) said that the division into two articles had been made in order to take into account a point made by Mr. Ago, who had stressed that while it might be reasonable to include an article on the lines of article 73 of the Vienna Convention, it was not correct to refer to succession of States in connexion with military occupation.[11] It was for that reason that article 31*bis* used the words "in regard to a treaty", not "in regard to the effects of a succession of States".

42. The CHAIRMAN suggested that the Commission should approve articles 31 and 31*bis*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 31*ter*

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 31*ter*, which read:

*Article 31*ter

Notification

1. Any notification under article ... or ... must be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification shall:

(*a*) be transmitted by the successor State to the depositary or, if there is no depositary, to the parties or the contracting States;

(*b*) be considered to be made by the successor State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification or any communication made in connexion therewith by the successor State.

5. Subject to the provisions of the treaty, such notification or communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

44. Mr. HAMBRO (Chairman of the Drafting Committee) said that article 31*ter* was the new article which, for the reasons he had explained when introducing article 22[12] the Committee had decided to devote to notifications other than notifications of succession. The Committee had been anxious to use the word "notice" in article 31*ter* in order to distinguish between notification of succession and other notifications. Unfortunately it would have been impossible to maintain that distinction in the French text and, he believed, in the Spanish. In French, "notice" could be translated only by *notification*, the term which was used in article 17, on notification of succession. All substitutes for *notification* which had been suggested, such as *signification*, *avis*, *notice*, had proved unacceptable. The Committee had decided, therefore, to use the word "notification" in the English text of article 31*ter*.

45. The CHAIRMAN suggested that the Commission should approve article 31*ter*, as proposed by the Drafting Committee, and decide later on its exact place in the draft.

It was so agreed.

ARTICLE 2[13]

46. The CHAIRMAN invited the Commission to consider article 2, as proposed by the Drafting Committee (A/CN.4/L.209/Add.5).

47. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 2:

Article 2

Use of terms

1. For the purposes of the present articles:

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*c*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*d*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*e*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*f*) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(*g*) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty;

(*h*) "full powers" means in relation to a notification of succession or a notification referred to in article 31*ter* a document emanating from the competent authority of a State designating a person or persons to represent the State for communicating the notification of succession or, as the case may be, the notification;

(*i*) "ratification", "acceptance" and "approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*j*) "reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

[11] See 1290th meeting, paras. 5-7.

[12] See previous meeting, para. 5.

[13] For previous discussion see 1264th meeting, para. 46.

(*k*) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force:

(*l*) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*m*) "other State party" means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;

(*n*) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

48. The Drafting Committee had made only minor changes in the provisions of article 2 (A/8710, chapter II, section C). Those changes concerned sub-paragraphs (*b*), (*f*), (*g*) and (*h*) of paragraph 1.

49. The first change—concerning sub-paragraph (*b*)—affected the French and Spanish texts only. It consisted in the replacement of the words "*du territoire*" and "*del territorio*" by "*d'un territoire*" and "*de un territorio*". The other changes affected the texts in all four languages.

50. In sub-paragraph (*f*), defining the term "newly independent State", the Committee had replaced the words "means a State" by "means a successor State", because a newly independent State was a successor State for the purposes of the present articles. The commentary would emphasize that the definition applied to all types of newly independent States, including those formed from two or more territories.

51. In sub-paragraph (*g*), defining the term "notification of succession", the Committee had deleted the words "to the parties, or as the case may be, contracting States or to the depositary". Those words were unnecessary, since article 17 specified to whom the notification had to be transmitted.

52. The Committee had made two changes in sub-paragraph (*h*), defining "full powers". First, it had extended the scope of the definition to cover not only notifications of succession, but also the other kinds of notification referred to in article 31*ter*. Secondly it had replaced the word "making", in the last line of the sub-paragraph, by the word "communicating", since that was the word used both in article 17 and in article 31*ter*.

53. Mr. TSURUOKA, referring to paragraph 1(*f*), said he was not sure exactly what the Commission meant by a "newly independent State". It seemed to him that the Commission found itself obliged to use that expression without being able to define its exact meaning.

54. Sir Francis VALLAT (Special Rapporteur) said that the term "newly independent State" was one used for convenience throughout the draft. Reference was made in the draft to States which had been dependent territories and the definition made it clear that the newly independent States were former colonies, trust territories or territories whose foreign relations had been handled by another State. In the context of the United Nations, there could be very little doubt as to what the term meant.

55. Mr. USHAKOV said that article 6*bis* answered Mr. Tsuruoka's question. For the purposes of the future convention, newly independent States would be States which came into being after its entry into force.

56. The CHAIRMAN, speaking as a member of the Commission, said that since paragraph 1 contained a definition of "notification of succession", it would seem logical also to include a definition of "notification".

57. Mr. HAMBRO (Chairman of the Drafting Committee) said that that point had been discussed in the Drafting Committee, which had decided that a definition of "notification" was unnecessary, since it would merely be a repetition of articles 17 and 31*ter*.

58. Mr. ELIAS suggested that further discussion of that question should be deferred until the Commission had taken a final decision on the content of articles 17 and 31*ter*.

It was so agreed.

59. Mr. USHAKOV, referring to paragraph 1(*m*), pointed out that the expressions "other party" and "other State party" seemed to have been used without distinction in the draft. In his opinion, the former was sufficient.

60. Mr. HAMBRO (Chairman of the Drafting Committee) referring to sub-paragraph (*n*), said that one Government, in its comments, had recommended the use of the expression "international intergovernmental organization" (A/CN.4/278/Add.2, para. 155), but the Committee had decided against it.

61. Mr. EL-ERIAN suggested that the commentary should state that the expression "international organization" was the one normally used in drafts prepared by the Commission.

It was so agreed.

62. The CHAIRMAN suggested that the Commission should approve article 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLES 6 AND 6*bis*[14]

63. Mr. HAMBRO (Chairman of the Drafting Committee) said that at its 1286th meeting, the Commission had referred articles 6 and 6*bis* back to the Drafting Committee.[15] After careful reconsideration of all the problems involved, the Committee had adopted, on second reading, the articles it was now proposing to the Commission (A/CN.4/L.222) which read:

Article 6

Cases of succession of States covered by the present articles

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

[14] For previous discussion see 1285th meeting, para. 15.

[15] See 1286th meeting, para. 26.

*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 present articles apply only in respect of a succession of States which has occurred after the entry into force of these articles except as may otherwise be agreed.

64. In article 6, the Committee had made no change in the title or the text it had adopted on first reading. Members would recall that they were identical with the title and text of article 6 in the 1972 draft.

65. The CHAIRMAN suggested that the Commission should approve article 6, as proposed by the Drafting Committee.

It was so agreed.

66. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Committee had retained the title it had previously given to article 6*bis*, but had made two changes in the text of the article.[16] The first change, which was of a stylistic nature, consisted in replacing the words "the articles apply only to the effects of a succession of States" by the words "the present articles apply only in respect of a succession of States". The second change consisted in the addition of the words "except as may otherwise be agreed" at the end of the article; the purpose of that change was to introduce a measure of flexibility by adding a clause such as was referred to in the opening phrase of article 28 of the Vienna Convention on the Law of Treaties.

67. Mr. KEARNEY said he would not object to article 6*bis*, but wished to state once more that he considered the article unnecessarily broad.

68. Mr. ELIAS said that unless more arguments were advanced to justify that article, he would vote against it, since it seemed likely to detract from the force of article 6.

69. Mr. USHAKOV said it was perfectly clear from the present wording that the articles would apply only in respect of a succession of States which occurred after their entry into force. It must, of course, be a succession of States which occurred in conformity with international law, and, in particular, with the principles of international law embodied in the Charter of the United Nations.

70. The question was, to what situations was the present draft intended to apply? Was it to apply to past situations, or to future situations which would be governed by the convention resulting from the present articles? In his opinion, the draft could only apply to situations arising in the future, after the entry into force of the rules of international law formulated in it. It was clearly impossible to apply the draft articles to a situation which had arisen previously.

71. Mr. EL-ERIAN said he had no objection to the substance of article 6*bis*, though he had some doubts about the method the Commission appeared to be following. In the present case, the Commission was stating rules of law without indicating which of them it regarded as constituting codification of international law and which as constituting progressive development.

72. The CHAIRMAN, speaking as a member of the Commission, said that if article 6*bis* was not included in the draft, the future convention would be governed, as far as retroactivity was concerned, by article 28 of the Vienna Convention of the Law of Treaties. But that article was drafted in such a way that it was unsuitable for transposition to the present draft, which dealt with an entirely different subject. He appreciated the point made by Mr. El-Erian, but he still believed that the adoption of article 6*bis* would facilitate the work of the future conference which would eventually adopt the convention on succession of States in respect of treaties.

73. Mr. THIAM said he must reiterate the reservations he had previously expressed regarding article 6*bis*. First, the Vienna Convention on the Law of Treaties already contained a provision stating the principle of the non-retroactivity of treaties. Secondly, the articles under consideration would add nothing to the draft, but would weaken its effect, particularly with regard to newly independent States. In most cases of decolonization up to the present, the predecessor State and the succcessor State had found practical means of overcoming the difficulties they had encountered.

74. Mr. RAMANGASOAVINA said that he too had expressed reservations about the need for article 6*bis*.

75. The CHAIRMAN said that the points made by Mr. Kearney, Mr. Elias, Mr. El-Erian, Mr. Thiam and Mr. Ramangasoavina would be duly recorded. He then put article 6*bis* to the vote.

*Article 6*bis *was approved by 8 votes to 4, with 5 abstentions.*

76. Mr. TABIBI, explaining his vote, said that during the earlier discussion of article 6*bis*, he had expressed views similar to those of his African and Asian colleagues. He had strong objections to articles 29 and 30,[17] however, and since those articles had now been included in the draft, he had abstained from voting against article 6*bis*, because it would weaken their effect.

ARTICLE 12*bis*[18]

77. The CHAIRMAN invited the Commission to resume consideration of the new article 12*bis* proposed by Mr. Ushakov, dealing with multilateral treaties of a universal character (A/CN.4/L.215).

78. Mr. USHAKOV observed that the Commission had not sufficient time to examine article 12*bis*. He would therefore prefer his proposal to be mentioned in the report, with an explanation that the Commission had not had time to study it. That would enable governments to take a position on the proposed article.

79. Mr. REUTER supported that suggestion. He himself was not opposed to the establishment of a special

[16] For previous text see 1285th meeting, para. 17.

[17] See 1287th meeting, para. 11 *et seq.*

[18] For previous discussion and text, see 1293rd meeting, para. 54.

régime for certain treaties, as proposed in Mr. Ushakov's article 12*bis*; but it was a delicate question which required thorough study. It was, of course, easy to give examples of multilateral treaties of a universal character which should benefit from such a special régime; but examples could also be given of treaties in that category to which the special régime could hardly be applied. For instance, the 1958 Geneva Conventions on the law of the sea were multilateral treaties of a universal character, but a rule under which they would remain in force for a newly independent State after the date of the succession of States would be very difficult to apply, since many newly independent States would refuse to be bound by them. On the other hand, there were treaties which, although not of a universal character, should benefit from the special régime provided for by article 12*bis*. He therefore agreed with Mr. Ushakov that it would be better to defer consideration of the question.

80. Mr. USHAKOV said he still thought that, even in the case of the Conventions on the law of the sea, it was preferable for multilateral treaties of a universal character to remain in force in respect of the territory to which the succession of States related, since it was always open to the newly independent State to give notice of termination if it so desired. Besides, most of the treaties covered by article 12*bis* were advantageous for newly independent States.

81. The CHAIRMAN invited members of the Commission to comment on the suggestion that Mr. Ushakov's proposal should be mentioned in the appropriate chapter of the Commission's report.

82. In reply to a question by Mr. ELIAS, he said that a suitable place to include the text of the draft article 12*bis* might perhaps be the commentary to article 12.

83. Sir Francis VALLAT (Special Rapporteur) said that the commentary to article 12 would be seriously distorted if the whole of draft article 12*bis* was included in it. He did not think it would be advisable to insert it in the introductory commentary or in the commentaries to either article 12 or article 18, both of which were also touched on in some way by the proposed new article.

84. It was his firm view that if the régime proposed by Mr. Ushakov resulted in imposing the obligations arising out of a multilateral treaty upon a newly independent State, even for a single day, it would run counter to the spirit, if not to the actual text, of article 11, which embodied the clean slate rule. He therefore proposed that a short passage on the question should be included in the last part of the introductory commentary and that the text of the proposed article 12*bis* should be reproduced as an annex at the end of the chapter.

85. The CHAIRMAN said that, if there were no further comments, he would take it that the Special Rapporteur's proposal was acceptable to the Commission.

It was so agreed.

ARTICLE 32

86. The CHAIRMAN invited Mr. Kearney to introduce his revised proposal for an article 32 on the settlement of disputes (A/CN.4/L.221), which read:

Article 32

Settlement of disputes

1. In any dispute between two or more parties regarding the interpretation or application of these articles, which is not settled through negotiation, any one of the parties to the dispute may set in motion the procedure specified in the annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights or obligations of the parties, under any provisions in force binding the parties with regard to the settlement of disputes.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 32, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for

the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

87. Mr. KEARNEY said that the text he now proposed for article 32 superseded his previous proposal on the settlement of disputes (A/CN.4/L.212). His proposal embodied a conciliation system derived from the Vienna Convention on the Law of Treaties, which had been used as a moded by the Commission throughout its present proceedings.

88. There was no need to explain in detail his reasons for proposing such an article. Many of the articles which the Commission had approved were bound to give rise to disputes; those disputes would necessarily relate to the application of treaties and would be of the same character as those for which article 66 of the Vienna Convention, and the annex to that Convention, had been adopted.[19]

89. Mr. EL-ERIAN said that he appreciated the concern Mr. Kearney had shown regarding the question of the settlement of disputes; it would serve to focus attention on that question, whether the Commission decided to include a provision on it in the draft articles or not. The question would be brought to the attention of the Sixth Committee of the General Assembly and subsequently to that of the diplomatic conference which would consider the draft articles.

90. As a matter of method, however, he believed that a provision on the settlement of disputes properly belonged in the final clauses, which, traditionally, the Commission did not include in its drafts. It was true that the Commission had to some extent departed from its traditional practice in its 1966 draft on the law of treaties, article 62 of which dealt with the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of the treaty.[20] That case, however, had been a very special one, in that article 62 had been included as part of an intricate compromise designed to satisfy certain members of the Commission who were concerned at the inclusion in the draft articles on the law of treaties of a number of provisions that could lead to the unilateral abrogation of treaty obligations, in particular draft article 50, on treaties conflicting with a peremptory norm of general international law.[21] Hence the analogy with the draft on the law of treaties did not hold good.

91. He therefore urged the Commission not to depart from its consistent practice of not including in its drafts any final clauses, such as clauses on the settlement of disputes.

92. The CHAIRMAN said that the enlarged Bureau had discussed the question of the settlement of disputes at length and a number of solutions had been proposed. One was that, subject to General Assembly approval, the Special Rapporteur should undertake a study of the problem and submit a report to the Commission at its next session. Another suggestion, made by Mr. Ago, was that a conciliation system should be adopted for the present draft, on the analogy of the Vienna Convention on the Law of Treaties.

93. Mr. ELIAS suggested that, in accordance with a view which had received fairly general support in the enlarged Bureau, the same solution should be adopted for the proposed article 32 as had been adopted for Mr. Ushakov's proposed article 12*bis*. An explanation would be given in the introductory commentary and the proposal itself would constitute a second annex to the draft. It would then be for the General Assembly to decide whether it wished the Commission itself to examine the problem or to leave it to the plenipotentiary conference, as had been done in the past for other drafts prepared by the Commission.

94. Mr. TABIBI and Mr. EL-ERIAN supported that suggestion.

95. Sir Francis VALLAT (Special Rapporteur) said he believed that because of the problems raised by many of the articles the draft was hardly viable without an article on procedure for the settlement of disputes. That being so, the conciliation system which Mr. Kearney had taken from the Vienna Convention would be a natural and logical one to adopt. He had not yet been able to complete his study of the question of the settlement of disputes in relation to the present draft articles. He would, of course, be prepared to undertake any work on that question which might be requested by the General Assembly.

96. Mr. TSURUOKA said he agreed with Mr. Kearney, but thought the Commission did not have time to study the proposed article 32. He suggested that the Commission should state in its report, for the information of the General Assembly, that it intended to study the question of the settlement of disputes.

97. Mr. USHAKOV said he thought the Commission should adopt the same procedure as for article 12*bis* and indicate in its report that it had not had time to study the proposed article 32. It was necessary to ascertain the views of the General Assembly on the subject, for without a clear-cut decision by the Assembly, the Commission would not be able to take up the question of the settlement of disputes at its next session.

98. Mr. REUTER said he agreed with the Special Rapporteur that it was desirable to include a clause on the settlement of disputes in the draft articles. He had to admit, however, that such a clause would probably not have the support of a majority of Governments, so perhaps it would be better not to include it.

99. Mr. HAMBRO said he could not agree with that approach. The Commission should prepare a draft that was as complete as possible and submit it for the consideration of Governments. A clause on the settlement of disputes should be included, even if it was ultimately rejected.

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[19] 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), pp. 298 and 301.

[20] See *Yearbook ... 1966*, vol. II, pp. 261-263.

[21] *Ibid.*, p. 247.

100. Mr. QUENTIN-BAXTER welcomed the fact that the question of a clause on the settlement of disputes had been raised. The Commission would be doing less than its duty if it failed to indicate that serious consideration needed to be given to the question of including such a clause in the draft. It was, however, clearly beyond the capacity of the Commission to deal with the matter at the present session. That fact should be reflected in its report, so as to draw the attention of the General Assembly to the matter and elicit the views of Governments on the course which the Commission should follow.

101. Mr. SETTE CÂMARA supported the suggestion made by Mr. Elias. It was desirable to cover the question of machinery for the settlement of disputes, but that machinery would clearly not be an integral part of the future convention.

102. It was necessary to respect the desire of Governments to be free to choose methods for the settlement of disputes. That point had been appreciated by Mr. Kearney; for after proposing, in document A/CN.4/L.212, arbitration machinery based on alternative B for article 12 of the Commission's 1972 draft articles on the prevention and punishment of crimes against diplomatic agents (A/8710/Rev.1, chapter III, section B), he was now proposing a totally different system, based on the conciliation procedure set out in the annex to the Vienna Convention on the Law of Treaties.

103. The procedure proposed by Mr. Elias would show Governments that the Commission had not overlooked the problem of settlement of disputes, but would not impair the flexibility which States obviously desired.

104. Mr. KEARNEY said he did not favour the course suggested by Mr. Elias, which would amount to a failure on the part of the Commission to deal with an essential problem. If no clause on the settlement of disputes was included in the draft articles, the General Assembly would certainly not ask the Commission to study the problem, but would refer the draft to a diplomatic conference without such a clause, so that no action would be taken in the matter. He therefore urged that his proposed article 32, which was based on the relevant provisions of the Vienna Convention, should be included in the draft, so that a future conference of plenipotentiaries could deal with the question.

105. He was not impressed by the argument that the settlement of disputes belonged in the final clauses of a convention; the Commission had just approved an article 6*bis* on non-retroactivity, which was also regarded as a subject for final clauses.

106. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to include in its report a paragraph stating that many members considered that a clause on the settlement of disputes should be included in the future convention on succession of States in respect of treaties. That paragraph would reflect the feeling of those members that, in view of the close affinity of the draft with the Vienna Convention on the Law of Treaties, the proposed conciliation system should be given serious consideration.

It was so agreed.

Organization of future work

[Item 9 of the agenda]

107. The CHAIRMAN drew attention to the recommendation by the General Assembly in paragraph 3(*c*) of its resolution 3071 (XXVIII) that the Commission should undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts. The enlarged Bureau had examined the matter and recommended that the Commission should decide to include that topic in its general programme of work. If there were no comments, he would take it that the Commission agreed to adopt that recommendation.

It was so agreed.

108. The CHAIRMAN reminded the Commission that it had agreed to give priority at its next session to the topic of State responsibility, which would take up four weeks. Bearing in mind that one week was required for consideration of the Commission's report on the session, that would leave only five weeks for the remaining topics. Those topics included succession of States in respect of matters other than treaties, for which the Special Rapporteur had strongly urged absolute priority, the question of treaties concluded between States and international organizations or between two or more international organizations, and the most-favoured-nation clause. Five weeks would obviously not be sufficient to deal with all those topics and the situation would be even more difficult if the General Assembly requested the Commission to study the problem of a clause on the settlement of disputes for inclusion in the draft articles on succession of States in respect of treaties.

109. The enlarged Bureau had not taken any decision on the allocation of time to the various topics at the next session, but it had unanimously agreed that ten weeks would not be sufficient to deal with all the work in hand. It had therefore agreed to recommend that the Commission should include a paragraph on the duration of forthcoming sessions in its report. The paragraph would state that, in order to carry out its programme satisfactorily, the Commission considered it necessary to request that the practice of holding a twelve-week session, which had been introduced in 1974, should be continued for the next and subsequent sessions.

110. If there were no comments, he would take it that the Commission agreed to adopt that recommendation.

It was so agreed.

The meeting rose at 6 p.m.

1297th MEETING

Monday, 22 July 1974, at 3.15 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney,